IN THE SUPREME COURT OF FLORIDA

NO. 1999-150

ARTHUR DENNIS RUTHERFORD,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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ARGUMENT IN REPLY

INTRODUCTION

A claim alleging ineffective assistance of appellate counsel is not a "second appeal", as Respondent seems to suggest, but rather a valid claim based on the Sixth Amendment to the United States Constitution, as well as the Due Process Clause of the Fourteenth Amendment. "A first appeal as of right []is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucev, 469 U.S. 387, 396 (1985). This Court has recognized that "[i]t is the unique role of that [appellate] advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process." Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985).

In addition, a claim of ineffective assistance of appellate counsel should not be dismissed by a mechanistic incantation of "procedural bar" in order to prevent full review of the claims presented in Mr. Rutherford's petition. In several issues, Respondent indicates that because Mr. Rutherford raised some of the same issues in his Rule 3.850 motion and in his habeas petition, he is procedurally barred from raising these issues in a habeas petition-l As a legal justification for this argument,

[1]See Response at 8 (regarding Claim II), 16 (regarding Claim VI), 22 (regarding Claim IX), and 23 (regarding Claim X) .

Respondent cites to this Court's opinion in Blanco v. Wainwrisht, 507 So. 2d 1377 (1987). However nowhere in the Blanco opinion does the Court state that a claim is procedurally barred if it is raised in both a Rule 3.850 motion and a habeas corpus petition. In Blanco, the Court observed that the "gravamen of the petition . . . is appellate counsel's failure to recognize egregious errors appearing on the face of the trial record, to wit: ineffective assistance of trial counsel." Blanco, 507 So. 2d at 1384. The Court then rejected the argument that appellate counsel on direct appeal should present issues relating to ineffective assistance of trial counsel because "[a] proper and more effective remedy is already available for ineffective assistance of trial counsel under rule 3.850." Id.

Mr. Rutherford's habeas petition does not allege that appellate counsel failed to raise claims that trial counsel rendered ineffective assistance of counsel. Rather, Mr. Rutherford's habeas petition alleges serious violations of his Sixth Amendment right to the effective assistance of appellate counsel for failing to raise clearly meritorious issues which are apparent on the face of the record and which were either preserved for appeal and/or constituted fundamental error either singularly or cumulatively. See generally Pope v. Wainwright, 496 So. 2d 798 (Fla. 1986); Barclay v. Wainwrisht, 444 So. 2d 956 (Fla. 1984).

CLAIM I

MR. RUTHERFORD WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. APPELLATE COUNSEL FAILED TO RAISE ANY OF THE NUMEROUS PRETRIAL MOTIONS RAISED BY TRIAL COUNSEL.

In this case, appellate counsel's performance was deficient in a number of respects and that deficiency undermines confidence in the outcome of Mr. Rutherford's direct appeal, thus depriving Mr. Rutherford of the effective assistance of counsel to which he was constitutionally entitled. It is **axiomatic** that a single critical error may render counsel's performance constitutionally deficient. Vela v. Estelle, 708 F.2d 954, 965 (5th Cir. 1983). Mr. Rutherford **has** identified not one error, but many. When considered cumulatively, counsel's errors create a reasonable probability of a different outcome **and** requires that Mr. Rutherford be afforded a new direct appeal proceeding followed by relief.

Pretrial Motions

Respondent argues that these issues were not preserved because trial counsel did not object to the denial of the motions (Response at 4). However, Respondent's assertion is clearly inaccurate.

For example, trial counsel filed a pretrial motion regarding the vagueness of the aggravators (R. 136-137). After presenting the penalty phase, a charge conference was held in the judge's chambers that was unrecorded (R. 888). When court resumed, the judge placed on the record the aggravators that were discussed (R. 893). As to the heinous, atrocious and cruel aggravator the

court stated: "The defense has objected to the Court instructing the jury on the . . . The especially wicked, evil, atrocious or cruel instruction" (R. 894).

Trial counsel renewed his pretrial motions and objected to their denial at the appropriate time, yet, Mr. Rutherford's appellate attorney failed to raise these preserved issue. Accordingly, Mr. Rutherford was denied the effective assistance of appellate counsel to which he is entitled. Habeas relief is required,

CLAIM II

MR. RUTHERFORD WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BECAUSE AVAILABLE OBJECTIVE *FACTS* AND CIRCUMSTANCES INDICATING THE PROSECUTOR INTENTIONALLY GOADED MR. RUTHERFORD INTO MOVING FOR *A* MISTRIAL TO GAIN TACTICAL ADVANTAGE UPON RETRIAL WAS NOT ASSERTED ON DIRECT APPEAL. THE DOUBLE JEOPARDY CLAUSE *OF* THE FIFTH AMENDMENT WAS VIOLATED AND MR. RUTHERFORD WAS TJNCONSTITUTIONALLY SUBJECTED TO REPEATED PROSECUTIONS FOR THE SAME OFFENSE.

Respondent first argues that this claim is procedurally barred from review because the claim was already raised on direct appeal (Response at 8). Apparently, Respondent misapprehends Mr. Rutherford's claim, Admittedly Mr. Rutherford's direct appeal contained a claim that the trial court lacked jurisdiction to try him a second time since the granting of a mistrial during the initial trial was based upon intentional prosecutorial misconduct and the Double Jeopardy Clause barred the second prosecution

However, Mr. Rutherford's claim asserts that appellate counsel was ineffective for failing to uncover and present

objective evidence of the prosecutor's intent to provoke a mistrial and thereby gain tactical advantage. Mr, Rutherford was entitled to have this claim raised in a reasonably effective manner. Wilson v. Wainwrisht, 474 So. 2d 1162, 1165 (Fla. 1985). Because appellate counsel failed to effectively argue this issue, this Court did not have the pertinent information that would have changed the outcome of this issue.

Mr. Rutherford has not devised "another theory to support [his] claim" (Response at 10) . Instead he has presented objective evidence to support his claim and requested that this Court allow evidentiary development so that he can prove it,

Appellate counsel's error certainly prejudiced Mr. Rutherford since this Court acknowledged that the trial court found "the prosecution had committed a willful discovery violation", but concluded there was "no indication" the prosecutor's motivation was to obtain a mistrial. Rutherford v. State, 545 So. 2d 853, 855 (Fla. 1989). The information Mr. Rutherford now possesses with or without further evidentiary development could have been obtained by appellate counsel and would provide the "indication" that the prosecutor's motivation was to obtain a mistrial, Mr. Rutherford is entitled to relief.

CLAIM III

APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THE FUNDAMENTAL ERROR CAUSED BY TESTIMONY OF INCOMPETENT WITNESSES.

Respondent argues that Mr. Rutherford's claim is procedurally barred and without merit (Response at 10). However,

Mr. Rutherford's appellate counsel rendered ineffective assistance in failing to raise this issue. Appellate counsel's failure to recognize and raise this issue was below the standard of performance of reasonable appellate counsel.

Respondent also argues that "the record shows that any [competency] challenge would not have been successful (Response at 11). However, Respondent overlooks the testimony in which Ms. Heaton admitted that she had been in a mental institution for five months prior to trial (R. 411). In addition, Ms. Heaton had trouble differentiating if what happened on the day of the crime was fact or fantasy (R. 412). Ms. Ward, another prosecution witness, was only thirteen years old at the time of the crime. Certainly, a challenge to these witnesses' competency may well have succeeded.

Not only does the record indicate that the testimony of these witnesses raised competency issues, but when considered in light of their roles in the case (Ms. Heaton and Ms. Ward were the only witnesses to place the victim's check or checkbook in Mr. Rutherford's possession), appellate counsel could not have overlooked this issue.

Furthermore, Respondent attempts to distinguish the cases Mr. Rutherford cited because in two of those cases trial counsel objected to the competency of the witnesses. However, Mr. Rutherford cited these cases in order to illustrate the competency standards witnesses must meet and inquiries judge's must conduct before allowing witnesses to testify.

Certainly Ms. Heaton's testimony failed to meet the requirement that she be able to provide a "correct account of the matters which [she] ha[d] seen or heard relative to the question at issue." Kaelin v. State, 410 So. 2d 1355, 1357 (Fla. 4th DCA 1982). Appellate counsel was ineffective for failing to raise this claim, Habeas relief is proper.

CLAIM IV

APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THE PREJUDICIAL ERROR CAUSED BY THE ADMISSION OF INFLAMMATORY PHOTOGRAPHS THAT VIOLATED MR. RUTHERFORD'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Appellate counsel's failure to raise the issue regarding the admission of prejudicial and inflammatory photographs, an issue which had been properly preserved for review, was deficient and prejudicial performance.

Respondent argues that [p]hotographs are admissible if they assist a medical examiner in explaining the nature and manner in which wounds were inflicted" and cites Bush v. State, 461 So. 2d 936 (Fla. 1984), cert. denied 475 U.S. 1031 (1986) (Response at 13). However, as Respondent's own brief illustrates the introduction and use of these photographs was designed solely to inflame the jurors' emotions. As Respondent concedes, photographs of the victim's injuries were admitted in the guilt and penalty phases of the trial (Response at 12). Furthermore, the prosecution presented the testimony of a sheriff's investigator and not the medical examiner to introduce the photographs in the penalty phase (Response at 13). The sheriff's

investigator did not add any relevant evidence regarding the photographs that was not obtained using the photographs introduced during the guilt phase,

Photographs of the victim had already been admitted in the guilt phase of the trial which was accompanied by extensive testimony regarding the victim's injuries. The photographs admitted at the penalty phase were unnecessary and cumulative to the State's case. There was no legitimate purpose in submitting these pictures to the jury. The only purpose was to inflame and enrage them,

The photographs showed "nothing more, than a gory scene". Thomas v. State, 59 So. 2d 517 (1952). Appellate counsel failed to raise this issue despite their being proper objections by trial counsel. Habeas relief is proper.

CLAIM VI

APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL TEAT MR. RUTHERFORD WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BECAUSE HIS ATTORNEYS REVEALED CONFIDENCES TO THE TRIAL COURT, VIOLATING THEIR DUTY OF LOYALTY TO THEIR CLIENT AND OPERATING UNDER A FUNDAMENTAL CONFLICT OF INTEREST, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Respondent argues that Mr. Rutherford's claim is procedurally barred and without merit (Response at 15). However, Mr. Rutherford's appellate counsel rendered ineffective assistance in failing to raise this issue. Appellate counsel's failure to recognize and raise this issue was below the standard of performance of reasonable appellate counsel.

Respondent claims that because Mr. Rutherford has been characterized as a "difficult client" it was permissible for trial counsel to inform the court that Mr. Rutherford was offered a plea and for trial counsel to begin to protect himself from future attacks (Response at 17).

However, in protecting himself, trial counsel revealed confidential information to the ultimate sentencer. This information was outside the evidence adduced at trial and it is obvious that the judge considered this information in his sentencing order. In the sentencing order, the court said:

> While the Court cannot use the attitude of the defendant and his lack of remorse for this crime as an aggravating circumstance, the Court does find that the defendant's lack of remorse adds weight to the Court's determination that the crime was especially heinous, atrocious and cruel.

(Supp. R. 4).

Defense counsel actively placed their interests above Mr. Rutherford's by informing the judge that Mr. Rutherford had rejected a life sentence. Mr. Rutherford's trial counsel had no basis to reveal the information regarding the unaccepted plea and an actual ethical duty not to reveal it. Clearly, trial counsel's attempt to preempt any future attacks on his performance by providing the court with confidential information prejudiced Mr. Rutherford.

Appellate counsel failed to raise this fundamental error. Habeas relief is proper,

CLAIM VIII

THIS COURT MUST REVISIT THE ISSUE OF WHETHER THE INTENSE SECURITY MEASURES IMPLEMENTED DURING MR. RUTHERFORD'S TRIAL IN THE JURY'S PRESENCE DILUTED THE STATE'S BURDEN TO PROVE DEATH WAS THE APPROPRIATE PENALTY AND INJECTED MISLEADING AND UNCONSTITUTIONAL FACTORS INTO THE PENALTY PROCEEDINGS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respondent indicates that on direct appeal this Court found this issue to have no merit (Response at 20). However, on direct appeal, Mr. Rutherford raised this claim and it was rejected without discussion. Rutherford v. State, 545 So. 2d at n.4.

Mr. Rutherford requests that because the circumstances of his shackling were particularly egregious, this Court address his issue, particularly in light of the case law that emerged in the same period of time as Mr. Rutherford's opinion.

Mr. Rutherford was shackled just prior to the penalty phase closing argument, As justification for the shackling the trial court indicated that "based on his conviction for the ultimate crime of first degree murder and facing a possible recommendation of death, the court has ordered that he be placed in leg irons" (R. 895).

However, this justification does not make sense. Mr. Rutherford had not been shackled during the testimony in the penalty phase. The timing and nonsensical justification suggest that the court sent a signal indicating that he expected them to recommend death.

The circumstances surrounding Mr. Rutherford's shackling are strikingly similar to those in Bello v. State, 547 So. 2d 914 (Fla. 1989). In Bello, this Court held that the defendant was entitled to a new trial because the trial judge made no appropriate inquiry, Id. Mr. Rutherford, too, is entitled habeas relief.

CLAIM **IX**

MR. RUTHERFORD'S JURY WEIGHED INVALID AND UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE SENTENCING PROCEEDING, AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS **INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.**

As Respondent indicates, appellate counsel raised and this Court addressed the applicability **of** the heinous, atrocious and cruel and cold, calculated and premeditated aggravator on direct appeal (Response at 22). However, appellate counsel failed to raise the **issue** of instructions despite the fact that trial counsel filed a Motion to Vacate the Death Penalty, arguing that the aggravating circumstances are in the death penalty statute not sufficiently defined (R. 136-137). Mr. Rutherford was entitled to have this claim raised in **a** reasonably effective manner. Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). Appellate counsel failed to challenge the deficiencies of the fundamentally flawed instructions.

As stated in Mr. Rutherford's Initial Brief, that there was fundamental constitutional error in the instructions to the jury is a matter which is now not open to debate. Espinosa v.

Florida, 112 S. Ct. 2926, 120 L.Ed.2d 854 (1992). Thus, habeas relief is warranted.

CLAIM XI

THE SENTENCING COURT ERRED BY FAILING TO PROPERLY AND TIMELY IMPOSE A WRITTEN SENTENCE OF DEATH, IN DIRECT VIOLATION OF FLORIDA LAW AND MR. RUTHERFORD'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

Respondent argues that this claim has no merit because this Court's holding in Grossman[2] occurred after Mr. Rutherford's direct appeal and that holding was to be applied prospectively (Response at 24). However, as this Court indicated, this claim could have been raised on direct appeal. Rutherford II, 727 So, 2d at n.2, 219. Appellate counsel was deficient for failing to the sentencing order deficiency to this Court's attention.

Respondent points out that Grossman was sentenced after Mr. Rutherford, however, Van Royal[3] was decided well before Mr. Rutherford's capital trial, thus error was evident on the face of the record but it was ignored by appellate counsel,

In addition, Respondent ignores Mr. Rutherford's argument that the sentencing court failed to properly state its reasons justifying the death sentence on the record. Appellate counsel failed to raise this error on direct appeal. As the record reflects, at Mr. Rutherford's sentencing hearing, the trial judge did not conduct a contemporaneous independent weighing of

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2 Grossman v. Dusser, 525 So. 2d 833 (Fla. 1988).

3 Van Royal v. State 497 So. 2d 625 (Fla. 1986).

aggravating and mitigating circumstances by the sentencing judge: ". . . leaving as a balance of three aggravating circumstances to one mitigating circumstance . . ." (R. 948). This was clearly not a "meaningful weighing" as required by Florida law.

Appellate counsel's failure to bring the defects of the sentencing proceeding and order to this Court's attention was a serious and substantial error. The omission was prejudicial, since it prevented Mr. Rutherford from effectively challenging the trial court's failure to engage in a reasoned weighing process. Mr. Rutherford is entitled to habeas relief.

REMAINING CLAIMS

Mr. Rutherford relies on the arguments set forth in his habeas petition in reply to the Respondent's arguments as to the remaining claims and issues. To the extent that the Respondent discusses procedural bars as to the remaining claims, Mr. Rutherford adopts the arguments contained in this pleading to specifically rebut any procedural bar argument. Mr. Rutherford in no way waives and/or abandons any specific issue raised in his Habeas Petition yet not addressed in this Reply.

CONCLUSION

For all of the reasons discussed herein and in his petition, Mr. Rutherford respectfully urges the Court to grant habeas corpus relief.

I HEREBY CERTIFY that a true copy of the foregoing Reply to State's Response to Petition for Writ of Habeas Corpus has been

furnished by United States Mail, first class postage prepaid, to all counsel of record on February 7, 2000.

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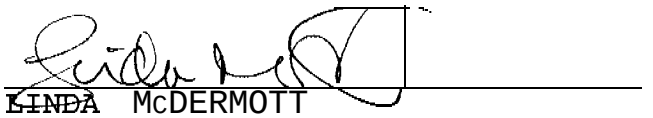

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