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IN THE SUPREME COURT OF FLORIDA

NO. SC13-1065

HAROLD BLAKE,

Petitioner,

v.

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

Respondent.

PETITIONER'S REPLY BRIEF

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

CLAIM I

JUROR RHODES' SEATING ON MR. BLAKE'S JURY DENIED HIM A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHERE JUROR RHODES COULD NOT HAVE BEEN IMPARTIAL AND WAS NOT IMPARTIAL. THE FAILURE OF TRIAL COUNSEL TO REMOVE JUROR RHODES WAS INEFFECTIVE AND THE TRIAL COURT ERRED IN FAILING TO REMOVE HER SUA SPONTE. APPELLATE COUNSEL'S FAILURE TO RAISE PROPER OBJECTIONS WAS DEFICIENT PERFORMANCE WHICH DENIED MR. BLAKE EFFECTIVE ASSISTANCE OF COUNSEL.

In it's response to Mr. Blake's Petition for Writ of Habeas Corpus, the State points out that "[a] habeas petition is the proper vehicle to assert claims of ineffective assistance of appellate counsel" under the "Legal Principles and Standards of Review" heading. See Response at 6. Later, the State argues that Mr. Blake's claim is procedurally barred because this claim was available for direct appeal. See Response at 8. These two principles stand at odds with one another. If the latter were true - that Mr. Blake cannot raise the issue that appellate counsel was ineffective in failing to raise this claim, then he would be precluded from raising the claim at all.

In support of it's position, the State cites *Spencer v. State*, 842 So. 2d 52, 68 (Fla. 2003). However, in *Spencer*, this Court's reviewed the trial court's denial of claims raised in a Rule 3.850 motion. The claims at issue in *Spencer* were barred not because they were raised in a petition for writ of habeas corpus, but because they were raised in a Rule 3.850 motion. See

Id.

The State's argument to impose a procedural bar applies to a claim of "ineffective assistance of trial counsel" and does not apply to the circumstances presented here. Here, Mr. Blake's claim is that Juror Rhodes seating on his capital jury violated Mr. Blake's constitutional right to an impartial jury. Ms. Rhodes' rendering a verdict in Mr. Blake's capital trial created fundamental error that is established purely based on the information that she conveyed in voir dire and reasonable inferences that can be drawn therefrom and that appellate counsel rendered ineffective assistance in failing to raise this issue.

The State also argues that Juror Rhodes' responses to other voir dire questions indicate that trial counsel made a "strategic" decision to seat her on Mr. Blake's jury in spite of her husband's murder by a stranger's gun. See Response at 10. The State's brief points to the following exchanges as support of this argument:

PROSPECTIVE JUROR RHODES: There's a difference to me between presuming a defendant innocent and presuming my friend or my child innocent.

MR. COLON: Okay. Could you explain.

PROSPECTIVE JUROR RHODES: Yeah. I think - when I think of a courtroom and going into a courtroom, my mind-set is that defendant is innocent until you prove me differently.

But my children, now, let me tell you, that's a whole different ball game. And if you used that example yesterday and I was thinking but, you know, a

mother knows her children. And generally I can tell the difference if my children lie to me. But if I have a friend lie to me or something, I may not - I may think that they have and they not have. Do you see the difference.

MR. COLON: It's a little harder.

PROSPECTIVE JUROR RHODES: In the everyday world I don't put the weight on it that I would as I think of a courtroom situation.

MR. COLON: So you believe the fact that we're here seems to accentuate this presumption of innocence concept even more so than your average life.

PROSPECTIVE JUROR RHODES: Yeah.

(T. 288-9). And:

MR. COLON: I asked the previous panel about confession. Okay. And I talked about false confessions basically, why would someone confess to something they did not do, and you've all heard some answers.

Can anybody give me some answers as to why someone would say I did something when, in fact, they didn't do it? Anyone?

PROSPECTIVE JUROR RHODES: To cover for somebody else.

MR. COLON: To cover for somebody else. What else?

PROSPECTIVE JUROR RAMOSKI: Pressure.

MR. COLON: Pressure. Okay. What else? Does anyone here on the panel feel - you know, one thing is to give a false confession about something and another one is to give a false confession about murder.

Does anyone feel that there is no way that anyone would give a false confession to a murder charge? By show of hands.

PROSPECTIVE JUROR RHODES: Say that question again. I understand the lead-in. Just ask the question.

MR. COLON: The question is does anyone on the panel feel that there's no way someone would confess to murder when, in fact, they didn't commit the murder, it's just no way that you can buy that?

PROSPECTIVE JUROR RHODES: I believe it can happen. For instance, I believe say a mother might confess to something that a child of theirs did to protect the child. I mean that's how strong love can be. So, yeah, I believe it can happen.

MR. COLON: And so you would see it possible in a love type context?

PROSPECTIVE JUROR RHODES: Well, I use that as an example, but yes.

PROSPECTIVE JUROR RHODES: In a threatening aspect. If you don't - you know, if you don't confess you did it, I'll do something to your family member.

MR. COLON: Or even to you.

PROSPECTIVE JUROR RHODES: Uh-huh.

MR. COLON: We all were teens at one time. ... Would you all agree, just in general, that the older we get the more mature we get, the wiser we get?

PROSPECTIVE JUROR RHODES: (Indicate affirmatively.)

(T. 293-5).

The State, likewise, points to Juror Rhodes' statements as to how she would assess witness credibility including "body language, how they're presenting their testimony, the voice - ... and what they have to say and how it matches up with other testimony, does it fit in with other testimony, does it make sense with other testimony." (T. 298). The State also points to Juror Rhodes' agreement to follow the law in that the State has

the burden of proof (T. 300-2).

However, Juror Rhodes' responses do not address her ability to be impartial in light of her husband's murder in circumstances very similar to the murder of Mr. Patel. Defense counsel could not have made a "strategic" decision to include Juror Rhodes on Mr. Blake's jury absent thorough, specific voir dire of how her husband's murder and the subsequent lenient sentence on his killer effected her ability to be impartial. Irrespective of any of Juror Rhodes' answers to voir dire questions, her personal tragedy demonstrated that she could not be impartial.

In *Lugo v. State*, 2 So. 3d 1, 16 (Fla. 2008), this Court indicated that the severity of the crime and the similarity of the crime suffered by a juror to the crime being tried has a strong bearing on whether or not a juror can be impartial. In this case, Juror Rhodes was a victim of a crime very similar to the one at issue, thus indicating the need to investigate her impartiality. There was no affirmative showing on the record that she could be impartial because no one, including trial counsel, the Judge or prosecutor ever asked her.

And, contrary to the State's position, *Owen v. State*, 986 So. 2d 534, 550 (Fla. 2008), is not dispositive of the issue because in *Owen* the three jurors at issue were rehabilitated because all the jurors specifically indicated that they could lay aside these biases.

The issue of Juror Rhodes' impartiality is not meritless; was a violation of due process and constituted fundamental error. Appellate counsel was ineffective for raising this issue on direct appeal and relief is warranted.

CLAIM II

MR. BLAKE WAS DENIED A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE THE PROSECUTOR'S ARGUMENTS PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. APPELLATE COUNSEL'S FAILURE TO RAISE THE ISSUE DENIED MR. BLAKE THE EFFECTIVE ASSISTANCE OF COUNSEL.

The State's contention that Mr. Blake's claim is procedurally barred (see Response at 6 citing *Valle v. Moore*, 837 So. 2d 905, 907 (Fla. 2002)), contradicts the procedural mandate that "a habeas petition is the proper vehicle to assert claims of ineffective assistance of appellate counsel.". This principal stands irrespective of the cases cited by the State in its response. As Mr. Blake argued in his petition, the actions and arguments of the prosecutor at trial created fundamental error; it was ineffective of direct appeal counsel to fail to raise this issue on appeal.

The State's response makes a cursory attempt to ratify the prosecutor's inconsistent treatment of Teresa Jones. See Response at 16. The State asserts that "[i]t is not inconsistent for the prosecutor to recognize that a witness's reluctance and varying

levels of disclosure may have been influenced by many different factors - including being castigated by the defense as a 'snitch,' intimidation from others, or their relationship with the suspects." See Response at 16. However, the State's position fails to accurately reflect the circumstances in Mr. Blake and Green's trials. Indeed, the prosecutor explained Jones' inconsistencies to Mr. Blake's jury by saying she was afraid of Mr. Blake and his family (absent any evidence) and explained her inconsistencies in Green's trial based on the prosecutor's contention that she was lying when she said that she feared Mr. Blake. Of course the prosecutor's arguments were completely opposite of one another and violated Mr. Blake's right to due process. Appellate counsel's failure to review the transcript from Green's trial and raise this critical inconsistency as fundamental error constituted ineffective assistance of counsel.

The State relies on *Darden v. Wainwright*, 477 U.S. 168 (1986), to support its argument that the examples of misconduct on the part of the prosecutor raised in Mr. Blake's petition do not rise to the level of a due process violation. The United States Supreme Court's determination that the improper comments in *Darden* were not constitutional error was based on the Court's finding that: (1) the "prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right

to remain silent” and (2) “[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense.” *Darden*, 477 U.S. at 182. However, in Mr. Blake’s case, it is not only the prosecutor’s argument that misstated the evidence in relation to Teresa Jones’ credibility, but the prosecutor pursued directly contradictory strategies in how he used Jones’ testimony in Green’s and Mr. Blake’s trials. Unlike *Darden*’s trial counsel, Mr. Blake’s trial counsel did not “invite” the objectionable content at issue. In *Darden*, the improper commentary was limited to the prosecutor’s closing argument; whereas at Mr. Blake’s trial, the misconduct at issue existed throughout the trial including during presentation of a key State witness; during cross-examination of Mr. Blake; and during closing arguments. In this way, the misconduct “permeated” Mr. Blake’s capital trial.

Likewise, the State’s reliance on *Parker v. Matthews*, 132 S.Ct. 2148 (2012), is also misplaced. As noted by the State, in *Parker*, the prosecutor suggested that the defendant colluded with his lawyer and psychiatrist to manufacture an extreme emotional disturbance defense, but immediately disavowed this suggestion. Here, the prosecutor never disavowed his improper statements and contradictory versions of the evidence to Mr. Blake’s jury.

And, Mr. Blake’s case is unlike the facts in *Reese v. Sec’y, Fla. Dep’t of Corr.*, 675 F.3d 1277, 1287-1288 (11th Cir. 2012),

because in *Reese*, the defendant's claim pertained to improper statements during the prosecutor's closing argument alone. In Mr. Blake's case, the prosecutor's misconduct "permeated the trial" as the misconduct was not limited to improper statements made during closing argument.

The prosecutor's misconduct resulted in prejudice to Mr. Blake because his jury was urged to set aside the logical analysis of the evidence and instead decide the case based on an emotional response to the crime and to Mr. Blake. Appellate counsel was ineffective for raising this issue on direct appeal and relief is warranted.

CLAIM III

THE STATE VIOLATED MR. BLAKE'S RIGHT TO DUE PROCESS BY UTILIZING INCONSISTENT THEORIES OF THE ROLES OF THE CO-DEFENDANTS IN THE CRIME FOR WHICH MR. BLAKE WAS CONVICTED. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THIS AT TRIAL AND APPELLATE COUNSEL WAS LIKEWISE INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE STATE'S INCONSISTENT ARGUMENTS AS TO BLAKE AND GREEN'S RELATIVE CULPABILITY ON APPEAL AS THIS DUE PROCESS VIOLATION CREATED FUNDAMENTAL ERROR.

The State's contention that Mr. Blake's claim is procedurally barred (see Response at 6 citing *Valle v. Moore*, 837 So. 2d 905, 907 (Fla. 2002)), contradicts the procedural mandate that "a habeas petition is the proper vehicle to assert claims of ineffective assistance of appellate counsel.". This principal stands irrespective of cases cited by the State in its response. As Mr. Blake argued in his petition, the State's use of

inconsistent theories at Mr. Blake's and Green's trials violated Mr. Blake's right to due process. Appellate counsel failed to cite to Green's record on appeal in Mr. Blake's direct appeal and failed to raise this issue. This claim is properly raised in a petition for writ of habeas corpus based upon ineffective assistance of appellate counsel.

The State's use of inconsistent theories prejudiced Mr. Blake. The jury found him guilty of first-degree murder, attempted robbery (with a finding that he discharged a firearm resulting in death), and grand theft of a motor vehicle. *Blake v. State*, 972 So. 2d 839, 850 (Fla. 2007). Had the prosecutor not utilized inconsistent theories of culpability between co-defendants Blake and Green the jury would not have found Mr. Blake guilty of first-degree murder and would not have found Mr. Blake guilty of discharging a firearm resulting in death. This is especially true in light of evidence that Mr. Blake did not know that Green intended to rob the store. The presentation of inconsistent theories as to Mr. Blake's culpability vis a vis Green was not harmless error as was argued by the State in its response and citing to *Mendoza v. State*, 87 So. 3d 644, 655 (Fla. 2011). In *Mendoza*, this Court stated that the identity of the shooter was not material where a defendant was found guilty of first degree felony murder. That is not the case here.

Further, the present case is unlike the other cases cited in

the State's response. In *Raleigh v. State*, 932 So. 2d 1054, 1065-1067 (Fla. 2006), the prosecutors did not argue that *Raleigh's* co-defendant played a bigger role in the murder than Raleigh did; rather the prosecutor argued that Figueroa formed the necessary intent to be convicted of first-degree murder. Additionally, there was evidence that Raleigh killed one person while his co-defendant Figueroa killed another person. Similarly, *United States v. Hill*, 643 F. 3d 807, 834 (11th Cir. 2011), is inapplicable where that case involved co-defendants who were "guilty to the gills" of money laundering and bank fraud. The present case involves a murder where only one co-defendant could be the actual shooter. The State's reliance on *Parker v. State*, 542 So. 2d 356 (Fla. 1989) distinguished by *State v. Gates*, 826 So. 2d 1064, 1067 (Fla. 2nd DCA 2002) is likewise misplaced. In *Gates* the reviewing court pointed out:

The State points to *Parker v. State*, 542 So. 2d 356 (Fla. 1989), in support of the proposition that it can present conflicting theories of prosecution in separate trials. However, the *Parker* case simply held that the State did not have a duty to tell the jury that it was taking an inconsistent position. Moreover, a review of *Parker's* codefendant's case, *Bush v. Singletary*, 988 F. 2d 1082 (11th Cir. 1993), shows that the State did not actually take inconsistent positions at the trial of the two codefendants. Rather, at *Parker's* trial, the State argued that *Parker* was the triggerman. At *Bush's* trial, while the State made one isolated comment that suggested the *Bush* might have been the triggerman, the State primarily argued that it "did not have to prove that *Bush* touched or stabbed the victim to sustain a first degree murder conviction." *Id.* at 1088. Thus, it is clear from reading both cases that the State's arguments were not actually inconsistent.

Id.

The State's use of conflicting theories to convict Mr. Blake of first degree murder and attempted robbery (with a finding that he discharged a firearm resulting in death) vis a vis his co-defendant Green resulted in a conviction that is arbitrary and irrational. Mr. Blake's appellate counsel was ineffective for failing to incorporate Green's trial transcript in Mr. Blake's record on appeal and ineffective in failing to raise this claim on direct appeal. Habeas Relief is warranted.

CLAIM IV

MR. BLAKE WAS DENIED HIS RIGHTS UNDER AKE V. OKLAHOMA AT HIS CAPITAL TRIAL, IN VIOLATION OF MR. BLAKE'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS. APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

Once again, the State argues that Mr. Blake is procedurally barred from raising this claim in a habeas petition citing to the fact that the circuit court, found the claim Mr. Blake raised in his Rule 3.851 proceedings to be barred. However, Mr. Blake is not "relitigating" claims made in postconviction as argued by the State. Mr. Blake's claim of ineffective assistance of appellate counsel is properly presented in his petition for writ of habeas corpus.

The State misstates the holding in *Conklin v. Schofield*, 366

F. 3d 1191, 1206 (11th Cir. 2004), as standing for the proposition that *Ake v. Oklahoma* did not require that Mr. Blake receive an adequate psychiatric evaluation as that related to Mr. Blake's guilt phase defense. *Conklin* referred to **non-psychological** experts.

Mr. Blake was denied constitutionally mandated mental health assistance at the guilt phase of his capital trial. Appellate counsel was ineffective for raising this issue on direct appeal and relief is warranted.

CONCLUSION AND RELIEF SOUGHT

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY has been furnished by electronic mail to Katherine Vickers Blanco, Assistant Attorney General, this 21st day of October, 2013.

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 12 point Courier type, a font that is not proportionately spaced.

/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. BLAKE