IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC06-275
Lower Tribunal Case No. 95-2932-CFA

ARTHUR BARNHILL, III,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This brief is filed on behalf of Arthur Barnhill, III, and in reply to the Answer Brief of Appellee, the State of Florida. Citations shall be as follows: The record on appeal concerning the trial proceedings shall be referred to as R. ___ followed by the appropriate volume and page numbers. The postconviction record on appeal will be referred to as PCR. ____ followed by the appropriate volume and page numbers. References to the Answer Brief of Appellee will be referred to as AB. ___ followed by the appropriate page number or numbers. All other references will be self-explanatory or otherwise explained. Appellant will rely upon his arguments in the Initial Brief of Appellant on Arguments V through X.

ARGUMENT I

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION . TRIAL COUNSEL FAILED TO FILE A MOTION TO WITHDRAW THE APPELLANT'S PLEAS DESPITE THE APPELLANT'S QUESTIONABLE COMPETENCY. COUNSEL'S PERFORMANCE WAS DEFICIENT AND PREJUDICIAL, AND AS A RESULT, APPELLANT'S DEATH SENTENCE IS UNRELIABLE.

In reply, the appellant agrees with the appellee that "… trial counsel discussed the possibility of withdrawing the plea but counsel and Barnhill made a strategic decision not to withdraw the plea." AB 18. The appellant disagrees, however, that the reference to that decision ends the consideration of this issue. Notably, the appellee repeats the shortcoming of the court below in not addressing the import of the facts that (1) defendant's trial counsel thought the decision to plead guilty was imprudent (PCR Vol. 9, 196) and (2) the defendant informed trial counsel that he wanted to withdraw his pleas "because he either thought he was not competent at the time of the plea or that he had hurt his case by entering the pleas." (PCR Vol. 10, 215-221 *et seq*.). Also notable is that the appellee repeats the shortcoming of the court below in not addressing the import of the ruling in Eckles v. State, 180 So. 764 (Fla. 1938):

> Where there is sufficient evidence to raise a doubt as to the sanity of the accused at the time that the plea of guilty is entered, he should, as

> of right, be allowed to withdraw his plea of guilty, and substitute not guilty ... The withdrawal of the plea of guilty should not be denied in any case where it is in the least evident that the ends of justice will be subserved by permitting not guilty to be pleaded in its place. (citations omitted).

Eckles, 180 So. at 766.

Again, the court below denied the claim based on Dr. Danziger's testimony that the plea entry was "likely the stress that brought about" the "brief reactive psychosis" and on counsel's testimony that the appellant was "acting normally" and "not suffering from any loss of touch with reality" [sic] on the day of the plea. The court also noted, but only in part, counsel's post-plea discussion with his client about the possibility of asking to withdraw the plea. (PCR Vol. 8, 1319). Ignored is that the record now raises a doubt as to the appellant's competency on October 14, 1998. First, Dr. Danziger's opinion was conditional – opining that the plea entry was "likely" the stress that caused the brief reactive psychosis is short of a firm opinion that it "without a doubt" was the cause. Secondly, Dr. Kirkland's incompetent opinion was based on a diagnosis of "major depression" while Dr. Gutman's competency opinion still recognized chronic depression. (PCR Vol. 11, 481-482). Dr. Brad Fisher testified that a "brief reactive psychosis" is a serious mental illness (PCR. Vol. 11, 449) and that various stressors combined with depression may have caused the illness before the pleas change was made. (PCR.

Vol. 11, 449). Dr. Harry McClaren testified for the State and said, among other things, that appellant was suffering from a depressive disorder that may have been of psychotic proportions when appellant was in the jail, especially after he entered a plea. (PCR. Vol. 11, 502-504). Consequently, perhaps the only person who really knew whether the brief reactive psychosis existed at the time of the plea was the appellant himself. Again, by itself, it is evidence raising a doubt as to competency, when appellant, on November 10, 1998, told counsel that he wanted to withdraw his plea, in part, because he thought he was not competent on October 14, 1998. (PCR Vol. 10, 215-221). The court's factual findings deserve little deference, its Strickland [v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] determination was in error and relief should issue.

ARGUMENT II

APPELLANT DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL, VIOLATING HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION, WHEN COUNSEL FILED A LEGALLY INSUFFICIENT MOTION TO DISQUALIFY THE TRIAL JUDGE.

The appellee argues that the presentation of the motion to disqualify in the form prepared by defense counsel was well within the wide range of reasonable, professional assistance. (AB 25). The written motion was denied by the trial court

without comment (R. Vol. 10, 1302) and held by this Court on direct appeal as legally insufficient because the supporting affidavit made by the defendant did not state the specific facts which lead him to believe he will not receive a fair trial and because the certificate of counsel of record was attached to the motion itself and stated only that the statements of the defendant contained "herein" are made in good faith. Barnhill v. State, 834 So.2d 836, 842-843 (Fla. 2002). The appellee is plainly wrong and fails to provide case authority for the proposition that having this or any motion to disqualify denied as technically insufficient is within the bounds of reasonable lawyering.

The appellee further argues that the allegations contained in the motion to disqualify were legally insufficient to warrant disqualification and uses case authority as to adverse rulings and mere subjective fear of bias as denial reasons for this conclusion. (AB 26). Not addressed by the appellee were cases where judges commented on the truthfulness of a party or witness such as Campbell Soup Co. v. Roberts, 676 So.2d 435 (Fla. 2d DCA 1995); Deauville Realty Co. v. Tobin, 120 So.2d 198 (Fla. 3d DCA 1960); Crosby v. State, 97 So.2d 181 (Fla. 1957) and the others cited in the appellant's direct appeal initial brief. (Direct Appeal Appellant's Initial Brief, pp. 38 *et seq*.). Again, on direct appeal this Court stated that "Barnhill cites several cases where the judge's commentary on the truthfulness

of a witness affected the outcome of the trial and warranted disqualification. Whether that is true or not, the technical requirements of the motion were not met and the trial court's decision to deny the motion as legally insufficient was proper." Barnhill v. State, 834 So.2d at 843. Consequently, no court has addressed the merits of appellant's fear of bias.

Lastly, it is noted that neither the court below nor the appellee addresses the claim's second example of ineffective assistance upon counsel's verbal renewal, on September 13, 1999, of the disqualification motion (R. Vol. 11, 1353) in violation of Rogers v. State, 630 So.2d 513 (Fla. 1993). Here, and again, but for counsel's repeated unprofessional errors, either the trial court would have been compelled to remove himself immediately or the defendant would have been granted a new sentencing on direct appeal. See Livingston v. State, 441 So.2d 1083 (Fla. 1983) and Cave v. State, 660 So.2d 705 (Fla. 1995). Counsel was ineffective and the result of counsel's errors rendered the proceeding unreliable and, hence, unfair.

ARGUMENT III

TRIAL COUNSEL'S QUESTIONING DURING VOIR DIRE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL AND BECAUSE IT RESULTED IN PREJUDICE IT DEPRIVED APPELLANT OF HIS RIGHTS TO A FAIR TRIAL AND CAPITAL SENTENCING UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The appellee states that trial counsel was not deficient in his questioning during *voir dire* simply because, in hindsight, it could have been more concise or that, with the benefit of hindsight, appellant would have conducted *voir dire* differently. (AB 33). The appellee further states that the allegations of trial counsel's deficiencies in *voir dire* are merely conclusory. (AB 35). Appellant, however, believes that the deficincies of counsel and the confusion caused during the *voir dire* has nothing to do with hindsight. It was the State of Florida, after all, that told this Court on direct appeal that "defense counsel's questioning [was] bifurcated, rambling, disjointed, and nonsensical ... his questions were confusing the jury." (Direct Appeal Answer Brief - p. 34). Additionally, neither the court below nor the appellee address the separate ineffective assistance example regarding the fact that defense counsel also skipped over and abandoned the opportunity and duty to question jurors Robinson and Lowe. (PCR Vol. 9, 39-41). Neither the court below nor the appellee address the *ABA Guidelines* that trial attorneys in death penalty cases "must be able to apply sophisticated jury selection techniques...," and "... ensure that the client is not harmed by improper, inaccurate or misleading information being considered by the sentencing entity or entities in determining the sentence to be imposed." *ABA Guideline* 1.1, Commentary p. 21 (1989) and *ABA Guideline 11.8.2(C)*, p. 69 (1989). It is the appellee and the court

below that make conclusory determinations of no prejudice in denying that there is a reasonable probability that the outcome of the penalty phase would have been different had a sophisticated, non-rambling, non-disjointed and non-confusing *voir dire* taken place in appellant's trial. Confidence in the outcome of the penalty phase of the trial is thus undermined.

ARGUMENT IV

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND THEREBY PREJUDICED AT THE SENTENCING PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO ADEQUATELY PREPARE, INVESTIGATE AND PRESENT MITIGATING EVIDENCE AND THUS FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE.

In a footnote (number 10) presented in the answer to this claim, the appellee seems to either misread the appellant's Rule 3.851 motion or the ruling of Nelson v. State, 875 So.2d 579 (Fla. 2004). The appellant pled ineffective assistance of counsel in his motion for deficient investigation, preparation and presentation of mitigation evidence. The motion indicated that, among other witnesses, the appellant's father, Arthur Barnhill, Jr., was not interviewed or presented as a trial witness and was available at the time of trial. The motion did not claim that social worker Andrew Gruler was a necessary witness at trial. The appellant referred to the postconvition usage of the social worker much as was done in Wiggins v.

Smith, (citation omitted) (PCR Vol. 4, 588-591). The appellant does not read Nelson so as to require that an expert testifying in postconviction be qualified as having also been available for use by different counsel at the time of the trial.

As to the mitigation evidence itself, in view of the extensive research literature which indicates that most character formation occurs in the developmental years leading up to the age 14, when the person can hardly be held responsible for how he or she turns out, the State wrongly attempts to discredit the impact of the testimony of appellant's father about appellant's development as a child. The State claims that Arthur Barnhill, Jr.'s testimony was hardly helpful (AB 39), hardly endearing (AB 37), cumulative or counter-productive. (AB 36). The appellee also argues that it was a strategic decision not to call the father at trial but fails to address the fact that trial counsel never made an attempt to interview the father at a nearby prison and had no idea what the father would say. The postconviction record and appellant's initial brief (at pages 37-39), as well as the appellee's answer brief (at pages 36-39) outline the multiple mitigating factors involving the role of appellant's father in the child rearing years that were not presented at trial. In mitigation, the goal is to place the defendant's life in a larger social context and, in the final analysis, to reach conclusions about how someone who has had certain life experiences, been treated in particular ways, and

experienced certain kinds of psychologically-important events has been shaped and influenced by them. The State even expanded the details of the repulsive nature of this father's role in the family and on appellant when, during cross examination, Arthur Barnhill, Jr., acknowledged that he was part of and a leader of the Black Spades gang in New York (PCR. Vol. 10, 334). Again, as Justice Souter summarized in the holding of Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456 (2005), the same conclusions can be reached about the basis and effect of trial counsel's limited investigation and presentation of family and social history in the appellant's case:

> This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," Wiggins, (citation omitted)(quoting Williams v. Taylor, citation omitted) and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing, Strickland (citation omitted).
>
> Rompilla at 2469.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the lower court improperly denied Rule 3.851 relief. This Court is respectfully urged to order that appellant's convictions and sentences be vacated and the case remanded for such further relief as the Court deems proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of the Appellant has been furnished by United States Mail, first class postage prepaid, to Barbara C. Davis, Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118-3958 on this 18th day of December, 2006.

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I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14-point font.

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