IN THE SUPREME COURT OF FLORIDA

WILLIAM GREGORY THOMAS,

Appellant,

vs. Case No.: SC01-1439

STATE OF FLORIDA

Appellee.
_____/

APPELLANT'S REPLY BRIEF

On appeal from the Circuit Court of the Fourth Judicial Circuit,
in and for Duval County, Florida

Dale G. Westling, Sr., Esquire
Florida Bar Number 203262
331 East Union Street
Jacksonville, Florida 32202
(904) 356-2341

Attorney for Defendant

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I.

THE TRIAL COURT ERRED IN HOLDING THAT THE NEGOTIATED PLEA IN ANOTHER CASE WAIVED DEFENDANT'S RIGHT TO APPEAL FROM ANY ERRORS IN THE SENTENCING PHASE OF THE TRIAL IN THE INSTANT CASE; ALTERNATIVELY, DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BEFORE TRIAL, BECAUSE COUNSEL FAILED TO ADVISE DEFENDANT AGAINST ENTERING THE NEGOTIATED PLEA IN THE OTHER CASE

In response to Issue I, the State argues that a defendant has a right to waive appeals and, therefore, the waiver in this case should be enforced. As grounds for its argument, the State cites Hauser v. Moore, 767 So.2d 436 (Fla. 2000) and Durocher v. Singletary, 623 So.2d 482 (Fla. 1993) for the proposition that a criminal defendant can waive his statutory right to post-conviction relief. The State has provided a studied and deliberate failure to address the important arguments on this issue.

First, the State argues the facts. It says that Mr. Thomas benefitted from this deal because the State certainly would have convicted him for the murder of his

mother and surely he would have received a death sentence. Of course, if all of this was as clear and certain as the State argues, one would need to wonder why the State made the offer. Since he had already been found guilty in the case at bar, Mr. Thomas faced a minimum sentence of life without parole. The only gain to the State was that Mr. Thomas ostensibly waived his right to appeal from even fundamental errors in the guilt phase of the case at bar. And in advising Mr. Thomas to accept this offer, Mr. Nichols had a conflict of interest of a very unique nature: by recommending that Mr. Thomas accept the offer, Mr. Nichols could insulate from review his own errors in the case at bar.

The State complains that Mr. Thomas has presented no authorities for the proposition that this waiver should be disregarded. The State is right. Mr. Thomas has found no case law which addresses this factual scenario. This particular aspect of the plea agreement is rather irregular; as Assistant State Attorney Day testified, he had never before used such a term in a plea agreement. R.2-337. While there do not appear to be any reported cases which address this unique factual situation, there are numerous cases, cited in the Initial Brief, which discusses the societal importance of the appellate process in ensuring that the death penalty is imposed in a rational manner.

The State cites Hauser v. Moore, supra, for the proposition that a defendant can waive his right to forego post-conviction relief. Actually, this case only says that a

defendant's mother lacks standing to seek post-conviction relief as next friend of the defendant. Similarly, Durocher v. Singletary, supra, says that the office of Capital Collateral Representative lacks standing to seek post-conviction relief as next friend of a defendant.

The State then cites U.S. v. Fleming, 239 F.3d 761 (6th Cir. 2001), Davila v. U.S., 258 F.3d 448 (6th Cir. 2001), U.S. v. Cockerham, 237 F.3d 1179 (10th Cir. 2001), U.S. v. Abarca, 985 F.2d 1012 (9th Cir. 1993), and U.S. v. Wilkes, 20 F.3d 651 (5th Cir. 1994) for the proposition that defendants can validly waive their right to raise post-conviction challenges. Not one of the cited cases involve a defendant sentenced to death and not one of the cases involve a plea entered in one case waiving the right to appeal in a separate case. The cases do say that, even though such a waiver is valid, it does not waive the right to challenge a sentence which is illegal or contrary to the agreement. See, e.g., Fleming, 239 F.3d at 765. If Mr. Thomas's conviction and death sentence was obtained in contravention of his constitutional right to the effective assistance of counsel, are not his conviction and sentence illegal?

Finally, the State argues that this case is not the appropriate vehicle for Mr. Thomas to argue the effectiveness of counsel in recommending acceptance of a plea offer in another case. Of course, if this was a post-conviction proceeding arising from the other case, the State would probably argue that such other case was not the

appropriate vehicle because the challenged term affected neither the conviction nor sentence in such other case. In the final analysis, Mr. Nichols took an action which potentially affected Mr. Thomas' ability to appeal from errors in the case at bar. His duty to render effective representation extended to all actions that he took which affected this case. He violated that duty.

II.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE, BEFORE TRIAL, COUNSEL VISITED APPELLANT INFREQUENTLY, COUNSEL FAILED TO INVESTIGATE THE BACKGROUND OF A KEY WITNESS, AND COUNSEL FAILED TO INTERVIEW OR PRESENT THE TESTIMONY OF AVAILABLE IMPEACHMENT WITNESSES

The State's response to Mr. Thomas' argument on this issue is first, to simply conclude that the testimony concerning Mr. Nichols' trial preparation was contradictory and resolved in favor of the State; i.e., the trial court chose to believe Mr. Nichols and to disbelieve Mr. Thomas. The State, like the trial court, essentially ignores the deficiency in Mr. Nichols' testimony. Mr. Nichols testified that he did not remember most of the details of his representation of Mr. Thomas. When his testimony was anything other than 'I don't remember,' it began with a qualifying phrase such as 'what I must have done was . . ..' For testimony to be received as competent evidence, a witness must have a recollection of the events about which he testifies. State v. Green, 733 So.2d 583 (Fla. 1st DCA 1999).

The State simply argues that a trial court's findings of fact are entitled to deference, as stated in Stephens v. State, 748 So.2d 1028 (Fla. 1999), implying that

the trial court weighed conflicting evidence and this Court should not engage in any reweighing of that evidence. Deference to a trial court's findings does not mean, however, that such findings of fact cannot be reviewed. The meaning of "deference" in this situation is well established:

> A finding of fact by the trial court in a non-jury case will not be set aside on review unless there is no substantial evidence to sustain it, unless it is clearly against the weight of the evidence, or unless it was induced by an erroneous view of the law.

Holland v. Gross, 89 So.2d 255 (Fla. 1956). "Deference" does not mean that a trial court's findings of fact must be unquestionably accepted upon appellate review.

The State argues that Mr. Thomas has not shown any prejudice from the deficient performance of Mr. Nichols. The State ignores very important facts which were stated in Mr. Thomas' initial brief. Mr. Mahon, one of the witnesses who was never interviewed by Mr. Nichols, would have testified that money for the lump sum which Mr. Thomas owed to his ex-wife under the terms of the divorce settlement had been deposited into Mr. Mahon's trust account on September 3, nine days before the disappearance of Rachel. R.1-171. Since this evidence was not in the record, it is understandable that the jury would have been misled, as was this Court on the direct appeal of this case:

Supreme Court of Florida.

William Gregory THOMAS, Appellant,
v.
STATE of Florida, Appellee.

No. 84256.

March 20, 1997.
Rehearing Denied May 15, 1997.

PER CURIAM.

We have on appeal the judgment and sentence of the trial court imposing the death penalty on William Gregory Thomas. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm.

Thomas planned the kidnapping and murder of his wife, Rachel, in order to avoid paying his part of a settlement agreement in their pending divorce.

* * *

Thomas vs. State, 693 So.2d 951 (Fla. 1997)(emphasis supplied). However, Mr. Nichols testified that "[i]t didn't seem to me that that was something they [referring to the jury] were finding very important." R.2-222. Of course, the State characterizes this as merely a 'tactical decision,' a characterization which it impliedly suggests should foreclose further review. However, merely invoking the word to explain serious errors in professional judgment falls far short of satisfying the constitutional requirement of effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 691 (1984), rehearing denied, 467 U.S. 1267 (1984), on remand, 737 F.2d 894 (11th Cir. 1984); accord, Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991), cert. denied, 503 U.S. 952 (1992).

III.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, IMPROPER COMMENTS BY THE STATE DURING ITS CLOSING ARGUMENT

The trial court did rule, R.1-141, as noted by the State in its Answer Brief at 41, that the addendum to the 3.851 motion was barred due to untimeliness and failure to allege any reason for neglecting to include the newly asserted grounds in the originally filed motion. However, neither the trial court nor the State recognize the provisions of Fla.R.Crim.P. 3.851(b)(3): "[t]he time limitation in subdivision (b)(1) . . . shall not preclude the right to amend or to supplement pending pleadings under these rules." The Addendum To Motion filed on August 15, 2000 was a supplement to a pending pleading. The rule provides the right to file such a supplement.

In Huff v. State, 762 So.2d 476 (Fla. 2000), following several rounds of appeals, this Court held that a trial court did not abuse its discretion in refusing to permit an amendment in 1996 to a motion which had been filed in 1988. In contrast to the facts of that decision, in the instant case, the original 3.851 motion was filed on October 5, 1998, R.1-001-116, an amended motion was filed on April 19, 2000, R.1-011-074, and the challenged supplement to that motion was filed on August 15, 2000, R.1-078-079. The trial court never advised Defendant that the supplement would not

be allowed unless some cause was shown and it never requested any explanation of the need to supplement the motion. On these facts, denial of the amendment in this case constitutes an abuse of discretion.

IV.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, NUMEROUS COMMENTS BY THE PROSECUTOR WHICH SUGGESTED THAT THE LAW REQUIRED A DEATH PENALTY IN THE INSTANT CASE

The State responds to Mr. Thomas' argument regarding this issue by relying on the legal authority of Mr. Nichols, who testified that "calls for" is not the same thing as "requires." R.2-231. Perhaps a better authority to consult would be a dictionary:

> **calls for 1**: to call (as at one's house) to get <I'll *call for* you at 8 o'clock> **2**: to require as necessary or appropriate <lifting the box *called for* all her strength>; make necessary <more business *calls for* more judges - S. D. Bailey> **3**: to give an order for, DIRECT <legislation *calling for* the establishment of two new schools>: provide for <the design *calls for* three windows>

Webster's Third New International Dictionary 318 (1971 ed.)

The State, conceding that the prosecutor's comments may have been improper, again argues that this is simply 'trial tactics.' Answer Brief at 49. Again, the fact that certain actions are characterized as being a part of counsel's "strategy" does not immunize those actions from review. Counsel's choice of tactics and strategy must be reasonable under the circumstances as they existed at the time of trial. Cave v.

Singletary, 971 F.2d 1513 (11th Cir. 1992). The performance must be evaluated in light of all the circumstances of the cases and not individually without regard to their cumulative effect. Horton v. Zant, 941 F.2d 1449, 1461 (11th Cir. 1991), cert. denied, 503 U.S. 952 (1992).

The State suggests that the prosecutors could not have selected a death-qualified jury without asking the questions which they asked. This is a desperate response to the issue. The prosecutor could have asked: 'Mr. Juror, would you recommend a life sentence, rather than the death penalty, regardless of the evidence which was presented to you, or are there some circumstances in which you would consider the death penalty appropriate?' That question does not imply that a death penalty is ever required under any particular set of circumstances and it determines whether a juror would refuse to recommend a death penalty regardless of the evidence.

V.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, ARGUMENT BY THE STATE WHICH TOLD THE JURY THAT THE UNDERLYING CRIME OF KIDNAPPING WAS AN AUTOMATIC AGGRAVATING FACTOR

Mr. Thomas acknowledges that this Court's decision in Blanco v. State, 706 So.2d 7 (Fla. 1997) is contrary to his position on this issue. Nonetheless, Defendant stands on the argument presented in his Initial Brief.

VI.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, INSTRUCTIONS AND ARGUMENT WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING

The State responds to this issue by citing a line of cases upholding the standard jury instructions regarding the jury's responsibility for sentencing against attacks relying on Caldwell v. Mississippi, 472 U.S. 320 (1985). It is true that the cited cases uphold the standard jury instructions against such attacks.

However, Mr. Thomas also complains about the prosecutor's comments about the jury's responsibility and Mr. Nichols' failure to object. The State responds with one sentence which says, in essence, that the argument is meritless. The State's cavalier refusal to address the merits of this claim is telling, but even more telling is the trial transcript:

> Our purpose here today is for you to consider what punishment to recommend to Judge Wiggins that the defendant should get for executing Rachel Aquino.
>
> **The final decision is not made by you.** It's made by Judge Wiggins. It's not a difficult process. The jury makes a recommendation. Now that recommendation must be given great weight by the Judge but **the**

Judge will then take your recommendation and then he will decide what the sentence finally will be in this case.

Trial.1409-1410. How could a reasonable jury have heard this argument and not have had some dilution of their sense of responsibility for the ultimate sentencing decision? How could a jury hear this argument, not objected to By Mr. Nichols, and think that their recommendation regarding imposition of the death penalty would be entitled to deference unless it was so erroneous that no reasonable person would have agreed with it? Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); accord, Hallman v. State, 560 So.2d 223 (Fla. 1990); Fead v. State, 512 So.2d 176 (Fla. 1987), receded from on other grounds, 545 So.2d 861 (Fla. 1989); Ferry v. State, 507 So.2d 1373 (Fla. 1987); Wasko v. State, 505 So.2d 1314 (Fla. 1987); Brookings v. State, 495 So.2d 135 (Fla. 1986); Garcia v. State, 492 So.2d 360 (Fla. 1986), cert. denied, 479 U.S. 1022 (1986).

VII.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, THE JURY INSTRUCTION REGARDING THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING FACTOR

The State relies on Thompson v. State, 759 So.2d 650 (Fla. 2000) for the proposition that a defense attorney is not deficient for failing to object to standard instructions which have not been invalidated at the time of sentencing. In that case, the actual holding appears to be that the assistance of counsel was not ineffective because the decision in Jackson v. State, 648 So.2d 85 (Fla. 1994), appeal after remand, 704 So.2d 500 (Fla. 1997), appeal after remand, 767 So.2d 1156 (Fla. 2000) would not have been available on direct review from those sentencing proceedings even if the error had been preserved for review. However, in the case at bar, the Jackson decision would have been available to this Court and should have resulted in the death sentence being vacated and the case being remanded for further proceedings.

Additionally**,** the State now claims that "although additional argument seems unnecessary, it must be noted that this case was clearly cold, calculated and premeditated under any standard . . .." Answer Brief at 54. In the pretrial

proceedings, there was some argument about whether to use a special verdict which would ask the jury about guilt under premeditated murder and felony-murder theories. During the argument, prosecutor Bateh conceded that "I think the evidence of felony murder is – my own view is a little bit stronger than the evidence of premeditation." Trial.86-87.

VIII.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, THE JURY INSTRUCTION GIVEN REGARDING THE "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR

Defendant acknowledges that the cases cited by the State have upheld the HAC aggravator instruction against challenges based on Espinosa v. Florida, 505 U.S. 1079 (1992), reh. denied, 505 U.S. 1245 (1992), on remand, 626 So.2d 165 (Fla. 1993), cert. denied, 511 U.S. 1152 (1994). Nonetheless, Defendant stands on the argument presented in his Initial Brief.

CONCLUSION

The judgment and sentence entered by the trial court should be vacated and the cause remanded for a new trial

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Initial Brief has been furnished to Curtis M. French, Esquire, Capital Collateral Appeals, Office of The Attorney General, The Capitol, Tallahassee, Florida 32399-1050; by mail delivery, this 17th day of April, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been printed in the Times New Roman 14-point font available in Corel WordPerfect 8, in compliance with Fla.R.App.P. 9.210.

DALE G. WESTLING, SR., ESQUIRE
Florida Bar Number 203262
331 East Union Street
Jacksonville, Florida 32202
(904) 356-2341
Attorney for Defendant