IN THE SUPREME COURT OF FLORIDA
CASE NO. SC05-914

ALLEN W. COX,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES

ARGUMENT

ISSUE I

APPELLEE IS INCORRECT IN ASSERTING THAT THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL BASED UPON THE ALLEGATION THAT COUNSEL FAILED TO INVESTIGATE AND PRESENT AVAILABLE MITIGATING EVIDENCE AT PENALTY PHASE

Appellee asserts in the Answer Brief that Trial Counsel Stone began "working on" the mitigation case at the very onset of his representation because he reviewed Mr. Cox's medical history and retained Dr. Berland. Answer Brief of Appellee at p. 32. However, merely reviewing medical records and retaining an expert is not what is contemplated by the *Wiggins* decision as to the responsibilities of Trial counsel to conduct a complete investigation in preparation for the penalty phase. Trial counsel stated that he had not talked to any family members until the deposition of Hazel Cox which took place on February 23, 2000. (ROA Vol. III at 297) As of February 28, 2000, the defense team was unaware of what, if any, mental mitigation evidence was going to be presented. (ROA Vol. III at 329). The withdrawal of Dr. Berland from the case is no excuse. Counsel should have monitored Dr. Berland's findings early in the litigation to ensure all appropriate mitigation witnesses were interviewed so a complete

mitigation case could be presented to the jury. It was counsel's lack of preparation that led to an incomplete presentation of available mental mitigation evidence.

Appellee also erroneously asserts in the Answer Brief that counsel failed to contact family members until very late in the litigation due to the wishes of Mr. Cox. Answer Brief of Appellee at 32. Counsel Stone specifically testified that he did not forego contacting family members because of any instruction on the part of Mr. Cox to avoid involving such witnesses. (ROA-PC-Vol. IV at 258). Furthermore, counsel did not make a strategic decision to limit his mitigation to three or four good witnesses. A strategic decision cannot be made based upon an incomplete investigation. Since counsel admittedly never spoke to Betty Gilbert, Tina Farmer, Nina Thomas or Teresa Morgan, he could not have made a strategic decision regarding whether to call these witnesses either in person or through a mental health expert.

Appellee also erroneously argues that the lack of experience of Mr. Higgins is irrelevant because Florida Rule of Criminal Procedure 3.112 affords no "legal rights". Answer Brief of Appellee at 39. Although the lack of experience of co-counsel is not dispositive of the issue of ineffectiveness it does have evidentiary value in evaluating performance. Death penalty litigation is very complex, and Rule 3.112 is an attempt to ensure competent representation. A death penalty case

requires two qualified counsel in order to afford the defendant proper representation.

The fact that Mr. Higgins said he was not heavily involved in the mitigation investigation proves Mr. Cox's point - he did not have two qualified counsel to investigate his guilt and penalty phase issues. Mr. Stone could not perform this substantial task all on his own. This is evidenced by the fact Mr. Stone did not attempt to visit any family members until very late in the investigation, Had he had qualified co-counsel, this responsibility could have been shared and a complete penalty phase investigation as contemplated in *Wiggins* could have been performed.

Appellee also argues that the lower court was correct in not addressing the issue of Mr. Stone's actions in Kentucky, asserting this was "irrelevant" to the case. Answer Brief of Appellee at p. 39, 40. However, Mr. Stone's actions in Kentucky are the subject matter of Mr. Cox's allegations of ineffectiveness. The fact that two witnesses testified Stone became intoxicated and had to be driven to his hotel room is surely relevant to whether he conducted an adequate penalty phase investigation. Counsel had the responsibility to completely and lucidly conduct the penalty phase investigation. He could not do so while getting drunk at a bar with Ray Cox. Contrary to the assertions of Appellee, the Lower Court erred

in failing to even address this testimony in the order denying Mr. Cox's 3.851 motion.

ISSUE II

APPELLEE IS INCORRECT IN ASSERTING THAT THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN THE GUILT PHASE

Counsel Conceded Appellant's Guilt in the Opening Statement

The state argues to this Court that Florida Rule of Criminal Procedure 3.112 is inapplicable in this case because, although it was adopted Oct. 28, 1999, before trial in this case, it was not scheduled to take effect until July 1, 2000. However, the rule only imposes requirements on the courts as to appointment of capital counsel. Mr. Cox may not be heard to complain that the trial court violated the rule, but he is still free to rely on the fact that cocounsel who committed the errors in this trial did not meet even the minimum standards which this Court believes are necessary for cocounsel.

The comments to the rule indeed indicate that "[T]hese standards are not intended to establish any independent legal rights." If no legal right is established, i.e. only the behavior of the courts is regulated, then the question of whether the

standard recognized as the minimum level of competency for cocounsel was imposed on the courts at the time of appointment in this case is irrelevant.

Mr. Cox's complaint is not inappropriate appointment by the court in violation of the rule, his complaint is that cocounsel failed to meet the standards for adequate representation recognized at the time his counsel was appointed which were already long-established by the ABA. This Court had already recognized the standards at the time of appointment in this case. Although the standards were formally adopted a few months after counsel was appointed in this case, the standard had been recognized and expressed during the rule making process.

Rule 3.112 did not appear spontaneously in October 1999. And the rule's delayed effective date did not have the effect of ratifying the competence of incompetent counsel appointed before that date.

Nor is the fact that counsel fails to meet the standards of Rule 3.112 of no consequence or weight in evaluating the competence of trial counsel, for the sentence immediately following the sentence noting no new right is created states: "For example, the failure to appoint cocounsel, **standing alone**, has not been recognized as a ground for relief from a conviction or sentence." (Emphasis added).

Clearly, the failure of a trial counsel to have attained the bare minimum standards recognized by the ABA and this Court is a factor in the evaluation of competence. For instance, counsel not meeting the standard might not have had the experience, knowledge, and training to make a competent strategic decision, even if one may be articulated in hindsight. The law does not excuse a bad trial action because a strategic reason can be found for the action – counsel must have consciously had a strategic intent, and it is the actual intent which excuses mistaken decisions, not ex post facto intent. *See, e.g., Occichone v. State*, 768 So.2d 1037, 1048 (Fla. 2000)*:* " [S]trategic decisions do not constitute ineffective assistance of counsel **if alternative courses have been considered and rejected** and counsel's decision was reasonable under the norms of professional conduct." (Emphasis added). It is not ineffective assistance so long as counsel "investigate[d] each line [of defense] substantially before making a strategic choice about which lines to rely on at trial." *Strickland v. Washington*, 466 U.S. 668, 681 (1984).

Counsel falling below the minimum standard is less likely to have had the training and experience to have undertaken the reasoned consideration of strategic options, and this likelihood should be considered in determining whether such counsel's later claim that an action was strategic is credible or whether such counsel was even capable of making a legitimate strategic decision.

In the instant case, cocounsel who did not meet the accepted standards for cocounsel in a capital case claimed he made a strategic decision to admit Mr. Cox's partial guilt as part of an overall strategy to deal with the fact Mr. Cox was seen to have stabbed the victim. The state also points out that the defense denied making an admission that Mr. Cox inflicted the fatal wound when the state suggested to the trial court that an inquiry was necessary because the admission of guilt had been made. The state further points out that defense counsel reiterated this position in the evidentiary hearing.

Unfortunately, Mr. Cox is in the odd position of agreeing with the state attorney – regardless of the subjective belief of trial counsel that the admission was neither intended nor made, what the state attorney heard, and what the jury heard, was an admission to all the facts establishing that Mr. Cox inflicted the fatal wound. Defense counsel admitted Mr. Cox fought with the victim and stabbed him. Defense counsel then admitted Mr. Cox allowed the victim to stand up. This in no way countered the witnesses who observed the fight. They reported Mr. Cox took the victim to the ground, stabbed the victim, and the victim then got up and left the area seeking medical help. There is no break in that sequence to account for the intervention of another assailant. Defense counsel admitted every fact in the murderous sequence was committed by Mr. Cox.

It does not matter what counsel intended to admit or believed was admitted in the opening statement – what the state heard, and what the record reflects, is a full admission to the murder. If trial counsel believed the opening statement did not constitute a full admission, the fault lies with counsel inexperienced in capital litigation who was incapable of comprehending the effect of his words.

Strategic Decisions Must be Reasonable

The state relies on some points on the principle that ineffective assistance of counsel cannot be found when the error was the result of a strategic decision by counsel. The state relies on *Maharaj v. State*, 778 So.2d 944 (Fla. 2000). However, this Court obviously did not intend to give an unqualified pass to every strategic action, regardless of reasonableness. For instance, this Court undertook a reasonableness analysis in *Fennie v. State*, 855 So.2d 597, 603 (Fla. 2003), *cert. denied*, 541 U.S. 975 (2004):

> The record reveals that **trial counsel made a strategic decision** not to ask each prospective juror specific race-based questions. Trial counsel testified during the post-conviction proceeding that he does not automatically ask race-related questions in interracial crimes, and that his decision to do so turns on the composition of the prospective panels and the facts of the case involved. Counsel further asserted that he did not regard Fennie's case as racially motivated, and that he wanted to avoid offending or alienating potential jurors by asking each of them questions related to race. In trial counsel's experience, the risk of jury alienation would not have been cured through the use of individual voir dire. Counsel confirmed that he went over each juror strike with Fennie and consulted him before the jury was empaneled. Counsel further testified that having successfully selected

> a jury, there was no basis on which to request a change of venue under controlling caselaw. *See Henyard v. State*, 689 So.2d 239, 245 (Fla.1996). **The record supports the reasonableness of counsel's decision to avoid the creation of racial conflict during the voir dire process, and belies any basis for an ineffective assistance of counsel claim. See *Maharaj v. State*, 778 So.2d 944, 959 (Fla.2000)**.
>
> The reasonableness of counsel's course of action is further underscored by his experience. Alan Fanter had practiced in Brooksville for eleven years at the time of Fennie's trial, and had previously successfully litigated interracial crimes.

(Emphasis added). Thus, *Maharaj* does not serve to validate unreasonable strategic decisions.

In this case, Mr. Cox maintains that the purported decision to admit all of the facts supporting the homicide in the opening statement was unreasonable and, therefore, ineffective. The second paragraph of the *Fennie* quotation further illustrates the reason why cocounsel's lack of qualifications supports the finding of ineffectiveness – the reasonableness of cocounsel's "decision" in this case is not "further underscored by his experience." Cocounsel's ineffectiveness in the error of confession, whether a strategic decision or an unintended fumble, is buttressed by his lack of experience.

Also, the purported strategic decision to not object to the medical examiner's testimony about the shank having been wiped clean of all DNA evidence is similarly unreasonable. The trial court rejected this claim in part because counsel tried to justify the failure because the jurors would know that it

would be "preposterous" to remove all of the DNA from the shank. ROA-PC-Vol. II P. 365. How would they know? Because of all the television shows they must have watched which show that it is impossible to completely remove DNA from an object. This is absurd, and certainly unreasonable. The jury was expressly instructed to rely on the evidence and testimony at trial. And surely the compelling expert testimony of the medical examiner would outweigh any inferences the jury might have improperly and perhaps incorrectly drawn from television shows.

The trial court rejected this claim because it was the result of a strategic decision, citing to *Maharaj*. The trial court failed to rule that the strategic reason was reasonable, such that, as *Fennie* makes clear, the trial court's ruling is insufficient and should be reversed.

Examination of Inmate Maynard

The state argues that witness Wheeler's testimony, that Maynard indicated by his expression that he inflicted the final, fatal wound on the victim, had no merit in part because Wheeler testified that Mr. Cox inflicted three stab wounds before Maynard administered the fatal blow. However, regardless of the number of wounds Wheeler allegedly cited when he spoke to Maynard, the obvious thrust of the conversation was that, regardless of the number of stab wounds Mr. Cox

inflicted, the fatal wound was inflicted by Maynard, whether it was the third or fourth.

Regardless of the number of felonies Mr. Cox admitted in his testimony, few if any jurors would necessarily know these would support two life sentences. Instead, what could have been minimized as a dozen felonies of undetermined severity (possibly even nonviolent offenses) was exaggerated in importance when Maynard informed the jury of the two life sentences. To a layman, a person serving an indeterminate time for a dozen felonies would appear less dangerous, and possibly less predisposed to violence, than one serving two life sentences. Most jurors would know such a sentence is imposed for the most serious offenses, including first degree murder, especially since their preliminary instructions and the questioning in voir dire had indicated that there was a possibility they would have to choose life or death for the murder in this case.

Maynard's revelation of the life terms was, therefore, not innocuous. At the very least, the prejudice arising from the statement, combined with the other errors and prejudice shown in this post conviction proceeding, results in a cumulative degree of prejudice justifying a new trial. Counsel was ineffective in the first instance regarding this issue by failing to adequately prepare the witness to ensure he would not reveal unsolicited information.

CONCLUSION

Mr. Cox relies on the record and his arguments in the Initial Brief and this Reply. His trial was fatally infected with prejudice arising from the failings of trial counsel who were ineffective at both guilt and penalty phases, in part because of the insufficient qualifications of cocounsel. Mr. Cox should receive a full new trial, or, at the least, a new penalty phase trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **REPLY BRIEF** has been furnished by U. S. Mail, first-class, to all counsel of record on this June 14, 2006.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing INITIAL BRIEF OF APPELLANT, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

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