IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

GARY RAY BOWLES

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Appeal No.: **SC05-2264**
L.T. Court No.: 94-CF-12188

APPELLANT'S AMENDED REPLY BRIEF, PURSUANT TO FLA. R. APP. PRO. RULE 9.210(d)

On Appeal from the Circuit Court, Fourth Judicial Circuit, and For Duval County, Florida

Honorable Jack Schemer
Judge of the Circuit Court, Division A

FRANK J. TASSONE, JR. ESQ.
Fla. Bar. No.: 165611
RICK A. SICHTA, ESQ.
Fla. Bar. No.: 0669903
1833 Atlantic Boulevard
Jacksonville, FL 32207
Phone: 904-396-3344
Fax: 904-396-0924
Attorneys for Appellant

TABLE OF CONTENTS

CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

Appellant, GARY RAY BOWLES, will be referred to as "Appellant." The State of Florida will be referred to as "Appellee." Attorney(s) Frank J. Tassone and Rick A. Sichta, who are representing Appellant in this matter, will be referred to as the "undersigned counsel."

References to the Record on Appeal will be designated "ROA." followed by the page number indicated on the Index to the Record on Appeal. Volume Three of the Record on Appeal will be designated "ROA," Vol. III, followed by the page number of Volume III on the Record of Appeal. References to Appellee's Answer Brief will be designated "Answer Brief," followed by the page number of said Brief. References to Appellant's Initial Brief will be designated "Initial Brief," followed by the page number of said Brief.

IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

GARY RAY BOWLES

Appellant,

v.

	Appeal No.:	**SC05-2264**
STATE OF FLORIDA,	L.T. Court No.:	94-CF-12188

Appellee.
_____/

ISSUE ONE:

THE DECISION BY BOWLES' TRIAL ATTORNEY NOT TO PRESENT A MENTAL HEATH EXPERT AT BOWLES' PENALTY PHASE WAS NOT A REASONABLE STRATEGIC DECISION

Appellee first argues in their Answer Brief, that although their existed mitigation that could have been presented to the jury in Bowles' penalty phase, it would have done Bowles more harm than good to call an expert on Bowles' behalf. (Answer Brief, p. 27); *Gaskin v. State*, 822 So. 2d 1243 (Fla. 2002).

In support of their contention, Appellee avers to the fact that Bowles' counsel retained the services of Dr. McMahon, and after Dr. McMahon had evaluated Bowles, she did not believe Bowles suffered from a frontal lobe impairment, and his propensity towards violence was not due to neurological factors, but rather "psycho dynamics," surfacing from his familial

background and his interpersonal relationships (Id.). Appellee also notes that the Doctor was "unwilling to testify that Bowles' mild brain dysfunction was akin to a severe neurological disorder (Id.).

Continuing, Appellee alleges that although Dr. McMahon "perhaps would have been able to testify regarding some potentially mitigating aspects of Bowles' life – such as his history of being abused as a child, McMahon would have also testified that Bowles was not encumbered by a mental infirmity that lessened his culpability; and further, she would have stated that Bowles' had a likelihood of future violence." (Answer Brief, p. 28); *See* Reed v. State, 875 So. 2d 415 (Fla. 2004)

However, as shown in Bowles' Initial Brief, the failure to present expert testimony regarding Bowles' mental infirmities precluded Bowles and his counsel from ever establishing two statutory mental mitigators, i.e. (1) the defendant suffered from extreme emotional disturbance at the time of the murder, and (2) the capacity of the defendant to appreciate the criminality of his acts, was at the time of the homicide substantially diminished. (See ROA pgs. 78-88). Moreover, though lay witness testimony was presented regarding Bowles' drug and alcohol dependency, abuse, and lack of a parental figure, no expert was used to show the jury how said facts

correlate with brain damage and mental infirmities later in life[1]. As a result, no weight was given by the trial court for said two mitigators. *See* Phillips v. State, 608 So. 2d 778 (1992) [*Holding that although defense counsel presented some mitigation at the initial sentencing, such as defendant's mother, he did not present a large amount of evidence concerning defendant' childhood abuse nor did he present expert testimony regarding defendant's mental or emotional deficiencies].

Continuing, trial counsel did not present the testimony of Dr. McMahon at Bowles' Spencer hearing (ROA, pg. 1083), a hearing whereby evidence that was not presented in the penalty phase is usually introduced.

Lastly, in light of the above facts, trial counsel's decision not to use Dr. McMahon in the penalty phase of Bowles' trial was not sound strategy, as the reasons given by counsel for not using the Doctor were was the

[1] The testimony from both Dr. McMahon and Dr. Krop show that such a link was possible (and recommended pursuant to Dr. Krop's testimony). (See ROA, volume II, pgs. 194-295) In particular, both experts found Appellant to have mild cognitive disorder and impairment (See ROA, volume II, pgs. 221, 260)[1]; both experts found Appellant to have a borderline IQ, falling in the low average range (See ROA, volume II, pgs. 199, 260); both experts found (independent of each other) that Appellant had extensive difficulties in performing tasks involving reasoning, and judgment. Essentially, both experts found that Appellant had difficulty in evaluating consequences of choices, learning from mistakes, memory retention, and other tasks associated with frontal lobe brain impairment. (See ROA, volume II, pgs. 275-277)[1]

implication of the negative characteristics of Appellant that would come out through cross-examination. (See ROA, volume III, pg. 170)[2] Bowles reiterates this point quoting from his initial brief:

> In particular, one of the main reasons of not calling Doctor McMahon (in both the original sentencing proceeding and the resentencing after remand by the FSC) was the fact that Appellant's convictions for two unrelated murders would be heard by the jury. (See ROA, volume III, pg. 170) However, this information would have been heard by the jury regardless of this decision to call Dr. McMahon, as Appellant pled guilty to two murders during the interim of his original sentencing proceeding and his resentencing hearing. (See ROA, volume III, pg. 174) Counsel's decision therefore is irrelevant in determining the potential impact of Dr. McMahon's testimony and again supports Appellant's contention that not calling the Doctor was not a strategic decision.
>
> Additionally, the American Bar Association's guidelines, specifically in guidelines 10.7(A) and 10.11(A) (F), give explicit instructions to death counsel regarding investigating and presenting mitigation in the penalty phase of the trial.[3] *See also Rompilla v.*

[2] Mr. White discusses the negative aspects of the potential testimony in cross examination that could have been brought out in the ROA, volume III, pgs. 170-194. Notably, these were his anti-social personality disorder and "lack of conscious" (*Id* at 177) (which is not elaborated on further by counsel).

[3] To note, guideline 10.7(A) states: "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to both guilt and penalty." Continuing, 10.11(A) states: "As set out in guideline 10.7(A), counsel at every stage of the case has a continuing duty to investigate issues bearing on penalty and to seek information that supports mitigation or rebuts the prosecutions case in aggravation." Most importantly, 10.11(F) states: "In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following: (1) Witnesses familiar with and evidence relating to the clients life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence

> *Beard*, 125 S. Ct. 2456 (2005) *[Holding that: the ABA guidelines in place at the time of trial should be used as a guide to determine whether counsel's actions can be considered strategic.]* Here, it is clear that counsel did not take every reasonable measure possible to ensure that the Appellant's mitigation information was prepared and presented adequately when viewed in light of the ABA guidelines. Given the Supreme Court's ruling in *Rompilla*, strategy cannot be used to explain the inadequate presentation that resulted at sentencing.

In conclusion, Bowles' respectfully requests this Court to reverse and remand the trial court's ruling on this issue.

ISSUE TWO:

BOWLES' TRIAL COUNSEL WAS DEFICIENT IN FAILING TO REBUT THE EXISTENCE EVIDENCE THAT SUPPORTED THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR (HAC) THAT WAS FOUND BY THE TRIAL COURT

Appellee contends that Bowles' claim of ineffective assistance of counsel for failing to challenge the applicability of the HAC aggravator is procedurally barred and should be rejected. Appellate also insists that Bowles' trial counsel was not ineffective in failing to rebut the existence of HAC aggravator, because Bowles confessed to a struggle with the victim, and the evidence proves that the victim struggled. (Answer Brief, pgs. 32-

---

less than death; (2) Expert and lay witnesses along with supporting documentation (e.g. school records, military records) to provide medical, psychological, sociological, cultural, or other insights into the client's emotional and/or mental state and life history that may explain or lesson the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaption to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor.

33). In support thereof, Appellee states that the testimony of the State medical examiner Dr. Margarita Arruza conclusively proved that the HAC aggravator existed, as the victim was strangled, attempted to fight back, was not immediately rendered unconscious (Answer Brief, p. 30).

Continuing, Appellee also says that HAC is supported by Bowles' statements to authorities, as he acknowledged that he struggled with the victim before he died. (Answer Brief, p. 32) and therefore the victim was cognizant of his imminent death and therefore the HAC was properly found (Answer Brief, p. 33)

However, despite Bowles' admission of a struggle between he and the victim[4] a complete investigation was not sought on how to rebut said HAC aggravator. Trial counsel has a duty to lessen the strength of the prosecution's aggravating factors that are presented to a jury, and this was not done in the instant case. *See* Rompilla v. Beard, 125 S. Ct. 2456 (2005) *[Holding that: the ABA guidelines in place at the time of trial should be used as a guide to determine whether counsel's actions can be considered strategic.]; See also* American Bar Association's guidelines, (specifically in guidelines 10.7(A) and 10.11(A)(F), which give explicit instructions to death

[4] Dr. Wright's testimony was that the victim would have been rendered immediately unconscious (Glasgow level 3) and therefore unable to feel pain or have any awareness of his surroundings. (ROA, volume III, pg. 41)

counsel regarding investigating and presenting mitigation in the penalty phase of the trial.[5]); *See also* *Elam v. State*, 636 So. 2d 1312 (Fla. 1994)[*Stating that, Although the defendant was bludgeoned and had defensive wounds, the medical examiner testified that the attack took place in a very short period of time ("could have been less than a minute, maybe even half a minute"), the defendant was unconscious at the end of this period, and never regained consciousness*.].

Wherefore, Bowles' requests that the trial court's ruling on this issue be reversed and remanded.

---

[5] To note, guideline 10.7(A) states: "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to both guilt and penalty." Continuing, 10.11(A) states: "As set out in guideline 10.7(A), counsel at every stage of the case has a continuing duty to investigate issues bearing on penalty and to seek information that supports mitigation or rebuts the prosecutions case in aggravation." Most importantly, 10.11(F) states: "In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following: (1) Witnesses familiar with and evidence relating to the clients life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death; (2) Expert and lay witnesses along with supporting documentation (e.g. school records, military records) to provide medical, psychological, sociological, cultural, or other insights into the client's emotional and/or mental state and life history that may explain or lesson the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaption to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor.

ISSUE THREE:

THE TRIAL COURT ERRED IN SUMMARILY DENYING BOWLES' CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO BRING FORTH MITIGATION EVIDENCE, AND SAID CLAIM WAS NOT PROCEDURALLY BARRED

Appellee argues that the claim involving (the court failing to accord significant weight to his mitigation claims) lacks merit, as the summary denial of a postconviction claim is entirely appropriate if it is clearly shown that the claimant is not entitled to any relief. (Answer Brief, p. 34); *See* Garcia v. State, 2006 Fla. LEXIS 2614. (*Holding that a defendant is entitled to a postconviction evidentiary hearing unless (1) the motion, files, and records in the case conclusively show that the prisoner is not entitled to any relief, or (2)*

Appellee argues that because Bowles is arguing alleged trial court error as well as alleged trial counsel error, these are "identical" arguments raised and addressed in direct appeal, and therefore summary denial was appropriate. (Answer Brief, p. 35)

Appellee is incorrect in their assumption. Appellee seems to suggest that Bowles alleged the identical claim in his direct appeal that he did in his 3.850 motion. This is incorrect. On direct appeal, Bowles raised in Claim Nine that the trial court erroneously rejected two statutory mental mitigating

factors. *See* Bowles v. State, 804 So. 2d 1180 (Fla. 1998). This claim involved alleged trial court error. In contrast, Bowles' claim in his 3.850 motion dealt with trial counsel error[6]. (Appellant's Initial Brief, pg. 28).

Bowles reiterates what was said in his Initial Brief regarding this issue:

> Appellant's Claim One was entitled, "Counsel for Mr. Bowles failed to sufficiently present both statutory and/or non-statutory mental mitigating factors, in clear violation of 8th and 14th Amendments." (ROA, pg. 25) Moreover, Claim One stated that, (ROA, pg. 27), "Counsel for Mr. Bowles erred in failing to produce sufficient available testimony and evidence regarding these three mitigators."[7] Appellant further stated that the court refused to find these mitigators because a "reasonable quantum of relevant and uncontroverted evidence supporting theses mitigators was not presented to the court."[8] Appellant also stated that "Defendant's counsel's failure to present adequate testimony in this regard." (e.g. counsel's failure to present evidence in support of said three mitigating factors). (ROA, pg. 31)

---

[6] Claim One included such ineffective assistance of counsel facts including but not limited too: counsel for Bowles failed to present statutory and/or non-statutory mental mitigating factors, in clear violation of the 8th and 14th Amendments, and also failed to produce sufficient available testimony and evidence regarding said mitigators.

[7] The mitigators included the following (1) Defendant suffered from extreme mental or emotional disturbance at the time of the murder (2) the capacity of the Defendant to appreciate the criminality of his acts at the time of ht homicide, was substantially diminished (3) Mr. Bowles' mental and emotional condition were both exacerbated by his level of intoxication which precluded Mr. Bowles from being able to conform his conduct to the requirements of the law." (Transcript, Sentencing Proceeding 1999 at p. 240).

[8] Appellant does concede that a portion of this claim dealt with the Court's error in not finding said mitigators.

> As the aforementioned paragraph illustrates, Appellant's Claim One was not "mere conclusory allegations of ineffective assistance of counsel," but rather a claim that discussed how trial counsel was ineffective in failing to substantiate their contention that two statutory mitigators should be included and given weight against the aggravating factors and imposition of death. (ROA, pg. 25-31) *See Gaskin v. State*, 737 So. 2d 509 (Fla. 1999)*[Holding that, the movant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if he alleges specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant…upon review of a trial court's summary denial of a postconviction relief without an evidentiary hearing, the court must accept all allegations in the motion as true to the extent they are not conclusively refuted by the record."].*
>
> Fla. R. Crim. P. 3.850(d) provides that when denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records that conclusively shows that the prisoner is entitled to no relief shall be attached to the order. *Williams v. State*, 642 So. 2d 67 (Fla. 1st DCA 1994). Moreover, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing. *Id.* Continuing, "While defense counsel is entitled to broad discretion regarding trial strategy, where the trial court is confronted with a claim of ineffective assistance of counsel, a finding that come action or inaction by defense counsel was tactical is generally inappropriate without the benefit of an evidentiary hearing. The determination that tactical decisions are best made after an evidentiary hearing unless the record conclusively refutes the allegations. *Anthony v. State*, 660 So. 2d 374 (Fla. 4th DCA 1995). Lastly, where there has been no evidentiary hearing, the allegations in support of the motion for postconviction relief must be taken as true unless they are conclusively rebutted by the record. *Harich v. State*, 484 So. 2d 1239 (Fla. 1986)

Therefore, based on the preceding facts and case law, this claim was improperly summarily denied, and should have been given an evidentiary hearing at the trial court level. *See Murphy v. State*, 638 So. 2d. 975 (Fla. 1st

DCA 1994)[*Holding that "although trial counsel is given great discretion regarding trial strategy, when a court is confronted with a claim of ineffective assistance of counsel, a finding that some action or inaction by defense counsel is tactical is generally inappropriate absent an evidentiary hearing."].*

Wherefore, Bowles respectfully requests this Court to reverse and remand this issue back to the trial court for an evidentiary hearing.

ISSUE FOUR:

THE TRIAL COURT ERRED IN SUMMARILY DENYING CLAIMS FOUR, FIVE, SIX, SEVEN IN APPELLANT'S 3.850 MOTION FOR POSTCONVICTION RELIEF

Defendant realleges and reincorporates Claims Four through Seven as stated in his trial court 3.850 Motion for Postconviction Relief as reasons for why the trial court erred in denying said claims[9]. (ROA, pgs.39-74)

ARGUMENT FIVE

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S "MOTION TO REOPEN TESTIMONY" CLAIM IN HIS AMENDED 3.850 MOTION

[9] Claims Four and Five primarily dealt with Florida's capital sentencing scheme and how it is unconstitutional and violates *Ring v. Arizona*, 536 U.S. 584 (2002). (ROA, pgs. 39-70). Claim Six encompassed an issue whereby the holdings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) require elements of the offense necessary (aggravating factors) to establish capital murder must be charged in the indictment. (ROA, pgs. 70-72) Claim Seven alleges that *Apprendi* and *Ring* require a unanimous jury finding of death. (ROA, pgs. 72-74)

Bowles realleges and reincorporates the argument made in his initial brief on this issue. (Appellants Initial Brief, pgs. 32-35).

CONCLUSION:

Wherefore, Appellant respectfully requests this Honorable Court to reverse and remand the trial court's denial of Appellant's 3.850 Motion for Postconviction relief, entitling Appellant to either a new resentencing hearing and/or a new evidentiary hearing concerning the claims that were summarily denied in said 3.850 Motion.

RESPECTFULLY SUBMITTED,

FRANK J. TASSONE P.A.

s/Frank Tassone Jr. Esq.
FRANK TASSONE, ESQUIRE
Fla. Bar. No.: 165611
RICK SICHTA, ESQUIRE
Fla. Bar. No.: 0669903
1833 Atlantic Boulevard
Jacksonville, FL 32207
Phone: 904-396-3344
Fax: 904-396-0924
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via U.S. Mail to all counsel of record, on this 12th day of March, 2007.

RESPECTFULLY SUBMITTED,

FRANK J. TASSONE P.A.

s/Frank Tassone Jr. Esq.
FRANK TASSONE, ESQUIRE
Fla. Bar. No.: 165611
RICK SICHTA, ESQUIRE
Fla. Bar. No.: 0669903
1833 Atlantic Boulevard
Jacksonville, FL 32207
Phone: 904-396-3344
Fax: 904-396-0924
Attorneys for Appellant

Copies furnished to:

Bernardo de la Rionda, Esq.
Assistant State Attorney
Office of the State Attorney
330 East Bay Street
Jacksonville, FL 32202-2921

Curtis French, Esq.
Assistant Attorney General
Office of the Attorney General
PL-01 The Capitol
Tallahassee, FL 32399-1050

CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

FRANK J. TASSONE, P.A.

s/Frank Tassone Jr. Esq.
FRANK J. TASSONE, ESQUIRE
Fla. Bar No.: 165611
RICK A. SICHTA, ESQUIRE
Fla. Bar No.: 0669903
1833 Atlantic Boulevard
Jacksonville, FL 32207
Phone: 904-396-3344
Fax: 904-396-0924
Attorney(s) for Appellant