

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-1615

MICHAEL SEIBERT,

Petitioner,

v.

**WALTER McNEIL, Secretary
Florida Department of Corrections,**

Respondent.

**REPLY TO RESPONSE TO
PETITION FOR A WRIT OF HABEAS CORPUS**

**ROSEANNE ECKERT
Assistant CCRC-S**

**ANNA-LIISA NIXON
Staff Attorney**

**OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284**

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iii

INTRODUCTION1

ARGUMENT IN REPLY TO CLAIM I1

MR. SEIBERT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(a) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA. 1

C. MR. SEIBERT WAS CONVICTED AND SENTENCED TO DEATH BY A BIASED JURY.....1

D. THE ADMISSION OF GRUESOME PHOTOGRAPHS OF THE VICTIM’S BODY AT THE CRIME SCENE WAS ERROR.5

CONCLUSION.....9

CERTIFICATE OF SERVICE10

CERTIFICATE OF FONT10

TABLE OF AUTHORITIES

Cases

Irvin v. Dowd, 366 U.S. 717 (1961).....1

Larzelere v. State, 676 So. 2d 394 (Fla. 1996)4

Matire v. Wainwright, 811 F. 2d 1430 (11th Cir. 1987).....5

Rideau v. Louisiana, 373 U.S. 723 (1963).....2

Welty v. State, 402 So. 2d 1159 (Fla. 1981).....8

Constitutional Provisions

Art. I, § 16, Fla. Const.1

Art. I, § 17, Fla. Const.1

Art. I, § 9, Fla. Const.....1

U.S. Const. Amend. VI1

U.S. Const. Amend. VIII1

U.S. Const. Amend. XIV1

Other Authorities

American Bar Association Standards of Criminal Justice and Guidelines for the
Performance of Counsel in Death Penalty Cases (2003).....5, 8

INTRODUCTION

Mr. Seibert submits this Reply to the State's Response to the Petition for Writ of Habeas Corpus. Mr. Seibert replies only to subparts C and D of Claim I. However, Mr. Seibert neither abandons nor concedes any issues and/or claims not specifically addressed in this Reply. Mr. Seibert expressly relies on the arguments made in his Petition for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

ARGUMENT IN REPLY TO CLAIM I

MR. SEIBERT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(a) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

C. MR. SEIBERT WAS CONVICTED AND SENTENCED TO DEATH BY A BIASED JURY.

Mr. Seibert was deprived of his Sixth Amendment right to the effective assistance of appellate counsel because his attorney failed to argue on direct appeal that Mr. Seibert was convicted and sentenced to death by a biased jury. In *Irvin v. Dowd*, the United States Supreme Court explained:

In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimum standards of due process. "A fair trial in fair tribunal is a basic requirement of due process."

366 U.S. 717, 721 (1961) (internal citations omitted). It simply cannot be said that Mr. Seibert's trial comported with the mandate or spirit of the constitutional guarantee of a "fair tribunal." To assert that Mr. Seibert's jury was "impartial" is to render due process "but a hollow formality." *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963).

At the penalty phase of the trial, during its cross examination of William Ace Green, the State asked whether Mr. Seibert "would frequent or he would go to gay clubs to hustle money from gay guys." (T. 4220). The circuit court sustained defense counsel's objection on relevance grounds, but denied the motion for mistrial. (T. 4223).

The very next day, Richard Levine, one of the alternate jurors, asked to be excused because several of the other jurors had made homophobic and anti-gay comments that made him very uncomfortable because he was homosexual. (T. 4578). The court questioned juror Levine about whether he had heard any other disturbing remarks prior to that morning and juror Levine responded that he had not, but that

...from the beginning I felt kind of an undertone. That is why I stayed to myself. I never said anything, but I have never from day one, back from October through November until now, have heard nobody mention anything about gay people. ...I just felt there was a lot of homophobic people in the jury.

(T. 4592) (emphasis added). The circuit court questioned all the jurors individually regarding the comments that were made, and based on those inappropriate comments, as well as the misleading answers from numerous jurors regarding the comments, trial counsel moved to strike the entire panel. (T. 4656, 4660-61). The circuit court denied the motion, but excused jurors Floyd Ginton and Steve Lennen on the basis of the inappropriate exchange between them, and excused alternate juror Levine because of his discomfort after hearing the exchange. (T. 4658, 4666). Mr. Seibert argued that appellate counsel's failure to argue this issue on appeal constitutes serious error that prejudiced Mr. Seibert by compromising his appellate process to such a degree as to undermine confidence in the correctness of the result.

The State argues that the claim is insufficiently plead and without merit. (Response at 14). The State asserts that Mr. Seibert has not presented any argument as to how the trial court abused its discretion in finding that any prejudice from the incident where two jurors made anti-gay and homophobic comments was remedied by removing the affected jurors. (Response at 16). The State misses the point. These two jurors admitted to having the conversation with the anti-gay and homophobic comments, but denied under oath that they were directed towards the clerk, and the trial court said of juror Lennen's denial that the comments referenced the clerk, "I don't necessarily think he was totally honest." (T. 4649).

These are the same jurors who sat through the guilt/ innocence phase of Mr. Seibert's trial, deliberated with the rest of the jury, and found Mr. Seibert guilty of first degree murder. Removing these two jurors during the penalty phase could not possibly remedy the prejudice at the guilt phase. The misleading nature of the jurors' responses to the circuit court's questioning regarding the inappropriate comments calls into question the fairness of the entire trial.

The State's reliance on *Larzelere v. State*, 676 So. 2d 394, 403-04 (Fla. 1996) is misplaced. There, the issue was whether the trial judge erred in failing to grant the defendant's motion for new trial, which was based on allegations that the jury had been contaminated by extrajudicial information after the completion of the guilt/ innocence phase, but prior to the start of the penalty phase. This Court concluded that since "[t]he incident occurred after the completion of the guilt phase . . . it in no way affected the jury's verdict as to appellant's conviction." *Id.* at 404. In the instant case, the statements made by the jurors after the guilt phase was evidence of their inherent bias toward jurors, a bias that was no doubt present during the guilt phase. The jurors were not excused simply because they made the comments; rather, they were excused due to the previously hidden prejudice that was revealed by the comments. Mr. Seibert was deprived of his right to a fair trial by a panel of impartial, indifferent jurors. (T. 4592) (emphasis added).

Appellate counsel's failure to raise this issue on direct appeal was error. Appellate counsel has the duty to raise all meritorious issues regarding errors occurring during the trial and thus, was obligated to appeal the denial of the motion to strike the entire panel of jurors.¹ It cannot be said that the "adversarial testing process worked in [Mr. Seibert's] direct appeal." *Matire v. Wainwright*, 811 F. 2d 1430, 1438 (11th Cir. 1987). Appellate counsel's deficient performance worked to Mr. Seibert's actual prejudice. Relief is warranted.

D. THE ADMISSION OF GRUESOME PHOTOGRAPHS OF THE VICTIM'S BODY AT THE CRIME SCENE WAS ERROR.

The State argues that appellate counsel was not ineffective for failing to raise an issue regarding the admission of gruesome photographs of the victim because the issue is without merit. (Response at 22-23). The State argues that at a pretrial hearing regarding the motion in limine to exclude the photographs, the State agreed to present only one photograph showing the dismemberment of the victim's body. (Response at 22). The record reveals, however, that the State presented at least three photographs depicting the dismemberment. (*See* State's

¹ Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice and Guidelines for the Performance of Counsel in Death Penalty Cases (2003). "Given the gravity of the punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent on appellate counsel to raise every potential ground of error that might result in a reversal of defendant's conviction or punishment." Commentary to ABA Guideline 6.1 (2003).

Exhibit 37, State's Composite Exhibit 132, numbers 14 and 25). State's Exhibit 37 is an approximately 27 inch by 40 inch blown-up poster depicting the victim's body in the bathtub of the apartment. The victim's lower torso is eviscerated, her internal organs are visible, a knife is stuck in her chest, her left foot is completely severed, and her legs are carved to the point where they are only bones. (State's Exhibit 37). This exhibit was displayed in front of the jury for an hour and fifteen minutes during the testimony of the medical examiner. (T. 3588).

Also during the medical examiner's testimony, the State gave each juror a packet of 25 autopsy photographs. (T. 3561; State's Composite Exhibit 132, 1-25). Prior to the start of the medical examiner's testimony, trial counsel objected to the manner in which the State planned to publish the autopsy photographs, *i.e.*, by giving each individual juror the packet of 25 photographs. (T. 3518). Trial counsel also objected specifically to the admission of four of the photographs because of their gory and inflammatory nature. (*Id.*). The circuit court heard arguments regarding three of those photographs, State's Composite Exhibit 132, numbers 12, 14, and 22. (T. 3518-25). Photograph number 14 of the composite exhibit depicts the victim's severed hand with exposed bloody tissue at the wrist. (State's Composite Exhibit 132, 14). Photograph number 25 of the composite exhibit shows the victim's arm with hand missing below the wrist. (State's Composite Exhibit 132, 25). Although there was some discussion of cropping the photographs

in order not to show the dismemberment, the photographs were ultimately admitted un-cropped over trial counsel's objection. (T. 3524).

The State argues that appellate counsel was not ineffective for failing to raise this issue on direct appeal as the trial court did not abuse its discretion in admitting the photographs showing the dismemberment because they were relevant to an issue in dispute: who killed the victim. (Response at 24). The State argues that by presenting evidence that Danny Mavarres or someone else killed the victim, the "Defendant made evidence of the dismemberment and its effects on the remaining evidence directly relevant to an issue in dispute." (Response at 25). In its opening and closing arguments at the guilt/ innocence phase, the State argued that no one but the person who lived in the apartment would have taken such care to keep the bathroom clean while disposing of the body. (T. 2327, 3742-43, 3761-62, 3773-74). Yet photographs of a severed hand alone, or an arm without a hand, or of a dismembered and mutilated body in a bathtub are not in any way probative of who killed the victim. Rather, photographs of the clean bathroom floor, of the towels and other items that are usually kept in the bathroom folded neatly in another area of the apartment, of the shower curtain folded up over the curtain rod, of empty bottles of cleaning supplies would be probative of whether someone was taking care to keep the bathroom clean while disposing of the body. Such photographs were admitted into evidence at trial, and the State could have made

the same arguments without multiple photographs showing the gruesome dismemberment of the victim's body. (*See, e.g.*, State's Exhibits 31, 58, 74, and 75). Any possible probative value of the dismemberment photographs was clearly outweighed by their prejudicial effect on the jury.

The only reason for the admission of the photographs depicting the dismemberment was to inflame the jury. Consequently, Mr. Seibert was deprived of his right to a "dispassionate a trial as possible and to prevent interjection of matters not germane to the question of guilt." *Welty v. State*, 402 So. 2d 1159, 1162 (Fla. 1981). The prejudice to Mr. Seibert is that these horrific photographs were in the minds of the jurors during their deliberations prior to returning a guilty verdict. Additionally, the prejudice spilled over into the penalty phase because the photos were in the minds of the jurors when they decided to recommend a death sentence for Mr. Seibert. There was already a danger that the post-mortem dismemberment could have the impermissible effect of a non-statutory aggravator; the gratuitous use of the gruesome photographs only added to the prejudice.

Appellate counsel's failure to raise the issue on direct appeal was deficient performance under the ABA Guidelines and Mr. Seibert was prejudiced by appellate counsel's failure to raise the issue. Relief is warranted.

CONCLUSION

For the foregoing reasons and in the interest of justice, Mr. Seibert respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail, first class postage prepaid, to Sandra S. Jaggard, Assistant Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131 this ____ day of December, 2008.

ROSEANNE ECKERT
Assistant CCRC-S
Florida Bar No.: 082491

ANNA-LIISA NIXON
Staff Attorney
Florida Bar No.: 26283

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL
COUNSEL
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR PETITIONER

CERTIFICATE OF FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font.

ROSEANNE ECKERT
Florida Bar No. 082491