

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NUMBER: SC12-677

LOWER TRIBUNAL CASE NUMBER: 1996 CF 2147

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JERMAINE LEBRON,

Appellant,

v.

STATE OF FLORIDA

Appellee.

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT.

STRICKLAND.

Appellee argues that to establish the deficiency prong under Strickland, Appellant must prove that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed to the defendant by the Sixth Amendment.” Further, Appellee argues that Appellant must prove that the deficient performance resulted in prejudice. Thus, Appellant must demonstrate that ‘there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would've been different.’

To establish counsel was ineffective, Strickland requires a defendant to demonstrate (1) specific errors or omissions that show that counsel's performance from the norm or fell outside the range of professionally acceptable conduct, and (2) the deficiency of that performance compromised the process to such a degree as to undermine confidence in the fairness and correctness of the result. Wilson v. Wainwright, 474 So. 2d 1162, at 1163 (Fla. 1985).

Trial counsel's failure to raise the meritorious issues addressed during Appellant’s evidentiary hearing demonstrate the advocacy involved "serious and substantial deficiencies" that individually and "cumulatively" established

that "confidence in the outcome is undermined." Fitzpatrick v. Wainwright, 490 So.2d 938 at 940 (Fla.1986); Barclay v. Wainwright, 444 So. 2d 956 at 959 (Fla. 1984); and Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985).

In Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003), the United States Supreme Court held that "Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation to support that strategy." Strickland, at 2538.

[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness.

Wiggins, at 2535.

In making this assessment, the court "...must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins, at 2538. In finding that counsel's investigation and presentation "fell short of the standards for capital defendants work articulated by the American Bar

Association standards to which we have long referred to as "guides to determine what is reasonable", the Court held that the ABA Guidelines set standards for counsel in investigating mitigation evidence. Wiggins, at 2537.

In Williams v. Taylor, 529 U.S. 362 (2000), trial counsel was found to be ineffective when they only considered a narrow set of sources and did not attempt to introduce evidence of Williams' borderline intellectual functioning, prison records showing commendations, and testimony from prison guards that Williams would not likely to be a danger in prison. Williams at 369. Citing the commentary to the ABA Guidelines, the Court found that counsel's failures and omissions "...clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of defendant's background." Williams, at 397.

The United States Supreme Court recently reiterated that according to "prevailing professional norms", counsel has an "obligation to conduct a thorough investigation of defendant's background." Porter v. McCollum, 130 S.Ct. 447 (2009), citing Williams v. Taylor, at 396. In Porter, the Court held that a state court unreasonably applied Strickland's prejudice standard when it failed to give weight to mitigating evidence of a capital defendant's abusive childhood, brain damage, and post-traumatic stress disorder.

In addressing the importance of counsel's duty to investigate the penalty

phase, this Court has said:

Trial counsel's obligation to zealously advocate for their client is just as important in the penalty phase of a capital proceeding as it is in the guilt phase. There is no more serious consideration in the sentencing arena than the decision concerning whether a person will live or die. When an attorney takes on the task of defending a person charged the capital offense, the attorney must be committed to dedicate both time and resources to thoroughly investigate the background and history, including family, school, health, criminal history of the defendant for the kind of information that could justify a sentence less than death. I believe the Constitution and the case law from this court and the United States Supreme Court requires no less.

Coday v. State, 946 So. 2d 988, at 1015-1016 (Fla. 2006) (Quince, J., concurring.)

Further, this Court has held that trial counsel rendered deficient performance when his investigation involves limited contact with a few family members and he failed to provide his experts with background information.

Sochor v. Florida, 883 So.2d 776, at 772 (Fla. 2004).

The ABA Guidelines have been cited by the United States Supreme Court as " guidelines to determining what is reasonable." Wiggins, at 2537. The Guidelines in effect at the time of Mr. Lebron's penalty trial were created in 2003. Guideline 10.11 sets out the prevailing norms for presentation at the penalty phase. The Commentary to that Guideline notes that "it is critically important to construct a persuasive, narrative [of mitigation], rather than to simply present a catalog of seemingly unrelated mitigating factors."

Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.11 (2003). Further, the Guidelines note that "[s]ince an understanding of the clients extended multigenerational history is often needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains the clients complete social history from before conception to present. Expert witnesses may be used for this purpose, and in any event, are almost always crucial to explain the significance of the observation." With respect to the penalty phase investigation, the Guidelines stress that "[r]ecords should be requested concerning not only the client, but his parents, grandparents, siblings, and children. A multigenerational investigation frequently discloses significant patterns of family dysfunction that may help establish or strengthen a diagnosis or the hereditary nature of a particular parable." See: Commentary to ABA guidelines for the Appointment and Performance of Counsel in Death Penalty Cases with 10.7 (2003).

The standard of proof of ineffective assistance of counsel claims are set out in Strickland. Because the right to effective assistance of counsel is so fundamental, standard for proving prejudice is low:

...an ineffective assistance claim searches the absence of one of the crucial assurances that the results of the proceedings are reliable, so finality concerns are somewhat weaker in the

appropriate standard. Prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, enhance the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence that determine the outcome.

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a death sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer-including an appellate court to the extent it independently reweighs the evidence, would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim, must consider the totality of the evidence before the judge and jury.

Strickland, at 694-696.

Strickland, does not require Appellant to establish that he would have been acquitted or received a life sentence recommendation order to establish prejudice. Strickland requires a reasonable probability that the outcome would be different, not an absolute certainty. Subsequent decisions by the United States Supreme Court have underscored this distinction between reasonable probability/unfair trial and an acquittal. See: Kimmelman v. Morrison, 477 U.S. 365 at 374 (1986) wherein the court stated that the essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance point between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.

The reasonable probability standard has been defined by Florida courts as a question of whether a "reasonable jury" could have believed the omitted evidence or whether the omitted evidence would cast doubt. Tyson v. State, 905 So.2d 1048 at 1049 (Fla. 2d DCA 2005). Florida has unquestionably adopted the Strickland standard. See: Spencer v. State, 842 So. 2d 52, at 61 (Fla. 2003).

THE 7-5 JURY RECOMENDATION.

Mr. Lebron has twice been sentenced to death-first in 1998 after a 7-5 vote by the jury to recommend death (1998 ROA Vol. XXVIII) and again in 2005 after another 7-5 vote by the jury to recommend death (2005 ROA VOL V, pp290-403)

This Court has recognized that "failure to investigate and present available mitigation can be prejudicial, especially with such a close jury recommendation vote." Sliney v. State, 944 So2d 270 (Fla . 2006), citing Phillips v. State, 608 So. 2d 778 (Fla. 2006).

THE CUMULATIVE EFFECT DOCTRINE.

The sheer number and types of errors in Mr. Lebron's trial, especially the penalty phase, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing each individual error, addressing

these errors on an individual basis will not afford adequate safeguards required by the Constitution against a improperly imposed death sentence. Trial counsel failed to properly investigate and present mitigation. They failed to recognize clear signs of numerous personality disorders testified to at the evidentiary hearing by Doctors Cunningham and Eisenstein. Dr. Cunningham's testimony alone consumed approximately 12 hours of the evidentiary hearing and covered dozens of areas of mental health mitigation that were apparently never explored by trial counsel.

The errors in Mr. Lebron' s trial cannot be harmless. Under Florida law, the cumulative effect of these errors denied Mr. Lebron certain fundamental rights under the Constitution of the United States and the Florida Constitution. See: State v. Diguilio, 491 So. 2d. 1129 (Fla. 1986); Ray v. State, 403 So.2d. 956 (Fla. 1981); Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So. 2d 51 (Fla. 5th DCA 1993); and Landry v. State, 620 So. 2d 1099 (Fla. 4th DCA 1993). Where multiple errors are discovered in the jury trial, a review of the cumulative effect of these errors is appropriate because even if each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors may be such as to deny defendant a fair and impartial trial that is the inalienable right of all

litigants McDuffie v. State, 970So. 2d 312, at 328 (Fla. 2007). The cumulative error doctrine provides that an aggregation of nonreversible errors can yield a denial of the constitutional right to a fair trial and call for reversal. United States v. Munoz, 150 F.3d 401 at 418 (5th Cir. 1998). Individual errors, insufficient in themselves to necessitate a new trial, may in the aggregate have a more debilitating effect. A column of error may sometimes have a logarithmic effect, producing a total impact greater than the sum of its parts.

Of necessity, claims under the cumulative error doctrine are sui generis. A reviewing tribunal must consider each claim against the background of the entire case, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any and the combined effect; how the lower court dealt with the errors as they arose and the strength of the state's cases against the defendant. See: United States v. Sepulveda, 15 F.3d 1161 at 1195-96 (1st Cir. 1993); United States v. Edwards, 303 F.3d 606 at 647 (5th Cir. 2002) and United States v. Williams, 264 F3d 561 at 572 (5th Cir. 2001).

CONCLUSION

Based upon the foregoing, Appellant prays this Honorable Court reverse the Trial Court's Order entered on March 13, 2012, denying Appellant's Motion to Vacate Judgments of Conviction and Sentence.

Respectfully Submitted,



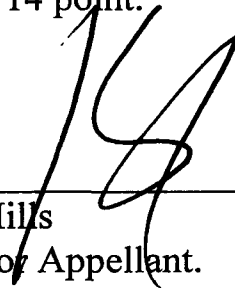
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Certificate of Service.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Kenneth S. Nunnely, Senior Assistant Attorney General by electronic mail at Ken.Nunnely@myfloridalegal.com this 19 day of January, 2013.

Certificate of Compliance.

This brief is typed in Times New Roman 14 point.



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