IN THE SUPREME COURT OF FLORIDA

CASE NO. **71,679**

JERRY WHITE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE NINTH JUDICIAL CIRCUIT COURT IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT I

DEFENSE COUNSEL'S PERFORMANCE IN THE GUILT PHASE OF THE TRIAL WAS IN AND OF ITSELF SO DEFICIENT AND PREJUDICIAL AS TO RENDER THE CONVICTION AND SENTENCE UNCONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Failure to Present the Only Viable Defense and to Prevent the Defendant From Positing a Theory of Self-Defense.

Appellant would reply only to that portion of appellee's brief regarding trial counsel's failure to present Mr. White's only viable defense and his failure to dissuade Mr. White from testifying. Appellee places total and unmitigated blame for the disastrous outcome of the trial on the Defendant and would have his trial counsel remain blameless. The State writes that trial counsel "chose to present the defense favored by appellant himself, in which self-defense was argued . . . ." (State's Brief, p. 15)(emphasis added). Although the State intimates that trial counsel discussed with Mr. White all available alternative defenses before "choosing" to rely on "self defense," such a suggestion is belied by the record of the evidentiary hearing held in the Rule 3.850 court. In fact, that record reveals that trial counsel was wholly unaware of other available defenses, defenses far more compelling than that which counsel "chose" to

present (See, e.g., R. II 24, 153, 157, 225-27).[1] Because trial counsel was unreasonably ignorant of other available, more compelling defenses, as a result of his unreasonable failure to investigate and prepare, no "strategic" or "tactical" reasons can be attributed to his "choice" of defenses. See, e.g., Strickland v. Washinaton, 466 U.S. 668, 691 (1984); Kimmelman V. Morrison, 106 S. Ct. 2574, 2588-89 (1986).

Mr. White's principle contention with respect to the instant claim is that trial counsel was unreasonably ineffective for failing to introduce a state of mind defense based on the amply available evidence of Mr. White's voluntary intoxication at the time of the offense. As discussed at length below and in Mr. White's initial brief, such a defense was well supported by the available evidence, and if presented would have precluded a jury finding of the specific intent element prerequisite to a conviction for first degree murder. The prejudice emanating from trial counsel's unreasonable failures in this regard is undeniable -- the presentation of such a defense would literally have made the difference between life and death, as it would have reduced the offense from first degree to second degree murder.

Inextricably linked to counsel's unreasonable failure with respect to the intoxication defense is counsel's culpability in

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[1] References to the post-conviction evidentiary hearing under Rule 3.850 are cited as (R. II ___).

not preventing Mr. White from self-destructing with a story of self-defense. Despite the Rule 3.850 court's finding that Mr. White "wanted to take the stand to tell his story" (R. II 1023), nothing in the record indicates Mr. White made any informed strategic choice in this regard. To the contrary, the record demonstrates that there were virtually no communications between Mr. White and his trial counsel (see, e.g., R. II 28, 153), much less meaningful discussions regarding the availability and efficacy of alternative defenses. It is never appropriate to accede to the demands of a client when the client has not had the benefit of adequate advice, founded on independent investigation. A client's decisions must be made after proper counsel: "Uncounseled jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better informed advice." Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983). "After informing himself fully on the facts and the law, the lawyer should advise the accused," ABA Standards for Criminal Justice, the Defense Function, Standard 5.1(a), and decisions made by clients without advice based on independent investigation are decisions made without "the guiding hand of counsel." Powell v. Alabama, 287 U.S. 45 (1932).

Evidence elicited at the post-conviction hearing established that there was ample scientific and medical information and eyewitness testimony upon which to base a defense of voluntary

intoxication (See Defendant's Brief 46-48). In addition, a legal expert opined that, under the circumstances, this was the only viable defense (R. II 271-72). The issue of intoxication was a matter that should have been presented to the jury with proper instructions.

A Defendant is entitled to a full, fair and adequate opportunity to vindicate his constitutional rights pursuant to the post-conviction process established under Article V, sec. 3(b)(9), Fla. Const., Fla. R. App. P. 9.030(a)(3), and Fla. R. Crim. P. 3.850. See, e.g., Holland v. State, 503 So. 2d 1250 (Fla. 1987). Such a "fair" opportunity would encompass a hearing before an unbiased court. Cf. Suarez v. State, So. 2d ___, 13 F.L.W. 386 (Fla. 1988). In this instance, however, the motion judge was not impartial. The court, without a hearing, denied eight of the nine claims raised in the motion for post-conviction relief. A hearing was allowed only as to the claim of ineffective assistance of counsel. As to this one, trial counsel's credibility was plainly at issue. Why then did the motion judge except trial counsel from the witness sequestration order? The defense had invoked the rule. Attorney Moran, however, lodged his own objection to the impending order. Over the Defendant's objection, Mr. Moran's request was allowed (R. II 4-12). The law in this regard is well settled:

> The reason for the rule is to avoid the coloring of a witness's testimony by that

> which he has heard from other witnesses who have preceded him on the stand. ~~Spencer v.~~ State, 133 So.2d 729 (Fla. 1961), cert. denied, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962)(emphasis added).

Randolph v. State, 463 So. 2d 186, 191 (Fla. 1984). Cf. Fed. Rules of Evid., 615 (exclusion mandatory upon request). This Court has held that exceptions to the rule should not be made unless "it is shown that it is necessary for the witness to assist counsel in trial and that no prejudice will result to the accused," id. at 192; Thomas v. State, 372 So. 2d 997, 999 (Fla. 1979); Spencer v. State, 133 So. 2d 729, 731 (Fla. 1961).

The Rule 3.850 court's ruling on this motion was an abuse of discretion since it emasculated the very purpose intended by the rule. The court made no finding that Mr. Moran's assistance to the State or his presence in the courtroom was necessary and indispensable, see Randolph, supra, at 191; Thomas, supra, at 999, or that prejudice would not result. See County of Dade v. Callahan, 259 So. 2d 504, 507 (Fla. 1972)(refusal of Defendant's request for sequestration of witness rule was arbitrary and justified reversal of conviction). See also Spencer, supra, at 731. Moran had an overriding "personal interest in the results" of the hearing. Ratliff v. State, 256 So. 2d 262, 263-64 (Fla. 1972). Mr. White undoubtedly was prejudiced by his presence. Moran was able to hear the testimony of those critical of his performance before he had to testify. But Moran did more than

merely listen: twice he lodged his own objections to segments of the testimony (see Defendant's Brief at 19 n.7, 25 n.9). When he felt that his own testimony was not coming in as he would have liked, he asked, and the court allowed, that he be excused until the next day (See Defendant's Brief at 19 n.6). Having heard the damning evidence, it is not unlikely that Moran thereafter tailored his testimony to make Mr. White the "fall guy" for his (Moran's) own ineptitude. Moran in effect testified that he decided not to use a voluntary intoxication defense since it was incompatible with the Defendant's version: Mr. White, on the other hand, asserts that Moran was ignorant of the facts of the case and the law relating to voluntary intoxication. Trial counsel Moran's bald assertion was one conjured by him only after hearing the critical testimony at the post-conviction hearing and was not a strategic choice made before the actual trial began (Cf. State's Brief, p. 13-14). Portions of the censorious testimony Moran heard before he formulated his responses follow:

Shadrick Martin, Moran's investigator, testified that Moran asked him to help on the case because the Defendant would not talk to him (R. II 28). Martin also said that Moran engaged in substance abuse while the trial was taking place (R. II 29).

Wesley Blankner, Jr., the attorney who prosecuted the case, testified that he had contemplated moving the court to disqualify Moran based on his "general knowledge'' of Moran and his concern

that he was not capable of properly handling the case (R. II 44-49).

Dr. Lisa Miller, a psychopharmacologist, testified that based on the available scientific data, the Defendant's blood-alcohol level at the time would have been somewhere between 211 and 240 mg/dl, which meant that he would have been "definitely drunk" (R. II 98-104).

Dr. Warren Rice, a neuropsychologist, concluded that at the time of the crime the Defendant suffered from extreme mental disturbance (R. II 127), and that he would have been incapable of "any sort of planned, deliberate kind of goal seeking behavior . . ." or of conduct "willful or planned" (R. II 125).

Newman Brock, a criminal defense attorney, testified that Mr. Moran did not enjoy a good reputation for professional competence and temperance in drink (R. II 190-91). Joseph Durocher, Public Defender for the Ninth Circuit, corroborated Mr. Brock's testimony (R. II 199-200).

James Russ, the defense's criminal law expert, posited that the Defendant did not receive effective assistance of counsel. This primarily was because Moran failed to use what was the obvious and "only viable theory of defense," namely, Mr. White's intoxication at the time of the offense and its relation to the element of specific intent as regards the charged offenses (R. II 271-72). Mr. Russ also testified that the theory which was used,

namely a "very confused" mixture of excusable and justifiable homicide and self-defense or mistake was "[un]supportable" by the evidence. Id.

Intimating that there was some reasoned strategic choice on Moran's part, the State writes that Moran "was aware of the availability of a defense based upon intoxication, . . . [and] was certainly not unaware of the potential use for evidence of intoxication, inasmuch as he argued such at the penalty phase. . . ." (State's Brief at 15). The record simply contradicts this. Moran acknowledged that he was not "communicat[ing]" with the Defendant, and that he therefore had to rely on his investigator to discern what was the prospective defense. He also stated that "all [he] had was Jerry White's word" as to what had occurred, and that he believed his version of the incident as told to him by his investigator (R. II 153-54).

Moran admitted that he never discussed intoxication with the Defendant, never considered the Defendant's blood alcohol level as reflected in his medical records (R. II 157), nor consulted with any experts (R. II 225, 227). Since the Defendant apparently told Martin that the homicide occurred in self-defense, Moran accepted this, even though he later characterized the defense as foolish and "impossible" (R. II 160). As the record conclusively demonstrates, Moran did no independent investigation or preparation. His "decision" to present a

defense which he himself considered "foolish" and "impossible" thus cannot be attributed to "strategy" or "tactic". It is by now axiomatic that no "strategy" can be ascribed to attorney conduct based on ignorance or on the failure to investigate and prepare -- such failures are flatly unreasonable. See, e.g., Kimmelman, supra, 106 S. Ct. at 2588-89 (failure to request discovery based on the mistaken belief that State was obliged to hand over evidence); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986)(failure to interview potential alibi witnesses); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986)(failure to investigate and obtain mitigating evidence); Aldrich v. Wainwright, 777 F.2d 630, 633 (11th Cir. 1985)(failure to depose any of State's witnesses); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984)(failure to present character witnesses in mitigation); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984)(failure to investigate mental condition and history of alcoholism); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978)(failure to present a defense and to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972)(failure to interview alibi witnesses); Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985)(trial counsel "simply failed to make the effort to investigate"); see also O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984)(failure to investigate mental health-related mitigating evidence). While courts do not question

informed strategic and tactical choices made by counsel, "when counsel's choices are uninformed because of inadequate preparation, a defendant is denied the effective assistance of counsel." United States v. DeCaster, 487 F.2d 1197, 1201 (D.C. Cir. 1973).

The State, again, would hold Mr. White accountable for the unreasonable and ineffective conduct of his trial counsel:

> The testimony below indicated that appellant himself never told his attorney that he had been so intoxicated at the time of the incident, so as not to be able to form the requisite intent and, to the contrary, supplied his attorney with a completely detailed version of events. Under these circumstances, it was not deficient performance for Attorney Moran not to have sought out further evidence of intoxication, despite the fact that there was, as will be noted infra, testimony regarding appellant's use of intoxicants.

(State's Brief, p. 17).

Of course, the most common and easiest defense to ineffective assistance of counsel claims is to counter with an allegation that the client lied to counsel, or withheld information, or was uncooperative, or controlled the litigation by dictating what evidence could and could not be presented and what witnesses could or could not testify. The reasonable performance of defense counsel's duties should produce actions pretermitting such questions. Courts do not allow attorneys to "dodge" their failings by pointing to their clients. Such

protestations are, as here, merely "weak attempt[s] to shift blame for inadequate preparation." Kimmelman, supra, 106 S. Ct. at 2588. Effective counsel is not "a mere lacky or mouthpiece," but is in charge and has the responsibility for the conduct of the trial. See Kimmelman, supra. Decisions on what avenues of investigation to pursue, which witnesses to present, whether to cross examine particular witnesses, etc., are not decisions for the client, but for the professional, who exists to advise, not mimic, the client. See United States v. Goodwin, 531 F.2d 347, 351 (6th Cir. 1976)("This appears to be a case of counsel relying on his client for legal advice. This is hardly reasonable representation."); see also Defense Function, Standard 4-4.1, commentary, p. 4.54; Standard 4-1.1, Commentary, p. 4.9 (The lawyer is the client's advisor and representative, "not the accused's alter ego.").

The State's argument completely ignores the advice quotient in a meaningful attorney-client relationship and constitutionally effective representation. Moreover, it would be the extraordinary accused who could appreciate, without legal training or exceptional intelligence, the significance that intoxication at the time of the crime could have toward mitigating his culpability as to specific intent offenses. Based on what is known of Mr. White, this subtle facet of the defense was well beyond his intellectual range. No attorney can hide

behind the decisions of a client whose competency to decide complex legal questions is a matter of conjecture. "Under any professional standard, it is improper for counsel to blindly rely on the statement of a criminal client whose reasoning ability is highly suspect." Brennan v. Blankenship, 472 F. Supp 149, 156 (D.C. W.D. Va. 1979). Apparently, the State would have counsel merely parrot an accused's justification for his behavior, no matter how absurd, and having done so, thereby avoid any subsequent claims of deficient performance. If Moran regarded the Defendant's version as a "cock-and-bull story," his duty was to tell him such. As Attorney Russ testified:

> [I]f the lawyer has worked with the client, has built a rapport with the client, has a true attorney-client relationship and this is something that takes times and takes patience and takes human involvement, . . . even the most recalcitrant client, when treated in this manner, is going to come around to accepting the advice and counsel of his lawyer.

(R. II 343-44).

Moran's duty was to investigate the intoxication defense, and to render professional advice and counsel to the Defendant as to the efficacy of that defense and the advisability of his taking the stand and testifying as he ultimately did. No matter how much one searches this record, it is impossible to find a discernible defense strategy resulting from informed tactical choices based on thorough preparation and investigation on

counsel's part. As Mr. Blankner, the trial prosecutor, testified at the Rule 3.850 hearing, it is the attorney's role to decide which defense is the best and whether the accused should testify. Trial counsel sorely failed to fulfill his role in a reasonably effective manner, to Mr. White's obvious prejudice.

According to Strickland v. Washington, 466 U.S. 668, 691 (1984), "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Not having investigated the obvious defense based on voluntary intoxication because the Defendant early on said that the homicide was an act of self defense was not a "reasonable decision" on Moran's part. The motion judge found that the Defendant's detailed version was inconsistent with a voluntary intoxication defense. The judge, however, made no finding that that version accurately reflected what in fact occurred on the fateful day of the offense. The Defendant may well have confabulated the events since his besotted condition may have precluded any accurate recall on his part (see testimony of Dr. Rice: "Mr. White probably had filled in some of the details that he would not have been able to recall" [R. II 125-26]). Trial counsel's failure to investigate and prepare the amply available intoxication defense fell far below professional norms. This critical omission, standing alone, establishes that Mr. White was deprived of his constitutional rights to the

effective assistance of counsel: when considered in conjunction with the numerous other instances of unreasonable attorney conduct identified in his initial brief, Mr. White's entitlement to relief is undeniably demonstrated.

Mr. White relies on his initial brief for all additional arguments.

CONCLUSION

For the reasons expressed herein and in Mr. White's initial brief, this Court should reverse the convictions and remand this case for a new trial or, alternatively, reduce the conviction of murder in the first degree and remand the case for resentencing.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been forwarded by U.S. Mail, first class, postage prepaid, to Richard Martell, Assistant Attorney General, Department of Legal Affairs, 125 North Ridgewood Avenue, 4th Floor, Daytona Beach, FL 32014, this 9 day of August, 1988.

Attorney