IN THE SUPREME COURT OF FLORDA

THEODORE RODGERS,
Appellant,

v.

Appeal No. SC11-2259
L.CT. 01-CR-2386

STATE OF FLORIDA,
Appellee
_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant, Mr. Rodgers, will respond to the State's arguments as to each issue. In addition, he will continue to rely upon the accurate and complete Statement of Case and Facts contained in the Initial Brief as well as the arguments and citations of authority cited therein.

REPSONSE TO THE STATE'S REQEUST TO DISPENSE WITH ORAL ARGUMENT

Contrary to the State's request that this Court abandon its long standing practice of holding oral arguments in death penalty cases, there is no persuasive argument advanced by the State for doing so. The State's claim that this case does not merit oral argument is not based on law or fact and is contrary to both.

ARGUMENT

ISSUE I

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AND PRESENT EVIDENCE THAT MR. ROGERS HAS ORGANIC BRAIN DAMAGE. THE POSTCONVICTION COURT'S DETERMINTATION THAT THIS OMISSION DID NOT RESULT IN PREJUDICE IS ERROR SUBJECT TO REVERSAL.

Trial counsel must discharge very significant responsibilities at penalty phase. The investigation and presentation of mitigation evidence is the most fundamental

of those duties for the availability of accurate information about a defendant's mental health status is fundamental to a reliable penalty phase proceeding. Accurate sentencing information is a prerequisite to a reasoned determination of whether a defendant should live or die. Gregg v. Georgia, 428 U.S. 153, 190 (1976)[plurality opinion]; Tyler v. Kemp, 755 F.2d 741, 743 (11th Circuit 1985). This Court has held that the obligation to investigate and prepare for penalty phase "cannot be overstated." State v. Pearce, 984 So. 2d 1094, 1102 (Fla. 2008). In this case, trial counsel's investigation and presentation of mental health evidence was constitutionally deficient because trial counsel failed to thoroughly investigate and present evidence that Mr. Rodgers has organic brain damage which affects the executive control functions of his brain. Mr. Rodgers has established both deficient performance and prejudice under Strickland v. Washington, 466 U.S. 668 (1984).

In the Initial Brief, Mr. Rodgers submitted that the controlling authorities governing this case are Hurst v. State, 18 So.3d 975 (Fla. 2009), Parker v. State, 3 So.3d 974 (Fla. 2009), and Blackwood v. State, 946 So. 2d 960 (Fla. 2006). The State has failed to address these cases

in the Answer Brief, but argues that under Buzia v.State, 82 So.3d 784 (Fla. 2011), and two cases cited therein relief should be denied. The State is wrong. The prevailing case law which delineates the obligation of counsel under the facts presented in this case compels reversal.

In Willacy v. State, 967 So.2d 131, 143 (Fla. 2007), this Court explained that under Strickland "counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary." See also, Coleman v. State, 64 So.3d 1210, 1217 (Fla. 2011). When investigation leads to information suggesting that a defendant has mental health problems, a thorough evaluation "is fundamental in defending against the death penalty." Arbelaez v. State, 898 So. 2d 25, 34 (Fla. 2005). Before counsel can make a decision to limit an investigation that has produced potentially mitigating evidence, the investigation must be thorough. No further investigation is required only where the evidence suggests that the results would be fruitless. Wiggins v. Smith, 123 S.Ct. 2527, 2535 (2003). The evidence in this case more than suggested that a thorough investigation into organic brain damage was necessary. Trial counsel's failure to

thoroughly investigate organic brain damage as a cause for Mr. Rodger's mental health issues was not reasonable and not sustainable under prevailing standards of professional norms and the applicable law.

In this case trial counsel associated Dr. Michael Gamache prior to the Spencer hearing. Trial counsel escorted Dr. Gamache to the jail in order for him to conduct neuropsychological testing on Mr. Rodgers. Dr. Gamache notified counsel by letter of his results, wherein he indicated that Mr. Rogers showed neurological defects consistent with organic brain damage. Trial counsel was aware of this report and was aware that Dr. Gamache's findings were mitigation evidence that differed significantly from the evidence of mental retardation that trial counsel had presented evidence on during the penalty phase. Despite evidence in his hands that Mr. Rodgers' mental health issues stemmed from brain damage and not mental retardation, defense counsel took no further action. Defense counsel did not contact Dr. Gamache to review his findings. Defense counsel did not explore the need for additional neuropsychological testing. Defense counsel did not seek a PET scan. Defense counsel notified the trial court in a footnote in the defense sentencing memorandum

that this evidence had come to his attention. Thus, the facts of this case are that defense counsel conducted some investigation which led to information that Mr. Rodgers has organic brain damage, but he failed to follow through with additional investigation, failed to present this evidence to the trial court at the Spencer hearing, and relegated significant mitigation to a mere footnote.

The State ignores the determinative fact which separates this case from Buzia, Darling v. State, 966 So.2d 366 (Fla. 2007), and Card v. State, 992 So. 2d 810 (Fla. 2008). The fact that defense counsel was provided with information by Dr. Gamache that testing of Mr. Rodgers was indicative of neuropsychological deficits and very inferior cognitive functioning distinguishes this case from the three cases relied on by the State. In Buzia, Darling, and Card trial counsel was told by the retained expert that additional testing was not needed or that the defendant did not demonstrate any evidence of brain damage. When counsel's retained experts do not find evidence of mental health mitigation, counsel may reasonably rely on the qualified expert's opinion. Buzia, Darling, and Card do not sanction actions by an attorney which ignore or overlook an expert's opinion that a defendant suffers from

a particular mental health issue or brain damage.

The State misapprehends the standard set forth in Rompilla v. Beard, 545 U.S. 374, 382-83 (2005), which requires that counsel conduct a reasonable investigation into mitigating circumstances by asserting that in this case counsel was relieved of any responsibility because he does not have to "scour the globe on the off chance something will turn up,".[Answer Brief p. 42-3] There was no "scouring of the globe" required in this case. Trial counsel retained Dr. Gamache, facilitated the testing, received a report, and mentioned the findings in a footnote. Rather, trial counsel's failures in this case are analogous to those of the attorney in Williams v. State, 987 So. 2d 1 (Fla. 2008), who failed to present a psychological report to the sentencing court at the Spencer hearing. This Court reversed the death sentence, finding that counsel's failure to provide the court with mitigation evidence that he "literally had in his hand" constituted deficient performance under Strickland. Trial counsel in this case also had in his hand evidence that Mr. Rodgers has organic brain damage and failed to pursue an thorough investigation of that evidence to make a meaningful presentation to the jury and trial court.

The State erroneously asserts that trial counsel's decision to forgo a thorough investigation and presentation of organic brain damage was a strategic decision. The State's argument that **trial counsel** made a strategic decision to go with mental retardation instead of organic brain damage is not supported by the facts.

A sound strategic decision does not constitute ineffectiveness of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the prevailing professional norms. Hurst v. State, 18 So.3d 975, 1008 (Fla. 2009). A decision to forgo mitigation must be informed. Hurst, at 1012 quoting, Rose v. State, 675 So. 2d 567 (Fla. 1994). In this case there is no evidence that counsel considered and rejected organic brain damage over mental retardation after a thorough and informed investigation and consideration.

Trial counsel Hooper's testimony at the evidentiary hearing regarding Dr. Gamache was rather confusing. Initially Hooper claimed to have no recall of Dr. Gamache being involved in the case and acknowledged contacting Dr. Gamache only after being shown a letter from Dr. Gamache in which it was reported that not only had Mr. Hooper contacted him, but had in fact escorted Dr. Gamache to the

jail. Hooper then admitted that he had "missed" salient information about head injuries suffered by Mr. Rodgers that were contained in Dr. Gamache's report. Dr. Gamache was not retained until after the penalty phase in this case. Any information about brain damage did not come to light until **after** defense counsel had presented the mitigation evidence to the jury at penalty phase. Thus, it cannot be logically argued that at the time of penalty phase Hooper was informed of the organic brain damage, had considered the alternate course of relying on organic brain damage instead of retardation, and rejected organic brain damage as mitigation in order to secure a ban on execution through mental retardation.

The State's argument that Hooper chose retardation because it was an absolute bar to execution over brain damage is absolutely contradicted by Hooper's own statement to the trial court in the Defendant's Memorandum In Favor of A Life Sentence, in which Hooper told the trial court in a foot note that Dr. Gamache's findings were "separate and distinct mitigation, different in character and kind, that must be considered in evaluating the Defendant's culpability and the proportionality of the death penalty in this case." Hooper acknowledged in his testimony that

retardation was a bar to execution, but he never testified that he intentionally chose a strategy of retardation over establishing organic brain damage. The State has failed in the Answer Brief to explain how Hooper's statement and testimony support this ill-taken position. In this case, trial counsel made neither a reasonable investigation nor a reasonable strategic choice based on an untimely and incomplete investigation of organic brain damage.

The State argues that even if Mr. Rodgers has established that trial counsel's performance fell below the prevailing professional norms as Mr. Couture acknowledged that it did, he has failed to establish prejudice. This argument is without merit. Death in not indicated where there is substantial mitigation. Bevel v. State, 983 So. 2d 505, 524 (Fla. 2008), quoting, Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999). This Court has always considered evidence of organic brain damage to be significant.

The State claims that evidence of organic brain damage would not have been beneficial to Mr. Rodgers, but would have been damaging and harmful. This assertion is not supported by the facts. The testimony of Dr. Krop and Dr. Wu did not contain any damaging information that would be dangerous for a jury to hear. Neither found Mr. Rodgers to

have an unsavory diagnosis such as antisocial personality disorder or other negative character traits. Neither Dr. Wu or Dr. Krop testified that the type of brain damage that Mr. Rodgers has resulted in him being a dangerous man prone to excessive violence. The evidence from Dr. Wu and Dr. Krop did not portray Mr. Rodgers as a drug abuser or alcoholic, but rather a man who whose mental defects stemmed from birth and outside his control. His mental deficits were not the result of negative behaviors or attributable to him. The evidence of organic brain damage explained Mr. Rodgers' mental health deficits in a sympathetic manner that was in harmony with the mitigation evidence presented by his family and friends.

A lawyer's basis for believing that mitigation is harmful and excluding it must be sound. Hurst, 18 so.3d at 1012. Trial counsel did not testify in the evidentiary hearing that he believed that any presentation of organic brain damage would have been harmful to the jury. Trial counsel didn't even know about the existence of organic brain damage at the time of the penalty phase. Nor did counsel testify that the evidence of organic brain damage was not worthy of consideration by the trial court or diminished the weight of the other mitigation. Trial

counsel told the trial court to consider this different mitigation in a footnote. Thus, there is no evidence to support the argument that trial counsel had a sound basis for excluding the evidence of organic brain damage from consideration in the equation of determining whether death was an appropriate punishment.

The trial court's order in this case violates the precepts of Porter v. McCollum, 130 S.Ct. 447, 454-55 (2009). Under Porter, the Constitution requires that the sentencer in a capital case be permitted to consider any relevant mitigating factor. The trial court's conclusion that Mr. Rodgers was not prejudiced by the omission of the evidence of organic brain damage fails to take into consideration this requirement. Further, the trail court's findings that effect that organic brain damage of this nature would have on Mr. Rodgers' behavior, emotions, and actions likely stemming from that damage would have undercut the self-defense claim from the guilt phase is not a legitimate basis to deny relief. Mr. Rodgers is not required to present mitigation which excuses his commission of the crime or explains it under Porter. This Court has held that the presentation of mitigation evidence, in particular evidence of brain damage, does not conflict with

a claim of innocence in guilt phase. See, Hurst v. State, 18 So.3d at 1012-13.

The trial court unreasonably discounted the effect that this mitigation might have had on the jury. Mr. Rodgers' does not have to show that the jury would have voted differently, he must establish a probability sufficient to undermine confidence in the outcome. Mr. Rodgers has done this. The evidence presented by Dr. Krop and Dr. Wu was not cumulative or minor. The postconviction evidence would have materially altered the mitigation evidence presented to the jury. Instead of a diagnosis of mental retardation that had significant material challenges as to the legitimacy of the diagnosis, the neuropsychological evidence of organic brain damage from Dr. Krop and Dr. Gamache was not rebutted at the evidentiary hearing. The State's own trial expert evaluated Mr. Rodgers in these proceedings, but was not called by the State to rebut the defense testimony. Dr. Mings was not called by the State in these proceedings to rebut the testimony of Dr. Krop, Dr. Gamache, or Dr. Wu.

Mr. Rodgers has established both prongs of Strickland. The order of the trial court denying relief should be reversed.

ISSUE II

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CONSULT AND CALL AN EXPERT WITNESS IN THE AREA OF CHILD WINTESSES WHO WOULD HAVE ASSISTED IN THE PREPARATION OF CROSS-EXAMINATION OF DETECTIVE CHIOTA AND THE CHILD WITNESSES, ENSURING THAT THE CHILD WITNESSES WERE COMPETENT TO TESTIFY, AND IN CROSS-EXAMINING THE CHILD WITNESSES ABOUT THE INCONSISTENCIES IN THEIR TESTIMONY WITH PREVIOUS STATEMENTS WITH QUESTIONS APPROPRIATE FOR CHILD WITNESSES.

The State relies on Butler v. State, ---So.3d---, 37 Fla. L. Weekly S513 (July 12, 2012), in arguing that defense counsel was not ineffective in failing to utilize a expert in child witnesses to assist during trial and to ensure the competency of the children. If the pretrial procedures that were utilized in Butler had been used in this case, there would be no argument. However, Butler serves to highlight the deficiencies in the procedures used in this case with the child witnesses.

In Butler the defendant's daughter was removed from her mother's bed by the defendant and taken to her own room. The defendant then killed the victim. The six year old child testified that she recognized the defendant, that she heard her mother yell "Stop", saw her father pinning her mother's leg down, and heard her mother screaming as if she was hurt. Prior to trial the child in Butler was

evaluated by a psychologist to asses whether she was competent to testify and to explore whether she was capable of testifying at trial at the request of the State. The child was interviewed twice by the doctor. The child was given an IQ test as part of the evaluation.

Prior to trial the defense filed a motion to determine the competency of the child. The trial court conducted a hearing on the issue of competency in which the videotape of the law enforcement interview with the child was also reviewed by the trial court. The trial court questioned the child at the competency hearing. The child was asked "concerning whether she knew the difference between the truth and a lie, whether she understood when something is make-believe, whether she knew the consequences of telling a lie, and whether she was able to take an oath and make a promise to tell the truth." Butler, at S516. The child was questioned by both the State and defense. The defense objected to the child being found competent to testify. While allowing the child to testify, the trial court agreed with the defense that the officers had shown bias in the videotaped interview with the child.

Mr. Rodger's submits that the procedures that were utilized in Butler should have been done in his case.

ISSUE III

TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO ESTABLISH THAT THE GUN USED IN THIS HOMICIDE BELONGED TO THE VICTIM'S EX-HUSBAND, WILLIE ODUM, AND DID NOT BELONG TO MR. RODGERS.

Mr. Rodgers argued in his collateral proceedings and in this appeal that trial counsel was ineffective for failing to introduce evidence which established that Willie Odum owned the gun used to shoot the victim. Mr. Rodgers presented testimony at the evidentiary hearing that both of the attorneys representing Mr. Rodgers at guilt phase and one of his penalty phase attorneys believed the gun was important evidence for multiple reasons. The fact that Mr. Rodgers did not own the gun nor bring it to the daycare diminished premeditation, highlighted the emotional nature of the case, and the level of emotional stress Mr. Rodgers was under for penalty phase.[VII,T199;312-13;314;346]

Mr. Odum was not served by the defense prior to trial, contrary to the State's assertion.[Answer Brief, p.66] According to the testimony of Junior Barrett and Rowana Williams the defense requested that Odum be served, but it was learned that he could not be located and had not been served.[VII,T314;346] Thus, trial counsel was on notice that if evidence that Odum owned the gun was going to be

admitted it would have to be done with documentary evidence.

The State asserts that because defense counsel attempted to introduce documentary evidence establishing ownership and the trial court sustained the State's hearsay objection, the issue should have be raised on direct appeal and is not a cognizable postconviction claim. This is incorrect.

The trial court properly sustained the State's objection as hearsay because trial counsel had not procured the necessary witnesses under Section 990.803(6)(Fla. 2006). Contrary to the State's assertion that the trial lawyers "did all they could", trial counsel did not do all they could.[Answer Brief p. 67] Trial counsel could have procured the necessary witnesses to establish the ownership of the gun through the business records exception codified in Section 90.803(6)(Fla. 2006).

Since the trial court's ruling was correct based on defense's counsel's failure to have the proper witnesses present to testify and thus satisfy the requirements of the evidence code, there was no appellate issue. Appellate counsel has no duty to raise a meritless claim on direct appeal and cannot be found ineffective for failing to do

so. See, Pietri v. State, 885 So.2d 245, 273 (Fla. 2004); Rutherford v. Moore, 774 So.2d 637 (Fla. 2000). Appellate counsel would have no duty to raise a claim on direct appeal that trial counsel was ineffective in failing to have procured the necessary witnesses to testify to satisfy the evidentiary requirements for the admission of a business record under Section 90.803(6). Claims that trail counsel failed to introduce evidence and call a witness are not cognizable on direct appeal. See, Nairn v. State, 978 So.2d 268 (Fla. 4th DCA 2008).

The State's argument that the question of whether or not trial counsel was ineffective for failing to call witnesses is without merit and should be rejected.

ISSUE IV

THE TRIAL COURT ERRED IN DETERMINING THAT MR. RODGERS KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO "DRESS OUT" BEFORE THE JURY AND INSTEAD APPEARED IN JAIL CLOTHING DURING PENALTY PHASE.

The State's argument that Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) stands for the proposition that a defendant does not have a right to appear in street clothes in front of a jury is wrong. Estelle recognized a defendant's constitutional right to appear in front of a guilt phase jury under the Fourteenth

Amendment to the United States Constitution. Thus, it is the defendant's right to waive, not the desire of defense counsel. The State cites to no authority for the specious claim otherwise.[Answer Brief, p.69]

The State relies to their detriment on Felker v. Thomas, 52 F.3d 907, 911-12 (11th Cir. 1995). In 2005 the United States Supreme Court rejected the rationale of Felker in Deck v. Missouri, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005) by specifically holding the considerations that apply to the wearing of jail garb at the guilt phase apply at the sentencing stage of a capital trial. The State's assertion that Mr. Rodgers had "red on his ledger and was in no position to pretend otherwise" is in direct contradiction with the United States Supreme Court's opinion in Deck. The State offers no explanation for why this Court is being urged to follow a seventeen year old 11th Circuit case whose rational was rejected seven years ago by the United States Supreme Court.

The State seems to assert that the law does not require Mr. Rodgers to knowingly and voluntarily waive his Fourteenth Amendment right to appear before his jury dressed out and that no hearing is required in which the defendant waivers that right.[Answer Brief p. 68] The State

claims that no case was cited which "requires a judge to conduct a hearing on the voluntariness of every event during the trial." [Answer Brief, p.68] The State must have overlooked the citation and argument in the Initial Brief to Parker v. State, 831 So.2d 725 (Fla. 4th DCA 2002). In Parker the appellate court held "The crux of the issue is whether the defendant knowingly waived his right to appear in non-prison clothing. The record reflects that his lawyer discussed the clothing issue with him and advised him to wear jail pants instead of prison pants. It is unclear whether the defendant knew he had a choice other than wearing prison or county-jail pants." Clearly a hearing to determine whether a defendant knowingly and voluntarily waives his right to appear in street clothes is required, for absent such a hearing it cannot be determined the factual circumstances of the waiver. Mr. Rodgers cited to case law which requires a hearing.

The State's remaining arguments are unpersuasive and without merit. Mr. Rodgers is entitled to relief on this claim.

CONCLUSION

Mr. Rodgers respectfully requests that the order of the trial court denying relief be reversed. The arguments,

citations of law, and other authorities presented in the Initial and Reply Briefs warrant such relief. Mr. Rodgers is entitled to a new trial, a new penalty phase, or, in the alternative, to have the sentence of death vacated in favor of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing Reply Brief has been furnished by U.S. Mail to the Office of the Attorney General, ASAG Mitchell Bishop, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32119, this ___ day of August, 2012.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of font used in the preparation of this Reply Brief is Courier New 12 point in compliance with Fla. R. App. P. 9.210(a)(2).

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