IN THE SUPREME COURT OF FLORIDA

NO. SC05-1558

ERIC SCOTT BRANCH,

Petitioner,

v.

JAMES V. CROSBY, JR.,

Secretary, Florida Department of Corrections,

Respondent.

REPLY TO RESPONSE FOR WRIT OF HABEAS CORPUS

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CLAIM I

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO SUFFICIENTLY ARGUE THAT THE STATE HAD FAILED TO PROVE THE AGGRAVATOR OF PRIOR VIOLENT FELONY THROUGH THE INTRODUCTION OF THE INDIANA STATUTE IN SUPPORT OF SECTION 921.141(5), FLORIDA STATUTES.

Respondent argues, at page 14 in Response Petition (hereafter RP), that the admissibility of the Abstract was not preserved for appeal. While technically trial counsel did not object to the admissibility of the abstract, he did object to its relevance in failing to demonstrate the abstract established a violent felony. Basically, respondent argues form over substance. The State admitted the abstract for the sole purpose of attempting to show that Petitioner had been convicted of a prior violent felony.

On direct appeal, appellate counsel argued in his Initial Brief (hereafter IB) at page 55:

> "Counsel objected to Fairburn's testimony because the state had offered no testimony that the crime indicated by the judgment, i.e. sexual battery, was necessarily a crime of violence…"
>
> * * *
>
> The court, accepting the state's argument "that when you molest someone who cannot consent, that is a crime of violence," overruled the objection. It allowed the state to introduce, without any further proof, the Indiana judgment (T975). That was error."

Basically, Petitioner's direct appeal counsel did argue the introduction of the Indiana Judgment was error. However, he argued the wrong reasoning; it was inadmissible because the State failed to establish that the name on the abstract was in fact the Petitioner.

However, Respondent argues, at pages 7 and 11 RP, even if there was error, such error was harmless because at the Spencer[1] hearing the State introduced a certified copy of the circuit court file of Petitioner's Indiana case. Petitioner fails to distinguish between evidence presented to a jury and evidence presented to the trial court. The jury was presented with only the abstract. While Respondent is correct that either party may present additional evidence at the Spencer hearing, Respondent fails to discuss what the impact of an improperly admitted aggravator, prior violent felony, would have on a jury.

Respondent incorrectly argues, at pages 13-14 RP, that the allegations contained in the certified copy of the pleadings of the offense in Indiana are sufficient to establish the surrounding circumstances constituting a prior violent felony. The cases cited by Respondent for their argument clearly pertain to

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

"testimony," not allegations that cannot be cross-examined.

Respondent further argues at page 12 of RP that Petitioner's Indiana conviction was a felony. Petitioner contends the test for this point was set out in Carpenter v. State, 785 So.2d 1181 (Fla. 2001). Notwithstanding Respondent's argument, Petitioner relies upon his Petition and this Court's holding in Carpenter.

Respondent argues, at p15 of RP, even if Appellate Counsel were ineffective, the result would be harmless. Respondent properly cites Peterka v. State, 640 So.2d 59, 71 (Fla. 1994), for the proposition that reversal "is only permitted if this Court finds that the errors in weighing the aggravating and mitigating circumstances, if corrected, reasonably could have resulted in a lesser sentence." Respondent argues that because two other aggravators still exist the result would not have been different.

Obviously, that is for this Court to decide. However, having proved no criminal history to the jury, other than the contemporaneous offense of sexual battery, a jury may very well have found the mitigators outweighed the aggravators.

CLAIM II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THE ISSUE OF THE TRIAL COURT'S ERROR BY ADMITTING DNA PROBABILITY STATISTICS WITHOUT A PROPER FRYE HEARING

Basically, Respondent's response to the petition merely disagrees with the conclusion of Petitioner without any significant comparison between the facts of the present case with the facts and holding in Brim v. State, 779 So.2d 427 (Fla. 2nd DCA 2000), and Darling v. State, 808 So.2d 145 (Fla. 2002).

Petitioner relies upon his Petition as support for this issue.

CLAIM III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AND ARUGE THE ISSUE THAT THE TRIAL COURT ERRED IN DENYING APPELLANT ACCESS TO HIS ATTORNEY BY RESCINDING THE APPROVAL FOR A RECESS IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND RIGHT TO COUNSEL.

Respondent cites to Perry v. Leeke, 488 U.S. 272 (1989), as support of the argument that a defendant has no constitutional right to consult with his lawyer while he is testifying. It appears that one reason the Court in Perry made that finding was: "[I]n a short recess in which it is appropriate to presume that nothing but the testimony will

be discussed, the testifying defendant does not have a constitutional right to advice." However, this record is clear that Mr. Allbritton wanted to discuss his client's defense with the Petitioner, not his testimony.

> MR. ALLBRITTON: Your Honor, my client is an intricate part of his defense. I mean, he has helped plan it and so forth. Whether or not there are other questions I need to ask, other points that I should cover at this point, there is one, frankly, that I have a question of whether or not I should proceed with it, and I want to do that in conjunction with him. I would like him to participate in that decision.

(TT. Vol. V, p852-855).

However, Leerdam v. State, 891 So.2d 1046 (Fla. 2d DCA 2004), assess this right under the Florida Constitution and points out that any denial of access to counsel during a recess, however short, is error, albeit subject to harmless error. The Respondent does not disagree with this argument.

Respondent further argues at pages 23-24 of RP that there is no constitutional right, either federal or state, to a recess. Respondent is correct. A recess is within the discretion of the court and will not be disturbed on appeal absent a showing of abuse of discretion. Bova v. State, 410 So.2d 1343, 1344 (Fla. 1993). The abuse of discretion standard was recently re-expressed by this Court in Perez v. State, 2005 WL 2782589 (Fla. Oct. 27, 2005).

> Under the **abuse** of **discretion standard**, a trial court's ruling will be upheld unless the "judicial action is arbitrary, fanciful, or unreasonable, ... **discretion** is abused only where no reasonable [person] would take the view adopted by the trial court." *Trease v. State,* 768 So.2d 1050, 1053 n. 2 (Fla.2000) (alteration in original) (quoting *Huff v. State,* 569 So.2d 1247, 1249 (Fla.1990)).

The record establishes the trial court granted a recess on three occasions, but rescinded that grant when the state argued that there was no right to a recess (TT. Vol. V, 852-855). The trial court was aware that case law did not permit it to disallow the Petitioner access to his lawyer during a recess: “THE COURT: There are some cases that indicate it might be reversible error to deny the opportunity to confer.” However, the trial court only realized that he could stop counsel from conferring with the Petitioner when the State pointed out it didn’t have to provide a recess. It was only then that the trial court denied the recess (TT. Vol. V, 852-855).

It is undisputed that Florida law stands for the proposition that during a recess the court cannot deny attorney/client access, regardless of the length of the recess. So in effect, because the trial court did not want attorney/client access, the court manipulated the situation by denying the recess. However, just prior to the denial, a recess was granted three times. The trial court’s strategy

is demonstrated through its last remarks: “THE COURT: I think that’s right. If you need some time, I’ll give you some time. I’m not going to take a recess so you can confer with your client, not in the middle of his testimony” (TT. Vol. V, p852-855). Contrary to the Court’s characterization of the “middle of his testimony,” the request was made on REDIRECT; the State had already concluded its cross-examination. Petitioner also contends, first, that “some time” is not any different than a “recess” when it was for the purpose of denying attorney/client access, and second, the decision to deny a recess was an abuse of discretion. Any reasonable person would adopt the view that the trial court’s ultimate ruling was fanciful. The trial court’s granting and rescinding a recess was fanciful and constituted an abuse of discretion.

Respondent also argues even if the denial was an abuse of discretion it was harmless error, RP at page 24. In addition, Respondent states Petitioner does not elaborate how his defense would be harmful. In Thompson v. State, 507 So.2d 1074 (Fla. 1987), the Court didn’t elaborate how the denial of attorney/client access was specifically harmful, but it reversed anyway: "Had the attorney-client consultation been allowed, defense counsel could have advised, calmed, and reassured Thompson without violating

the ethical rule against coaching witnesses." Id. at 1075. Inability to discuss a defense with a client is more harmful than “advising, calming, and reassuring. Appellate counsel was not able to argue the specific explanation because trial counsel didn’t provide any to the court. However, the explanation given was sufficient to alert the trial court as to the subject matter.

In stating the harmless error test set out in Chapman v. California, 386 U.S. 18 (1967), this Court in Thompson stated:

> …the harmless error test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state.

The State has not shown the error denying attorney/client access was not harmless. The trial court abused its discretion and the Petitioner was prejudiced. Therefore, appellate counsel was ineffective for failing to raise this issue on appeal.

CLAIM IV

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT FLORIDA'S NELSON INQUIRY IS UNCONSTITUTIONAL AS APPLIED, BECAUSE IT VIOLATES A DEFENDANT'S RIGHT TO COMPETENT PRIVATE COUNSEL UNDER THE SIXTH AMENDMENT AND EQUAL PROTECTION, AND FOR FAILING TO POINT OUT IN A MOTION FOR REHEARING THIS COURT'S MISAPPREHENSION OF THE FACTS REGARDING THE ISSUE OF COUNSEL'S INCOMPETENCE.

Respondent argues, RP at page 27 that "Petitioner offers no citation to the record to establish that anyone had requested that retained trial counsel withdraw." Apparently, Respondent missed the cite in the Petition at page 35 "[R. Vol. I, p154-156]," referring to Petitioner's grandfather having informed the court that trial counsel was asked to withdraw. The following exchange took place at the above cite:

> DEFEDANT'S GRANDFATHER: Well, I feel that I have some things that – in that affidavit that should have been answered by someone.
>
> THE COURT: Not by this court. Mr. Allbriton is not responsible to me. His retention by Mr. Branch is a matter of contract between Mr. Branch and Mr. Allbritton. And unless Mr. Allbritton seeks leave to withdraw, it's not something –
>
> DEFENDANT'S GRANDFATHER: That is my request, that – because I paid him, but I do not have – and I have the letter.
>
> THE COURT: That's not something with which I can be concerned. I'm afraid.

> DEFENDANT'S GRANDFATHER: I have a copy of a letter I was going to give him and ask him to withdraw from the case, because he hasn't –

(R. Vol. I, p155-156). The Petition also cites to page 18 of the Petitioner's Initial Brief on direct appeal where appellate counsel set out the above colloquy.

Respondent is disingenuous to suggest that Petitioner didn't attempt to discharge counsel. The record is clear that Petitioner's grandfather attempted an appeal to the trial court for help to have trial counsel withdraw. Petitioner sent a letter to the court explaining his complaints and requested a hearing, which never took place. As stated in the Petition at page 35, and stated here again: When private counsel has been paid and is asked to withdraw, yet fails to do so, what is a defendant's remedy other than to express these facts to the court? Petitioner and his grandfather are not lawyers and shouldn't be required to express "magic words" in order for a court to listen to complaints about an attorney's performance. Spurlock v. State, 420 So.2d 875 (Fla. 1982).

While Petitioner concedes, again, that Nelson holds for the review of only court-appointed counsel for incompetency, Petitioner suggests that this Court should revisit this issue as it pertains to private counsel as well, especially since Nelson is 22 years old and the

federal courts, Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed.2d 333 (1980), do not acknowledge any distinction between court appointed counsel and private counsel. A defendant who hires private counsel should—no must—be afforded the same safeguards by the courts for competent representation; especially in capital cases.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by hand delivery to: Casandra Dolgin, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050 on December ___, 2005.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is Courier New 12 point.

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