IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-2486

DAVID JOSEPH PITTMAN,

Petitioner,

v.

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

Respondent.

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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REPLY TO FACTS AND PROCEDURAL HISTORY

The State in its Response observes that in Mr. Pittman's direct appeal his attorney filed "a 98-page brief" (Response at 3, 15) and "a 32-page reply brief" (Response 4). The State's focus on superficial measures of quantity ignores that the issue as it relates to ineffective assistance of counsel concerns quality. It is not a question of whether appellate counsel was able to put enough words down on pieces of paper to fill up 98-pages of an initial brief and 32-pages of a reply brief, but instead a question of what was not included in the brief but should have been. Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1986). Accordingly, an ineffective assistance of counsel claim must be judged by what was not in the brief.

ARGUMENT IN REPLY

CLAIM I

In attempting to address Claim I of Mr. Pittman's habeas petition, **the State completely skirts the specific contention made by Mr. Pittman. Certainly, Mr. Pittman alleged that he received ineffective assistance when appellate counsel failed to challenge the sufficiency of the evidence that supported the three convictions of first degree murder. However, he specifically explained: "A careful examination of the record in Mr. Pittman's case establishes that no rational trier of fact could have found the essential elements of first degree murder beyond a reasonable doubt" (Petition at 12).**

As explained in the Petition, the State's case required that Mr. Pittman had arrived at the Knowles' residence within a couple of

minutes of 2:43 AM. It also required the fire to be large enough to be visible in the night sky two miles away by 3:10 AM. This would mean that the fire would need to have been started by 3:00 AM or that ten minutes were taken putting additional accellerant on the house for the fire to be so large at 3:10 AM. Thus, according to the State's case, in a seventeen minutes time frame Mr. Pittman had to have gained consensual entry into the residence (R. 2253, 56),[1] have a conversation of some length with Bonnie Knowles (R. 2253), try to talk her into having sex (R. 2253), try to quiet her when she became agitated and began to holler (R. 2253), hit her when she would not be quiet (R. 2253), lose control and in anger stab her (R. 2253), stab Mrs. Knowles when he heard her approaching Bonnie's bedroom (R. 2253), stab Mr. Knowles when he heard the commotion and went to use the telephone (R. 2253-54), walk around the premises looking for gasoline (R. 2254), find the gasoline and pour it throughout the house (R. 2254), find a tire and place it under Bonnie's bed (R. 2254), pour the remaining gasoline in the gas can that he used outside (R. 2254), decide that before lighting the fire he needed to wash up in the bathroom next to Bonnie's bedroom and then proceed to spend some time washing himself and his clothes to remove blood (R. 2254), find the keys to Bonnie's car somewhere in the house (R. 2253), carry the single gasoline can to Bonnie's car and put it inside (R. 2254), and then set the fire (R. 2254). According to the State's theory,

[1]After lengthy deliberations, the jury acquitted Mr. Pittman of the charge of burglary.

there was no pre-existing plan to commit the murders. Bonnie was stabbed in a flash of anger because she was hollering. Mrs. Knowles was stabbed in a reflexive action when she approached the bedroom. Mr. Knowles was also stabbed in a reflexive action when he went for the telephone.

The jury acquitted Mr. Pittman of the burglary charge. Though he was convicted of arson and grand theft, these convictions rested upon acts committed after the murders, *i.e.* setting the house on fire and taking Bonnie's car. These felonies could not serve the basis for a felony/murder convictions. The murders were not committed in the course either of the arson or the grand theft.

So as to elements of first degree murder, it is clear that there was certainly no evidence of premeditation presented as to Bonnie Knowles. As to Mr. and Mrs. Knowles, there was no evidence of premeditation presented. According to the State's theory, each interrupted Mr. Pittman while he was angry and he stabbed them.

But beyond the issue of premeditation, the evidence presented by the State in its own case created reasonable doubt. No rational trier of fact could or can believe that Mr. Pittman could have done all the things that were done in the limited time frame established by the evidence.

Rather than deal with the time line that the State's own evidence established and which was spelled out in detail in the habeas petition, the State simply ignores what the time frame was as it cites a couple of pieces of circumstantial evidence. The State goes through three bits of evidence that were presented which simply do

not explain how the murders and the arson could have been committed by Mr. Pittman in the seventeen minute time frame that the State's own case established.

The State first discusses the evidence presented in an attempt to link Mr. Pittman to the fire set in Bonnie's car over three hours later, miles from the Knowles' residence. Evidence used to link Mr. Pittman to the burned car simply does not address in any fashion how Mr. Pittman could have gained consensual entry into the residence, conversed with Bonnie for a period of time, become angry, stabbed her to death, stabbed Mrs. Knowles to death, stabbed Mr. Knowles to death, found a can of gasoline, spread it throughout the house, found a tire and placed it under the bed, washed blood off of himself and his clothes in the bathroom, found Bonnie's car keys, put the gasoline can in the car, and set the fire that burned the house such that the blaze was visible nearly two miles away at 3:10 AM. What occurred at 6:40 AM does not and cannot overcome the fact that the State's own case made it impossible for Mr. Pittman to have done all that was alleged in a seventeen minute time span.

Next, the State relies on David Pounds, a convicted felon, who according to the State, David Pittman "met while in state prison" (Response at 12).[2] The State relies upon Mr. Pounds' testimony that

[2]There was absolutely no evidence that Mr. Pittman said anything to Mr. Pounds "in state prison." In June of 1990, Mr. Pounds was sentenced to serve time in state prison. Mr. Pounds did not want to go to state prison. After he got to state prison, he suddenly came up with a story that, while he was county jail, Mr. Pittman had told him that he committed the murders, but no one could pin it on him. Conveniently for Mr. Pounds, no details regarding the murders were provided beyond that simple statement.

once he got to state prison he recalled that Mr. Pittman told him, "Yeah, I did it but there's no way they can pin it on me" (Response at 12).[3] Mr. Pounds who had a substantial motive to curry favor with the State was unable to provide any details. The time frames established by the State were not changed by Mr. Pounds. He provided no evidence that it was possible for Mr. Pittman to have committed the murders. Instead the evidence that the State presented established that Mr. Pittman only had seventeen minutes to gain consensual entry into the residence, converse with Bonnie for a period of time, become angry, stab her to death, stab Mrs. Knowles to death, stab Mr. Knowles to death, find a can of gasoline, spread it throughout the house, find a tire and place it under the bed, wash blood off of himself and his clothes in the bathroom, find Bonnie's car keys, put the gasoline can in the car, and set the fire that burned the house such that the blaze was visible nearly two miles away at 3:10 AM. Mr. Pounds' testimony is refuted by the State's own case.

Next, the State relies upon Polk County Officer Hunter who testified that on some occasion while incarcerated in the county jail, Mr. Pittman complained about problems he had with the Knowles family (Response at 13). According to Officer Hunter, Mr. Pittman even said that "if necessary he would 'kill them'" (Response at 13). Once again, the State ignores that this evidence still in no way

[3]Evidence was presented during the Rule 3.851 evidentiary hearing that Mr. Pittman and Mr. Pounds were not incarcerated together during the three week period they were both housed in the Polk County Jail before Mr. Pounds was sent to state prison.

demonstrated how Mr. Pittman could have possibly done the murders in the time frame that the State's own evidence established. Officer Hunter's testimony did not show how Mr. Pittman could have gained consensual entry into the residence, conversed with Bonnie for a period of time, become angry, stabbed her to death, stabbed Mrs. Knowles to death, stabbed Mr. Knowles to death, found a can of gasoline, spread it throughout the house, found a tire and placed it under the bed, washed blood off of himself and his clothes in the bathroom, found Bonnie's car keys, put the gasoline can in the car, and set the fire that burned the house such that the blaze was visible nearly two miles away at 3:10 AM. The fact that Mr. Pittman had at some time declared anger with his in-laws does not establish that Mr. Pittman did the murders, or more importantly that he could have done the murders.

After discussing the evidence concerning Bonnie's burning car which was discovered at 6:40 AM nearly four hours after the murders, after discussing David Pounds' testimony, and after discussing Officer Hunter's testimony, the State asserts:

> Post conviction counsel's argument asserting that Pittman did not have the opportunity to commit these murders within a short window of time was made by trial counsel below. Trial counsel argued to the jury, complete with time chart, that Pittman did not have the opportunity in time to commit these murders and such was sufficient to demonstrate that the State had not met its burden of proving the murders beyond a reasonable doubt (DA-R 4048-71). The jury's guilty verdicts rejected trial counsel's argument.

(Response at 14). The State's reliance upon the jury verdict to prove that as a matter of law there was sufficient evidence to convict Mr. Pittman of murder is at a minimum surprising.

In Jackson v. Virginia, 443 U.S. 307 (1979), the United States Supreme Court held that a jury's verdict finding guilt is not the last word as to whether there was sufficient evidence to support the guilt verdict.[4] In fact, the test for determining the sufficiency of the evidence to support the verdict that was adopted as a matter of constitutional law presupposes that a jury returned a guilty verdict. So reliance upon a guilty verdict as somehow establishing that sufficient evidence existed to support the guilty verdict against a constitutional attack under Jackson v. Virginia is more than misplaced. It also demonstrates a fundamental misunderstanding of the claim.

But not only does the State fail to understand that there can be no sufficiency of the evidence claim under Jackson v. Virginia without a guilty verdict, it also fails to recognize that trial counsel's argument that the time line established that the State could not meet its burden of proof shows that appellate counsel should have seen the issue simply by reading the transcript. The fact that trial counsel argued that there was not sufficient evidence of guilt given the time frame that the State had established in its case, should have alerted appellate counsel to the issue. So the State's reliance upon trial counsel's "time chart" and argument that a rational trier of

[4]When this Court followed Jackson v. Virginia in Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985), and concluded that appellate counsel rendered deficient performance when he did not raise a sufficiency of the evidence claim, there also had been a guilty verdict. This Court did not find that the guilty verdict showed that an insufficiency of the evidence claim could not be made.

fact had to have a reasonable doubt actually supports Mr. Pittman's claim of ineffective assistance of appellate counsel; it does not refute at all.

The State's reliance on Hardwick v. Wainwright, 496 So. 2d 796 (Fla. 1986) is equally perplexing. The State misrepresents the holding in Hardwick "rejecting claim of ineffectiveness of appellate counsel for failing to raise the issue of the sufficiency of the evidence **because** the Court independently reviews each conviction and sentence to ensure they are supported by sufficient evidence" (Response at 9)(emphasis added). In fact, this Court did not reject the claim "because" of this Court's independent review. It rejected the claim because it concluded in considering the appellate ineffectiveness claim that there was sufficient evidence to support the verdict:

> In our review of cases involving imposition of the death penalty we have been confronted with a wide range of appellate strategies; some advocates raise every conceivable issue while others present only those issues the advocate feels are the most meritorious. There is no single correct approach. Further, this Court independently reviews each conviction and sentence to ensure they are supported by sufficient evidence. For instance, in petitioner's direct appeal we noted that his fingerprint was found to the left of the driver's side of the victim's vehicle, and his palm print was found on the bottom sheet of the victim's bed. Hardwick v. State, 461 So.2d 79, 80 (Fla.1984). **These facts coupled with the other evidence presented at petitioner's trial *were* sufficient to affirm the convictions and we cannot conclude that appellate counsel was ineffective for not arguing the point here.**

Hardwick, 496 So. 2d at 798 (emphasis added).

Indeed the decision in Hardwick followed this Court's decision in Wilson v. Wainwright by about one year. Certainly, there is no

indication in Hardwick, that this Court was retreating from Wilson v. Wainwright where it clearly and definitively stated:

> **Counsel for the state asserted at oral argument on this petition that any deficiency of appellate counsel was cured by our own independent review of the record.** She went on to argue that our disapproval of two of the aggravating factors and the eloquent dissents of two justices proved that all meritorious issues had been considered by this Court. **It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate.** It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process.

Wilson v. Wainwright, 474 So. 2d at 1165 (emphasis added). Thus, contrary to the State's representation, this Court has clearly held that its own independent review which includes consideration of the sufficiency of the evidence does not cure a failure to raise a meritorious challenge to the sufficiency of the evidence to support a guilty verdict.

The State while not acknowledging the salient holding of Wilson v. Wainwright, nevertheless first attempts to distinguish the case by resorting to superficial measures of quantity. According to the State, Mr. Pittman's reliance upon Wilson v. Wainwright is misplaced because there only five issues had been raised in the direct appeal, while in Mr. Pittman's case ten issues were raised in a 98-page initial brief. Again, it is an issue of quality, not quantity. Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1986).

The State says reliance on Wilson v. Wainwright is also misplaced

because there counsel did not raise sufficiency of the evidence even though the issue was apparent from the "cold record" (Response at 14). Yet, the State in the Response notes that trial counsel vociferously argued that there was not sufficient evidence to convict in light of the time frame established by the evidence and the fact that it was not possible for Mr. Pittman to have undertaken each step of the crime in that time frame.

Finally, the State says reliance on Wilson v. Wainwright is misplaced because the Court noted a lack of preparation and zeal on the part of appellate counsel during the direct appeal proceedings. Of course what the State overlooks is that this Court did not say in the direct appeal that it had observed a lack of preparation and zeal. It was something that this Court noted when it found ineffectiveness in failing to raise the insufficiency of the evidence claim in the direct appeal. Here according to the State, the cold record shows that trial counsel strenuously argued at trial that the evidence was insufficient and that the State as a matter of law did not carry its burden in proving guilt beyond a reasonable doubt. Just as in Johnson v. Wainwright, the failure to raise a meritorious issue that was obvious from the face of the record constitutes ineffective assistance of appellate counsel. Habeas relief should issue.

CLAIM II

As to Mr. Pittman's second claim, the State argues that the claim was raised in Mr. Pittman's direct appeal and that accordingly it is res adjudicata and thus procedurally barred from being reconsidered at this point. In his habeas petition, Mr. Pittman acknowledged that

indeed the claim based upon Chambers v. Mississippi, 410 U.S. 284 (1973), had been raised on direct appeal. Thus, the parties agree that the claim was raised on direct appeal.

However in his habeas petition, Mr. Pittman argued that decisions emanating from the United States Supreme Court after this Court's rejection of Mr. Pittman's direct appeal are controlling and establish that this Court's denial of the claim was in error. The new decision by the United States Supreme Court demonstrates that this Court was in error and failed to properly apply federal constitutional law. Specifically, Mr. Pittman relied upon the recent decision in Holmes v. South Carolina, 547 U.S. 319 (2006), as demonstrating this Court's failure to appreciate the scope of the Sixth Amendment right to present a meaningful and complete defense.[5] Even though Mr. Pittman specifically set forth Holmes v. South Carolina in his habeas petition as demonstrating that this Court's analysis in his case was erroneous, the State does not cite, let alone address, Holmes v. South Carolina and its impact here.

CLAIM III

As to Mr. Pittman's third claim, the State relies heavily upon this Court's decision in Smith v. State, 931 So. 2d 790 (Fla. 2006), as setting forth the proper Brady analysis when a habeas petitioner asserts that his due process is violated when the State withheld

[5]Mr. Pittman also cited the decision in Curtis v. State, 876 So. 2d 13, 18 (Fla. 1st DCA 2004), as reflecting the current federal law regarding the Sixth Amendment right to present a defense when the evidence in question is another individual's confession to the murders for which the defendant stands trial.

favorable information that had it been disclosed would have warranted a reversal of a conviction and sentence of death on direct appeal. However subsequent to the submission of the Response, the U.S. Court of Appeals for the Eleventh Circuit held that this Court's Brady analysis was contrary to or an unreasonable application of well established federal law. Smith v. Secretary, Dept. Of Corr., 572 F.3d 1327 (11th Cir. 2009). Accordingly, it would seem that reliance upon this Court's faulty understanding of Brady and its progeny that was employed in Smith would be misplaced.

The United States Supreme Court has written that under the American system a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). When it comes to the government withholding evidence from criminal defendants, the U.S. Supreme Court has made clear that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly." Brady v. Maryland, 373 U.S. at 87. It is axiomatic that the prosecution's suppression of favorable evidence violates due process. Cone v. Bell, --- U.S. ---, 129 S. Ct. 1769 (2009); Kyles v. Whitley, 514 U.S. 419 (1995).

Given that the U.S. Supreme Court has long recognized that the prosecutor's obligation is not just to win, the prosecution cannot,

by itself, determine the truth. See Kyles, 514 U.S. at 440. The prosecution cannot assume the validity of its own theory of the crime is the whole truth and ignore exculpatory evidence that undermines that theory. Id.

Individual prosecutors have a duty to learn of any favorable evidence known by others acting on the prosecution's behalf, including police investigators. Kyles, 514 U.S. at 437. Surely appellate attorneys representing the State on appeal are not exempt from the obligation to see that justice is done.

The State's good or bad intentions in withholding evidence are irrelevant. Id. Because the purpose of the criminal justice system is to ensure fairness and truth, the prosecutor cannot escape his constitutional duty even when he is not aware of the suppressed or missing information. Kyles, 514 U.S. at 440. While the prosecutor is free to form his own opinion as to what happened, any withholding favorable information to support his theory defeats the "truth-seeking function" of the proceedings in court and is unacceptable. Cone, 129 S.Ct. at 1782; Bagley, 473 U.S. at 681. The same reasoning must also apply to the State's appellate counsel. To do otherwise would simply encourage an appellate prosecutor to seek the safe harbor of ignorance as opposed to actively defending the integrity of our criminal justice system.

Within its Response to Claim III, the State demonstrates why the State appellate counsel must be held to the same ethical standards that a trial prosecutor is. In the Response, the State's makes this factually false representation:

> Although Pittman amended his post conviction motion several times, he did not allege any claim under Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199 (1964)(unlawful for police to plan with cooperating co-defendant to utilize listening device to gather incriminating evidence on charged offense from representing defendant[.]

(Response at 25). This representation is patently false.

While Mr. Pittman did not label a claim as a Massiah claim, he most assuredly asserted that the State withheld information showing that Carl Hughes was a state agent sent to obtain incriminating evidence that could be used against Mr. Pittman. In Claim I of his Second Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Interview Jurors which was submitted on September 13, 2005, Mr. Pittman specifically set forth:

> 25. *To the extent that the undisclosed information that* Carl Hughes was acting as an agent of the State, *the information could have been used to exclude his testimony.* In enlisting the aid of Mr. Hughes and placing him in a cell with David Pittman, the State violated Mr. Pittman's Sixth Amendment right to counsel. Massiah v. United States, 377 U.S. 201 (1964). The State did not simply passively receive surveillance from an attentive Mr. Hughes, but rather deliberately elicited incriminating information from Mr. Pittman. See United States v. Henry, 447 U.S. 264 (1980); Rolling v. State, 695 So. 2d 278 (Fla. 1997). *To the extent that the State failed to disclose the necessary facts to allow Mr. Pittman's counsel to raise this issue, due process was violated.*

(2nd Amended Motion at 13).

The evidentiary hearing was held on Claim I among others. Mr. Pittman presented evidence that Mr. Hughes was a state agent sent in to gather incriminating evidence that the State could use. Trial counsel testified that had he been aware of this evidence he would have relied upon the Sixth Amendment to seek to preclude Carl Hughes

from testifying. The State's assertion that Mr. Pittman has not sought to argue that his rights under Massiah and Henry were violated is simply false.

CONCLUSION AND RELIEF REQUESTED

Mr. Pittman, through counsel, respectfully urges that the Court issue a Writ of Habeas Corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Response to Petition for a Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Katherine M. Diamandis, Assistant Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607 on September ___, 2009.

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CERTIFICATE OF FONT

This petition is typed in Courier 12 point not proportionately spaced.

MARTIN J. MCCLAIN