IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-655

THOMAS WYATT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR INDIAN RIVER COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT I

THE LOWER COURT ERRED IN DENYING GUILT PHASE RELIEF

a. Comparative Bullet Lead Analysis (CBLA)

i. Newly discovered evidence

The State contends that the information contained in the August 7, 2008 letter from the FBI to Mr. Wyatt's counsel does not constitute newly discovered evidence. The State first asserts that the claim is time barred because the claim was raised more than two years after the publication in 2004 of the National Research Counsel's (NRC) report on the subject (Answer Brief p. 18). The State takes issue with Mr. Wyatt's assessment of the letter, which repudiates the specific testimony in Mr. Wyatt's case, and asserts that the letter "is more akin to subsequent scientific studies in medical journals and legal publications" (Answer Brief p. 20). The State takes that position to support its argument regarding the time bar, but that position is simply inaccurate.

The State completely ignores the unrebutted testimony of Professor Spiegelman and Mr. Tobin regarding the purpose and findings of the NRC with regard to CBLA. Dr. Spiegelman and Mr. Tobin made clear that prior to the FBI letters, like the August 7, 2008 letter in this case, regardless of what may have been thought or suspected in the scientific community, the FBI (which was the only entity practicing CBLA and testifying to it in courts and thus the only entity

responsible for defending or supporting its testimony) had never admitted that its CBLA testimony was unreliable.

The State also does not address the fact that the NRC was totally irrelevant to this instant issue because the NRC was not a party in any part of Mr. Wyatt's case, did not offer any opinion on the reliability or otherwise of CBLA in this case and did not act as the State's agent in this case. It does not address the testimony of Professor Spiegelman that the purpose of the NRC was to fix the CBLA procedure prospectively and decidedly not to review past instances of its use on a case-by-case basis. It was a deliberate and careful decision on the part of the NRC not to make a retrospective inquiry, even when Dr. Spiegelman requested such an inquiry. This stands in stark contrast to the FBI letter explicitly rejecting CBLA and the specific CBLA testimony in this case. The NRC is a separate entity from the FBI and is not empowered to take a position on behalf of the FBI on a scientific issue. The FBI repudiating its CBLA testimony in a capital murder trial has a legal significance profoundly different from the NRC reporting on problems with CBLA. The information contained in the FBI letter therefore is not time barred and forms the basis of a newly discovered evidence claim.

The State next claims that the information in the FBI letter is not newly discovered evidence because it was not in existence at the time of Mr. Wyatt's trial (Answer Brief p. 21). Once again, the State does not address the arguments made

by Mr. Wyatt in his Initial Brief. Agent Riley was insistent in his testimony that CBLA was based on solid science. However, as the evidentiary hearing testimony made plain, there was no scientific study and no scientific basis for that assertion. The FBI had not done any study on which to base CBLA's validity, which must have been known by Agent Riley when he testified at Mr. Wyatt's trial, and which the State does not address.

The State attempts to liken this instant case to Wright v. State, 857 So. 2d 861 (Fla. 2003), Trepal v. State, 846 So. 2d 405 (Fla. 2003) and Kearse v. State, 959 So. 2d 976 (Fla. 2007) in order to refute Mr. Wyatt's argument that this information is newly discovered evidence. However, each of these cases is factually distinct from Mr. Wyatt's case. In Wright v. State, , the newly discovered evidence claim was predicated upon a memorandum dated in 1986 which was critical of the veracity of the investigator in Mr. Wright's case, together with several police reports that were generated after the trial in 1983. 857 So. 2d at 861. This is distinguishable from Mr. Wyatt's situation because in Wright neither the documents in question nor the knowledge or information contained therein existed at the time of trial. This is in stark contrast to this case because it was known (although not admitted) by the FBI that there was no comprehensive meaningful scientific study supporting CBLA analysis at the time of Mr. Wyatt's capital trial. Regardless of whether this letter, this particular recordation of the information at

issue, was in existence at the time of the trial, the determinative question is whether the knowledge—the information—existed. The State confuses the piece of paper with the content of the page and in so doing absurdly reduces the newly discovered vehicle contrary to the law.

In Trepal v. State, the evidence in question was a report of the Office of the Inspector General of the United States Department of Justice (OIG), which was "highly critical" of the work performed by FBI Crime Laboratory personnel in Washington DC in certain cases, including that of Mr. Trepal. 846 So. 2d at 405. Again this is distinct from the instant cause. In Trepal, the focus of the OIG report was on the individual practices of FBI Crime Laboratory personnel, and whether they conformed to accepted procedure. There was no knowledge, either constructive or otherwise at the time of Mr. Trepal's trial that the FBI personnel in question had been sloppy or otherwise performed deficiently in their laboratory analysis. Moreover, in Trepal, it was not the scientific basis for the testing as a whole that was revealed by the new documents but the sloppy practices of individual examiners.

In Kearse v. State, the evidence in question related to testimony given in a New Mexico case, by the psychologist who testified for the State at Mr. Kearse's penalty phase in 1996. 959 So. 2d at 976. The testimony in the New Mexico case post-dated Mr. Kearse's penalty phase, so was not in existence at the time of Mr.

Kearse's penalty phase. In contrast, in the instant case, as both Professor Spiegelman and Mr. Tobin testified, there had been no proper scientific study done to support CBLA at the time of Mr. Wyatt's trial. This fact was known by the FBI, but could not have been known by defense counsel at that time, especially in the face of Agent Riley's false and misleading assertions that the practice was supported by scientific study. In sum, in Wright, Trepal and Kearse, both the documentation and the underlying knowledge contained therein were not in existence at the time of the trial. In the instant cause, the knowledge of the lack of scientific study was in existence at the time of the trial but not revealed until the August 7, 2008 letter, a crucial distinction.

The State also claims that Mr. Wyatt is not entitled to relief because this evidence would not have probably produced an acquittal on retrial. Yet again, the State does not address Mr. Wyatt's argument to the contrary. The State ignores the testimony of David Morgan, the trial prosecutor, who said that that the CBLA evidence was put on in Mr. Wyatt's case because it was "relevant" to establish his guilt (T2. 2789). Indeed, that testimony, coming in the form of expert testimony from an iconic federal law enforcement agency, was profoundly influential on the jury. How can it be said that an FBI agent telling the jury that the bullet in the victim came from Mr. Wyatt did not affect the outcome? How can it be said that in a capital murder trial, if a law enforcement agency provides false testimony to

help convict someone and later says the testimony is wrong, that we should accept that as a circumstance that our judicial system approves of? The State ignores the argument that the jury must have given great weight to the apparently unimpeachable word of the FBI. The very identity of the agency clothes such testimony in almost sacrosanct credibility, such that it would have removed all reasonable doubt from the minds of the jurors. The jury very probably found the CBLA evidence to be a sticking point and did not continue past it to question the other evidence. Relief is warranted.

ii. Giglio

The State next contends that Mr. Wyatt's claim under Giglio v. United States, 405 U.S. 150 (1972) is without merit. The State contends that the testimony of Mr. Tobin supports the State's position because Mr. Tobin stated that at the time of Mr. Wyatt's 1991 trial the technique had never been excluded from a trial, that it had been used for over 40 years and that the NRC report indicated that it could provide relevant evidence in a criminal case (Answer Brief p. 24-25). However, the State ignores the unrefuted testimony of both Mr. Tobin and Professor Spiegelman which emphatically shows both that the FBI was aware that such testimony was flawed, even in 1991, and that, contrary to Agent Riley's trial testimony, no comprehensive scientific research had been done to validate the technique.

Professor Spiegelman testified that no meaningful or comprehensive scientific research was ever presented by the FBI to the NRC committee to support the practice (T2. 2741). Mr. Tobin testified that "the practice had never been developed by the scientific method . . . . [T]here should have been an assessment for purposes of litigation or criminal evidence in criminal trials, is there any probative value to a declaration of a claimed match" (T2. 2690-91).

The State complains that Mr. Wyatt is over reliant on Haynes v. United States, 451 F. Supp. 2d 713, 719 n.3 (D. Md. 2006). However, Mr. Wyatt is merely relying on the fact that metallurgist Lundy pleaded guilty to perjury in relation to testimony substantially similar to that of Agent Riley at issue here. The State also ignores the plethora of other testimony adduced at the evidentiary hearing as to the fact that the FBI had to have known of the flaws in the method. Professor Spiegelman testified that even when the FBI representatives came to the NRC they stated that the technique "wasn't any good" (T2. 2730), and that it "wasn't accurate" (T2. 2731). The very fact of the FBI's discontinuation of the technique in 2005 is also telling. Furthermore, as Mr. Tobin testified, any competent metallurgist, statistician or expert in product distribution would have known of these flaws in 1991, and that in fact that FBI had been put on notice of these flaws by Dr. Vincent P. Gunn who had tried for several decades to advise the FBI that their practice was very seriously flawed (T2. 2694). Thus, the testimony

supports the fact that Dr. Gunn knew (and told the FBI) that the technique was flawed, and that any "competent metallurgist, statistician or expert in product distribution" would have known the technique was flawed, Agent Lundy, a metallurgist, pleaded guilty to perjury relating too this kind of testimony, and the FBI representatives who testified at the NRC meetings knew that the technique "wasn't any good." In combination with the testimony that no meaningful scientific research had been done to validate the technique, the conclusion is clear. Contrary to the State's assertions, Mr. Wyatt has established his entitlement to relief.

iii. Brady

The State's contention regarding Mr. Wyatt's claim under Brady v. Maryland, 373 U.S. 83 (1962) is based solely upon the fact that the actual FBI letter did not exist at the time of the trial in 1991 and therefore could not have been disclosed. Once again, the State's argument fails because it is the information contained within the letter and not the date and method of its publication to Mr. Wyatt's legal team that is at issue. As noted in Argument I.ii., there is a plethora of unrebutted testimony in the record of the 2009 evidentiary hearing that shows that the FBI was aware of the flaws in CBLA for a substantial period of time which extends back to before the time of Mr. Wyatt's capital trial in 1991.

Additionally, the State completely fails to address the false and misleading testimony of Agent Riley that the CBLA technique was supported by comprehensive scientific research. The evidentiary hearing testimony shows that there was never any such research conducted, and Agent Riley had to have known this. Contrary to the State's assertion, the non-existence of any research supporting the technique should have been disclosed to Mr. Wyatt's defense team.

iv. Ineffective Assistance of Trial Counsel

The State asserts that the Strickland portion of the claim fails because "it is not what the scientific community accepts now, but what the norm was in 1991" that is important (Answer Brief p. 33). This is a misleading statement. The State completely ignores the fact that the only agency ever to utilize CBLA for any length of time was the FBI (T2. 2670).[1] It therefore cannot have been "the norm." Furthermore, as noted *supra*, there was no meaningful or comprehensive research to support the technique. Professor Spiegelman explained at length that the use of statistics is essential in any scientific study. As he noted "[Statistics is] the science of designing scientific studies, and analyzing the data that comes from them and making inferences from those" (T2. 2721). The use of statistical methodology is important, because "in forensics, if the sample size is too small people can be

[1] The Alcohol Tobacco and Firearms Agency (ATF) used the technique "only for a very brief period of time" (T2. 2670).

fooled" (T2. 2721). Because no meaningful comprehensive study had ever been done to support the use of CBLA, it could not have been affirmatively accepted by the "scientific community" in 1991. No formal hypothesis was ever formulated. No hypothesis was ever tested. No theory was ever developed, tested, statistically validated, peer reviewed or published. In short, the only reasons for accepting the technique in 1991 were the unscientific and baseless representations of the FBI. Trial counsel did not challenge the lack of scientific research by the FBI, and as such Mr. Wyatt was prejudiced by his omissions.

v. Prejudice

The State chooses to analyze prejudice on an issue-by-issue basis rather than cumulatively with the errors relating to the testimony of Patrick McCoombs. This is error. The State's sole argument seems to be what the lower court termed the "overwhelming evidence" of Mr. Wyatt's guilt. The lower court erroneously failed to consider the cumulative effect of all the constitutional errors that occurred in this case. See Gunsby v. State, 670 So. 2d 920, 924 (Fla. 1996). All this evidence must be examined "collectively, not item by item." Kyles, v. Whitley, 514 U.S. at 436. "Cumulatively, the total picture in this case" compels this court to grant Mr. Wyatt a new trial. Mordenti v. State, 894 So. 2d 161, 175 (Fla. 2004).

The State also ignores the fact that the denial of relief on Claim 1a *supra* relating to the discrediting of the CBLA evidence at trial was not prejudicial

because of the "overwhelming evidence" of Mr. Wyatt's guilt. This evidence included McCoombs's testimony. If the lower court had considered the effect on the jury of the false and misleading CBLA testimony, together with the impeachment of McCoombs, there is a reasonable probability that there would have been a different outcome at Mr. Wyatt's capital trial and penalty phase. The use of junk science relating to CBLA rendered Mr. Wyatt's trial unfair. Relief is warranted.

b. Testimony of Patrick McCoombs

The State's argument as to the testimony of Patrick McCoombs is almost entirely a reiteration of the orders of the trial court following both the 2007 and 2009 evidentiary hearings. However, the State has failed to address a number of points raised by Mr. Wyatt in his Initial Brief.

First of all, the State does not address the sheer importance of McCoombs's testimony in securing both a conviction and death sentence of Mr. Wyatt. None of the witnesses, aside from Patrick McCoombs, provided any solid evidence that it was Mr. Wyatt who shot and killed the three Domino's employees. The only evidence presented which tied Mr. Wyatt to any of the bodies was the scientific evidence which related to the sexual assault for which Mr. Wyatt was convicted. There was no compelling evidence whatsoever presented by the State that it was Mr. Wyatt that fired the weapons that killed the three victims. The only evidence

the jury heard truly inculpatory of Mr. Wyatt came from the mouth of Patrick McCoombs. This was acknowledged by trial prosecutor David Morgan when he wrote the U.S. Attorney who prosecuted McCoombs's federal case that his testimony against Mr. Wyatt was "extremely important" in the instant cause and "essential" in the other capital case. The State also ignores the sequence of events that have occurred since Mr. Wyatt's capital trial that could be used as impeachment against McCoombs in any future proceeding against Mr. Wyatt. Not only is there the conflicting evidence of inmates Rollins, Morrison and Bravo, but also the extensive paper trail of conflicting statements, threats and self serving antics of McCoombs whilst in federal custody. The State also ignores the impropriety of McCoombs's continuing relationship with the trial and post conviction prosecutors in Mr. Wyatt's case, which apparently continue to the present day. Specifically, all of McCoombs's statements, letters, affidavit, threats, recantations, and court testimony would be admissible at re-trial for purposes of impeachment, challenging his credibility, demonstrating bias and as prior inconsistent statements. All of the newly discovered evidence unavailable at the time of trial, assessed cumulatively with all other claims and evidence in these post-conviction proceedings, demonstrates that Mr. Wyatt would probably receive an acquittal or a lesser sentence on retrial.

ARGUMENT II

INEFFECTIVE ASSISTANCE OF COUNSEL AT PENALTY PHASE

The State claims that Mr. Wyatt has shown neither deficient performance nor prejudice relating to trial counsel's investigation and presentation of mitigation at M. Wyatt's penalty phase. However, the State's argument misses several important factual and legal issues.

Regarding counsel's performance, it is noteworthy that the State's analysis does not even mention the American Bar Association (ABA) Standards of Criminal Justice. As Strickland v. Washington, 466 U.S. 668 (1984), Rompilla v. Beard, 545 U.S. 374 (2005), and Wiggins v. Smith, 539 U.S. 510 (2003), all make plain, the Guidelines are just that—a guide to what is reasonable. While adherence to the Guidelines is not mandatory in every circumstance, they are a guideline and should be considered, which trial counsel clearly did not do.

The State's reliance on Mr. Wyatt's purported waiver of mitigation is also not dispositive in the instant cause. As noted *supra*, the ABA Guidelines amount to a guide as to what is reasonable in investigating and presenting mitigation at the penalty phase.

The ABA Guidelines specifically refer to cases such as Mr. Wyatt's in which counsel believes that the client does not wish mitigation to be investigated. ABA Guideline 10.7(A) is clear that "Counsel at every stage have an obligation to

conduct thorough and independent investigations relating to the issues of both guilt and penalty." Guideline 10.7(A)(2) further states that "[t]he investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be conducted or presented." See also Blanco v. Singletary, 943 F.2d 1477, 1502 (11th Cir. 1991) ("[A] defendant's desires not to present mitigating evidence do not terminate counsels' responsibilities during the sentencing phase of a death penalty trial: 'The reason lawyers may not 'blindly follow' such commands is that although the decision whether to use such evidence is for the client, the lawyer first must evaluate potential avenues and advise the client of those offering potential merit'.").

The State similarly did not address Mr. Wyatt's arguments based on the Commentary to the Guidelines. The Commentary to ABA Guideline 10.7 states that "Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case." Commentary to ABA Guideline 10.7 (2003). Furthermore, ABA Guideline 10.7(A)(2003) is clear that "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." Guideline 10.7(A)(2) further states that "[t]he investigation regarding

penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be conducted or presented." This requirement is further explained by the 2003 Guidelines which require investigation of, *inter alia*, the client's medical history, family and social history, educational history, military service history, employment and training history and prior adult and juvenile correctional experience. See Commentary to ABA Guideline 10.7 (2003). The State's reliance on Mr. Wyatt's purported waiver is not borne out by these principles.

The State's assertion that Mr. Wyatt was not prejudiced by counsel's deficient performance is similarly flawed. The State asserts that because Mr. Wyatt presented some limited mitigation at his second trial and still received a death recommendation, he was not prejudiced in his first trial (Answer Brief p. 76). That argument must fail, because the facts and procedural posture of the two cases are entirely different. It is impossible to infer from the Wyatt II jury recommendation what the recommendation would have been in Wyatt I, had some mitigation been presented.

The State claims that Mr. Wyatt is not prejudiced because the social history presented through Dr. Sultan presented "nothing new" Answer Brief at 74. The State takes issue with Mr. Wyatt that trial counsel should have obtained a social history and suggests that they in fact did so. The State ignores the admonition in

Wiggins v. Smith that a **proper** social history be conducted. 539 U.S. at 510. The United States Supreme Court found Mr. Wiggins's trial counsel ineffective even though the psychologist conducted interviews with some of Mr. Wiggins's family members, whereas in Mr. Wyatt's case, the retained psychologist did not. The fact remains that had trial counsel done a **proper** social history investigation the mitigation available would have been qualitatively and quantitatively superior to that adduced during the penalty phase of Wyatt II.

The lower court's analysis of prejudice falls short of the standards required by the United States Supreme Court. In the recent case of Porter v. McCollum, the United States Supreme Court found this Court's prejudice analysis under Strickland to be unconstitutional. 130 S. Ct. at 453-54. This Court failed to find prejudice due to an analysis which summarily found non-presented mitigation evidence to be lacking in weight, see id. at 451, and "either did not consider or unreasonably discounted" that evidence. Id. at 454.

In Sears v. Upton, the Court expounded on its Porter analysis, finding that a Georgia postconviction court failed to apply the proper prejudice inquiry under Strickland. 130 S. Ct. at 3266. The United States Supreme Court found that "[a]lthough the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case." Id. at 3264. The United States Supreme Court explained that courts ruling

on Strickland claims must "'speculate' as to the effect of the new evidence" while conducting a "probing and fact-specific analysis" of prejudice. Id. at 3266. Similar considerations apply here. The prejudice analysis below does not comport with these essential principles.

In Mr. Wyatt's case, the prejudice is apparent. See Williams v. Taylor, 529 U.S. 362 (2000), in which the Supreme Court granted relief based on ineffective assistance of counsel because " . . . the graphic description of [Mr. Wyatt's] childhood . . . might well have influenced the jury's appraisal of his moral culpability." Williams v. Taylor, 529 U.S. 362 at 398.

The failure to develop a proper social history was prejudicial in and of its own right. It further prejudiced Mr. Wyatt because, armed with a detailed social history, counsel would have been able to seek the specialist mental health evaluation of the type conducted by Dr. Bordini in the post conviction proceedings. Due to trial counsel's ineffectiveness, Mr. Wyatt was not given a neuropsychological examination although the same tests used by Dr. Bordini were available at the time of trial. Dr. Bordini testified that the same neuropsychological examination administered to Mr. Wyatt in 1991 would have most likely produced the same or even more serious indications of brain damage. (T. 2491). Trial counsel's failure to fully investigate all aspects of Mr. Wyatt's physical and mental health, as well as his upbringing, was constitutionally

ineffective. Because of this failure, compelling mitigation evidence of brain damage was never presented to the jury.

Had trial counsel conducted a thorough investigation that would have revealed Mr. Wyatt's history of head injuries, alcohol and substance abuse, and childhood trauma, they would have been put on notice that a neuropsychological evaluation was appropriate in this case, an implication which the State ignores.

The evidence adduced at Mr. Wyatt's evidentiary hearing as to his social history and brain damage is quantitatively and quantitatively superior to that investigated by trial counsel. In the past this Court has granted relief in such circumstances See, e.g., State v. Lara, 581 So. 2d 1288, 1290 (Fla. 1991) (affirming a Dade circuit court's grant of penalty phase relief to a capital defendant where the defendant presented at an evidentiary hearing evidence that, as the State conceded in that case, was "quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase"). Mr. Wyatt is entitled to a new penalty phase.

CONCLUSION

Mr. Wyatt respectfully requests this Court to vacate his convictions and grant him a new trial. But for the Brady, and Giglio violations, and/or the newly discovered evidence relating to his trial, and trial counsel's ineffective assistance during the guilt-innocence phase of his capital trial, there is a reasonable probability that the jury would have found Mr. Wyatt not guilty of first degree felony murder.

Mr. Wyatt is also entitled to a new penalty phase. But for counsel's ineffectiveness, there is a reasonable probability that the outcome of the penalty phase would have been different.

To the extent that Mr. Wyatt does not address all issues raised in the Answer Brief, he relies on his Initial Brief and on the record.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
RACHEL L. DAY
Assistant CCRC-South

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Leslie Campbell, Office of the Attorney General, 1515n. Flagler Drive, 9th Floor, West Palm Beach, FL 33401 on this ___day of September 2010.

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