IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-693

MICHAEL GORDON REYNOLDS

Petitioner

vs.

EDWIN G. BUSS, as
Secretary of the Florida
Department of Corrections

Respondent

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

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Petitioner, MICHAEL GORDON REYNOLDS, files the following Reply to the State's Response to his Petition for Writ of Habeas Corpus.

GROUND I

APPELLATE COUNSEL WAS INEFFECTIVE AND PREJUDICED THE OUTCOME ON DIRECT APPEAL IN FAILING TO RAISE OR DISCUSS AS FUNDAMENTAL ERROR THE TRIAL COURT'S MISSTATEMENT OF LAW IN INSTRUCTING JURORS ON THE STATE'S BURDEN OF PROOF

Appellate counsel neither raised nor discussed as fundamental error on direct appeal the trial court's misinstruction on the State's burden of proof, telling jurors: "the State doesn't have to do anything, you can't hold it against them." (V9, R571).

Contrary to the State's contentions—without citing any case on point---this erroneous instruction, placing the burden of proof on Reynolds, was not cured by other instructions properly noting the State's burden of proof, as "there is no reason to believe that [jurors] are likely to intuit which is the correct [instruction] and which is the erroneous one," and "[t]he conclusion is therefore inescapable that the jury may well have decided this case under an erroneous instruction as to the burden of proof." *Murray v. State*, 937 So.2d 277, 280 (Fla. 4th DCA 2006).

The cases cited in the State's Response, page 11, are distinguishable and inapposite of the State's position, as no case cited by the State dealt with a trial court's misinforming the jury that the State had no burden of proof as to the defendant's guilt. *Gonzalez v. State*, 990 So.2d 1017, 1027 (Fla. 2008) (dealing not with guilt phase, but with *penalty phase* comments); *Hojan v. State*, 3 So.3d 1204, 1212 n.4 (Fla. 2009) (dealing with a trial court's decision on a defendant's motion to suppress evidence); *Henyard v. State*, 689 So.2d 239 (Fla. 1996) (comment not trial judge's, but prosecutor's, and comment not during guilt phase, but penalty phase); *Allen v. State*, 939 So.2d 273, 276 (Fla. 4th DCA 2006) (not dealing with trial court's misstatement concerning the State's burden of proof).

Also, a trial court's negating a defendant's sole defense is fundamental error that cannot be deemed harmless. *Grier v. State*, 928 So.2d 368 (Fla. 3rd DCA 2006) ("the error was fundamental because it negated [defendant's] sole defense, an error which cannot be viewed as harmless and which we agree mandates reversal irrespective of an objection"). As Reynolds's sole defense was reasonable doubt, which is inherently dependant upon the State meeting its burden of proving the defendant's guilt beyond reasonable doubt, the trial court's error in relieving the State of its burden was fundamental. Appellate counsel was deficient and caused prejudice in failing to raise or discuss this fundamental error on direct appeal.

GROUND II

REYNOLDS WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL GUARANTEED BY THE SIXTH AMENDMENT WHEN COUNSEL FAILED TO RAISE OR DISCUSS THE TRIAL COURT'S ERROR IN INSTRUCTING JURORS AND FINDING THAT REYNOLDS COMMITTED MURDERS IN THE COURSE OF BURGLARY WAS AGGRAVATING FACTOR IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

The State argues that this ground (ineffectiveness in failing to argue that using a burglary conviction underling a felony murder conviction as an aggravating factor constitutes an unconstitutional "automatic aggravator") has no merit since "Reynolds was convicted of premeditated murder as well as felony murder." State's Reply, page 14. The State's argument in this regard, however, rests on a notion rejected by the decisions of this Court and the United States Supreme Court.

In *Yates v. United States*, 354 U.S. 298 (1957), the United States Supreme Court held that a criminal conviction under a general verdict is improper if it rests on multiple bases, one of which is legally inadequate, as the reviewing court cannot possibly be certain which of the two or more grounds the jury relied upon in reaching the verdict. As the *Yates* Court explained:

> [W]e think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.

Yates v. United States, 354 U.S. at 312. See also *Mills v. Maryland*, 486 U.S. 367, 376 (1988) ("the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching a verdict.").

This Court has thus applied this principle in overturning first degree murder convictions and death sentences in, for example, *Valentine v. State*, 688 So. 2d 313, 317 (Fla. 1996); and *Fitzpatrick v. State*, 859 So. 2d 486 (Fla. 2003), and Florida's District Courts of Appeal have applied this principle. *E.g.*, *Melahn v. State*, 843 So.2d 929, 930 (Fla. 5th DCA 2003) ("the jury returned a general verdict, so it cannot be determined upon which theory the jury relied. Because one of the theories is legally unsupportable, and it cannot be determined upon which theory the jury relied, the verdict must be set aside"); *Tricarico v. State*, 711 So.2d 624, 626 (Fla. 4th DCA 1998) (same); *State v. Reardon*, 763 So.2d 418, 419 (Fla. 5th DCA 2000) (determining in such circumstances that "[w]e must read the verdict in a manner which would give the benefit of the doubt to [the defendant]").

GROUND III

MR. REYNOLDS WAS DENIED HIS RIGHT TO A FULL AND FAIR DIRECT APPEAL OF HIS CONVICTIONS AND SENTENCES OF DEATH BY STATE ACTION WHEN THE COURT REPORTER ALTERED THE TESTIMONY OF DNA ANALYST BADGER SO THAT THE TRANSCRIPT BEFORE THIS COURT IN REYNOLDS'S DIRECT APPEAL FALSELY INDICATED THAT DNA ON SWABS FROM THE 11-YEAR-OLD CHRISTINA RAZOR'S VAGINA WAS THAT OF REYNOLDS

This ground alleges "Reynolds was denied his right to a full and fair direct appeal of his convictions and sentences of death in this Court by state action, as *the court reporter altered the transcribed testimony* of DNA Analyst Charles Badger, so that DNA on swabs from the 11-year-old victim's vagina appeared to be Reynolds's." Petition for Writ of Habeas Corpus, page 31 (emphasis added).

In response to this ground, the State claims "[t]his claim is a variation of an issue raised in the postconviction appeal ... [where] Reynolds claims *FDLE analyst Badger presented false testimony*." State's Reply, page 16 (emphasis added).

As seen from the foregoing quotations, these are two distinct claims arising from the State's ever-changing versions of the veracity of Badger's testimony and accuracy of the court reporter's certified transcript. The cases cited in the State's Reply, page 16, entail *duplicate* claims; not claims arising from the State's own

contradictory versions of events. *Johnston v. State*, 36 Fla. L. Weekly S193, 197 (Fla. Apr. 28, 2011) ("Johnston raises four additional claims in habeas that are procedurally barred because they are *mere duplications* of issues raised in his instant postconviction motion") (emphasis added); *McDonald v. State*, 952 So.2d 484 (Fla. 2006) (noting "habeas corpus petitions cannot be used as a means to seek a second appeal or to litigate issues that could have been or were raised in a postconviction appeal," whereas the present ground could not have been raised in a postconviction appeal as it involves Reynolds's right to a full and fair *direct appeal* due to state action); *Knight v. State*, 923 So. 2d 387, 395 (Fla. 2005) (*citing Baker v. State*, 878 So. 2d 1236, 1241 (Fla. 2004) (holding "habeas corpus [cannot] be used as a means...to litigate issues that...were raised in a motion under rule 3.850," whereas the present ground [court reporter's alteration of testimony] was not raised by postconviction motion [Badger's unobjected to perjury]); *Parker v. Dugger*, 550 So.2d 459, 460 (Fla. 1989) (*Booth* claim may not be raised via habeas corpus).

The trial transcript in the record on direct appeal in this case, which this Court relied upon in issuing its opinion in *Reynolds v. State*, 934 So.2d 1128 (Fla. 2006), contains materially false representations of testimony indicating the presence of Reynolds's DNA on vaginal swabs from the 11-year-old victim, Christina Razor.

The trial transcript provided to this Court on direct appeal represents that DNA Analyst Charles Badger testified:

> That was designated as ***vaginal swabs from Christina Razor***. . . . And those results that were obtained were found to be consistent or matched the DNA results that were obtained were found to be consistent or ***matched the DNA profile of Christina Razor and Michael Reynolds***. Robin Razor and Danny Privett were excluded from being the donors of the DNA profile observed.

(Vol. 17, R2015) (emphasis added). The State's notion "[t]his was a scrivener's error on the part of the court reporter, and there was a '.' in the wrong place," State's Reply, page 16, is unpersuasive because, even under the State's theory, the unaltered trial transcript would have much more than "a '.' in the wrong place." Id. In order to alter the trial transcript to the State's present liking, one would have to make 3 changes to the certified transcript: (1) insert a period after "Christina Razor" where none existed, (2) change a lowercase "a" to uppercase "A" after that newly added period, and (3) change a period to a comma after "Reynolds."[1]

The State's contention it "obtained an affidavit from the court reporter in which she corrected the error and the State attached the affidavit to its response to

[1] As the postconviction court denied the State's motion to correct the trial transcript, what the State represented below after direct appeal, and now represents as a false representation of Badger's DNA testimony conflicts with the trial record.

the postconviction motion," State's Reply, page 16, asks this Court to ignore that such an affidavit--obtained years after this Court's direct review based on the very transcript the State now seeks to retrospectively alter to its own present liking--threatens to undermine the very underpinnings of any reliable appellate review in reliance on a certified trial transcript. It injects new questions of fact into an earlier appellate review which assumed the veracity of the factual record before the Court.

Next, the State argues "Reynolds' claim that the court reporter *intentionally* altered the transcript to implicate him is nothing more than speculation." State's Response, page 16 (emphasis added). But intentionality is irrelevant. Assuming that, as the State contends, the transcript is not a reliable record of Badger's actual testimony, it does not matter whether the record was intentionally or inadvertently made incorrect. What matters is that, on direct appeal, the record misled this Court to believe Badger testified Reynolds's DNA was found in the child victim's vagina.

On direct appeal, the record spoke for itself, leading the Court to believe Badger testified before jurors that Reynolds's DNA was found in the child's vagina. This damning scientific testimony played directly into the State's introduction of testimony concerning an alleged prior sexual assault (V25 50-65), as well as the State's closing argument suggesting Reynolds committed the murders and did so in attempting to commit Sexual Battery on the minor victim. (V21 2937-39, 2949).

As a defendant's right to a full and fair appeal, Art. V, Sec. 4(b), Fla. Const., is governed by Due Process, *Douglas v. California*, 372 U.S. 353 (1963), he is entitled to full and fair appellate review when state action has deprived him of this right, and trial proceedings should not be validated if the State fails to insure all the requirements of due process. *Baggett v. Wainwright*, 229 So.2d 239 (Fla.1970).

A complete record on appeal is indispensable to this constitutional right. *Delap v. State*, 350 So.2d 462 (Fla. 1977); *Thomas v. State*, 828 So.2d 456, 457 (Fla. 4th DCA 2002) ("Once a criminal defendant has chosen to exercise his right to appeal, he is entitled to a full transcript of the trial record") (citations and internal quotation marks omitted); *Johnson v. Singletary*, 695 So.2d 263, 268 (Fla. 1996) (Anstead, J., concurring) ("an unequivocally accurate record of the proceedings is required to enable counsel and the Court to ensure that justice is done.").

"A belated appeal may ... be granted where it is found that other exceptional circumstances have rendered the ordinary appellate process unavailable." *Rumph v. State*, 746 So.2d 1249, 1250 (Fla. 1st DCA 1999). See *Tal-Mason v. Singletary*, 596 So.2d 796, 797 (Fla. 4th DCA 1992) ("Tal-Mason seeks habeas corpus relief in the nature of a second appeal of his life sentence for second degree murder. He claims that he was effectively deprived of the right to appeal on the first occasion when counsel was appointed [by the trial court] just a few days before this court

dismissed his appeal. We agree....This constitutes state action that can be deemed to be equivalent to a denial of the right."). At bar, state action in the form of the court reporter's misstatement of trial testimony, falsely indicating Reynolds's DNA was found in the child victim's vagina, deprived him of a full and fair direct appeal.[2]

The court reporter's misstatement skewed this Court's evaluation of the facts and circumstances surrounding this case on direct appeal, depriving Reynolds of his right to a full and fair appeal of his convictions and sentences, and, in fairness, entitling him to a new one. As this Court stated in *State v. Owen*, 696 So.2d 715, 720 (Fla. 1997): "This Court has the power to reconsider and correct erroneous

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[2] All three cases this Court cited on direct appeal in holding that this was not a circumstantial evidence case, *Reynolds*, at 1146-1147, dealt with murders involving attempted or completed sexual batteries. *Meyers v. State*, 704 So.2d 1368 (Fla.1997) (murder with attempted sexual battery of 14-year-old); *Orme v. State*, 677 So.2d 258 (Fla.1996) (DNA evidence suggesting defendant had sex with murder victim); *Fitzpatrick v. State*, 900 So. 2d 495 (Fla. 2005) (DNA evidence suggesting defendant engaged in sex with murder victim). The lone case this Court cited on direct appeal for the burden of proof in non-circumstantial evidence cases, *Reynolds v. State*, at 1147, dealt with an *ostensibly* similar murder involving a sexual battery. *Darling v. State*, 808 So.2d 145 (Fla.2002) (DNA in murder victim's vagina matched defendant's). The Court's exclusive reliance on the foregoing sex-murder cases in its opinion reviewing the *apparent* content of record evidence in affirming Reynolds's conviction on direct appeal, illustrates the pernicious effect of the court reporter's misstatement of this trial testimony, as "[f]ew criminal allegations would be more prejudicial to a defendant than molesting a child. If the jury believed the statement that Coverdale was a child molester, this gratuitous statement would deny him a fair trial...and no curative instruction could un-ring that bell." *Coverdale v. State*, 940 So.2d 558, 561 (Fla. 2nd DCA 2006).

rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case." Id., at 720. It would be manifestly unjust to perpetuate the trial transcript's misstatement concerning DNA evidence this Court deemed so central to affirming Reynolds's convictions and sentences of death. The court reporter's misstatement of trial testimony, falsely indicating Reynolds's DNA was found in an 11-year-old victim's vagina, constitutes an exceptional circumstance, justifying the Court's reconsideration and correction of its direct appellate ruling.

CONCLUSION

For the foregoing reasons and those set forth in the original Petition for Writ of Habeas Corpus, Mr. Reynolds should be accorded a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to (1) Thomas Hastings, Esquire, Office of the State Attorney, 101 Bush Boulevard Sanford, FL 32773, (2) Barbara Davis, Esquire, Office of the Attorney General, 444 Seabreeze, Daytona Beach, FL 32118, and (3) Mr. Michael Gordon Reynolds, #324170, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026, by United States Mail, this 10th day of August, 2011.

CERTIFICATE OF FONT AND TYPE SIZE

This petition is word-processed utilizing 14-point Times New Roman type.

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MELODEE A. SMITH
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