IN THE SUPREME COURT OF FLORIDA

NO. SC09-1010

VICTOR MARCUS FARR,

Petitioner,

v.

WALTER A. McNEIL,
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

COMES NOW, the Petitioner, **Victor Marcus Farr**, by and through undersigned counsel and hereby submits this Reply to the State's Response to Mr. Farr' Petition for Writ of Habeas Corpus. Petitioner will not reply to every issue and argument made by the State. The absence of any rebuttal is not, however, a waiver or abandonment of any claim or argument made previously. For arguments not addressed herein, Petitioner stands on the arguments presented in his Petition for Writ of Habeas Corpus.

INTRODUCTORY REPLY

Initially, Mr. Farr objects to and requests that this Court strike and/or disregard the State's "Facts and Procedural History" (see p. 1 - 2), because the "facts" upon which the State relies are not supported by any record. Mr. Farr has never been provided the opportunity to challenge the alleged "facts." Therefore, had the State wanted to rely on "facts" not in the record, the State could have requested an evidentiary hearing at which time both parties could have had notice and the opportunity to be heard.

CLAIM I

MR. FARR WAS DENIED AN ADEQUATE MENTAL HEALTH EXAMINATION IN VIOLATION OF AKE v. OKLAHOMA AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

The State contends first that this claim is barred because it was not raised on direct appeal.[1] The State's argument is illogical because Mr. Farr's point is precisely that appellate counsel was ineffective for failing to raise the issue. In his petition, Mr. Farr repeatedly stated that appellate counsel was ineffective for failing to raise the claim. Indeed, in subsection 4 of Claim 1 in his petition, Mr. Farr stated:

> **4. Appellate counsel should have raised an Ake Claim on direct appeal.**
>
> Appellate counsel was ineffective for failing to raise Mr. Farr's Ake claim on direct appeal. This Court has ruled that, where possible, claims under Ake v. Oklahoma must be raised on direct appeal. Davis v. State, 928 So. 2d 1089, 1122 (Fla. 2005)(appellant's claim that he was deprived of his right to an evaluation by a competent mental health expert pursuant to Ake was procedurally barred in postconviction because it could have been raised on direct appeal).

(Petition, at 10). Thus, Mr. Farr's claim is not procedurally barred.

Next the State argues that "[a] true *Ake* claim is a claim that the defendant asked for the assistance of a mental health expert and the trial court denied him that assistance." So, the State contends, since Mr. Farr had "access" to a mental health expert he cannot prove his claim. The State cites no authority for this proposition. In fact, applicable case law does not restrict Ake claims to the question of whether an expert was *appointed* to assist the defendant, but rather,

> whether the defendant was denied a federal constitutional right to at least one psychiatric examination and opinion **developed in a manner reasonably calculated to allow adequate review of relevant, available information, and at such a time as [would] permit counsel reasonable opportunity to utilize the analysis in preparation and conduct of the defense**.

Blake v. Kemp, 758 F.2d 523 (11th Cir. 1990), cert. denied, 474 U.S. 998 (1985)(interpreting the constitutional right set forth in Ake v.

[1] The cases cited by the State regarding a procedural bar of an Ake claim are all cases in which the capital defendant raised a substantive Ake claim in his 3.851 proceedings. See Response at 5. They are not cases in which an Ake claim was raised in a state habeas petition as an ineffective assistance of appellate counsel claim. See Anderson v. State, - so. 3d -, 2009 WL 1954982 (Fla. 2009); Ponticelli v. State, 941 So. 2d 1073, 1105-6 (Fla. 2006); Whitfield v. State, 923 So. 2d 375, 379 (Fla. 2005).

Okalahoma, 470 U.S. 68, (1985)). See also State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). The State's argument that "[o]nce an expert is appointed, that ends the matter" (Response at 9) is simply not supported by law or common sense.

The State asserts that the expert assistance in Mr. Farr's case was adequate because "Dr. Mahtre . . . is a competent expert." (Response at 8). And he is "often appointed as a confidential mental expert in capital cases." Again, the State is relying on facts that are not supported by the direct appeal record. Rather, the direct appeal record demonstrates that Dr. Mhatre conducted no mitigation evaluation of Mr. Farr (R. 145-8). Dr. Mhatre relied largely on Farr's self-report (R. 261-3). The only collateral source contacted by Dr. Mhatre was Farr's uncle, Frank Romine, who confirmed Farr's chronic drinking problem (Id.). Trial counsel did not provide Dr. Mhatre with *any* background materials or mental health records. Likewise, trial counsel never provided Dr. Mhatre with Mr. Farr's bizarre and self-destructive letters to the prosecutor and court that were made a part of the record on appeal(e.g., R. 208, 244-45, 219-222) or consulted Dr. Mhatre in any way. Dr. Mahtre conducted no psychological testing of Mr. Farr (R. 261-6). Dr. Mahtre's appointment and limited evaluation, that neglected to assess Mr. Farr for mitigation, did not fulfill the constitutional requirement that Mr. Farr not only be appointed a mental health expert, but also be appointed an expert whose "examination and opinion developed in a manner reasonably calculated to allow adequate review of relevant, available information, and at such a time as [would] permit counsel reasonable opportunity to utilize the analysis in preparation and conduct of the defense." See Blake v. Kemp, 758 F.2d 523 (11th Cir. 1990).

Finally, the State argues that appellate counsel was not ineffective in failing to raise this claim because Mr. Farr choose not to present mental health mitigation. However, the State's argument ignores two crucial considerations: first, whether Mr. Farr's waiver of his penalty phase was valid has to be considered in determining whether he received competent mental health assistance; and, second, it is not simply Mr. Farr's decision to waive mitigation.

As to these issues, this Court has repeatedly held that:

> a defendant's waiver of his right to present mitigation *does not relieve trial counsel of the duty to investigate*

> and ensure that the defendant's decision is fully informed. See e.g., State v. Lewis, 838 So. 2d 1102, 1113 (Fla. 2002) (" . . . *counsel must first investigate all avenues and advise the defendant . . .* to make an informed, intelligent decision.")

Grim v. Florida, 971 So. 2d 85 (Fla. 2007); See also State v. Pearce, 994 So. 2d 1094, 1102 (Fla. 2008)(affirming finding of counsel's ineffectiveness: "Counsel must first investigate . . . so that the defendant reasonably understands what is being waived. . . and the ramifications of the waiver."). Thus, if Mr. Farr did not receive adequate mental health assistance that would allow his trial counsel a reasonable opportunity to prepare and conduct a defense, or advise his client of what mitigation was available, then Mr. Farr's waiver would not be honored.

Likewise, it is this Court's responsibility to ensure that the death penalty is administered "in a fair, consistent and reliable manner . . ." Arbelaez v. Butterworth, 738 So. 2d 326, 326 (Fla. 1999). "A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law." Hamblen v.State, 527 So. 2d 800, 802 (Fla. 1988). Indeed, the United States Supreme Court has also repeatedly emphasized that the Eighth Amendment requires a heightened degree of reliability in capital cases:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(plurality opinion).

Thus, it is not simply a question of whether Mr. Farr would have allowed additional information to be considered by his sentencer, it is also a question of whether an adequate mental health evaluation would have changed the outcome of Mr. Farr's capital sentencing proceeding. Under the circumstances presented here, there is no doubt that had he had an adequate mental health evaluation, at a minimum, Mr. Farr would not have been sentenced to death.

CLAIM II

THE TRIAL COURT VIOLATED MR. FARR'S DUE PROCESS RIGHT TO BE COMPETENT TO STAND TRIAL WHEN IT PROCEEDED WITH THE PLEA HEARING AND THE SENTENCING, DESPITE MR. FARR'S BIZARRE LETTERS, WITHOUT FIRST CONDUCTING A COMPETENCY EVALUATION AND HEARING. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

The State, citing no authority, argues that Mr. Farr's claim is not cognizable in a habeas petition. On the contrary, Mr. Farr's claim is properly before this Court because appellate counsel was aware of Mr. Farr's bizarre and clearly disturbed behavior and letters, as well as the minimal background information before the circuit court that demonstrated a "bona fide doubt" about Mr. Farr's competency. See Pate v. Robinson, 383 U.S. 375, 385 (1966). Mr. Farr need not demonstrate that he was not competent (Response at 11). Indeed, as a matter of law, competency to stand trial cannot be determined retrospectively. Drope, 420 U.S. 162, 183 (1975); Pate, 383 U.S. 375, 386-87 (1966).

Thus, a postconviction defendant, like Mr. Farr, need only show that "the evidence raises a 'bona fide doubt' as to a defendant's competency to stand trial, . . ." Pate, 383 U.S. at 385. If shown, "the judge on his own motion . . . must conduct a sanity hearing." Id.

Mr. Farr has presented ample evidence that the record demonstrated a "bona fide doubt" about his competency. See Petition at 11-13.

CLAIM III

MR. FARR'S WAIVERS OF HIS RIGHTS TO A PENALTY PHASE JURY AND TO PRESENT MITIGATING EVIDENCE WERE NOT KNOWING, INTELLIGENT AND VOLUNTARY, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

The State initially states: "Farr does not frame this claim as a claim of ineffective assistance of appellate counsel." (Response at 14). This is clearly untrue. In his Petition, Mr. Farr specifically presented as Claim III, the allegation that "appellate counsel was ineffective in

failing to raise this claim on direct appeal." *See* Petition at 14, claim heading. Mr. Farr's claim is and has always been that appellate counsel was ineffective in failing to raise the issue that Mr. Farr's alleged waiver of a penalty phase and the presentation of mitigation was invalid.

Mr. Farr's claim derives in large measure from the ineffective assistance of trial counsel. Because of trial counsel's gross ineffectiveness, the State erroneously argues that the "claim is not cognizable in a habeas petition. The State's assertion is false. In 1987, well-before Mr. Farr's direct appeal proceedings, this Court recognized that where the ineffectiveness of trial counsel is apparent on the face of the record, it may be raised on direct appeal. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla 1987).

The State urges this Court to overrule its own long- established precedent based on the State's theory that "[t]he concept of 'knowing, intelligent and voluntary' does not fit with mitigation." Response at 15. This is so, according to the State, because every capital defendant knows his background and therefore knows his mitigation. Thus, there is no need for any bothersome protections and rights because a capital defendant's decision to waive mitigation is "automatically knowing." Response at 15. Again the State cites no authority for this argument and fails to cite any of the extensive and contrary precedent that disputes the State's argument.

First, it can not be assumed that Mr. Farr, an 8th grade dropout with brain damage and a psychiatric history would have understood the meaning and legal significance of "mitigation," especially given that his lawyer never visited him in jail or spoke to him on the telephone. (*See also* contemporaneously-filed Rule 3.851 Reply brief.) Thus, Mr. Farr can not be assumed to have understood the legal relevance or importance of the sexual, physical and emotional abuse he suffered in his past; his extreme reliance on alcohol and drugs as forms of self-medication for his mental illness; his prior suicide attempts; the murder of his mother; his impoverished and deprived childhood; the neglect, extreme mistreatment and malnourishment he endured as a child; his lack of education; his severe intoxication on the night of the offense; and his extreme remorse over the tragic incident. Understanding and explaining the legal importance of mitigation was trial counsel's obligation – not Mr. Farr's. Furthermore, Mr. Farr could not possibly have "known" or understood the implications that his traumatic past had on his mental health or necessarily have known, in the absence of appropriate treatment or intervention, that he was bi-

polar and what that meant. The State's argument that Mr. Farr was responsible for understanding his mental health history and social background is absurd. See Wiggins v. Smith, 123 S.Ct. 2527 (2003); Williams v. Taylor, 120 S.Ct. 1495 (2000); State v. Riechmann, 777 So. 2d 342 (Fla. 2000); Lewis v. State, 838 So. 2d 1102 (2002); Deaton v. Dugger, 635 So. 2d 4 (1993); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993) Blanco v. Singletary, 943 F.2d 1477 (1991).

Furthermore, the State's reliance on Schiro v. Landrigan, 550 U.S. 465 (2007), is misplaced. First, Schiro did not exist at the time of Mr. Farr's waiver or mitigation.[2] Rather, the law then required that trial counsel investigate and prepare for penalty phase – and that is still the law. Following Schiro, this Court again reviewed the circumstances of a capital defendant waiving mitigation. In State v. Pearce, 994 So. 2d 1094, 1102 (Fla. 2008), this Court affirmed the circuit court's finding of trial counsel's ineffectiveness, despite the defendant's waiver of mitigation, stating: "Counsel must first investigate . . . so that the defendant reasonably understands what is being waived. . . and the ramifications of the waiver."

Finally, the State seems to denigrate the ABA Guidelines (see Response at 19), without recognizing that both the United States Supreme Court and this Court have repeatedly utilized and relied on the ABA Guidelines in assessing attorney performance for reasonableness in relation to professional norms and standards of practice. Strickland v. Washington, 466 U.S. 668 (1984)("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable."). See also Wiggins v. Smith, 539 U.S. 510, 524 (2003); Rompilla v. Beard, 545 U.S. 374, 387 (2005), n.7; Parker v. Florida, 3 So. 3d 974 (Fla. 2009); Henry v. State, 937 So. 2d 563 (Fla. 2006); Peterka v. State, 890 So. 2d 219 (2004); Armstrong v. State, 862 So. 2d 705 (Fla. 2003).

Trial counsel's performance was egregiously deficient. Appellate counsel was ineffective in failing to raise Mr. Farr's claim on direct appeal.

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[2] In addition it is important to note that Mr. Farr was totally cooperative with Dr. Mahtre and, unlike Landrigan, never instructed trial counsel not to investigate his background or mental health.

CLAIM IV

THE TRIAL COURT'S RELIANCE ON MR. FARR'S UNCOUNSELED AND WHOLLY UNRELIABLE SELF-INCRIMINATING STATEMENTS RESULTED IN THE ARBITRARY IMPOSITION OF THE DEATH PENALTY, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

The State argues that because the aggravtors about which Mr. Farr complains were upheld in the initial direct appeal, Mr. Farr cannot challenge them here. Response at 21. As Mr. Farr stated in his petition, the aggravators found by the trial court were based entirely on patently unreliable and absurdly inaccurate self-incriminating statements by Mr. Farr rendered after he had decided he wanted to receive the death penalty. The uncontroverted evidence now demonstrates beyond any doubt that Mr. Farr's statements were false. Yet, the State has latched onto an inapplicable legal principle in order to argue that due process and the Eighth Amendment do not matter, and that this Court's prior approval of the clearly inapplicable aggravators precludes further consideration of this issue or review of the reliability of the death sentence in this case.

Furthermore, the case relied upon by the State presents a completely different legal scenario than that in Mr. Farr's case. In Denson v. State, 775 So. 2d 288 (Fla. 2000), the Court reviewed a case where a habeas petitioner requested relief from his sentence. This Court found that the exact same issue had been raised in a Fla. R. Crim. Pro. 3.800 motion and denied. Id. Therefore the issue was barred under *res judicata*. Id. However, in Mr. Farr's case *res judicata* cannot apply because he is now challenging an entirely separate and different proceeding than the proceeding that was challenged during his first direct appeal. The State's law of the case argument is inapplicable under the circumstances.

As to Mr. Farr's argument that the proceedings violated his rights and the doctrine of corpus delicti, the State argues that the doctrine does not apply in Mr. Farr's case. Response at 23. The State ignores all of the legal precedent set forth in Mr. Farr's petition. See

Petition at 29-30. Specifically, the State failed to address or distinguish this Court's explanation of the policy reasons for the corpus delicti rule: "The judicial quest for truth requires that no person be convicted out of derangement, mistake or official fabrication." See J.B. v.State, 705 So. 2d 1376, 1378 (Fla. 1998); see also Smith v. United States, 348 U.S. 147, 152-153 (1954). Because the State did not address Mr. Farr's claim, Mr. Farr relies on the argument set forth in his petition.

As to Mr. Farr's claim that the trial court's reliance on unreliable evidence violated Mr. Farr's rights to an individualized sentencing, the State circuitously argues that it is not a claim of ineffective assistance of appellate counsel, but that the claim is also procedurally barred because it could have been raised on direct appeal. Response at 25.

The State's argument is incorrect. Art. I, § 13 of the Florida Constitution provides:

> The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in the case of rebellion or invasion, suspension is essential to the public safety.

Art. I, § 13, Fla. Const. This Court authorized the filing of petitions for writs of habeas corpus in Fla. R. App. P. 9.100:

> (a) Applicability. This rule applies to those proceedings that invoke the jurisdiction of the courts described in rules 9.030(a)(3), (b)(2), b(3), (c)(2) and (c)(3) for the issuance of writs of mandamus, prohibition, quo warranto, certiorari, **and habeas corpus**, and all writs necessary to the complete exercise of the courts' jurisdiction; and for review of non-final administrative action.
>
> (b) Commencement; Parties. The original jurisdiction of the court shall be invoked by filing a petition accompanied by a filing fee if prescribed by law, with the clerk of the court deemed to have jurisdiction. If the original jurisdiction of the court is invoked to enforce a private right, the proceeding shall not be brought on the relation of the state. If the petition seeks review of an order entered by a lower tribunal, all parties to the proceeding in the lower tribunal who are not named as petitioners shall be named as respondents.

(emphasis added). Authorization for petitions for writs of habeas corpus filed in the Florida Supreme Court is clear from cross referencing Rule 9.130(a)(3), which provides:

> The supreme court may issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction, and may issue writs of mandamus and quo warranto to state officers and state agencies. **The supreme court or any justice may issue writs of habeas corpus** returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit court.

(emphasis added).

These rules have been in effect for many years. On the basis of these rules, many habeas petitions have included claims that were not framed as ineffective assistance of appellate counsel, yet were addressed by this Court. Mr. Farr requests the same consideration as all other habeas petitioners.

CONCLUSION AND RELIEF SOUGHT

For the reasons discussed herein and in Mr. Farr's petition for writ of habeas corpus, Mr. Farr respectfully urges this Court to grant habeas corpus relief.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the petition has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by U.S Mail to Charmaine Millsaps, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050, this 17 day of November, 2009.

Respectfully submitted,

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