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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 15-1276
L.T. 16-2003-CF-010182-AXXX

PAUL DUROUSSEAU

Appellant

v.

STATE OF FLORIDA

Appellee

On Appeal from the Circuit Court for the
Fourth Judicial Circuit, Duval County, Florida
Hon. Jack Schemer, Circuit Court Judge

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENTS

I. APPELLANT'S ARGUMENT FOR INEFFECTIVE ASSISTANCE OF COUNSEL DOES NOT REQUIRE THE SHOWING OF AN ACTUALLY BIASED JUROR

Appellee's counsel, in the Answer Brief, has misconstrued Appellant's argument regarding ineffective assistance of counsel in regard to the defense counsel's voir dire of the jury panel. Appellant's argument is not based on the rationale in *Carratelli v. State*, 961 So. 312 (Fla. 1997) requiring the showing of an actually biased juror, but rather on the rationale stated in *Solorzano v. State*, 25 So.3d 19 (Fla. 2nd DCA 2009). While Appellee relies on the rational regarding actual bias in a juror, Appellant argues the ineffective assistance of counsel was due to counsel failing to properly question a juror in an effort to discover bias.

In *Carratelli v. State*, supra, the issue presented was failure of defense counsel, after questioning the jury panel, to preserve his objection to the court's denial of his challenges for cause in regards to three jurors. Under the circumstances presented in the above case, the Court held that the Appellant must show that the error resulted in an actual biased juror being seated. In contrast, the Appeal Court in *Solorzano v. State* noted the failure of defense counsel to properly question an individual juror, and held that such lack of questioning resulted in a failure to conduct a meaningful voir dire to determine juror bias and

a denial of Defendant's constitutional right to have his case tried before a fair and impartial jury. The distinction between *Carratelli v. State* and *Solorzano v. State* is that the bias or potential bias was noted prior to the jury being empaneled.

In the instant case, there is no such failure to preserve a court's ruling alleged here. Frankly, there were insufficient grounds at trial to challenge any of the jurors who were seated. There were there clear grounds present on the record for defense counsel to make an informed judgment to exercise her peremptory challenges, as incomplete information was garnered from the individual jurors. The failure of defense counsel to adequately question the jurors during voir dire denied the Appellant his constitutional right to have his case tried before a fair and impartial jury.

Solorzano v. State and cases cited therein reference the principle that it is imperative for defense counsel to sufficiently question individual jurors to assure that the entire panel can lay aside any bias or prejudice and render a fair verdict, and in capital cases, a fair sentence. To quote *Solorzano* at length:

> Claims based on ineffective assistance of counsel for failing to conduct a meaningful voir dire implicate the defendant's constitutional right to have his case tried before a fair and impartial jury.
>
> *Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. *See Connors v. United States*, 158 U.S. 408, 413, 15 S. Ct. 951, 953, 39 L Ed. 1033 (1895).

> Similarly, lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts.
>
> *Rosales-Lopez v. United States*, 451 U.S. 182, 188, 101 S. Ct. 1629, 68 L.Ed.2d 22 (1981) (footnote omitted); *see also Lavado v. State*, 469 So.2d 917, 919 (Fla. 3d DCA 1985) (Pearson, J., dissenting), *dissent adopted by Lavado v. State*, 492 So.2d 1322, 1323 (Fla.1986). Thus, " [d]uring voir dire, counsel must question prospective jurors so that counsel can reasonably conclude that 'the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court.' " *Mansfield v. State*, 911 So.2d 1160, 1172 (Fla.2005) (quoting *Spencer v. State*, 842 So.2d 52, 68 (Fla.2003)). If trial counsel wholly fails to question a juror during voir dire, counsel's conduct may be deficient. *See, e.g., Mansfield*, 911 So.2d at 1172; *Cole v. State*, 841 So.2d 409, 415 (Fla.2003); *Teffeteller v. Dugger*, 734 So.2d 1009, 1020 (Fla.1999). In that case, prejudice would be inherent in the denial of the defendant's constitutional right to be assured of a fair trial before an impartial jury. *See Rosales-Lopez*, 451 U.S. at 188, 101 S. Ct. 1629.

In the instant case, although jurors were questioned, much of the voir dire constituted standard, perfunctory questions which were not really designed to elicit any deep-seated biases of individual jurors. Failure of defense counsel to ask questions which related to the heart of the matter and were designed to discover any potential juror bias which would negatively impact the Appellant during trial has caused Appellant to not have a fair trial. It is fair to say from a review of the record that the venire as a whole were strongly in favor of the death penalty. In view of this circumstance, it was imperative for defense counsel to question individual jurors in depth to determine whether they could really set aside their

predisposition to automatically impose the death penalty rather than just voicing what they believed counsel and the trial court wanted to hear.

As concluded by Defendant's expert witness, Brook Butler, who reviewed the record for the Rule 3.850 hearing, the predominance of group questioning, the lack of individualized questioning, the failure to sequester jurors for the individual questioning, and the lack of probing voir dire as to the jurors' true willingness to weigh mitigating and aggravating factors, resulted in an incomplete picture of venire and an insufficient basis for striking jurors or allowing them to be seated. Any one of the above oversites by Defense counsel would result in a potential biased juror being empaneled, and a combination of the same most certainly would result in a potential biased juror being empaneled.

The Defendant's expert witness, Terrence Lenamon, testified to the necessity of front-loading questions regarding mitigating and aggravating factors in a death penalty case to gauge the venire's true attitude towards the death penalty and to ferret out "stealth killers," (i.e. intractable automatic death penalty voters). Defense counsel testified that she intentionally did not emphasize aggravating and mitigating factors in her voir dire because she was following her client's wishes to concentrate on the guilt phase of the trial. She conceded at one point that more open-ended questions would have elicited more relevant information regarding mitigation and aggravation

As pointed out in Appellee's Initial Brief, and by the trial court, the evidence of Defendant's guilt presented at trial was overwhelming. (See Appellee's Brief, p. 49) It is a dubious proposition that defense counsel was not aware of all this evidence before trial. Under these circumstances, it has to be questioned whether it was a reasonable trial strategy to put all the Defendants' eggs in the basket of seeking an acquittal at trial and to intentionally subordinate and minimize issues related to the penalty phase, a life and death proposition.

II. APPELLE HAS FAILED TO DEMONSTRATE WHY EXPERT WITNESS TESTIMONY, WHICH WAS UNREBUTTED, SHOULD NOT HAVE BEEN GIVEN PROPER WEIGHT IN THE TRIAL COURT'S RULING IN DETERMINING THE ADEQUACY OF DEFENSE COUNSEL'S VOIR DIRE

Terrence Lenamon and Brook Butler both testified at the evidentiary hearing as expert witnesses in regard to jury selection in capital cases. They testified as to the importance of the "Colorado method" of front loading questions regarding aggravating and mitigating factors in their voir dire. They further established the importance of open-ended and individualized questioning rather than collective questioning to elicit the attitudes of "stealth killers."

Mr. Lenamon testified that his opinions were based on ABA standards, research through the Capital Jury Project, the Florida Capita Research Center, and his years of trying capital cases. Brook Butler had extensive

experience in legal research, juror psychology, and teaching at the New University in Florida, extensive experience as a jury consultant, and also worked through the Capital Jury Project. Ms. Butler had reviewed the questionnaires and the voir dire transcripts, and concluded that Ms. Finnell's voir dire – at a crucial stage of the proceedings – was deficient.

Defense counsel Ann Finnell testified that she did not believe that the Colorado method was effective in this jurisdiction, that collective questioning better served her purposes, and that she did not want to delve much into aggravating and mitigating factors because it could negatively influence the jurors in the guilt phase. Failure to plan ahead for the post guilt phase knowing the overwhelming evidence against her client which would be presented at trial is a demonstration of the ineffectiveness of counsel. A reasonable attorney plans for all outcomes of a case and does not place all of their trial strategy on one potential outcome.

While the defense counsel presented two independent expert witnesses who testified with authority and credibility as to their views on the proper standards in jury selection, the State presented only Ms. Finnell, whose job was not to act as an independent expert but to defend her performance at trial. The opinion presented by the two independent expert witnesses was thus uncontested. Ms. Finnell, by her own admission, indicated that she did not think

the Colorado method was effective in this jurisdiction but failed to demonstrate any evidence which corroborated her opinion.

The history of case law on the issue of jury selection, in the context of due process and right to an impartial jury, as set out at length in Appellant's Initial Brief, has been an evolving one. The Courts have steadily expanded their view of minimum standards in the voir dire process in capital murder cases. From the U.S. Supreme Court cases such as *Wainwright v. Witt*, 469 U.S. 412 (1985), *Penry v. Linaugh*, 492 U.S. 302 (1989), and *Morgan v. Illinois* , 504 U.S. 719 (1992), which expanded Defendant's rights to fairness in jury selection, to state cases such as *People v. Williams*, 628 P. 2d 869 (Cal.) ,which placed obligations on defense counsel to conduct a meaningful voir dire by defense counsel, to Florida cases such as *Soronzano v. State*, supra, which further defined what constitutes a meaningful voir dire by defense counsel, the courts have steadily expanded and refined what constitutes a constitutionally insufficient performance by counsel in jury selection.

In this case, Defendant's expert witnesses testified without rebuttal that the bare minimum performance by defense counsel – ignoring aggravators and mitigators - in her voir dire in favor of a dubious guilt phase trial strategy was deficient. The State's Initial Brief fails to demonstrate why these experts' testimony should not have been afforded more weight by the trial court, and the

Appellee's Answer Brief again failed to address these issues or any issues with these experts' testimony.

It is submitted that under these circumstances, this Court should find that the testimony by Defendant's experts is persuasive and refine the rule in *Solorzano v. State* to hold that a voir dire lacking in open-ended questions, individualized questions, and the delving into jurors' attitudes towards mitigating and aggravating factors is constitutionally deficient under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Clearly, there was a substandard voir dire on the penalty phase issues by Ms. Finnell, and prejudice to the Defendant in that he was sentenced to death.

CONCLUSION AND RELIEF SOUGHT

Mr. Durousseau reiterates his request for relief, as set out in his Initial Brief:

1. That his judgments of convictions and sentences, including his sentences of death, be vacated.
2. That he be granted a new trial, or alternatively, that his death sentence be commuted to life imprisonment.

Respectfully Submitted:

/s/ Richard Kuritz____
Richard Kuritz
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 8,2016, a true and correct copy of the foregoing Initial Brief of Appellant was served by U.S. mail on:

_/s/ Richard Kuritz_____
Richard Kuritz
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document is in Compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2). This document is submitted in Times New Roman 14-point font.

/s/ Richard Kuritz____
Richard Kuritz
Attorney for Appellant