IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-2021

CHADWICK WILLACY,

Defendant/Petitioner,

v.

JAMES R. MCDONOUGH,

Secretary, Florida Department of Corrections,

Respondent.

_____/

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS RELIEF

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CLAIM I

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE LACK OF PROBABLE CAUSE TO ARREST MR. WILLACY AND RESULTING LACK OF PROBABLE CAUSE TO SEARCH MR. WILLACY'S RESIDENCE.

The State contends that appellate counsel cannot be deemed ineffective for failure to raise on direct appeal an issue which "would in all probability" be without merit. In this regard, the State asserts that the trial court's order denying Mr. Willacy's motion to suppress was based on facts and law presumed correct on appeal. The presumption of correctness does not preclude a claim of ineffective appellate counsel. Moreover, the record establishes that law enforcement lacked probable cause to arrest Mr. Willacy. Furthermore, the search warrant of Mr. Willacy's home was not supported by probable cause. As such appellate counsel's failure to raise the issue on appeal compromised the appellate process to the degree that confidence in the correctness of the result has been undermined. See Power v. State, 886 So. 2d 952 (Fla. 2004).

Contrary to the State's assertion, the only constitutionally obtained facts known to the police at the time of Mr. Willacy's arrest were that (1) a black male had been seen in the neighborhood; (2) the victim's car had been stolen and abandoned; (3) Mr. Willacy had supplied a statement as to his

whereabouts which was confirmed by his girlfriend; and (4) Mr. Willacy had not kept an appointment with police nor agreed to provide law enforcement with his fingerprints. Without dispute, the basis for Mr. Willacy's arrest was the discovery of the check register in Mr. Willacy's bathroom wastepaper basket.

The inquiry then becomes was the discovery of the check register sufficient to lawfully arrest Mr. Willacy. Important to this analysis is the fact that upon the discovery of the check register, Mr. Willacy himself directed that Detective Santiago be contacted. Furthermore, Mr. Willacy lead Detective Santiago, upon his arrival at Mr. Willacy's home, to the wastepaper basket where the check register had been discovered. (1991R 1289-1290; 2375). Detective Santiago, on his own, determined that the writing in the check register was the victim's handwriting. Agent Cockreil looked at the check register at the request of Detective Santiago and expressed his opinion that the writing should be reviewed by a handwriting expert. (1991R 3247). At the time of Mr. Willacy's arrest, there had been no handwriting expert review nor family identification of the check register. As such the check register alone did not give rise to probable cause to arrest Mr. Willacy.

Excluding from the search warrant, (1) the information that the latent prints matched Mr. Willacy; (2) the illegally obtained statement from Mr. Willacy; and (3) excluding the illegally obtained identification from Mr. Barton, there clearly was not probable cause to justify the issuance of the search warrant. It is elementary that Mr. Willacy's being a muscular black male who refused to submit to all law enforcement requests did not constitute probable cause for a search warrant existed.

The trial court's finding that the police acted in good faith in reliance on the warrant is flawed. At the time the search warrant was issued law enforcement had (1) engaged in unconstitutional means to obtain a statement from Mr. Willacy; (2) engaged in illegal means to obtain the identification by Mr. Barton; and (3) purposely misled the trial court as to the quality and accuracy of the composite drawing. In petitioning for the search warrant, law enforcement knowingly failed to disseminate to the trial court accurate, reliable, and constitutionally obtained information. As such, law enforcement could not in good faith have relied on the search warrant.

Defense counsel fully litigated this issue, and therefore, it was properly preserved for appellate review. This viable issue, if properly argued on appeal, would have resulted in a reversal of Mr. Willacy's

conviction based on a lack of probable cause to arrest and search his residence. Accordingly, Mr. Willacy is clearly entitled to habeas relief.

CLAIM II

MR. WILLACY WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY HAVING A JUROR WHO WAS PENDING PROSECUTION SERVE AS THE FOREMAN OF HIS JURY.

A. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE TRIAL COURT'S FAILURE TO RULE ON MR. WILLACY'S OBJECTIONS TO THE TRIAL COURT'S ORDER DENYING THE MOTION FOR NEW TRIAL.

The State contends that this issue is "basically an effective-assistance-of-trial-counsel issue because trial counsel failed to obtain a ruling on his objections to the order on the motion for new trial." (State's Response at 14). The State then argues that (1) the issue is procedurally barred and (2) appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue on appeal. In so arguing, the State misconstrues the issue.

The un-refutted record establishes that the trial court by way of telephone conference with the parties announced its ruling, made no findings of fact, and directed the State to prepare an order denying the motion. The State forwarded its proposed order to the trial court, and on December 28, 1992, the trial court promptly adopted the State's proposed order verbatim. As such, the issue centers directly on the trial court's having delegated its

decision making authority to the State. Compounding the trial court's error is the fact that the trial court had been informed in two prior correspondences by the State that defense counsel would "communicate directly with the Court" regarding any objections and that defense counsel did not agree to the proposed order. Mr. Erlenbach then filed objections to the order on December 31, 1992 which were ignored by the trial court.

This issue mirrors the errors in Perlow v. Berg-Perlow, 875 So. 2d 383 (Fla. 2004), and quite clearly raises matters for direct appeal. This issue was not brought on direct appeal and therefore, is properly raised in a habeas petition. Porter v. Crosby, 840 So. 2d 981 (Fla. 2003).

This Court has plainly stated that while a trial court may request a proposed order from either or both parties, the opposing party must be given an opportunity to object or comment before entry of the order. Perlow, 875 So. 2d at 390. The failure to do so warrants reversal.

Here, Mr. Willacy was not afforded that opportunity, and the trial court adopted the State's proposed order verbatim. Mr. Willacy would have clearly prevailed on appeal had this issue been raised. Accordingly, appellate counsel's failure to raise the issue on direct appeal constitutes ineffective assistance of appellate counsel, entitling Mr. Willacy to relief.

B. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE INHERENT PREJUDICE TO

MR. WILACY RESULTING FROM JUROR CLARK'S SERVICE ON THE JURY.

The State responds generally to this issue, contending that it is procedurally barred because it is repetitive of the issues raised in Mr. Willacy's post-conviction relief motion. Mr. Willacy's 3.851 motion did not challenge any issues related to the ineffectiveness of his appellate counsel. As such the issue is not repetitive of any 3.851 issues and is properly raised in this habeas petition. Porter v. Crosby, 840 So. 2d 981 (Fla. 2003).

This Court's ruling in Lowrey v. State, 705 So. 2d 1367 (Fla. 1998), which involves facts identical to those here, establishes that inherent prejudice results from the service of a juror who is under prosecution by the same state attorney's office prosecuting the defendant. The Lowrey decision rests on a 1990 Texas case which held that a juror with pending criminal charges is absolutely disqualified from service and harm need not be shown.

Despite this available and clearly persuasive precedent, appellate counsel argued the more stringent standard of actual harm, placing a hefty burden on Mr. Willacy. Had appellate counsel argued the correct standard of law, Mr. Willacy would have prevailed on direct appeal as did Mr. Lowrey. Appellate counsel's deficient performance undermined confidence in the correctness of the result on appeal. As such, Mr. Willacy is entitled to habeas corpus relief.

C. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE STATE'S FAILURE TO INFORM THE TRIAL COURT OF JUROR CLARK'S STATUS WHICH RESULTED IN THE STATE DEPRIVING MR. WILLACY OF HIS CONSITUTITIONAL RIGHT TO A FAIR AND IMPARTIAL JURY.

Here too the State responds generally that this issue is procedurally barred. In his rule 3.851 motion, Mr. Willacy claimed that the State failed to inform the trial court of Juror Clark's status. In denying that claim, the trial court determined that the issue was procedurally barred, "because it was raised on direct appeal and decided adversely to the Defendant." (PCR at 2298). The issue of the State's duty to disclose to the trial court Juror Clark's pending felony charges or his referral to PTI and the State's failure to fulfill that duty, while an issue for direct appeal, was never raised on appeal. Appellate counsel failed to raise the issue, and as such denied Mr. Willacy effective representation. Porter v. Crosby, 840 So. 2d 981, 985-986 (Fla. 2003).

The State, at a minimum, was aware of Juror Clark's failure to disclose relevant information which constituted juror misconduct. The State acknowledged that it never informed the trial court of this information. As such, the State shirked its duty ". . . to see that the accused is accorded a fair and impartial trial." The Florida Bar v. Cox, 794 So. 2d 1278, 1285 (Fla.

2001)(quoting Pendarvis v. State, 752 So. 2d 75, 77 (Fla. 2d DCA 2000). Had appellate counsel raised the issue on appeal, Mr. Willacy would have prevailed. Accordingly Mr. Willacy is entitled to relief.

D. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL JUROR MISCONDUCT BY JUROR CLARK.

The State contends that this issue is procedurally barred because it is repetitive of the issues raised in Mr. Willacy's 3.851 motion. In denying Mr. Willacy post-conviction relief based on juror misconduct, the trial court found that the issue was, "procedurally barred because it could have been raised on direct appeal." (PCR at 2304). As such, because this claim should have been brought on direct appeal and was not, it is properly raised in a petition for writ of habeas corpus. Porter v. Crosby, 840 So. 2d 981, 985-986 (Fla. 2003).

The record conclusively establishes misconduct by Juror Clark. Without dispute, Juror Clark told no one that he had pending felony charges and had a scheduled docket sounding date just three weeks off. His explanations both in 1992 and 2004 are self-serving, argumentative, contradictory and simply not credible. The record amply supports a finding of juror misconduct.

Inexplicably, defense counsel failed to argue on appeal well-established Florida precedent on the issue of a juror's failure to disclose relevant information. Rather, defense counsel argued the standard announced by the United States Supreme Court in McDonough Power Equipment v. Greenwood, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed. 2d 663 (1984). The failure to argue established and controlling Florida precedent constitutes ineffective assistance of appellate counsel. Accordingly Mr. Willacy is entitled to habeas corpus relief.

E. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION FOR REHEARING CHALLENGING THIS COURT'S FINDING THAT JUROR CLARK WAS NOT PENDING PROSECUTION.

Again the State contends that this issue is procedurally barred. This argument is spurious. Quite surely, the failure of appellate counsel to alert this Court to controlling statutory authority constitutes a cognizable issue in a habeas corpus proceeding.

The ruling in Willacy v. State, 640 So. 2d 1079 (Fla. 1994) (Willacy I), clearly overlooks the provisions of section 944.025, Florida Statutes (1990). Thus, a motion for rehearing under rule 9.330, Florida Rules of Appellate Procedure, was warranted, and should have been filed by appellate counsel. Upon such a motion for rehearing, this Court would have agreed that section

944.025 dictates that Juror Clark was pending prosecution until such time as he had completed all terms and conditions of the program and the State had nolle prossed the charges against him.

The record establishes that as of the date of jury selection, Juror Clark had not yet signed the PTI contract, much less had he fulfilled the terms of the program. As such pursuant to section 944.025, Juror Clark was pending prosecution and was ineligible to serve on Mr. Willacy's jury pursuant to section 40.013, Florida Statutes. Accordingly, Mr. Willacy is entitled to relief.

F. THIS COURT'S DECISION IN LOWREY V. STATE, 705 So. 2d 1367 (Fla. 1998) SHOULD BE APPLIED RETROACTIVELY IN THIS CASE.

Here too the State contends that this issue is procedurally barred. In full measure, the State seeks to sidestep all the Juror Clark issues by blanketedly claiming procedural bar. Interestingly, the State completely fails to address in any manner the merits of this quagmire and the irreconcible conflicts raised by Juror Clark's service on Mr. Willacy's jury. Rather the State elects at every turn to sheepishly hide behind this Court's ruling in Willacy I. Contrary to the State's assertion, the retroactive application of Lowrey is cognizable on habeas review.

This Court's rulings in Willacy I and Lowrey v. State, 705 So. 2d 1367 (Fla. 1998) cannot be reconciled. The facts of each case are identical, that is both involve a juror with pending charges who failed to reveal the prosecution. Both jurors subsequent to their jury service were placed in PTI pursuant to section 944.025. In Lowrey, this Court determined that the juror was ineligible under section 40.013, and prejudice was presumed to the defendant. However, in Willacy I, this court overlooked section 944.025 and relying on Cleveland v. State, a prosecutorial discretion case, found that the juror was not ineligible to serve on the jury. Mr. Willacy is clearly entitled to the benefit of this Court's decision in Lowrey.

The decision in Lowrey readily meets both Florida's Witt v. State, 387 So. 2d 922 (Fla. 1980) retroactivity test as well as the federal retroactivity test announced in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed. 2d 334 (1989). Accordingly, Mr. Willacy is entitled to habeas corpus relief.

CLAIM IV

MR. WILLACY WAS DENIED EFFECTIVE REPRESENTATION OF APPELLATE COUNSEL BY COUNSEL'S FAILURE TO ARGUE THAT THE JURY WAS IMPROPERLY INSTRUCTED AS TO THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDIATED.

In its response, the State maintains that this issue was not argued below, and thus not preserved for appellate review. Secondly, the State contends that the claim lacks merit because the standard jury instruction was given.

The State erroneously maintains that defense counsel did not preserve a request for a jury instruction distinguishing ordinary premeditation from CCP. At the charging conference, defense counsel urged the trial court to instruct the jurors such that they had the necessary knowledge to understand the critical distinction between ordinary premeditation, the premeditation necessary to convict of first-degree murder, and the heightened premeditation necessary to find the aggravating circumstance of cold, calculated and premeditated. The present CCP jury instruction underscores the necessity for the jurors to completely understand the distinction.

Paramount to this discussion is the fact that the jury here was a re-sentencing jury. This jury was instructed by the trial court that Mr. Willacy had been convicted of first-degree premeditated murder. This jury, however, was not instructed as to the elements of first-degree murder, and had no understanding of the definition of premeditated murder. As such this jury, without this fundamental and essential background knowledge, was tasked with determining whether the aggravating circumstance of CCP had been

established. Without this prerequisite foundation the jurors were ill-equipped to make a competent and reliable finding as to the existence of the aggravating circumstance.

A fundamental understanding of the law through adequate and complete instruction is required in order to safeguard faith in a jury's verdict. This jury was in no position to render an informed verdict as to CCP.

Trial counsel adequately preserved this issue for appellate review, yet the issue was not raised on direct appeal. Appellate counsel's failure to raise the issue constitutes ineffective assistance of appellate counsel. No faith can be had in this jury recommendation, as the jurors were woefully uninformed. As such, confidence in the correctness of the result has been fully compromised. Accordingly Mr. Willacy is entitled to a new penalty phase.

CLAIM VI

DEATH BY LETHAL INJECTION VIOLATES ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

On January 24, 2006, the United Statues Supreme Court granted a stay of execution in Clarence E. Hill v. Florida, Case No.: 05-8794, in order to consider Hill's claim that Florida's death by lethal injection constitutes cruel and unusual punishment. Mr. Willacy similarly

maintains that Florida's procedure of lethal injection causes undue pain to the inmate in violation of the Eighth Amendment of the United States Constitution. Accordingly Mr. Willacy's sentence should be commuted to life imprisonment.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Chadwick Willacy respectfully urges this Court to grant him habeas corpus relief.

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.

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CERTIFICATION OF TYPE

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

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