IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-704

JASON DIRK WALTON,

Appellant,
v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

RESPONSE TO THE STATE'S SUGGESTION THAT CROSS-REFERENCES TO CO-DEFENDANTS' RECORDS SHOULD BE STRICKEN 1

ARGUMENT II 4

MR. WALTON WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING OF THE EVIDENCE. 4

ARGUMENT III 8

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. WALTON'S CLAIM THAT FLORIDA'S EXISTING METHOD OF EXECUTION BY LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION 8

CONCLUSION 12

CERTIFICATES OF SERVICE AND COMPLIANCE 12

TABLE OF AUTHORITIES

Cases

Baze v. Rees, 128 S. Ct. 1520 (2008) 10

Brooks v. State, 918 So. 2d 181 (Fla. 2005) 2

Cooper v. Secretary, DOC, Case No. 8:04-cv-01447-JDW-MSS, Middle District of Florida (Tampa) 4, 5

Johnson v. State, 660 So. 2d 648 (Fla. 1995) 2

Lightbourne v. State, 969 So. 2d 326 (Fla. 2007) 9, 10

Moore v. State, 820 So. 2d 199 (Fla. 2002) 4, 5, 6

Morales v. Tilton, 465 F. Supp. 2d 972 (N.D.Cal. 2006) 12

Ohio v. Rivera, Lorain County Court of Common Pleas, Case No. 04CR065940 (June 10, 2008) 10

Parker v. State, 904 So. 2d 370 (Fla. 2005) 4, 6

Raleigh v. State, 932 So. 2d 1054 (Fla. 2006) 2, 3

Taylor v. Crawford, 2006 U.S. Dist. LEXIS 42949, *15 (W.D. Mo. 2006) 11

Taylor v. Crawford, 487 F. 3d 1072 (8th Cir. 2007) 12

Tillman v. State, 591 So. 2d 167 (Fla. 1991) 2

Wuornos v. State, 644 So. 2d 1012 (Fla. 1994) 2

Constitutions

Art. I, § 17, Fla. Const. 2

U.S. Const. Amend. V 4

U.S. Const. Amend. VI 4

U.S. Const. Amend. VIII 4, 8, 10, 11, 12

U.S. Const. Amend. XIV 4

Rules

Fla. R. Crim. P. 3.850 7

Fla. R. Crim. P. 3.852 4

Other Authorities

Leonidas G. Koniaris et al., Inadequate Anesthesia in Lethal Injection for Execution, LANCET 2005; 365:1412-14 9

INTRODUCTION

Jason Dirk Walton submits this Reply Brief of Appellant in response to the State's Answer Brief. Mr. Walton will not reply to every factual assertion, issue or argument raised by the State and does not abandon nor concede any issues and/or claims not specifically addressed in the Reply Brief. Mr. Walton expressly relies on the arguments made in the Initial Brief for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

RESPONSE TO THE STATE'S SUGGESTION THAT CROSS-REFERENCES TO CO-DEFENDANTS' RECORDS SHOULD BE STRICKEN

The crux of Mr. Walton's argument regarding the due process violations is that the State improperly and unfairly presented inconsistent theories in the trials of Mr. Walton and his co-defendants, Richard Cooper and Terry Van Royal. It goes without saying that the conduct of the prosecutors at the co-defendants' trials is relevant to this proceeding; the lower court recognized as much in the order denying relief in this matter. The lower court obviously considered the entire records of the co-defendants' trials given that the records were explicitly referenced in the order and portions of the records were attached. PCR-3. 633.[1] In

[1] The lower court wrote "[a] careful review of the guilt and sentencing phase proceedings in the Walton, Cooper, and Van Royal trials reveals that the State's theories advanced in each of the proceedings were legally consistent with one another." PCR-3. 633.

light of this, the State's suggestion that the references should be stricken based on this Court's precedent should be ignored.

In Johnson v. State, 660 So. 2d 648, 653 (Fla. 1995), this Court determined that the improper cross-referencing to other briefs or records would be subject to being stricken. However, in the Johnson case, the problem was that the prosecutor improperly attempted to incorporate an argument that was presented in another of the defendant's cases that was not clearly before the court. See also Wuornos v. State, 644 So. 2d 1012, 1019 (Fla. 1994) cert. denied, 115 S. Ct. 1708 (1995) (appellant/defendant sought to have this Court consider mitigation from another of her pending capital cases). The circumstances of the foregoing cases do not establish a prohibition against this Court's consideration of the record of a co-defendant; to the contrary, this Court routinely considers the circumstances of other cases in conducting the required proportionality review. Art. I, § 17, Fla. Const.; Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991); Brooks v. State, 918 So. 2d 181, 208 (Fla. 2005). Indeed, this Court certainly considered the facts and circumstances of the co-defendant's case in Raleigh v. State, 932 So. 2d 1054 (Fla. 2006) in evaluating whether there was a due process violation.[2] In Mr. Walton's

[2] At Raleigh's penalty phase, the prosecutor argued that Raleigh was the principal actor in the murder of both victims. This argument was not materially inconsistent with Figueroa's statement to investigator Horzepa that Raleigh had killed both victims. However, during closing argument at Figueroa's trial (at which

case, the State raised no objection below to the multiple references to the co-defendants' trials in the motion for post-conviction relief. PCR-3. 11-13, 16-19. Mr. Walton had every expectation that the circuit court had ready access to the records and that much is born out by the record in this case. Nevertheless, in an abundance of caution, Mr. Walton will seek supplementation of the record by separate motion.

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both of Figueroa's statements were introduced into evidence), the prosecutor commented upon the conversation between Figueroa and his uncle as follows:

> ["]Hey, man, tell me what you did. Tell me what you did,["] [Figueroa's uncle] said. ["]Tell me.["] This is the next day, if you remember. Finally, [Figueroa] says, ["]man, it was really bad. It was bad. I killed one and Bobby killed one.["] It doesn't sound like there is a whole lot of hesitation that I might have killed one or it's possible that I killed one or I am not sure if I killed one. I mean, he told his uncle the truth. I killed one and Bobby killed one.

Raleigh v. State at 1065.

ARGUMENT II

MR. WALTON WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING OF THE EVIDENCE.

The State's reliance on Moore v. State, 820 So. 2d 199, 204 (Fla. 2002) and Parker v. State, 904 So. 2d 370, 379 (Fla. 2005) is misplaced. As noted in the Initial Brief, the lower court was informed in 2006 that Mr. Walton's co-defendant Richard Cooper had been granted a motion for discovery in his federal habeas case, Cooper v. Secretary, DOC, Case No. 8:04-cv-01447-JDW-MSS, Middle District of Florida (Tampa).[3] The federal district court order allowed counsel for Cooper to examine the contents of eight (8) boxes of documents concerning Paul Skalnik that had been sealed based on exemptions claimed by the State. PCR-3. 8, 220-221. On February 13, 2006 Mr. Walton filed a public records request directed to the State Attorney pursuant to Florida Rule of Criminal Procedure 3.852 seeking access to those same eight boxes. PCR-3. 1870-76.

[3] The discovery issues in Cooper related to the eight sealed boxes of Paul Skalnick material have not been resolved as of the date of this brief and the on-line docket for the Middle District reveals that the next status conference in Cooper in federal district court is now set for June 18, 2008.

Neither the State nor Mr. Walton have ever contended that Mr. Walton was provided with the material (concerning Skalnick) in those eight boxes. The public records request was not "overly broad and unduly burdensome." Instead, it was actually quite specific in that it requested the post conviction file of the state attorney concerning co-defendant Richard Cooper, the eight (8) boxes of material "relating to Paul Skalnik that were the subject of the federal court order in Cooper v. Crosby, 8:04-CV-1447-27-MSS, dated August 22, 2005 by United States District Judge James D. Whittemore," eight case files in which Skalnick was himself the defendant, and twenty-two (22) cases in which, based on the best information that was available, counsel believed Skalnick had been a state witness.

The State's explanation in its Answer that "the non-exempt Skalnick records were previously provided to Walton; and the additional documents requested were found to be exempt from production" ignores the very fact in contention: there were at least eight boxes of material concerning Skalnick that have never been provided for examination by counsel for Mr. Walton that were made available to his co-defendant Mr. Cooper due to intervention by the federal district court. The public records request in February 2006 was specifically directed to that material. In Moore this Court found that there had been no showing by Moore that there was any additional information or that had not been previously disclosed. Id. at 204. That is manifestly not the situation in the instant case. There are eight boxes of

material that have not previously been disclosed. And, unlike in Moore, the record in the instant case does not support the trial court's finding that the 2006 demands for further production of the Skalnick were "overly broad, of questionable relevance, and unlikely to lead to discoverable evidence" Id.

And distinguishing Parker, it cannot be said that providing, at a minimum, the same access to the eight boxes of Skalnick records that was afforded Cooper would have resulted in a "prejudicial effect to the administration of justice [that] outweighed any possible probative value to the defendant." Parker at 379. The record will also reflect that in 2006-2007, unlike in Parker, the lower court failed to undertake any *independent review or examination* of the eight boxes to determine the content therein, whether the boxes contained any Brady material, or other information that is relevant or material to the claims in Mr. Walton's most recent postconviction motion. Id. at 379.

At the public records hearing on July 28, 2006, Assistant State Attorney C. Marie King never stated a position as to just how the 8 boxes of exempt material about Skalnick that were ultimately produced to Cooper matched up with the 14 boxes of material about Skalnick that were produced previously to Mr. Walton:

> Addressing first the request for records pertaining to Skalnick, CCR, representing Defendant Walton, previously requested all records pertaining to Skalnik and received those records, over 30,000 copies for which they paid over $4,000 back in 1993 through '95. In early '95, the copies were provided to them. The public records were provided to them, and the exemptions were provided to the Court for

> in camera review. They are sealed with the Clerk of Court. The in camera review affirmed the exceptions the State Attorney had relied on. Those issues have now been litigated in the 3.850 – the initial 3.850, which has been affirmed by the Florida Supreme Court back in 2003. So we are maintaining that those issues as to Skalnik's records should be foreclosed at this time. Additionally, we'd like it on the record that there are no relevance or probative value in Skalnik's records to Defendant Walton because Skalnik did not testify in Walton's trial or resentencing.
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> * * *
>
> As to CCR's request for the sealed exempt records as to Cooper and Walton, which have previously been approved by both the trial court and the Florida Supreme Court, they're now raising that they should have a similar access to the sealed records that Co-Defendant Cooper was afforded in the federal proceeding pursuant to a discovery proceeding. Pursuant to a discovery matter pending in federal court, Co-Defendant Cooper was given the right by the federal judge to view the sealed records, and counsel for Co-Defendant Cooper did view the sealed records looking for anything pertaining to Skalnik over almost a year ago. It was last August 2005. A representative from the State Attorney's Office and the Attorney General's Office sat with counsel for Cooper and – while they viewed those for two days. They took some copies. They have yet in the Cooper federal case to file anything pertaining to that viewing that was nearly a year ago, which would seem to indicate they found no relevance or anything of probative value even as to Cooper. Mr. Skalnik did testify at Cooper's trial. He would arguably have some relevance to Cooper's case, while he has none to Defendant Walton's case. Therefore, we would maintain to the request to the State Attorney's Office for additional records should be denied.

PCR-3.1706-1709. On November 6, 2006 the lower court rendered an order denying the public records requests from earlier in the year. The order included a denial of access to records concerning lethal injection requested from the Department of Corrections and the Attorney General. Judge Baird failed to

independently review any of the documents concerning Paul Skalnick claimed as exempt by the Office of the State Attorney, instead relying on the past representations of the State Attorney and Judge Downey's prior orders to deny Mr. Walton's 2006 records request:

> Having carefully reviewed the Defendant's demand for production and the State Attorney's objections thereto, this court shall not order the production of documents sought by the Defendant. With regard to the documents relating to Paul Skalnick, this court finds that these documents were requested by postconviction counsel previously and the documents were found to be statutorily exempt from production. See Exhibit 1: CCR Public Records Request; Exhibit 2: State's Summation and Memorandum of Law; Exhibit 3: Order; Exhibit 4: Supplemental Order Concerning Exemptions. This Court shall abide by the court's previous order denying the Defendant access to these documents.

PCR-3. Supp. 2498. Here, the court's fact finding process was unreasonable. Mr. Walton seeks a remand to the circuit court so that he may review the sealed public records concerning Paul Skalnick. Anything less will be a violation of his equal protection and due process rights under the United States and Florida constitutions.

ARGUMENT III

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. WALTON'S CLAIM THAT FLORIDA'S EXISTING METHOD OF EXECUTION BY LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In the Answer Brief, the State argued *ad nauseam* in support of the lower

court's rejection of the original claim that was based on the LANCET article[4] and, at the same time, criticized Mr. Walton for failing to present an amendment to his then-pending lethal injection claim before there was a ruling on the matter. Answer at 49-51. It just would have been silly if Mr. Walton had attempted to amend the motion during the time that there was a moratorium on executions and the State of Florida was without a Constitutional method of carrying out its death penalty. See Lightbourne v. State, 969 So. 2d 326 (Fla. 2007) cert. denied 2008 U.S. LEXIS 4194 (May 19, 2008) ("Although this Court relinquished jurisdiction in the Lightbourne proceedings in December 2006, the trial court appropriately waited until after the Governor's Commission studied the matter and issued its report before it held evidentiary hearings on the claims raised."). Although the State asserted that Mr. Walton's appeal is based on the events that surrounded the botched execution of Angel Diaz, the reality is that Mr. Walton is challenging the violation of due process and the abuse of discretion that was apparent in the hasty issuance of the denial of relief upon receipt of The Final Report with Findings and Recommendations, released by The Governor's Commission on Administration of Lethal Injection on March 1, 2007.

[4] Leonidas G. Koniaris et al., Inadequate Anesthesia in Lethal Injection for Execution, LANCET 2005; 365:1412-14.

Mr. Walton recognizes that this Court rejected the challenge to Florida's lethal injection procedures in Lightbourne and that the United States Supreme Court has upheld a challenge to the constitutionality of Kentucky's lethal injection protocol. Baze v. Rees, 128 S. Ct. 1520 (2008). The decision in Baze turned wholly on Kentucky's written protocol and by no means forecloses review of important questions that remain left open; neither does it foreclose a determination that a particular State's procedures are inadequate. See i.e. Ohio v. Rivera, Lorain County Court of Common Pleas, Case No. 04CR065940 (June 10, 2008) (Order declaring that the "use of two drugs in the lethal injection protocol (pancuronium bromide and potassium chloride) creates an unnecessary and arbitrary risk that the condemned will experience an agonizing and painful death.").

The U.S. Supreme Court upheld the constitutionality of Kentucky's lethal injection procedures, concluding that in light of the safeguards included in the written protocol, the risks identified by the petitioners were not so substantial or imminent as to amount to an Eighth Amendment violation. The high Court concluded that "redundant measures ensure that if an insufficient dose of sodium thiopental is initially administered through the primary line, an additional dose can be given through the backup line before the last two drugs are injected." Baze v. Rees. The Baze decision left open the important question of whether a protocol that is constitutional on its face may violate the Eighth Amendment when it is not

carried out as written. Florida's unique history of deviating from written execution protocols reveals the gravity of this assertion. The Diaz execution demonstrated that although a state may have a written protocol in place that contains myriad safeguards, if the people carrying out the execution choose not to follow the protocol, its existence does little to mitigate the risk of harm. The mere existence of a written protocol is not enough to safeguard against even the most predictable problems and therefore, that any evaluation of an Eighth Amendment challenge to a method of execution must go beyond the written document.

Mr. Walton still has been denied the opportunity to conduct fact finding regarding the actual qualifications, background, training, and experience of the people who will carry out the critical aspects of Florida's lethal injection protocol. Incredibly, Mr. Walton does not even know whether the technical team members who participated in the botched Diaz execution will participate in future executions. Necessary discovery into the background, training, and qualifications of execution team members is currently being allowed in some states but not others. Discovery in other states has revealed some disquieting facts. In lethal injection litigation in Missouri, for example, it was learned through discovery that the medical doctor responsible for mixing and administering the drugs suffered from dyslexia. Taylor v. Crawford, 2006 U.S. Dist. LEXIS 42949, *15 (W.D. Mo. 2006). The Eighth Circuit upheld Missouri's lethal injection procedures after

consideration of, inter alia, the State's promise that the dyslexic doctor would no longer take part in executions. Taylor v. Crawford, 487 F. 3d 1072 (8th Cir. 2007). In the California lethal injection litigation, a district court judge concluded that the evidence presented showed that California's protocol and the defendants' implementation of it suffered from a number of critical deficiencies, including inconsistent and unreliable screening of execution team members. Morales v. Tilton, 465 F. Supp. 2d 972, 979 (N.D.Cal. 2006).

The bottom line is that in order to accurately and meaningfully evaluate an Eighth Amendment challenge to a method of execution, courts must look beyond the four corners of a written protocol to what is actually happening during executions. Mr. Walton seeks a remand to the circuit court so that he may obtain public records and pursue his challenge to Florida's current method of execution.

Apart from the foregoing, Appellant will rely on the arguments in the Initial Brief and any subsequent supplemental authority submitted hereafter.

CONCLUSION

WHEREFORE, counsel for Mr. Walton respectfully requests that this Court enter an order requiring further evidentiary development below.

CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to Katherine V.

Blanco, Assistant Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33601 this 18th day of June, 2008.

The undersigned counsel further CERTIFIES that this INITIAL BRIEF was typed using Times New Roman 14 Point font.

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