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

RONNIE FERRELL

Petitioner,

v.

Case No.: SC07-1447

WALTER A. MCNEIL, Secretary,
Department of Corrections
State of Florida

Respondent.
_____/

REPLY TO THE RESPONDENT'S RESPONSE TO THE PETITION FOR WRIT OF HABEAS CORPUS

Submitted by:

TASSONE AND SICHTA, LLC

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NATURE OF RELIEF SOUGHT

Petitioner seeks to have this Honorable Court reverse and remand Petitioner's convictions and sentences and direct the trial court to have a new trial in Appellant's case.

CLAIM ONE:

PETITIONER'S DIRECT APPEAL COUNSEL WAS INEFFECTIVE AND DEFICIENT IN REPRESENTATION OF PETITIONER FOR FAILING TO ALLEGE PROSECUTORIAL MISCONDUCT IN BOTH THE GUILT AND PENALTY PHASES OF PETITIONER'S TRIAL ON DIRECT APPEAL. SUCH A DEFICIENCY IN COUNSEL'S PERFORMANCE COMPRIMISED THE APPELLATE PROCESS TO SUCH A DEGREE AS TO UNDERMINE CONFIDENCE IN THE RESULT

The Respondent alleges that Petitioner's contention of Ineffective Assistance of Appellate counsel should fail because: (1) the prosecutor's closing arguments did not rise to the level of fundamental error, (2) Petitioner raised a variation of this same claim on appeal from the denial of the motion for postconviction relief, and (3) the prosecutor's comments were either supported by, or constituted fair comment on, the evidence introduced at trial. (RB 12)

All of the Respondent's three contentions should fail as they are contrary to the plethora of established case law set by this Florida Supreme Court.

As explained in *State v. Brooks* and *State v. Urbin*, it seems that regardless of the facts of any particular case he has before him, the prosecutor (Mr. Bateh) uses textbook script representing "overzealous advocacy" for his closing arguments. 762 So. 2d 879 (Fla. 2000). In *Brooks*, the same overzealous advocacy rose to the level of fundamental error, thus this Court reversed *Brooks*' convictions and sentences for a new trial. [Upon Direct Appeal, reversing Brooks' death sentence and remanding for a new penalty phase in front of a new jury after "*considering the calmative effect of the numerous, overlapping improprieties in the prosecutor's penalty phase closing argument as well as the jury's 7 to 5 vote for death sentence*."].

With clear precedent before Respondent, they cannot now claim that the *exact* same misconduct found to be fundamental error in *Brooks*, condemning the same prosecutor, is now somehow harmless. Combined with the lack of physical evidence in the case, and the lack of competent performance by Petitioner's trial counsel (as demonstrated in Petitioner's Initial brief.) these comments cannot be construed as harmless. The Florida Supreme Court used the following adjectives to describe Mr. Bateh's closing arguments in his two previous Florida Supreme Court cases:

> "similar to comments condemned in *Urbin*", "repetitive, overzealous advocacy", "improper comments", "inflamed the passions and prejudices of the jury", "impermissible", "dehumanizing comments", "not isolated comments of the type

> we have deemed harmless in other cases", "blatantly impermissible", "this precise line of argument was specifically denounced by this Court", "irrelevant", "tends to cloak the State's case with legitimacy", "improper statements", "misstated the law", "clearly over-stepped the bounds of proper argument", "egregiously improper", "personal attack against defense counsel", "transcended the bounds of legitimate comment on the evidence", "egregious", "misleading".

The fact Petitioner has alleged Ineffective Assistance of Appellate Counsel in failing to allege prosecutorial misconduct in the instant Habeas Petition, and alleged ineffective assistance of trial counsel in failing to object to said prosecutorial misconduct in the Initial brief is of no concern. It is clear from the litany of case law that both ineffective assistance of counsel in failing to object to improper prosecutorial closing arguments is proper in a 3.850 motion, and ineffective assistance of Appellate Counsel of failure to allege improper prosecutorial closing arguments in Direct appeal are viable claims. *See* Rogers v. State, 957 So. 2d 538 (Fla. 2007)[*Holding "substantive claims of prosecutorial misconduct could and should be raise on direct appeal, and are thus procedurally barred from consideration in a post-conviction motion."]*.

As the preceding case law demonstrates, Petitioner has properly alleged a cognizable claim in the instant Habeas Petition that his Appellate counsel on direct appeal was ineffective in failing to allege prosecutorial misconduct in guilt and penalty phase closing arguments.

As to the Respondent's contention that the prosecution's comments were supported by the evidence, Petitioner will not again regurgitate the arguments made countless times in his previous motions, hearings, and briefs to this Court. One only needs to look to only one error of many made by Mr. Bateh in the instant case to see his comments were not a product of the evidence. For example, reciting the almost verbatim "golden rule" violation this made in *Urbin*,[1] Mr. Bateh created the following imaginary script for the jury in the guilt phase:

> *"They made sure, they show you in graphic detail that their intent was—is that Gino Mayhew would not live, the did all they could see that he died. That shows what was going on in their minds, to execute him."* (TT pg 842)

Continuing in the guilt phase closing arguments:

> *"Gino knew, had an idea what was going to be happening. That was the start of the kidnapping."* (TT p. 854)

[1] In *Urbin v. State* the Florida Supreme Court condemned the prosecutor's conduct when it stated he "*went far beyond the evidence in emotionally creating an imaginary scripts demonstrating the victim was shot while pleading for his life*." *Id*. *Urbin* further held the prosecution's comments constituted a subtle "golden rule" argument by literally putting imaginary words into the victim's mouth, i.e. "*Don't hurt me. Take my money, take my jewelry. Don't hurt me*," whereby the prosecution was trying to unduly create, arouse, and inflame the sympathy, prejudice, and passions of the jury to the detriment of the accused. *Id*. *Barnes v. State*, 58 So.2d 157 (Fla. 1951), *Garron v. State*, 528 So. 2d 359 (1988)

The following is the imaginary script the prosecution presented for the jury in the penalty phase of Petitioner's case,

> "*To think what was going through Gino's mind that night from the time the gun was pulled on him. I would submit to you that Gino was more than scared, he was scared in the worst sort of scared, he was experiencing the most – the worst kind of fear that a human being can experience… I would submit to you that Gino Mayhew may have thought well, it's another robbery, last Saturday, two days before, they beat me up, they shot at me, they took my property, it's happening again … But Gino was very frightened … He began to realize they're doing something different than they did Saturday … I would submit to you that Gino is asking himself "what's happening" … "what's going on." "They want my drugs, let them have my drugs, they want my money, let them have it." "Where are they taking me"… I would submit to you that during that ride Gino's fear rose to the level of terror … Where are they taking me … Gino began to realize that he was being forced to live through a living nightmare. Gino began realizing that that Blazer that he was driving, he was driving his own hearse, he was driving to the place of his death. Those are the thoughts that began to run through his mind. When they got to that lonely field … He hoped against hope that it wasn't going to occur. He was being forced to live through a torturous nightmare. He was being tortured in the worst sort of way. It was mental torture in the worst way. I would submit to you, that at some point during that ride before he was executed he began to hope, hoping against hope that the Defendant would show him some mercy, would not kill him… Gino was forced to live through in living horrific nightmare of terror*." (TT pgs. 997-1000).

This conduct is in some places verbatim with the conduct previously condemned in the ***Urbin*** case. Said misconduct inflamed the passions and minds of the jury and constituted fundamental golden rule error. The egregious conduct by the prosecutor, regardless of the most favorable light

the Respondent can put on it, cannot escape the plain fact that is it the same script used, and condemned, in two previous Florida Supreme Court opinions.

The fundamental error caused by Mr. Bateh's egregious misconduct in closing arguments cannot be ignored or explained away by some argument that all of his comments were fair comment to the evidence. The comments made by Bateh, as eluded too in *Brooks*, "were not mere casual innocuous observations made during an impassioned appeal," but were made and "tendered calmly and in a *fashion calculated to forestall a mercy recommendation." The only dissimilarity in Brooks* to the instant case is that in the Ferrell case Mr. Bateh extended his comments into the guilt phase of trial.

ISSUE TWO:

PETITIONER'S DIRECT APPEAL COUNSEL WAS INEFFECTIVE AND DEFICIENT IN REPRESENTATION OF PETITIONER FOR FAILING TO ALLEGE IN DIRECT APPEAL THAT MR. NICHOLS' CONDUCT CONSTITUTED ERROR UNDER *U.S. v. CRONIC.* SUCH A DEFICIENCY IN COUNSEL'S PERFORMANCE COMPROMISED THE APPELLATE PROCESS TO SUCH A DEGREE AS TO UNDERMINE CONFIDENCE IN THE OUTCOME

In an attempt to refute Petitioner's *Cronic* issue, Respondent states that because Ferrell raised almost every one of these allegations as a claim of ineffective assistance of counsel Initial Brief to this Court, Ferrell is

"attempting to use this habeas petition as a second appeal for questions that have already been raised in a Rule 3.851 Motion" (RB 38). Respondent does not mention the fact that if Direct Appellate Counsel had alleged these claims in Petitioner's Direct appeal, it would not be necessary for the undersigned to do so in a 3.851 motion.

A claim pursuant to *United States v. Cronic*, unlike Respondent's contention, can and should be raised on direct appeal if the facts warrant it. The facts of the alleged deficient performance is apparent from the record. For example, Mr. Nichols' outright failure to show up for Petitioner's jury selection with no rhyme, reason, or excuse, fits this standard in Petitioner's belief.

Respondent is correct in stating that a claim pursuant to *Cronic* is an ineffective assistance of counsel claim. (RB 38). Claims of ineffective assistance of counsel are normally brought in a Rule 3.850 motion; however, these claims may be brought by direct appeal when the ineffectiveness is glaringly apparent or obvious from the face of the record. *See Grubbs v. Singletary*, 900 F. Supp. 425 (Fla. Middle. District 1995)[*Holding that because ineffective assistance of counsel was apparent from the record, appellate counsel was ineffective in failing to pursue this claim in either a direct appeal or a 3.850 motion]; Florida v. Nixon*, 543 U.S. 175

(2004)[*Holding, Cronic recognized a narrow exception to Strickland's holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense. Cronic instructed that a presumption of prejudice would be in order in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." The Court elaborated: "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment that makes the adversary process itself presumptively unreliable."*

The instances of trial counsel's misfeasance of failing to attend various pretrial proceedings, including jury selection and the state's serving of its Habitual Offender Notice on Petitioner, were apparent from the record. More importantly, the failing attendances clearly stand out to a reader and should have been addressed in direct appeal, thus preserving judicial economy and allowing a ruling on an issue which facts cannot be disputed and are clear from the record.

CONCLUSION:

Mr. Ferrell's appellate counsel was ineffective in failing to allege Mr. Bateh's blatant misconduct in his closing arguments on direct appeal. The

failure to allege same was prejudicial to Mr. Ferrell, as said misconduct from the prosecution constituted fundamental error.

Mr. Ferrell's appellate counsel was further ineffective in failing to allege trial counsel was in violation of *U.S. v. Cronic* by failing to be at critical stages of Mr. Ferrell's case, and by failing to subject the state's case to meaningful adversarial testing.

Based on the above, Appellant requests this Court vacate his judgments and sentences, and remand the case for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail to all counsel of record, on this __ day of June, 2008.

RESPECTFULLY SUBMITTED,

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