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IN THE SUPREME COURT OF FLORIDA

NO.SC12-2465

BRETT A. BOGLE,

Petitioner,

v.

MICHAEL D. CREWS,
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

LINDA MCDERMOTT
Florida Bar No. 102857
McClain & McDermott
20301 Grande Oak Blvd.
Suite 118 - 61
Estero, FL 33928
Telephone (850) 322-2172
Facsimile (954) 564-5412

COUNSEL FOR PETITIONER

I. FELONY MURDER INSTRUCTION WHERE STATE FAILED TO CHARGE AN UNDERLYING FELONY

In It's Response, the State argues that "appellate counsel cannot be deemed ineffective for failing to raise" this issue as trial counsel failed to object at trial and the issue lacks merit. See Response at 2.

However, failure of appellate counsel to raise the issue of faulty jury instructions (even where trial counsel did not raise an objection) constitutes fundamental error requiring reversal. See Fla. Jur. Crim. Pro. § 517 2d; see also Permenter v. State, 953 So. 2d 647 (Fla. 4th DCA 2007). In Permenter, the court found appellate counsel to be ineffective where counsel failed to raise "an issue concerning the so-called 'forcible felony exception,' which negated his claim of self-defense. *See Giles v. State,* 831 So. 2d 1263, 1265 (Fla. 4th DCA 2002); *Zinnerman v. State,* 92 So. 2d 932, 933 (Fla. 5th DCA 2006)." Permenter, 953 So. 2d at 647. In doing so, the court stated that giving the faulty jury instruction was fundamental error. Id.; see also Thomas v. State, 831 So. 2d 253 (Fla. 3rd DCA 2002)(holding incorrect jury instruction on defense of justifiable use of deadly and non-deadly force constitutes fundamental error if there is a reasonable probability that the instruction may have led to the conviction); Bonilla v. State, 87 So. 3d 1222 (Fla. 3rd DCA 2012)(granting habeas relief on the basis of ineffective assistance of appellate counsel, where petitioner was convicted

of murder in the second degree after the jury was erroneously instructed on the lesser included offense of manslaughter, counsel failed to raise issue on appeal, and the deficiency of that performance compromised the appellate process to such a degree as to undermine the confidence in the fairness and correctness of the appellate result).

As to the merits of Mr. Bogle's claim that the trial court erred in instructing the jury on felony murder where the underlying felony of sexual battery was not charged, Respondent is incorrect in his assertion that Mr. Bogle's claim is based on his "false" statement that he was "only charged with premeditated murder in the indictment." Response at 4. Mr. Bogle's claim is based on the fact that his jury was instructed on felony murder where he was not charged with the underlying felony of sexual battery (T. 594-5). The indictment charged Mr. Bogle with four counts: (1) first degree murder; (2) burglary of a dwelling with assault or battery; (3) retaliation against a witness; and (4) robbery (R. 24-7).

Irrespective of the cases cited by Respondent (Hannon, Anderson, Kearse, and Knight), instructing the jury on felony murder where no underlying felony was charged violated Mr. Bogle's rights under the state and federal constitutions. See Givens v. Housewright, 786 F.2d 1379 (9th Cir. 1986). In Givens, the State did not charge felony murder due to a lack of evidence. The jury never found Mr. Bogle to be guilty of sexual battery

beyond a reasonable doubt. Thus, the felony murder jury instruction is a violation of due process because the jury did not find Mr. Bogle guilty beyond a reasonable doubt of every element of the offense.

Respondent also misstates the law because this Court has not held that "a trial court is required to give an instruction when there is any evidence to support it." Response at 5. And, the cases cited by Respondent do not support this assertion. Indeed, in Parker v. State, 458 So. 2d 750 (Fla. 1984), which was cited by Respondent, the court held that the Defendant has the right to a jury instruction on an independent act of a co-felon where any evidence is presented to support the Defendant's theory of an independent act. And, in Steward v. State, 558 So. 2d 416, 420 (Fla. 1990), also cited by Respondent, the court held that the trial court is required to instruct on all aggravating and mitigating circumstances for which evidence is presented. Thus, Parker and Stewart do not support Respondent's position that the trial court is required to give jury instructions on crimes that have not been charged.

Further, Respondent's argument that this claim lacks merit because the direct appeal opinion held that the evidence presented was sufficient to prove the aggravating factor of committed during the course of a sexual battery misses the point. See Response at 5. Mr. Bogle's guilt phase jury returned a general verdict of guilty. There was insufficient evidence

presented at trial as to Margaret Torres' being the victim of a sexual battery as is fully outlined in the Petition. That jury recommended death by a vote of seven to five, but the trial court granted a new penalty phase due to the prosecutor's due process violations. The second penalty phase jury did not have the opportunity to hear the entire trial testimony that would have undermined the sexual battery aggravator.

Appellate counsel's failure to raise this claim constitutes a specific, serious error that deviated from the norm and fell outside the range of professionally acceptable performance, and that deficient performance prejudiced Mr. Bogle's appeal to the extent that confidence in the fairness and correctness of the outcome is undermined. See Wyatt v. State, 71 So. 3d 86 (Fla. 2011). Habeas relief is required.

II. SPECIAL JURY INSTRUCTIONS REGARDING HAIR EVIDENCE

Appellate counsel's failure to raise the trial court's refusal to give Mr. Bogle's requested special jury instructions as to the hair evidence was ineffective because, as Respondent points out: "[i]ssues regarding the propriety of jury instructions are issues that should have been raised on direct appeal." Response at 7-9 citing Griffin, 866 So. 2d at 14-15.

The trial court abused it's discretion in refusing to give Mr. Bogle's special requested jury instructions where the instructions met the requirements of Stephens v. State, 787 So. 2d 747, 756-7 (Fla. 2001) because: (1) the special instruction

was supported by the evidence; (2) the standard instruction did not adequately cover the theory of defense; and (3) the special instructions were correct statements of the law and not misleading or confusing. Further, the requested jury instructions were not impermissible comments on the evidence. This Court defined what is an "impermissible comment on the evidence in Walker v. State:

> A forbidden comment on the evidence or a charge as to matters of fact would consist of comments such as an expression of opinion as to the credibility of one witness' testimony as opposed to that of another witness, or the expression of a view that one piece of evidence should be given more weight than is given to specified conflicting evidence. ***It is not a comment on the evidence for a judge to explain the legal significance which the law attaches to a particular factual finding*** *provided that it is clear to the jury that the judge is not expressing an opinion as to the existence or non-existence of the underlying facts.*

896 So. 2d 712 at 717, citing Hall v. State, 473 A. 2d 352, 356 (Del. 1984).

Indeed, instructing the jury that in order for the hair to be relevant evidence, the hair would have had to been transferred at the time of the crime is a statement of law supported by Ivey v. State, 176 So. 2d 611 (Fla. 3rd DCA 1965). And, Mr. Bogle's second requested instruction as to the scientific reliability of hair analysis is likewise a correct statement of law. See Scott v. State, 581 So. 2d 887, 892 (1991); see also Horstman v. State, 530 So. 2d 368 (Fla. 2nd DCA 1988). The standard jury instruction on circumstantial evidence and the reasonable doubt

jury instructions do not inform the jury of either of these legal principles. The testimony presented by the prosecutor through FBI Agent Malone was circumstantial evidence cloaked in the guise of scientific evidence. The prosecutor relied heavily on Malone and his microscopic hair analysis that was conducted on the hair found on Mr. Bogle's pants. Malone testified that the hair matched Torres' pubic hair. Cox argued to the jury:

> ... [T]he Hillsborough County Sheriff's Office continued their investigation and enlisted the help of **the greatest crime laboratory in the world**, the FBI Crime Laboratory and you've heard from **many experienced professional forensic experts and all the investigation that they didn't contradict what was already abundantly clear**. They found a pubic hair that was microscopically consistent and in every characteristic that was identifiable to the pubic hair of Margaret Torres in the crotch of the pants that Brett Bogle so hastily washed... .

(R. 556-7)(emphasis added). Cox also addressed the defense's argument regarding the hair in her closing to the jury:

> ... He may argue to you that there was a small fragment of hair found somewhere on Margaret Torres that was not her's or the defendants. But we have no idea how long that was there. We have no idea. You know, she could have picked it up from a bar stool; she could had picked it up by any manner of transfer. It's not like a pubic hair in the crotch of the pants he was wearing. That's not something that you just pick up by a casual encounter. That's not something that he picked up in that several minute long conversation with her in a bar.

(R. 559-60).

The Prosecutor's bolstering of Malone's testimony in regard to the hair and her misrepresentation of the evidence (Malone did not testify that the hair that he believed "matched" Margaret

Torres' pubic hair came from the crotch of the white pants), contributed to the necessity of the jury to be instructed with Mr. Bogle's requested jury instructions. Further, the instructions were supported by the evidence, given that there was testimony that Mr. Bogle had contact with Ms. Torres prior to her murder. The prosecutor's argument is unfairly prejudicial because she is trying to have it both ways – on the one hand she argues that the non-matched hair could have been picked up at any time; whereas the "pubic" hair could have only been picked up during intercourse.

The trial court's refusal to give the instructions so tainted the trial that there can be no faith in the fairness of the outcome. Appellate counsel was ineffective in failing to raise this issue on direct appeal. Appellate counsel's performance fell well below the acceptable standard for effective representation in a capital case. Habeas relief is required.

III. CONSIDERATION OF INAPPLICABLE AGGRAVATORS

Appellate counsel was ineffective to the extent counsel failed to effectively present and argue the issue of the inapplicable aggravators that were applied in Mr. Bogle's case. In it's Response, Respondent fails to address Mr. Bogle's argument that where the prior felony is substantially related to the murder, as it was according to the Prosecutor's theory here, the crimes are part of one lengthy criminal activity. Mr. Bogle relies on his argument as presented in his Petition. Habeas

relief is required.

IV. GRUESOME PHOTOGRAPHS

Mr. Bogle stands by the facts and argument presented in his Petition. Habeas relief is required.

V. TRIAL COURT'S EXCLUSION OF MITIGATING EVIDENCE

Respondent argues that appellate counsel was not ineffective in failing to raise the issue of the trial court's exclusion of the mitigating evidence of Mr. Bogle's drug use during the time period leading up to the crime because trial counsel failed to make a proffer when the trial court sustained the prosecutor's objection. See Response at 26. Respondent also seeks to trivialize this evidence which trial counsel sought to elicit from Mr. Bogle's mental health expert. Respondent argues that the trial court's exclusion of Dr. Gonzalez' answer to the question about Mr. Bogle's drug use during the time period prior to the crime was harmless error because there was "little evidence about drug and alcohol dependency around the time of the murder." Response at 28. This argument is nonsensical. The evidence about Mr. Bogle's drug and alcohol use prior to the crime is lacking because the trial court excluded Mr. Bogle's mental health expert from answering trial counsel's question. Trial counsel was attempting to elicit testimony about what Mr. Bogle's friends and family had told him about this subject.

Further, Respondent seeks to nullify the effect of the trial court's exclusion of mitigation by arguing that the family

members at the penalty phase did not offer explicit evidence of Mr. Bogle's drug use during the time period leading up to the crime. However, trial counsel was not required to elicit the testimony in a specific way. Rather, trial counsel wanted to elicit the testimony form his mental health expert who could then explain how Mr. Bogle's drug use prior to the crime was directly relevant to Dr. Gonzalez's expert opinion and the bearing the drug use had on establishing the statutory and nonstatutory mitigation. Here, the trial court refused to give any significant weight to the mental health statutory mitigator that Mr. Bogle's capacity to appreciate the criminality and conform his conduct to the requirements of the law was substantially impaired and to the nonstatutory mitigator of drug abuse prior to the crime precisely due to a lack of evidence. Thus, the trial court limited Mr. Bogle's presentation of mitigation and then refused to give the mitigation he attempted to present weight based on a lack of substantiation. The trial court violated Mr. Bogle's right to due process.

Appellate counsel's failure to raise this issue on direct appeal as fundamental error and as ineffective assistance of trial counsel (for failing to make a proffer of the evidence) falls below "the range of acceptable performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1964).

Further, the Eighth and Fourteenth Amendment requirements as outlined in Lockett v. Ohio, 438 U.S. 586 (1978) and Hitchcock v. Dugger, 481 U.S. 393, 399 (1987), mandate that Mr. Bogle have the opportunity to present any and all mitigation to his penalty phase jury and supercede state court evidentiary rules with regard to proffering evidence. See Response at 30.

Respondent's argument that "the Eighth Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted" and citation to Oregon v. Guzek, 546 U.S. 517, 526 (2006), fails to recognize Lockett and Hitchcock. See Response at 31. The trial court's refusal to allow Mr. Bogle's mental health expert to inform the penalty phase jury of the information that he gleaned from Mr. Bogle's family as to Mr. Bogle's drug use prior to the crime was not "reasonable." The ruling violated the constitution as explained in Lockett, Hitchcock and their progeny.

The cases cited by Respondent do not support the contention that the trial court may prohibit a mental health expert from informing the jury of the people that the expert spoke with and what they said in reaching the expert's conclusions. In Mendoza v. State, 87 So. 3d 644, 666 (Fla. 2011), this Court dealt with the admission of "materials" relied on by an expert into evidence and in Linn v. Fossum, 946 So. 2d 1032, 1036-39 (Fla. 2006), this Court addressed the issue of experts testifying as to their

consultations with other experts who did not review the underlying data in a civil matter. Neither of these cited cases are applicable to the current matter.

And, testimony that defendant did not appear to be intoxicated is not relevant as to the drug use or to the effects of prior drug use on Mr. Bogle's mental health, brain functioning or his actions at the time of the crimes.

Respondent's argument that the jury had "ample evidence before it regarding Defendant's substance abuse" does not address the problem with the trial court's excluding Dr. Gonzalez from testifying about what family members told him about Mr. Bogle's substance use prior to the crime - it is what family members told Dr. Gonzalez that informed his opinion as to the statutory mitigator and went to weight of that evidence, which the trial court ultimately found to be lacking. See Response at 33. Habeas relief is required.

VI. RING

Appellate counsel was ineffective in failing to raise the issue of Florida's unconstitutional capital sentencing scheme. Appellate counsel's failure to raise this claim constitutes a specific, serious error that deviated from the norm and fell outside the range of professionally acceptable performance, and that deficient performance prejudiced Mr. Bogle's appeal to the extent that confidence in the fairness and correctness of the outcome is undermined. See Wyatt v. State, 71 So. 3d 86 (Fla.

2011). Habeas relief is required.

VII. PROSECUTORIAL MISCONDUCT

Respondent argues that this claim is not properly made in a habeas petition. However, arguments concerning the ineffective assistance of appellate counsel are properly raised in a petition for writ of habeas corpus. Mr. Bogle's argument is based on appellate counsel's failure to raise this issue on direct appeal.

Further, the Prosecutor's improper, inflammatory, prejudicial comments to Mr. Bogle's jury so tainted Mr. Bogle's trial that it 'reach[ed] down into the validity of the trial itself to the extent that a verdict of guilty could not could not have been obtained without the assistance of the alleged error.' Braddy v. State, 37 Fla. L. Weekly S703, S710-13 (Fla. Nov. 15, 2012), citing Brooks v. State, 762 So. 2d 879, 899 (Fla. 2000). Further, a prosecutor's unobjected to, improper comments to the jury are subject to fundamental error review. See Braddy, 37 Fla. L. Weekly at S703 (stating: "[a]s for those comments to which Braddy did not object at trial but now appeals, we apply fundamental error review."). In analyzing the prosecutor's improper comments, the Court does not "review each of the allegedly improper comments in isolation; instead, [the court] examines 'the entire closing argument with specific attention to the objected-to ... and the unobjected-to arguments' in order to determine 'whether the cumulative effect' of any impropriety deprived [the Defendant] of a fair trial.". Card v. State, 803

So. 2d 613, 622 (Fla. 2001)." Id. When the comments in question are analyzed in their entirety within the context of Mr. Bogle's trial, the effect on the jury rises to the level of fundamental error.

Respondent's argument that the prosecutor's comments bolstering the State's case were not improper because the comments were responsive to a defense theory is not an accurate representation of the comments in question. The prosecutor's generalized statements that the Sheriff deputies did "everything they could"; conducted "a very thorough investigation"; and "followed every lead"; and used "the greatest crime laboratory in the world" are **not comments that are responsive to the defense theory** - they are generalized comments that bolster the State's case to the jury. Comments that would be "responsive" to Mr. Bogle's cross-examination of the State's witnesses would be specific comments about the investigation, for example: "the Sheriff checked the entire wall for prints" or discussion of specific leads that the Sheriff followed up on; or reminding the jury of Agent Malone's training, experience and protocols.

And, Respondent's argument that the prosecutor's incendiary statements to the jury that Mr. Bogle was somehow inhumane and indifferent to evil were a proper response to the defense's argument that Mr. Bogle would not have asked the Alfonso's for a ride if he had just murdered Margaret Torres similarly fails. The prosecutor's comments were not based on the evidence, they

served to paint Mr. Bogle as a monster unworthy of a reasonable weighing of evidence by the jury.

Further, it is not outside the realm of what Respondent calls an "ordinary" person to approach people that they have heated disagreements with, or to approach people that they barely know while in a social setting like a bar. Response at 44. This is not evidence that Mr. Bogle did not interact with people in a "normal fashion." Response at 44.

Respondent's Response attempts to gloss over the fact that Malone did not match the hairs that he analyzed to specific areas of the white pants so there was no way of knowing that the hair that allegedly matched Ms. Torres' public hair was found in the crotch of the white pants. See Response at 44. However, as the prosecution presented the evidence in order to link Mr. Bogle to the crime, the prosecutor's position which it established through the misrepresentation of the evidence and by bolstering the witnesses, was devastating. Habeas relief is required.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Bogle respectfully urges this Court to grant habeas corpus relief.

CERTIFICATION OF TYPE SIZE AND STYLE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing reply has been furnished by electronic transmission to Candance M. Sabella, Chief Assistant Attorney General, this 15th day of July, 2013.

/s/. Linda McDermott
LINDA McDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
20301 Grande Oak Blvd.
Suite 118 - 61
Estero, Florida 33334
(850) 322-2171
lindammcdermott@msn.com

COUNSEL FOR MR. BOGLE