IN THE SUPREME COURT OF FLORIDA

RONALD LEE WILLIAMS,

Appellant, **CASE NO.: SC05-226**
Lower Tribunal No.: 90-3515-CFA-01

v.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S RESPONSE TO ANSWER BRIEF OF APPELLEE

JOSEPH F. MCDERMOTT, ESQUIRE
MCDERMOTT LAW FIRM, P.A.
7116-A Gulf Blvd.
St. Pete Beach, FL 33706
Ph: (727) 367-1080, Fx: 367-9940
SPN: 00002251, FBN: 052469
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

ISSUE I

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

FAILURE TO REQUEST AN INDEPENDENT ACT INSTRUCTION ALTHOUGH THIS WAS THE PRIMARY DEFENSE.

(CONTRARY TO THE VI AND XIV AMENDMENTS U.S. CONSTITUTION AND SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA)

STANDARD OF REVIEW

1. DEFER TO TRIAL COURT'S FINDING ON FACTUAL MATTERS.
2. DEFICIENCY AND PREJUDICE PRONGS – DE NOVO
BURNO V. STATE, 807 So.2d 55 (FLA. 2002)

The issue involved is not determined by the adoption of a standard jury instruction after defendant William's trial. The law of independent act existed at the time and Attorney Etheridge did not request such instruction (PCT 14-15) (3.850 Transcript 80-82).

The failure to submit and instruction or grant one is prejudicial because Williams was not present at the homicides and a reasonable hypothesis existed that he did not orchestrate murders. His position was that he did not send people to Pensacola to do anything except locate drugs and money. It is quite reasonable to conclude that his co-defendants went outside the scope of their mission and that the killings were their independent acts. Accordingly, an independent act instruction did apply to Attorney

Etheridge's effectiveness as counsel. He simply did not request the instruction although he conceded that was the essence of his defense.

The Bryant case cited in Defendant's initial brief (Bryant v. State, 412 So.2d 347(Fla. 1982)) is clear authority that the law of independent act was effective long before Defendant, Williams' trial. It also determined that failure to grant the instruction was reversible error. It seems to follow that failure to counsel to request on instruction on the primary theory of the case is ineffective.

ISSUE 2

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

COUNSEL'S INJECTION OF PERSONAL BELIEFS IN OPENING AND CLOSING STATEMENTS THAT DEFENDANT DESERVED TO BE IN PRISON.

(CONTRARY TO THE VI AND XIV AMENDMENTS U.S. CONSTITUTION AND SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA)

STANDARD OF REVIEW

1. DEFER TO TRIAL COURT'S FINDING ON FACTUAL MATTERS.
2. DEFICIENCY AND PREJUDICE PRONGS – DE NOVO
BRUNO V. STATE, 807 So.2d 55 (FLA. 2002)

That defendant had been convicted of drug trafficking should not have been inserted in his trial by his own attorney. If that wasn't bad enough, Attorney Etheridge followed up with his personal view that Defendant Williams was "in prison where he belongs for doing that" (T-882) (PCT-34) and "He's in prison right now where I personally think he needs to be for that conviction." (T-882)(PCT-35).

There can be no tactical reason to submit such statements (not in evidence) to the jury. The cases cited by the State relate to matters in

evidence and do not relate to one's own counsel inflicting his personal beliefs.

ISSUE 3

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

FAILURE TO OBJECT OR REQUEST MISTRIAL TO PROSECUTOR'S CLOSING STATEMENT THAT AMOUNTED TO COMMENTS ON DEFENDANT'S FAILURE TO TESTIFY

(CONTRARY TO THE VI AND XIV AMENDMENTS U.S. CONSTITUTION AND SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA)

STANDARD OF REVIEW

1. DEFER TO TRIAL COURT'S FINDING ON FACTUAL MATTERS.
2. DEFICIENCY AND PREJUDICE PRONGS – DE NOVO
BRUNO V. STATE, 807 So.2d 55 (FLA. 2002)

The State agrees that Rodriquez v. State, 753 So.2d 295 (Fla. 2000), holds that it is impermissible for the prosecutor to comment on a point only the defendant can contradict (P-32 Answer Brief of Appellee).

The argument of the State (Trial Transcript P-828, 836-838) clearly established that only Defendant Williams could refute.

"That's who it was. Everybody knew it, undisputed, uncontradicted. Nobody took the witness stand and said, ok, no, they belonged to Jit, they belonged to Yoge. No, nobody said that. Every single witness knew who the boss was." (Emphasis added)

Once again, the State argues that since Rodriquez was decided after Defendant Williams' trial (2000) that it doesn't apply. The case of Marshall

v. State, 473 So.2d 688 (Fla. 4DCA 1984), sets forth the law applicable at the time of Defendant Williams' trial.

ISSUE 4

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

ERRONEOUS ADVICE TO DEFENDANT AS TO LOSING CLOSING ARGUMENTS IF HE SHOULD TESTIFY

(CONTRARY TO THE VI AND XIV AMENDMENTS U.S. CONSTITUTION AND SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA)

STANDARD OF REVIEW

1. DEFER TO TRIAL COURT'S FINDING ON FACTUAL MATTERS.
2. DEFICIENCY AND PREJUDICE PRONGS – DE NOVO
BRUNO V. STATE, 807 So.2d 55 (FLA. 2002)

Defendant Williams understands it to be the function of the trial court to make findings of fact. The State urges this Court to consider that the Etheridge memo was prepared by a secretary not knowledgeable in the law. (Appellee's Answer Brief P-37) The record does not support the contention that the issue of defendant's testimony arose after he put on a defense witness, Gregory Manning (Trial Transcript P.- 983 – 1020)

ISSUE 5

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

FAILURE TO SEEK DISQUALIFICATION OF JUDGE GEEKER BASED UPON HIS MINDSET TO IMPOSE A DEATH SENTENCE

(CONTRARY TO THE VI AND XIV AMENDMENTS U.S. CONSTITUTION AND SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA)

STANDARD OF REVIEW

1. DEFER TO TRIAL COURT'S FINDING ON FACTUAL MATTERS.
2. DEFICIENCY AND PREJUDICE PRONGS – DE NOVO
BRUNO V. STATE, 807 So.2d 55 (FLA. 2002)

Any competent trial lawyer would have sought Judge Geeker's disqualification based on three prior overrides of co-defendant's.

The statements of the trial court at Defendant Williams' sentence bear out the judge's pre-disposition to override and sentence Williams to death. (Sentence Transcript P. - 3)

The State, in argument, places weight on Judge Geeker's statement that "other judges" would have done the same.

Goines v. State, 708 So.2d 656 (Fla. 4DCA1998) addresses that point. It held "…. the law does not require that the party seeking disqualification still show that the result would be different before an impartial judge."

ISSUE 6

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

FAILURE TO PROVIDE THE TRIAL COURT WITH A SUBSTANTIAL MITIGATOR – DR. LARSON'S REPORT SHOWING DEFENDANT TO BE BORDERLINE RETARDED FUNCTIONING AT A 13 – 14 YEAR OLD LEVEL

(CONTRARY TO THE VI AND XIV AMENDMENTS U.S. CONSTITUTION AND SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA)

STANDARD OF REVIEW

1. DEFER TO TRIAL COURT'S FINDING ON FACTUAL MATTERS.
2. DEFICIENCY AND PREJUDICE PRONGS – DE NOVO
BRUNO V. STATE, 807 So.2d 55 (FLA. 2002)

The issue does not primarily relate to the jury recommendation of mercy. It focuses upon the failure of trial counsel to explore further mitigation suggested by Dr. Larson and his failure to present the Larson report to Judge Geeker at the Spencer hearing.

Judge Geeker did not have benefit of Defendant's IQ at sentencing. Neither did counsel explore the non-statutory mitigators:

1. "improvished childhood",
2. "beatings with an extension cord",
3. "parents frequently drank to point of intoxication",
4. "neighborhood ghetto",

5. “erractic school history”,

6. “dropped out when he was 16”,

7. “lengthy drug abuse history”,

8. “not recommended for employability”,

9. “personality disorder”.

Of course, these mitigators should have been explored and presented to a death penalty jury. Had that been done, then a judicial override would not likely withstood on appeal.

Be that as it may, the same information should have been presented at the Spencer hearing. Hindsight by Judge Geeker that he would still override is difficult to palate.

Stevens v. State, 552 So.2d 1082 (Fla. 1989) holds inaction as to mitigation may have affected the sentence imposed by the trial judge. (Jury Override of Life Recommendation)

Interestingly, the Stevens case noted that substantial mitigation would have been discovered had trial counsel conducted or arranged a reasonable investigation into Steven’s background. Those mitigators were:

1. childhood in poverty and neglect,

2. physical abuse and threatened,

3. violence by both parents,

4. Defendant’s drinking problems.

A comparison of those mitigators does not approach the mitigators for Defendant Williams.

ISSUE NO. 7

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

FAILURE TO REQUEST ASSISTANCE OF CO-COUNSEL

(CONTRARY TO THE VI AND XIV AMENDMENTS U.S. CONSTITUTION AND SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA)

STANDARD OF REVIEW

1. DEFER TO TRIAL COURT'S FINDING ON FACTUAL MATTERS.
2. DEFICIENCY AND PREJUDICE PRONGS – DE NOVO BRUNO V. STATE, 807 So.2d 55 (FLA. 2002)

Defendant Williams' position is that Death cases require co-counsel. They cannot be effectively handled by one lawyer. He concedes that the law in 1995 held otherwise, Death case litigation has developed substantially in those ten years to a point where co-counsel should be automatic.

ISSUE NO. 8

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

CUMULATIVE EFFECT OF SPECIFIC ACTS OF INEFFECTIVE COUNSEL SET FORTH IN ISSUES 1 TO 7

(CONTRARY TO THE VI AND XIV AMENDMENTS U.S. CONSTITUTION AND SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA)

STANDARD OF REVIEW

1. DEFER TO TRIAL COURT'S FINDING ON FACTUAL MATTERS.
2. DEFICIENCY AND PREJUDICE PRONGS – DE NOVO BRUNO V. STATE, 807 So.2d 55 (FLA. 2002)

The totality of errors by trial counsel Etheridge negate any theory of harmless error.

ISSUE 9

FAILURE OF THE TRIAL JUDGE TO GRANT SUGGESTION FOR DISQUALIFICATION AS TO 3.850 HEARING AND DENIAL OF MOTION TO RECONSTRUCT COURT'S RECORD

(VIOLATION OF DEFENDANT'S RIGHT TO DUE PROCESS, SECTION 16 OF THE CONSTITUTION OF THE STATE OF FLORIDA, FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES)

STANDARD OF REVIEW – DE NOVO

BRUNO V. STATE, 807 So.2d 55 (Fla. 2002)

Defendant concedes Appellee State may have a point if Judge Geeker had refused the files based on the exemptions set forth in Rule 2.051(c) of the Judicial Administrative Rules. He did not. However, Defendant Williams also sought to depose Judge Geeker and his staff to assist in furtherance of the disqualification issue for the 3.850 hearing. There appear to be no legal basis for refusal to permit depositions.

ISSUE 10

THE COURT ERRED IN DENYING DEFENDANT'S AMENDED MOTIONS FOR RELIEF UNDER RING, APPRENDI AND BLAKELY CASES

(CONTRARY TO DEFENDANT'S DUE PROCESS RIGHT AND TRIAL JURY RIGHTS UNDER SECTION 16, FLORIDA CONSTITUTION AND AMENDMENTS V, VI AND XIV, CONSTITUTION OF THE UNITED STATES)

STANDARD OF REVIEW – DE NOVO

BRUNO V. STATE, 807 So.2d 55 (Fla. 2002)

Defendant submits that the Ring, Apprendi, and Blakely cases apply to his conviction. Defendant concedes that the present state of law does not have retroactive application and that the legal principles have not been applied to his claim. This issue is preserved for possible Federal *habeas* or U.S. Supreme Court *certiorari.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail to the Office of the State Attorney, Escambia County, 190 Governmental Center, Pensacola, FL 32501 and the Office of the Attorney General, PL-01, The Capitol, 400 South Monroe Street, Tallahassee, FL 32399, this the _____ day of _____, 2006.

_____

JOSEPH F. MCDERMOTT, ESQUIRE
MCDERMOTT LAW FIRM, P.A.
7116-A Gulf Blvd.
St. Pete Beach, FL 33706
Ph: (727) 367-1080, Fx: 367-9940
SPN: 00002251, FBN: 052469
ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210 (a)(2), the Appellant certifies that this brief has 1 inch margins and 14-point Times New Roman font.

_____

JOSEPH F. MCDERMOTT, ESQUIRE
MCDERMOTT LAW FIRM, P.A.
7116-A Gulf Blvd.
St. Pete Beach, FL 33706
Ph: (727) 367-1080, Fx: 367-9940
SPN: 00002251, FBN: 052469
ATTORNEY FOR APPELLANT