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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC09-549

Cornelius Baker
Petitioner,
v.
Michael D. Crews
Secretary, Florida Department of Corrections,
Respondent.
and
PAMELA BONDI
Attorney General,
Additional Respondent,

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Baker's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Baker was deprived of the right to a fair, reliable and individualized sentencing proceeding and direct appeal. The proceedings resulting in his death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R_, Vol. _)" followed by the appropriate volume and page number. The postconviction record on appeal will be referred to as "(PC-R _, Vol. _)" followed by the appropriate volume and page number.

All other references will be self-explanatory or otherwise explained herein.

CLAIM I

DEFENSE EXHIBITS ENTERED INTO EVIDENCE DURING THE PENALTY PHASE, AND AGAIN DURING THE SPENCER HEARING, WERE NOT MADE PART OF THE RECORD ON APPEAL. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE THE COURT TO SUPPLEMENT THE RECORD, THEREBY DEPRIVING THE SUPREME COURT OF THE OPPORTUNITY TO REVIEW ALL THE EVIDENCE PRESENTED AT TRIAL AND RENDERING MR. BAKER'S DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A proportionality review is a two-pronged inquiry, which includes determining if the case is in the category of least mitigated murders. *See, Baker v. State*, 71 So.3d 802, 821 (Fla. 2011), citing *Almeida v. State*, 748 So.2d 922, 933 (Fla. 1999). Furthermore, it requires that this Court "discretely analyze the nature and weight of the underlying facts..." *See, Terry v. State*, 668 So.2d 954, 965 (Fla. 1996).

The State argues that Defense Exhibits that were entered into evidence twice, but failed to make it to the record on appeal, "add no substantial mitigating evidence to the record whatsoever." *Response* at 20. Petitioner contends that these Exhibits are relevant in light of the trial court finding that Mr. Baker was not under the influence of extreme mental or emotional disturbance when the crime was

committed. (R567, Vol. 4) As part of the court's reasoning, it admits that defense psychologist, Harry Krop, Ph.D., believed that "[Mr. Baker] suffers from significant brain damage," yet it notes, "no other of the numerous reports even suggested the possibility of brain damage." (R566, Vol. 4) This statement calls into questions Dr. Krop's opinion, implying that it is unsubstantiated by any other expert. Therefore, if the Exhibits contain information that "suggests the possibility of brain damage," that information would directly contradict the trial court's finding. This Court may find, in analyzing the weight of the facts, that significant brain injury would remove this case from the category of least mitigated murders.

The State appears to agree that one of the missing Exhibits, Dr. Upson's June 1994 report, found "significant impairment in the area of receptive language." *Response* at 31. However, the State claims that a test used to screen for organic impairment, that in fact shows impairment of receptive language development, is a learning disability that somehow has nothing to do with brain damage. *Id.* Theirs is an argument about semantics that misses the point. The question is whether Mr. Baker had a normal, healthy brain, not whether the source of the abnormality was disease, heredity or impact from a foreign object. Viewed from this perspective, Dr. Upson's findings support Dr. Krop's opinion.

Likewise, a PET scan revealed findings consistent with a patient suffering

from dementia. (PC-R 52, Vol. 12-A) These two missing Exhibits are all the more important in light of the State's cross examination of Dr. Krop, which the State admits challenged his findings of brain damage and borderline intelligence. *Response* at 28. The State's Response parses language by arguing that a brain disease or a brain disorder is something fundamentally different than brain damage, but to what purpose? See, *Response* at 33. It seems as though the State is taking Dr. Krop's words too literally in implying that the language in the PET scan about dementia does not support Dr. Krop's opinion that Mr. Baker "suffers from significant brain damage." Their focus on the word "damage" versus "disorder" or "disease" misses the point. Mr. Baker was not operating with a normal, healthy brain at the time the crime was committed and this is substantial mitigation that should have been reviewed by this Court in determining proportionality.

Mr. Baker cited this Court's 2005 ruling in *Crook*[1] to support his claims for relief. (*Petition* at 25) In the original *Crook*[2] appeal cited in the 2005 case, this Court reported that the evidence presented at penalty phase showed that defendant could not sit still in class and was placed on Ritalin as a child, had learning disabilities and borderline intellectual functioning, had a difficult childhood, had

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[1] *Crook v. State,* 908 So.2d 350 (Fla. 2005).

[2] *Crook v. State*, 813 So.2d 68 (Fla. 2002).

used drugs since the age of 12 years old, had suffered head injuries, and testing revealed that defendant had abnormalities regarding his frontal lobe. The experts concluded that defendant's difficulties arose as a result of organic brain dysfunction rather than any character disorder. Id. at 71. Finally, one of the experts testified that the defendant was under the influence of an extreme mental or emotional disturbance at the time of the murder. *Id.*

Evidence of an earlier psychological evaluation corroborated the penalty phase experts' testimony of brain damage and issues with intellectual functioning. This Court noted, "This report and its conclusions as to Crook's intellectual functioning and behavioral abnormalities also are *significant* in that the report was not prepared for the defense at trial, but it predated the crime in question by two years." (Emphasis added) *Id.* at 73. Defendant's sentence of death was vacated and remanded to the trial court to reconsider and reweigh the mitigating evidence. *Id.* at 78. Defendant's age, which was 20 years old at the time of the offense, was also a factor that this court considered in remanding the case for re-sentencing. *See,* the 2005 *Crook* opinion at 354.

At re-sentencing the trial court again imposed a death sentence. *Id.* at 355. Defendant once again appealed his sentence and this Court performed a proportionality review. Id. at 356. Pursuant to said review, this court found that

Defendant's crime was not among the category of least mitigated and reduced his sentence to life without possibility of parole. *Id.* at 356, 359.

The similarities between the mitigation in the *Crook*[3] case and Mr. Baker's case are striking. Mr. Baker was 20 years old at the time of the offense, could not sit still in class and was placed on Ritalin as a child, had learning disabilities and borderline intellectual functioning, was neglected as a child, used drugs since the age of 12 years old, loss consciousness after being involved in a motor vehicle accident, and testing revealed that defendant had abnormalities regarding his frontal lobe. Not only is the mitigation very similar, but so is the fact that the brain dysfunction was supported in an evaluation that pre-dated the crime, just as Dr. Upson's evaluation did in Mr. Baker's case. This Court found that corroboration "significant." Therefore, Mr. Baker submits that appellate counsel was ineffective for failing to ensure that this Court was able to review evaluations which contained information that support an opinion expressed by the defense psychologist, whose opinion was called into question by both the State and trial court. The omission was substantial enough to meet the standard set out in *Strickland*[4] for ineffective

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[3]Id.

[4]First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.

assistance of counsel.

Once we look past the hyperbole, colorful adverbs and bold lettering contained in the State's response, the issue in this petition is simply whether or not this Court is confident they were able to perform an adequate proportionality review, when significant evidence was missing from the record at the time of their review. In light of the fact that two dissenting Justices found Mr. Baker's death sentence failed to meet the proportionality test, the importance of including the omitted Exhibits in a proportionality review becomes all the more material. Without the corroborating evidence in the Exhibits, Mr. Baker was deprived of a fair appellate process. Mr. Baker has demonstrated how the missing Exhibits have prejudiced his case in accordance with this Court's ruling in Darling[5] and therefore is entitled to relief. The relief Mr. Baker seeks is for this Court to reconsider all the evidence in this case before determining whether or not his death sentence is appropriate.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[5]*Darling v. State,* 808 So.2d 145, 163 (Fla. 2002).

CLAIM II

THOUGH PORTIONS OF A PSYCHOSOCIAL REPORT WERE REFERENCED DURING TRIAL TESTIMONY, THE DOCUMENT WAS NOT ENTERED INTO EVIDENCE. FURTHERMORE, THE SENTENCING ORDER CONTAINS INFORMATION FROM THIS REPORT THAT WAS NOT MENTIONED DURING TRIAL TESTIMONY. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE THE COURT TO SUPPLEMENT THE RECORD WITH THE FULL REPORT, THEREBY CAUSING AN INCOMPLETE RECORD TO BE REVIEWED ON DIRECT APPEAL. THE SUPREME COURT WAS DEPRIVED OF THE OPPORTUNITY TO REVIEW ALL RELEVANT EVIDENCE, RENDERING MR. BAKER'S DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

At the conclusion of Dr. Krop's testimony, Defense counsel introduced into evidence a composite of numerous psychological evaluations from Mr. Baker's childhood. (R105, Vol. 17) Dr. Krop had just testified that his opinion was based partly on what he learned from these records, as well as neuropsychological testing and his own interviews. The Defense moved all these exhibits into evidence and the court received them. (R106, Vol. 17) The record is not clear which reports were handed to the Clerk, as they are not specifically announced by the Defense. *Id.* Next, the State inquiries about one of the evaluations on cross examination, the 2002 Act evaluation that was ordered after Mr. Baker reportedly attempted suicide.

(R110, Vol. 17) Thereafter, the trial court cited the 2002 Act evaluation as additional support for its finding of the CCP aggravator, only mentioning the evaluator's opinion that Mr. Baker had a "strong street sense." (R567, Vol. 4) The State agrees that the trial court's Sentencing Order indicates that the court had access to the actual document, not just Dr. Krop's testimony. (*Response* at 54-55) However, this report was not included as part of the record on appeal.

The State makes a good point in response to Mr. Baker's second claim which concerns ineffectiveness of appellate counsel for failing to ensure a complete record on appeal. Mr. Baker agrees with the State that there was likely confusion concerning admission of records presented to the court at the penalty phase. Mr. Baker is not raising an issue about a failure on the part of defense counsel. As the State says in their Response, "It was certainly understandable for anyone involved in this trial to believe that the Report had been introduced into evidence, particularly in light of the following statements of [Mr.] Baker's counsel at the time the Exhibit was introduced:

> MR. PHILLIPS: Your Honor, at this time, I'd like to introduce into evidence as defendant's composite, what was marked earlier as Defendant's Composite Exhibit A, **the reports that Dr. Krop relied upon during his evaluation process**, combined with the reports that he prepared, as Defendant's Exhibit Number 1 at this time."

Response at 55. Mr. Baker agrees with the State that "anyone involved in this

trial,"including defense counsel, would believe the evaluation had in fact been introduced.

We may assume the trial court had access to the document, because certain information was included in the Sentencing Order that did not come out in cross-examination. *Response* at 54-55. Mr. Baker does not allege any wrongdoing on the part of the trial court in reviewing this document for its Order. The most likely explanation is that the Clerk did not properly mark the document, after it was presented to the court. The mistake is nothing more than a scriveners error, which should have been caught by appellate counsel, as it was detected by post-conviction counsel.

The 2002 ACT evaluation was prompted by a report that Mr. Baker had tried to kill himself by tying a sheet around his neck. (*Petition* at Appendix) The value of the 2002 ACT evaluation is that it indicates suicidal thoughts and tendencies, which go directly to whether Mr. Baker was suffering from an extreme mental or emotional disturbance at the time of the offense. It is not remarkable that Mr. Baker denied his failed attempt at suicide. His inability to admit his depression and troubled thoughts made it unlikely that he would receive the help he obviously needed. This report was a vital piece of mitigating information, which this Court should have been able to consider as part of its proportionality review. Appellate counsel's failure to discover

the scriveners error and move to supplement the record on appeal with this report was a substantial error that calls into question the reliability of this Court's proportionality review. Appellant counsel's omission satisfies the *Strickland* [6] test for ineffectiveness and the *Darling*[7] requirement of prejudice, and therefore is entitled to relief. The relief Mr. Baker seeks is for this Court to reconsider all the evidence in this case before determining whether or not his death sentence is appropriate.

CONCLUSION AND RELIEF SOUGHT

Claims I and II both address appellate counsel's failure to make sure a complete record was before this Court. Taken separately or cumulatively, they demonstrate that Appellate counsel's ineffectiveness created fundamental errors on direct appeal. For all the reasons discussed herein, Cornelius Baker respectfully urges this Honorable Court to grant habeas relief.

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[6] *Strickland* at 687, 695.

[7] *Darling* at 163.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished by E-MAIL to james.riecks@myfloridalegal.com and CapApp@myfloridalegal.com and U.S. Mail to Cornelius Baker DOC# V25581, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026 on this 25th day of August 2014.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS, was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P.9.210.

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