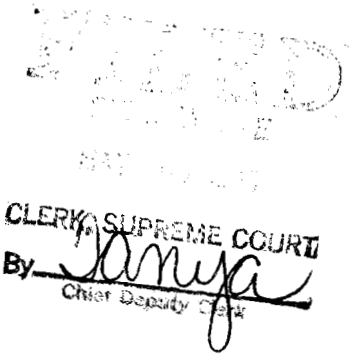
IN THE

SUPREME COURT OF FLORIDA

No. 68,619



JOHN EARL BUSH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR MARTIN COUNTY, FLORIDA.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

In this Reply Brief, Appellant John Earl Bush adheres to the abbreviations used in his Initial Brief, as follows:

R refers to the record on direct appeal;

Motion is used to refer to Mr. Bush's Motion to Vacate Judgment[s] and Sentences;

App., Ex. [letter designation] refers to exhibits contained in the Appendix (3 volumes) submitted with the Motion.

In addition, T. will be used to refer to the transcript of argument on the Motion held before Circuit Court Judge C. Pfeiffer Trowbridge on April 21, 1986.

Finally, references to a specific portion of the State's Answer Brief will be S.B. [page number].

Note: In its Answer Brief, the state has referred to each and every allegation made in Mr. Bush's Motion. For reasons of space limitation, defendant has chosen to emphasize only some of these in his briefs before this Court. In no way is this intended as a waiver, however, of any of the allegations made in his Motion.

STATEMENT OF THE CASE & STATEMENT OF THE FACTS

For purposes of this Reply Brief, Mr. Bush adopts his Statement of the Case and Statement of the Facts as presented in his Initial Brief.

There are many assertions in the state's presentation of the

facts (S.B. 2-21) with which Mr. Bush is not in accord. However, one such point is critical to this rebuttal. The state recites that "[t]he trial court concluded that, on the Record, it appeared that defense counsel had tactically and appropriately determined, after meeting with the court-appointed psychiatrist not to proceed with such an examination [a psychiatric evaluation of the defendant]." (S.B. 20), citing T. 86 (emphasis added). However, the trial court's entire relevant statement on the record was as follows:

> The question of whether the competency examination faulted [sic] or not seems to me to be a question of trial tactics by appointed counsel. There was never a, to my rememberance [sic], a claim filed that the defendant was incompetent that would require a hearing, there are two procedures and I believe this procedure he had an appointment but made [sic] of a mental health expert. But having considered the initial report and initial finding, apparently, it was Mr. Muschott's consideration that that was a poor route to go and that's a decision that I think he was entitled to make.

(T. 86) (emphasis added).

Thus, the state's synopsis of what the trial court found is misleading, because the trial court itself misperceived the facts: Muschott made no "tactical decision" on the matter because he was totally ignorant of what an evaluation might find - he himself along with an incompetent psychiatrist thwarted the very evaluation which he himself had asked the court to order. There was no initial report and there was no initial finding.

Unless one can somehow summarily confer either a Ph.D. in psychology or an M.D. with a psychiatric subspecialty on Muschott, that attorney was totally without the expertise to make any judgment on the issue of his client's mental status; presumably, that's why he requested the appointment of a mental health expert in the first place. [See further discussion below, Issue II, Claims I, II, and III.] Judge Trowbridge's references to an initial report and an initial finding, thus, is totaly unsupportable.

ISSUE I

THE TRIAL COURT ERRED BY DENYING DEFENDANT'S FACIALLY SUFFICIENT MOTION TO VACATE JUDGMENT[S] AND SENTENCES WITHOUT FIRST CONDUCTING AN EVIDENTIARY HEARING.

With reference to Issue I, Mr. Bush relies on the arguments made and the authorities cited in his initial brief. Counsel would note that the state apparently concedes that Claims I, II, and III (relating to the incompetency of the court-appointed psychiatrist, the competency of Mr. Bush to stand trial, and the ineffective assistance of trial counsel) are appropriately cognizable in post-conviction proceedings; the trial court apparently so found as well (see T. 85 ff).

Claim IV, which alleges that the state materially and deliberately misled the jury by presenting false evidence (evidence contradicted by its own ballistics report, App. Ex. NN)

and false argument to the effect that John Earl Bush fired the fatal bullet is based in great part on evidence arising from the subsequent trials of Mr. Bush's co-defendants -- information which could not have been presented as part of defendant's direct appeal to this Court.

ISSUE II

BECAUSE THE ISSUES RAISED ARE SUBSTANTIAL AND NON-FRIVOLOUS, ARE NOT CONCLUSIVELY REFUTED BY THE RECORD, AND ENTITLE DEFENDANT TO RELIEF, THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT[S] AND SENTENCES.

Claims I, II, and III all rely on evidence developed after Mr. Bush's trial and outside of the record. In dealing with each of these claims, the state insists that "the record" conclusively refutes the claim. The state has made our point, while twisting the legal standard: the record does not "refute" our claims, it conflicts with the non-record proffered evidence. Only an evidentiary hearing can resolve the conflict - it is simply not enough for the state to show that the record shows something other than what the proffer shows. In addition, the state suggests that trial counsel's arguments or the defendant's own statements are the same as corroborating, outside evidence. However, there can be no question that statements by a defendant are perceived by a jury as self-serving, while testimony of third parties carries more weight. The jury was so instructed. Third

party evidence can never be merely "cumulative" if the only evidence actually introduced on the defendant's behalf comes from the defendant's own mouth.

Claim I

THE INCOMPETENCE OF THE COURT-APPOINTED PSYCHIATRIST, WHO CONDUCTED NO MENTAL EVALUATION AT ALL, PREJUDICIALLY DEPRIVED DEFENDANT OF A NECESSARY COMPETENCY HEARING, OF CORROBORATING EVIDENCE OF DOMINATION AND LACK OF INTENT, OF EVIDENCE OF THE INVOLUNTARINESS OF HIS CONFESSION, AND OF SUBSTANTIAL MITIGATION, IN VIOLATION OF DUE PROCESS, EQUAL PROTECTION, AND SIXTH AND EIGHTH AMENDMENT RIGHTS.

Claim II

DEFENDANT WAS DEPRIVED OF A FAIR TRIAL AND DUE PROCESS BECAUSE HE NEVER HAD A COMPETENCY HEARING AND WAS IN FACT TRIED, CONVICTED, AND SENTENCED WHILE INCOMPETENT TO STAND TRIAL.

Claims I and II of necessity are interrelated and while theoretically separable, will be dealt with together in this Reply Brief.

As noted earlier, Judge Trowbridge's ruling below on this matter was based on a misunderstanding of the evidentiary proffer. Muschott requested and received a court-appointed expert to conduct an evaluation of Mr. Bush from several perspectives (see App. Ex. Q), including his competency to stand trial, insanity at the time of the offense; the existence of coercion or undue influence (necessary for the proper

establishment of a defense and of the involuntariness of Mr. Bush's statements to law enforcement personnel); establishment of mitigation at the trial's penalty phase; and the existence of mental mitigation aside frim coercion. Muschott's motion was obviously prompted by something arising from his observation of his client, his relationship with his client, his anticipation of the state's case, or some other factor. Without an evidentiary hearing, it is impossible to determine what Muschott's motivation was.

Nonetheless, despite his having acknowledged his own lack of expertise as to the above areas by his very request for an expert, Muschott subsequently, with the assistance of a psychiatrist acting totally outside of recognized professional norms and standards, prevented the evaluation from occurring. A half-hour conversation between counsel and "expert" substituted for a proper, thorough, and competent mental evaluation of the subject client/patient. There was no "report," there were no "findings," because Dr. Tingle never even met John Earl Bush, much less examined him.

Defendant contends that Dr. D'Amato's report is a sufficient proffer of the evidence which a court-appointed psychiatrist could have brought to the attention of the trial court and the jury to raise the relevant isssues and to demonstrate that a violation analogous to an Ake violation, Ake v. Oklahoma, 470

U.S. ___, 105 S.Ct. 1087, 84 L.Ed.2d 55 (1985) has occurred in this case. Mr. Bush's mental health was put in issue by counsel and the court, and then nothing was done. The fact that Dr. D'Amato's report is couched in careful language (like "probably" or "possibly") does not eliminate its conclusions: that there is some evidence of organic brain dysfunction which can be demonstrated by a complete neuropsychological evaluation (not yet done); that Mr. Bush's low IQ and learning disability suggest the possibility of incompetence to stand trial; and that Mr. Bush demonstrates both impaired judgment and a strong likelihood of domination at the time of the offense - none of which information was ever presented to the trial court or to the jury during any portion of Mr. Bush's criminal proceedings. The state contends Dr. D'Amato did not test for brain damage. They (like the trial court) did not read his report. The WAIS-R testing, Dr. D'Amato concluded, indicated brain damage. The state is wrong again. This is the reason that this Court encourages evidentiary hearings -- so we are not left with lawyers, untrained in clinical psychology, offering seat-of-the-pants opinions on crucial and complex mental health issues.

As previously stated (see Initial Brief at p. 32), Mr. Bush need not in his proffer prove incompetency; he need only to make a sufficient showing. He has. Incompetency to stand trial does not require that the defendant be psychotic or totally "off the

wall" - and the state's suggestion that because Mr. Bush testified at his trial he was therefore automatically not incompetent to stand trial is simply specious. Mental health experts would tell us otherwise. When do they get the chance? In fact, Mr. Bush gave statements to the authorities and testified at his trial against advice of counsel, which supports rather than undercuts the probability that he was behaving non-rationally, that he did not understand the seriousness of the charges against him, and that he was not relating well to his attorney. In fact, during the penalty phase, the state proferred evidence (kept out by the trial court) that even after he was found guilty of first degree murder, John Earl Bush totally failed to realize that he could be sentenced to death (R 1263).

Claim III

MR. BUSH WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

With reference to most of his allegations in connection with this claim, Mr. Bush relies on the Motion itself and on his previous brief.

However, the errors of trial counsel in connection with the penalty phase of Mr. Bush's trial merit further attention in this Reply Brief.

It is apparent from the record that Muschott had no penalty phase strategy whatsoever in connection with Mr. Bush's case, despite his pre-trial awareness that at least two aggravating factors were clearly present in the case. Mr. Bush's took the witness stand against advice of counsel; Muschott apparently intended to put on no evidence whatsoever on his client's behalf.

Evidence proffered in connection with the Motion indicates that witnesses were available and that evidence of Mr. Bush's background (including his having saved a drowning child's life) could have been presented to "humanize" the defendant. In light of the 7-5 jury recommendation, and of the trial court's comment that the record was wholly devoid of any evidence on Mr. Bush's behalf, it is impossible to say that there is no "reasonable likelihood" that the sentence would have been different had the profferred evidence been introduced. We need a hearing; there has been none.

The state disparages evidence of the traumatic effects of Mr. Bush's incarceration as a juvenile in adult institutions. The state says Muschott wouldn't have used the profferred evidence. How do we know? There was no hearing. The jury heard about his incarceration, and the state hammered on it during penalty phase. A response was necessary. The doubt about Mr. Bush's guilt in the prior offense and evidence of a co-defendant dominating him during that episode were never presented to the

jury. They only heard the state's side. The jury and court didn't hear about the victimization of Mr. Bush, as a child, in these adult institutions, a much-needed but absent and sympathetic account of his background.

The state claims that had Muschott offered any of the evidence which has now been developed of his mental status, personality, and background, it would have undercut his "theory" of the defense. When do we get to ask him? There is no evidence to support such speculation. The record negates any theory. Since Muschott obviously had no "theory" at penalty phase, there was no "theory" to undercut. Second, the only conceivable theory of the defense, at both guilt and penalty phases of Mr. Bush's trial (assuming arguendo that Mr. Bush's statements were admissable at trial) was that Bush was a participant in the events of April 26-27, 1982, but that he was not an intentional participant in the murder and in fact did not intentionally harm the victim. How the profferred evidence of Dr. D'Amato and of family members could have undercut this theory is not explained by the state. Indeed, the evidence of Mr. Bush's personality, low IQ, need for peer acceptance, etc. fits in with the guilt phase evidence presented primarily through defendant's imcriminatory statements. Middleton v. State 465 So.2d 1218 (Fla. 1985), cited by the state, involved a single perpetrator. How is that case relevant or controlling here?

The state repeatedly ascribes to Muschott tactical or strategic "decisions" which he could not possibly have made because the critical point is that Muschott, by failing to conduct any investigation whatsoever into his client's background or personality, was completely ignorant of the facts necessary for such decision making. Muschott was obligated to investigate. He didn't. Effective assistance of counsel clearly requires more. Thompson (William Lee) v. Wainwright, slip op. No. 84-5815 (11th Cir. Apr. 10, 1986).

Claim IV

THE STATE MATERIALLY MISLED THE JURY BY PRESENTING AND ARGUING FACTS WHICH IT KNEW TO BE FALSE, AND WHICH TOTALLY CONTRADICTED THE PROSECUTOR'S THEORY IN CO-DEFENDANTS' CASES, IN VIOLATION OF DEFENDANT'S FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Claim V

THE PROSECUTOR'S CLOSING ARGUMENTS AT PENALTY PHASE, CULMINATING AN INTENTIONAL AND DELIBERATE EFFORT THROUGHOUT THE TRIAL TO ENGENDER SYMPATHY FOR THE VICTIM'S FAMILY, WERE INFLAMMATORY, IMPROPER AND HIGHLY PREJUDICIAL, AND THEREBY VIOLATED MR. BUSH'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Claim VI

THE PENALTY PHASE JURY INSTRUCTIONS, WHEN COUPLED WITH IMPROPER PROSECUTORIAL VOIR DIRE, UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY.

Claim VII

FLORIDA'S DEATH PENALTY IS IMPOSED IN AN ARBITRARY AND DISCRIMINATORY MANNER ON THE BASIS OF IMPROPER RACIAL FACTORS, RENDERING THE PROCESS UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

With reference to Claims IV, V, VI, and VII, Mr. Bush relies on the arguments made and authorities cited in his initial brief.

CONCLUSION

For the reasons stated herein and in his Initial Brief, Mr. Bush respectfully requests this court to reverse the trial court's denial of his Motion to Vacate Judgment[s] and Sentence, and remand for an evidentiary hearing.

Respectfully submitted,

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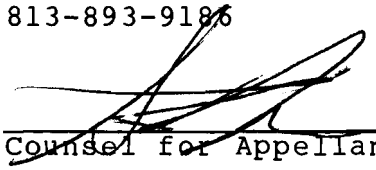
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to:

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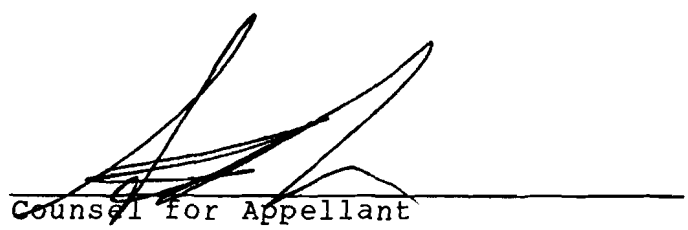

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