IN THE SUPREME COURT OF FLORIDA
CASE NO. SC12-205

QUAWN M. FRANKLIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT FOR LAKE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

Maria Perinetti
Florida Bar No. 0013837
CAPITAL COLLATERAL REGIONAL COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813-740-3544

Counsel for Appellant

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ARGUMENT

The Appellant relies on the arguments presented in his Initial Brief. While he will not reply to every issue and argument raised by the Appellee, he expressly does not abandon the issues and claims not specifically replied to herein.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING FRANKLIN'S CLAIM THAT COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL.

In Argument II of his Initial Brief, Mr. Franklin argued that trial counsel provided prejudicial ineffective assistance during the penalty phase of his capital trial. Initial Brief of Appellant at 33-79.

According to the Appellee, Mr. Franklin "erroneously asserts" in his Initial Brief that "trial counsel failed to obtain a presentencing investigation report from 1993 when Franklin was a juvenile, records regarding Franklin's hearing deficits, and school records" because "the testimony at the evidentiary hearing was equivocal as trial counsels Grossenbacher and Nacke could not recall whether the defense obtained this specific information." Answer Brief of Appellee at 44. The predisposition report and presentencing investigation report from 1993, which were contained in Mr. Franklin's court file in Pinellas County case number 92-

16073, were sealed by nearly identical court orders. The orders state that, pursuant to Rule 3.712, Florida Rules of Criminal Procedure[1], they are "sealed in the Court file and subject to opening only by any Judge of the Court." PC9/1687; PC19/3700. Although Pinellas County case number 92-16073 was not used by the State as an aggravator, trial counsel was aware of this conviction, and one of the mitigating factors that they unsuccessfully argued to the trial court was that "[a]t 15 years of age, Quawn was sentenced to adult prison for 1 year for the theft of an automobile." R4/744. Pursuant to the aforementioned order, trial counsel would not have been able to view the predisposition report or presentencing investigation report without a court order, similar to the order obtained by postconviction counsel in 2011. PC6/1051-52. There is no evidence in the record on appeal that trial counsel sought or obtained such an order. Additionally, trial counsel testified

[1] Rule 3.712, Florida Rules of Criminal Procedure, reads:

> Presentence Report: Disclosure
> The presentence investigation shall not be a public record and shall be available only to the following persons under the following stated conditions:
> (a) To the sentencing court to assist in determining the appropriate sentence.
> (b) To persons or agencies having a legitimate interest in the information that it would contain.
> (c) To reviewing courts if relevant to an issue on which an appeal has been taken.
> (d) To the parties as Rule 3.713 provides.

at the evidentiary hearing that they could not recall making any efforts to obtain either these reports or other records regarding Mr. Franklin's hearing impairments. PC25/4537, 4539, 4574, 4584. The evidence presented during postconviction, as well as the lack of an order which would have allowed trial counsel access to the 1993 predisposition report and presentencing investigation report, overwhelmingly establishes that trial counsel did not obtain these records. Trial counsel provided deficient performance by "ignoring these pertinent avenues for investigation" of which they were aware. *Simmons v. State*, No. SC10-2035, slip. op. at 45 (Fla. October 18, 2012) (citing *Porter v. McCollum*, 130 S.Ct. 447, 453 (2009)).

The Appellee cites Mr. Nacke's testimony that he recalled seeing Mr. Franklin's school records from Lake County in his file. Answer Brief of Appellee at 44. Mr. Nacke's testimony regarding the school records was as follows:

> Counsel: Well, let me ask about school records. Do you remember obtaining school records or not?
>
> Mr. Nacke: From reviewing the file, I think we tried to – Mr. Stone wrote a letter to a Lake County School Board and I think he got an answer, if I recall, that they didn't have any records of Mr. Franklin's, but I'm not sure. I think there were a very few from Pinellas County, just a couple pages of things, from reviewing the file.
>
> Counsel: Okay. Do you recall any additional efforts to obtain school records?
>
> Mr. Nacke: No, sir.

PC25/4571. Mr. Grossenbacher testified, "I don't think I ever saw any school records for Mr. Franklin." PC25/4537. Assuming *arguendo* that Mr. Nacke is correct and trial counsel did obtain a couple of pages of school records from Pinellas County, that is far less than the 36 pages of school records from both Lake County and Pinellas County that were obtained by CCRC-Middle and introduced at the postconviction evidentiary hearing. PC9/1649-86. Trial counsel provided deficient performance when they failed to obtain Mr. Franklin's complete school records. *See Rompilla v. Beard*, 545 U.S. 374, 382 (2005) (citing school records as one source of mitigation that trial counsel failed to obtain).

The Appellee argues that Mr. Franklin failed to establish prejudice under *Stickland* because the testimony presented at the postconviction evidentiary hearing was substantially cumulative to that presented during the penalty phase. Answer Brief at 45-48. As Mr. Franklin demonstrated in his Initial Brief, although there was some overlap, the evidence presented during postconviction went far beyond the evidence that was presented at trial. Initial Brief of Appellant at 33-79. The following information, while not an exhaustive list, was unknown to the jury and the sentencing judge:

- Mr. Franklin's mother suffered from epilepsy and seizures since before he was born, and she passed away at the age of 36, when

Mr. Franklin was only seventeen years old. PC24/4224, 4232, 4289-90, 4313. She may have been taking seizure medications when she was pregnant with Mr. Franklin, which can affect the child's development. PC24/4239-40, 4278-79; PC25/4485-86.

- Mr. Franklin's father, Hillard, did not know that Mr. Franklin was his son until Mr. Franklin was a teenager. PC24/4334, 4349. Mr. Franklin's father was incarcerated at times, and he had little contact with Mr. Franklin. PC25/4487. After his mother took him back from Mr. and Mrs. Thomas at age eight, Mr. Franklin did not have any significant father figures in his life. PC25/4508.

- Mr. Franklin was identified in his school records as emotionally disturbed and emotionally handicapped. PC24/4373; PC25/4491-92.

- Mr. Franklin has very low intellectual functioning, with a full scale IQ of 79. PC24/4369-70, 4378.

- Mr. Franklin was born with a significant hearing impairment, which was not addressed until he was fourteen years old. PC24/4383-85; PC25/4498-99. One of the doctors who treated him expressed concern in a letter that Mr. Franklin's behavioral problems were linked to the hearing impairment. PC24/4386; PC10/1848. Both Dr. Caddy and Marjorie Hammock described the negative effects that unrecognized hearing deficits can have on a child.

- Mr. Franklin suffers from a delusional disorder, "a psychosis in which the individual takes on an irrational distorted belief system that becomes the essence of who he is." PC24/4412.

This evidence would have informed the judge and jury about "the kind of troubled history [the United States Supreme Court has] declared relevant to assessing a defendant's moral culpability." *Porter*, 130 S.Ct. at 454 (quoting *Wiggins v.*

Smith, 539 U.S. 510, 535 (2003)). When the totality of the available mitigation evidence, including both the evidence that was presented at trial and the evidence that was introduced during postconviction, is reweighed against the evidence in aggravation, the confidence in the outcome of the proceedings is undermined. *Porter*, 130 S.Ct. at 453-54. The lower court failed to conduct such an analysis in this case. PC7/1204-05.

ARGUMENT IV
THE CIRCUIT COURT ERRED IN SUMMARILY DENYING CLAIMS III AND IV OF FRANKLIN'S MOTION FOR POSTCONVICTION RELIEF.

In Argument IV of his Initial Brief, Mr. Franklin argued that the circuit court erred in summarily denying Claims III and IV his motion for postconviction relief, which concerned ineffective assistance of counsel for failing to effectively conduct voir dire and ineffective assistance of counsel for failing to file a motion for change of venue. Initial Brief of Appellant at 83-100.

According to the Appellee, Mr. Franklin was not "functionally devoid of counsel" during voir dire because "the voir dire proceedings in this case covered over 350 transcribed pages, and a review of the record clearly shows that trial counsel questioned the venire on matters related to the case, including extensive questioning regarding the prospective jurors' views on the death penalty." Answer Brief of Appellee at 58. Drs. Bronson and Rountree address the length of the voir

dire in their report and describe why "[t]he questioning was superficial and limited." They explained:

> The entire death qualification lasted 59 pages of the transcript, 82 of which defense counsel's portion consumed only 22 pages, far less than what one typically sees in death qualification, and certainly less than what was necessary in the Franklin case. It should also be noted that the Court had already expressed its great annoyance that the case knowledge portion of the voir dire had taken 30 minutes and the entire voir dire had already taken two-and-one-half hours. The Court told the prosecutor that he had "60 minutes remaining to find of you can get a fair and impartial jury," so it may be true that defense counsel's fragmentary voir dire was to some extent because he wanted to avoid antagonizing the Court, but the result was a seriously inadequate voir dire for which the major responsibility lies with defense counsel who made no attempt to conduct a voir dire meeting professional standards. Also, in our experience, a 361-page voir dire transcript is very short in a case that raised very difficult issues of significant pretrial publicity, death qualification, a black defendant with a white victim, and the other standard issues. Defense counsel began his death qualification by rehabilitating those who favored the death penalty, the very ones he should have been questioning to establish cause challenges. The questioning was superficial and very limited.

PC6/1016.

The Appellee further argues that "there was no valid legal basis for trial counsel to raise a motion for a change of venue because the venire in April, 2004, was generally unaware of Franklin's crimes which occurred in December, 2001." Answer Brief of Appellee at 62. Drs. Bronson and Rountree described the substantial pretrial publicity surrounding Mr. Franklin's cases:

> The case at bar involved the attempted armed robbery and the first

> degree murder of security guard Jerry Lawley. To be sure, there was substantial pretrial publicity about the Lawley case, but as the above publicity analysis demonstrates, the Lawley case was not the major source of public attention. Much more media attention was devoted to the murder of John Horan, the pizza delivery man, and somewhat less so to the attack on Alice Johnson. All three of these cases arose within a very short time span, and in fact were characterized by the media (and by one jury panel member) as a spree.

PC6/1005. Although the jury panel was briefly informed of the facts of the Lawley case during voir dire, potential jurors were never questioned about the Johnson or Horan cases, which received considerable media coverage. Therefore, we cannot say whether there was actual prejudice in this case. As Drs. Bronson and Rountree explained in their report:

> As previously noted, the major source of prejudice to Mr. Franklin in his trial for the Lawley murder was the coverage of the other two cases, particularly the media's extensive reporting of the murder of Pizza Hut delivery man Horan. That coverage inextricably linked the Lawley and Johnson cases to the Horan case, yet the Lawley voir dire ignored the seamless web of reporting, thus missing jurors' knowledge of the prejudice generated by the connection and the composite picture. By doing so, they jeopardized Mr. Franklin's fair trial rights.

PC6/1001. They concluded that they "strongly believe it did not show that level of prejudice [actual prejudice], not because of its non-existence, but precisely because no one involved in the voir dire inquired about it in a manner that was likely to reveal it." PC6/1005.

If a defendant cannot demonstrate actual prejudice, which is the case here, he may be able to demonstrate that he is entitled to a change of venue by establishing that there is presumed prejudice. *See Coleman v. Kemp*, 778 F.2d 1487, 1489 (11th Cir. 1985) ("Prejudice is presumed from pretrial publicity when the pretrial publicity saturated the community where the trials were held."). Drs. Bronson and Rountree analyzed the population and demographics of Lake County, Florida, and pretrial publicity surrounding Mr. Franklin's cases using the four factors the Supreme Court took into account in *Skilling v. United States*, 130 S.Ct. 2896 (2010), for determining whether the presumption of prejudice applies: 1) the size and characteristics of the community, 2) the content of the pretrial coverage, 3) the time period between the pretrial news coverage and the trial, and 4) the jurors' verdict at trial. PC6/973-82. They concluded that the "the factors outlined in the *Skilling* case strongly indicate that the pretrial publicity in Franklin's case generated the presumption of prejudice." PC6/975. They stated in their report that:

> The U.S. Supreme Court's decision in *Skilling v. United States* outlines reasons why we believe that the coverage in Franklin's case was sufficient to trigger the presumption of prejudice. The size of Lake County was less than one-tenth the size of Southern District of Texas in Houston, increasing the likelihood that potential jurors in Lake County were exposed to the coverage. The content of the coverage in Franklin's case included a "smoking-gun" confession.

> Several articles [that]were published in the days and weeks leading up to the Lawley jury selection contained inadmissible evidence. These articles potentially refreshed the public's memory of evidence that was inadmissible in the guilt phase of Franklin's trial, and that was covered extensively in the years between the first reports of Horan's murder, and the Lawley jury selection. The Skilling court noted that crimes like those committed by Skilling "*did not present the kind of vivid, unforgettable information we have recognized as particularly likely to produce prejudice* "because the crimes in Enron were financial crimes. *Skilling,* 130 S.Ct. 2896, 2916. The crimes at issue in this case present the "*vivid, unforgettable information*" that is likely to produce prejudice. Finally, the jury's verdict in Franklin's trial for Lawley's murder was swift, unanimous, and unambiguously against Franklin. Thus, in our opinion, the pretrial publicity in Franklin's case contained the kind of information that was sufficient to trigger the presumption of prejudice under the framework outlined in the *Skilling v. United States* decision.

PC6/981-82. A content analysis of the pretrial publicity in this case similarly led Drs. Bronson and Rountree to conclude that "[g]iven the extent of the media coverage of this case, plus the unusually prejudicial nature of that coverage, the media coverage provides strong evidence in support of the need for a change of venue under either the federal or state standard." PC6/984-1004.

The circuit court was critical of the proposed example questions offered by Drs. Bronson and Rountree in their report (PC6/1007-08), which trial counsel could have used to probe the jury about their knowledge of the Johnson and Horan cases:

> Additionally, the proposed example questions made by these two (2)

> experts found on page 45 of their report begs comment. This case concerns only the shooting and killing of a security guard and has nothing to do with the two other cases.
>
> The Court believes that if trial counsel had followed the expert suggestions on page 45 of their report we would all be here listening to an argument by collateral counsel that trial counsel went too far by alerting the prospective jurors of the other cases of which the defendant was involved.

PC6/1066. While the circuit court is correct that the case at hand concerns only the killing of a security guard (although the Johnson and Horan cases were used as aggravators in the penalty phase), the other two cases are a relevant concern. Because of the extensive media coverage surrounding those cases, there is a danger that the potential jurors may have heard about those cases, and would not be able to be fair and impartial. Perhaps there was not a way to effectively question the jurors about the Johnson and Horan cases without alerting the jurors to their existence. Drs. Bronson and Rountree observed, "[i]t seems like a dubious proposition that if there was a serious question about whether trial counsel committed IAC in failing to file a change of venue motion that a prime means of the discovery of the IAC would be blocked by committing IAC during the voir dire." PC6/1005. Given the level of media coverage surrounding the Johnson and Horan cases in Lake County, if there was no way for trial counsel to question the prospective jurors about their knowledge of the Johnson and Horan cases without

committing IAC, the only way to ensure that Mr. Franklin received a fair trial would have been a change of venue.

CONCLUSION

Based on the foregoing Reply Brief and the Initial Brief of Appellant, the circuit court improperly denied Mr. Franklin relief on his 3.851 motion. Relief is warranted in the form of a new trial, a new sentencing proceeding, an evidentiary hearing on Claims III and IV of his postconviction motion, or any other relief that this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished electronically and to Stephen Ake, Esq. at cappapp@myfloridalegal.com and Stephen.Ake@myfloridalegal.com and to the Defendant by US Mail on November 21st , 2012.

Maria Perinetti
Florida Bar No. 0013837
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813) 740-3544

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

Maria Perinetti
Florida Bar No. 0013837
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813) 740-3544

Counsel for Appellant