IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-154

LOWER TRIBUNAL NO. 97-CF-1547

JOHN CALVIN TAYLOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

FRANK J. TASSONE
Fla. Bar No. 165611
Tassone & Dreicer, LLC
1833 Atlantic Blvd.
Jacksonville, FL 32207
(904) 396-3344
Fax (904) 396-3349

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT IN REPLY

I. TRIAL COUNSEL WAS DEFICIENT FOR FAILING TO UTILIZE A MENTAL HEALTH EXPERT IN THE PENALTY PHASE TO ESTABLISH MENTAL MITIGATION, RESULTING IN THE JURY FAILING TO MAKE THE CONNECTION BETWEEN MR. TAYLOR'S TUMULTUOUS CHILDHOOD AND RESULTING MENTAL AND BEHAVIOR ISSUES.

The State argues that trial counsel's decision not to present Dr. Krop's testimony at penalty phase was an informed decision based on the possibility that the potential diagnosis may be viewed by juries as more aggravating than mitigating. However, had trial counsel presented the testimony of Dr. Krop, it would have made the necessary connection between Mr. Taylor's tumultuous childhood resulting from his mental disorders. Without that connection, the jury was not able to correlate any mitigators to the facts and circumstances of the crime.

Had trial counsel utilized a mental health expert, the expert could have shown that Mr. Taylor committed the capital felonies while "under the influence of extreme mental or emotional disturbance," and that Mr. Taylor's "capacity… to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired." See Fla. Stat. 921.141 (6)(b) and (6)(f). Defense counsel requested only seven non-statutory mitigating factors, to only three of which the court attributed any weight.

Defense counsel should have used Dr. Krop's information to show that Mr. Taylor's actions were a result of a combination of his childhood environment and genetic background. See Morton v. State, 995 So. 2d 233 (Fla. 2008).

Both the United States Supreme Court and this Court have determined that a appellant's antisocial personality disorder is a valid mitigating circumstance for trial courts to consider and weigh. See Eddings v. Oklahoma, 455 U.S. 104, 107, 115, (1982); Robinson v. State, 761 So.2d 269, 273 (Fla. 1999), cert. denied, 529 U.S. 1057, (2000); Snipes v. State, 733 So.2d 1000, 1003 (Fla. 1999); Rutherford v. State, 727 So.2d 216, 224 (Fla.1998); Wuornos v. State, 676 So.2d 966, 968, 971 (Fla. 1995); Miller v. State, 42 So.3d 204 (Fla. 2010). Morton v. State, 995 So. 2d 233 (Fla. 2008).

Additionally, defense counsel's explanation for failing to present Dr. Krop was based on the fact that Mr. Taylor may have some anti-social traits; however, Dr. Krop never diagnosed Mr. Taylor with anti-social personality disorder. In fact, his report stated that his testing did not reflect anti-social tendencies.

Given that the state was seeking three aggravating factors, Taylor was prejudiced by his counsel's failure to seek even one statutory mitigating factor where this Court has consistently found that even one aggravating factor can support a death sentence where minimal mitigating evidence is established. See

e.g. Rogers v. State, 948 So. 2d 655, 670 (Fla. 2006.), Butler v. State, 842 So. 2d 817, 833 (Fla. 2003.)

Defense counsel's failure to present Dr. Krop's testimony, or the testimony of another psychologist, cannot be considered strategic. Prejudice resulted from Defense Counsel's failure to present a mental health expert on Mr. Taylor's behalf. Had counsel done so, two statutory mitigating factors would have been established and the jury would have been able to draw the connection from Mr. Taylor's egregious childhood and its relevance to the crime committed.

II. TRIAL COUNSEL WAS DEFICIENT FOR FAILING TO MOVE FOR A CHANGE OF VENUE IN LIGHT OF THE AMOUNT OF PUBLICITY THE CASE RECEIVED

The State argues that this claim fails for lack of proof , that there was no difficulty in selecting a jury, and that no prejudice resulted as a result.

Proof resides in the number of jurors who knew about the case prior to jury selection, and the perceptions the jurors had of Mr. Taylor's guilt. During voir dire one-fifth of the prospective jurors admitted to having knowledge of the Holzer murder. Every juror who had prior knowledge of the murder also had preconceived notions of Mr. Taylor's guilt.

Trial counsel rendered ineffective assistance of counsel by failing to move for a change of venue due to extensive and inflammatory pre-trial publicity. Defense counsel's ineffective representation in failing to move for a change of

venue adversely affected the outcome of Mr. Taylor's trial. Defense counsel should have moved for a change of venue due to the vast amount of publicity surrounding the case, resulting in one-fifth of every prospective juror having knowledge of the case. Defense counsel's failure to move for a change of venue was not a reasonable strategic position and resulted in prejudice.

Some cases naturally result in extensive publicity, which can make it impossible to select an impartial and unprejudiced jury without prior knowledge of the case. In the instant case, Clay County, a rural community with a population of only 131,984[1] was so saturated by inflammatory and hostile publicity surrounding the case that Mr. Taylor was inherently prejudiced. Murphy v. Florida, 421 U.S. 794, 798-9 (1975); Bundy v. Dugger, 850 F.2d 1402, 1424 (Fla. 1988). Inherent prejudice makes selecting a jury without actual prejudice nearly impossible. Actual prejudice, such as the Mr. Taylor suffered here, arises when jurors at the defendant's trial are prejudiced. See Heath v. Jones, 941 F.2d 1127, 1132 (11th Cir. 1991).

Prejudice is found especially where the publicity is inflammatory or hostile, instead of straightforward and factual. See Murphy, 421 U.S. at 798-99; Bundy, 850 F.2d at 1424. Defense counsel should also consider the length of time between the crime and trial, and when the publicity occurred during that time; whether the

[1] Source: Table CO-EST2001-12-12 Time Series of Florida Intercensal Population Estimates by County: Population Division, U.S. Census Bureau

State's or the police's version of the case has been publicized instead of the defendant's version; the size of the community; and whether all of the defense's peremptory challenges have been used. See Rolling v. State, 695 So.2d 278, 285 (Fla. 1997). Defense counsel should also consider the extent and nature of the pre-trial publicity and difficulty counsel may encounter in selecting a jury. Id. (citing Murphy v. Florida, 421 U.S. 794 (1975)). When these factors are present and there is a risk of prejudice, due process requires defense counsel move for a change of venue. Const. amend VI & XIV; see, Irvin v. Dowd, 366 U.S. 717, 722 (1961).

In the instant case, there were reports of the incident that appeared to be accurate, but there were also reports concerning Mr. Taylor's prior conviction for aggravated robbery, burglary, and theft in Arizona, some 'glitch' in the system that allowed his release, and his subsequent migration to St. John's County.

One Juror, Todd Millard, recalled hearing "a story of a young lady disappearing with - - taking the bank deposit…" (9 R 406.) Another, Richard Seamon, recalled reading a story in the newspaper about "a young lady I believe was going to the bank in Green Cove. She stopped I believe to give somebody a ride, if I'm not mistaken, and I believe at that point disappeared and was killed. (9 R 408.) When asked if he had a feeling about what should happen in the case Mr. Seamon stated, "I mean, to be honest, to me, if someone's arrested most of the time there's not - - they didn't arrest them for no reason. I believe if somebody's

arrested they probably had good cause to arrest those people." (9 R 412.) Another Juror, Sidney Fields, says that he was aware of the Holzen murder case. (9 R 413.) He stated that he was aware of the case due to newspaper reports, stating, "If I'm not mistaken, the son murdered the girl and the father covered it up." (9 R 413.) He then tells Defense Counsel that he believes the person arrested for this is guilty and deserves the death penalty. (9 R 414-16.)

Potential Juror Leticia Nelson admitted during voir dire that she had knowledge of the Taylor's case. (9 R 417.) Nelson's brother, Ernest Knight, was in jail with Taylor. (9 R 417.) Hugh Altman admitted to having knowledge of the case. (9 R 420.) He read about the case in the newspaper. (9 R 420.) Robert Forbis had prior knowledge of the case. (9 R 426.) Judy Waters stated that she knew about the case going into voir dire. (9 R 429.) She read about the case in the newspaper. (9 R 429.) William Redfearn had prior knowledge of the case. (9 R 431.) He read about the case and saw the story on the news. (9 R 431.) Dianne Obriant knew about the case prior to the trial. (9 R 433.) She thinks she worked at the Green Cove Springs Bank at the time the crime occurred and remembers hearing about it at work. (9 R 434.)

Robert Pfennigan, who was eventually seated on the jury, had knowledge of the case prior to trial. (9 R 429.), (11 R 884.) He heard the story on the radio and TV and read about it in the newspaper. (9 R 429.) He stated that while he did not

have an opinion about whether Taylor was guilty at the time of voir dire, he "might have at the time [of hearing the media accounts]." (9 R 439.)

Defense counsel admitted that the case was highly publicized, especially in the small town of Green Cove Springs. Counsel knew the extent of publicity about the murder and the public's predisposition to Mr. Taylor's guilt. Based on the jury pool's knowledge of the case, as well as the amount of publicity the murder attracted in the small town, Counsel was deficient in failing to move for a change of venue.

At least one of the jurors on Taylor's jury was influenced by the media accounts of Shannon Holzer's death. Mr. Pfenning admitted that he had a preconceived notion of Taylor's guilt at the time he read the articles. Had counsel filed a motion for change of venue, and presented sufficient evidence in support of the motion, it would have been granted due to the media coverage in the tight-knit county where the trial took place. The result of Taylor's trial would have been different had counsel requested a change of venue.

III. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO PROSECUTOR'S INFLAMMATORY AND INAPPROPRIATE STATEMENTS

The State argues that the prosecution's referral to the proceeds of the murder as "blood money" and the description of "the big grin" on Mr. Taylor's face when depositing the proceeds in his bank account are proper statements based on facts

presented during trial. These attacks alone, *unsupported by evidence*, clearly could have affected the jury's mind in the guilt or penalty phase and might have influenced the jury to reach a more severe verdict that it would have otherwise.

In its closing argument, the State asserted that Appellant greedily killed Ms. Holzer specifically so he could go on a "spending spree" with her "blood money," then he left her in the palmetto bushes in the most undignified manner in which any individual could have been left. (16 R 1909-1910.) Additionally, the state continuously inflamed the passions of the jury by asserting that Michael McJunkin was too ignorant to have committed the crimes, so Taylor, by default must have been responsible. (16 R 1936.) The comments of the prosecutor were highly inflammatory, were not supported by the evidence, and attacked the Appellant personally. The comments falsely characterized the actions and behaviors of the Appellant, notably telling the jury that he was smiling and happy after allegedly killing the victim.

The effect of this argument and behavior was to improperly appeal to the jury's passions and prejudices. Such remarks prejudicially affect the substantial rights of the defendant when they so infect the trial with unfairness as to make the resulting conviction a denial of due process. In Bertolotti v. State, 476 So.2d 130 (Fla. 1985), the Supreme Court of Florida stated:

> The proper exercise of closing argument is to review the evidence and explicate those inferences which may reasonably be drawn from the

> evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Id. at 134.

This Court has expressed increasing concern over the frequency with which prosecutors overstep the bounds of acceptable argument in both the guilt and penalty phases of capital trials. This concern has led to the reversal of death cases based upon such improper argument. Ruiz v. State, 743 So. 2d 1 (Fla. 1999). This court has stated that the proper role of closing argument in a criminal case is to serve as a review of the evidence and inferences which may be reasonably drawn from them. Bertolotti v. State, 476 So. 2d 130 (Fla. 1985). This Court, in cases such as Ruiz, has found the error to be fundamental, thus reversible if raised by appellate counsel.

In this case the arguments of the prosecutor were clearly improper. The prosecutor's arguments went beyond a review of the evidence and permissible inferences. He intended that Mr. Taylor's jury consider factors outside the scope of the evidence. The prosecutor's closing argument statements that the Appellant was "out laughing his way through a spending spree" and "with a big grin on its face was depositing money into his bank account" improperly characterized the Appellant's attitude toward the victim to the jury. (16 R 1909-10.) Additionally,

statements that the Appellant went on a "spending spree" with victim's "blood money" further impassioned the jurors' emotions and thoughts.

Trial counsel acknowledged at the evidentiary hearing that the prosecutor's statements were inflammatory and objectionable, and that he should have objected. (7 PCR 1102-03.) His failure to object prejudiced Mr. Taylor. There is a reasonable probability that had the prosecutor's statements been objected to, the jury would have reached a different result regarding Mr. Taylor's death sentence.

CONCLUSION

Based upon the contents of Mr. Taylor's Initial Brief and the argument contained herein, Mr. Taylor respectfully requests that this court find that trial counsel was deficient in the penalty phase of his trial, that Mr. Taylor was prejudiced by the deficiencies of his counsel, and that Mr. Taylor's death sentence be reversed and remanded for a new penalty phase.

RESPECTFULLY SUBMITTED,

TASSONE, SICHTA, & DREICER, LLC

___/s/ Frank Tassone_____
FRANK TASSONE, ESQUIRE
Fla. Bar No.: 165611
1833 Atlantic Boulevard
Jacksonville, FL 32207
Phone: 904-396-3344
Fax: 904-396-0924
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

___/s/ Frank Tassone_____
A T T O R N E Y

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via U.S. Mail to Assistant Attorney General, Meredith Charbula, Esq. at PL-01, The Capitol, Tallahassee FL 32399 on this _15th__ day of May, 2012.

___/s/ Frank Tassone_____
A T T O R N E Y