IN THE SUPREME COURT OF FLORIDA

NO. SC04-201

MICHAEL DUANE ZACK,

Petitioner,

v.

JAMES V. CROSBY, JR.,
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO AMENDED RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

COMES NOW, the Petitioner, **Michael Duane Zack**, by and through undersigned counsel and hereby submits this Reply to the State's Amended Response to Mr. Zack's Petition for Writ of Habeas Corpus. Petitioner will not reply to every issue and argument, however does not expressly abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Petitioner stands on the arguments presented in his Petition for Writ of Habeas Corpus.

CLAIM I

THE STATE PEREMPTORILY CHALLENGED AND REMOVED TWO FEMALE, AFRICAN-AMERICAN JURORS BASED ON THEIR GENDER AND RACE OVER DEFENSE COUNSEL'S OBJECTION AND IN VIOLATION OF MR ZACK'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THE ISSUE DURING MR. ZACK'S DIRECT APPEAL.

Without any authority, the State proclaims that "Appellate counsel is not ineffective for failing to raise an issue when the standard of review is clearly erroneous." (Response at 7; see also p.4). This Court has never held or even suggested that such a standard applies to ineffective assistance of counsel claims. Rather, what the State fails to recognize is that the Strickland standard applies when analyzing an ineffectiveness of appellate counsel claim.

Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000). Whether the standard of review is difficult to meet does not control whether or not appellate counsel was deficient in failing to raise a claim for review. As in Mr. Zack's case, the facts support a valid and persuasive claim that the State, at Mr. Zack's trial, violated his constitutional right to a fair and impartial jury and appellate counsel's failure to raise the claim was deficient.[1]

The State also improperly suggests that Mr. Zack's claim lacks merit because Mr. Zack is a white male and the challenged jurors are African-American females (Response at 14). This Court has held that "under article I, section 16 of the Florida Constitution it is unnecessary that the defendant who objects to peremptory challenges directed to members of a cognizable racial group be of the same race as the jurors who are being challenged." Kibler v. State, 546 So. 2d 710, 712 (Fla. 1989). Further, this Court has extended Neil's protections to gender. Abshire v. State, 642 So. 2d 542, 543-4 (Fla. 1994). Contrary to the State's argument, Reed v. State, 560 So. 2d 203 (Fla. 1990), did not "distinguish" Kibler. In

[1]If defense counsel failed to properly preserve the issue for review because he did not object to the peremptory challenges before the jury was sworn, the claim was still available to appellate counsel because it constitutes a fundamental constitutional error.

Reed, this Court merely found the race of the defendant may be considered in reviewing a Neil claim. However, unlike in Reed, in Mr. Zack's case, the prosecutor successfully removed all of the African-American females from the jury, without requesting the removal of a single other prospective juror.

The State argues that the prosecutor's explanation of Juror Gillam's employment at a hospital was genuine and therefore acceptable (Response at 4). However, the State ignores the fact that during the defense's questioning of the jurors about who had any specific knowledge or familiarity with post-traumatic stress disorder (PTSD) and fetal alcohol syndrome, despite her employment at the hospital, Juror Gillam did not indicate that she had any knowledge of either of these mental conditions.

As to Juror Jones[2], she did have some knowledge of PTSD but so did several of the other potential jurors who were not

[2]The State indicates uncertainty as to whether the State struck prospective Juror Jones, who was also an African-American female (Response at 8). However, the prosecutor specifically stated that the Juror Jones he was peremptorily challenging was African-American (T. 139-40). The only issue that is unclear is whether the prospective Juror Jones who was challenged had any specific knowledge of PTSD and fetal alcohol syndrome or like Juror Gillam solely was employed at the Lakeview Center.

challenged by the State.[3]

Also, contrary to the State's interpretation, the judge was concerned about the prosecutor's strikes because he was concerned that the prospective jurors' employment was **not** a reasonable explanation for the strike (T. 141). In fact, prospective Juror Gillam did not have any special knowledge due to her employment or anything else. Therefore, the prosecutor's reason was not genuine.

The prosecutor's basis for his peremptory challenges of the only two African-American females was not genuine. Rather, the prosecutor systematically removed all three African-American females from the jury pool. His explanation for removing the jurors who had knowledge of post-traumatic stress disorder and fetal alcohol syndrome due to their employment at the Lakeview Center is directly refuted by the record. The prosecutor did not exercise a single other challenge despite the fact that several jurors were familiar

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[3]The State lists all of the prospective jurors who responded to defense counsel's inquiry about who had any knowledge of PTSD and fetal alcohol syndrome and states that not all of them served on the jury. However, the fact that some jurors had knowledge of PTSD and fetal alcohol syndrome but did not serve on the jury does not help the State demonstrate the genuineness of its challenges. The defense challenged all of the prospective jurors who were not chosen to sit on the jury, other than the only three African American female prospective jurors.

with PTSD and fetal alcohol syndrome. In fact, jurors were seated who admitted they had more knowledge that prospective Juror Gillam.

Appellate counsel was ineffective in failing to raise this claim. Mr. Zack is entitled to habeas relief.

CLAIM II

MR. ZACK WAS DENIED A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PROSECUTOR'S ARGUMENTS PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE.

The State relies on this Court's recent decision in Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010 (Fla. 2000), to argue that the prosecutor's comments that Mr. Zack was a liar and that he lied when he testified were not improper. However, Murphy was decided after Mr. Zack's conviction and sentence became final. At issue in Murphy, was whether relief could be granted based upon unobjected to comments in a civil case. 766 So. 2d at 1012-3. Furthermore, this Court did not hold that prosecutorial argument in a criminal case where the prosecutor refers to the defendant as a liar cannot constitute reversible error. Id. at 1028-9. Rather, this Court held that a lawyer may state that a witness lied or is a liar only when such a characterization is supported by the evidence. Id.

The State argues that because Mr. Zack admitted upon cross examination that he had lied in the past, the prosecutor was allowed to call him a liar and argue that his testimony was a lie. However, the State attempts to read this Court's

statement in Murphy too broadly. At trial, Mr. Zack maintained that he testified truthfully about what occurred between he and Ms. Smith. Mr. Zack did admit that he had been untruthful in the past. But, in his closing argument the prosecutor argued that Mr. Zack's admission that he had lied in the past meant that he lied about what occurred between he and Ms. Smith. The prosecutor did not refer to the evidence, but rather took an unrelated statement about a lie that Mr. Zack had told and argued that Mr. Zack is a liar and he lied about his encounter with Ms. Smith. Murphy, a case that was decided after Mr. Zack's direct appeal, does not cure the prosecutor's improper argument at Mr. Zack's trial.

Additionally, the State attempts to validate the prosecutor's argument that urged the jury to imagine the torture Ms. Smith endured by contending that the argument was necessary in order to establish the heinous, atrocious and cruel aggravating factor (Response at 21-2).

This Court has held that the heinous, atrocious and cruel aggravator "focuses on the means and manner in which death is inflicted". Brown v. State, 21 So. 2d 274, 277 (Fla. 1998). The prosecutor was not, as the State would like this Court to believe, focusing on the means and manner of the victim's death, but rather, was attempting to inflame the jury by

asking them to imagine themselves as the victim and telling them that Mr. Zack had tortured the victim (T. 2070). The prosecutor never once referred to the evidence or the cause of death or the medical examiner's testimony of how long the victim survived after first being stabbed or when the evidence showed that the victim knew that she was going to be killed. Instead, the prosecutor "inflame[d] the minds and passions of the jurors so that their verdict reflect[ed] an emotional response . . . rather that the logical analysis of evidence in light of the applicable law." Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985).

Appellate counsel was ineffective for failing to raise this issue. Mr. Zack is entitled to habeas relief.

CLAIM III

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. ZACK'S TRIAL THAT IT RESULTED IN THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

The State argues that the introduction of non-statutory aggravation was not error because it is not prohibited by the Eighth Amendment and other jurisdictions allow the admission of non-statutory aggravation (Response at 22, 26-7). However, in Proffitt v. Florida, the United States Supreme Court upheld

Florida's sentencing statute based on the specific aggravating factors defined in the statute. 428 U.S. 242 (1976).[4] This Court has also held that based upon Proffitt, non-statutory aggravation is inadmissible: "The aggravating circumstances specified in the statute are exclusive, and no others may be used [to impose the death penalty]." Purdy v. State, 343 So. 2d 4 (Fla. 1977); see also Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977)("We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death."). Also, in Miller v. State, this Court held that "strict application of the sentencing statute is necessary" so that the sentencer's decision is "guided and channeled" by requiring "examination

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[4]The State's belief that under Florida's capital sentencing scheme "once the State establishes one statutory aggravator, it may introduce any number of non-statutory aggravators without any constitutional concerns" (Response at fn. 2), is totally wrong. The United States Supreme Court has upheld Florida's capital sentencing statute based on the specific aggravators found in the sentencing statute that narrow and channel the sentencer's discretion. Thus, the Proffitt Court and this Court has found that the specificity of the aggravators eliminate arbitrariness and capriciousness in the imposition of the death penalty and allow the statute to survive constitutional scrutiny. If the State's belief were to ever prevail upon this Court or any other, undoubtedly, Proffitt would have to be overturned and Florida's sentencing scheme found to be unconstitutional. While the State does not understand why this Court has found that the admission of non-statutory aggravation raises constitutional concerns, one need look no further than Proffitt.

of specific factors . . . thus eliminating total arbitrariness and capriciousness in its imposition." 373 So. 2d 882, 885 (Fla. 1979). Therefore, the State's argument that other jurisdictions allow non-statutory aggravation has no bearing on Mr. Zack's claim. The State chooses to ignore that the United States Supreme Court held Florida's capital sentencing statute constitutional based upon the specific aggravators and mitigators which channeled the sentencer's discretion and that this Court has consistently found that non-statutory aggravation is not permissible in Florida's sentencing scheme.

Also, for the first time, the State suggests that Dr. McClaren's testimony was proper because it was used to rebut Mr. Zack's remorse for having stabbed the victim. Later, the State argues that the testimony was proper to establish the cold, calculated and premeditated aggravator[5] (Response at 26). However, these arguments were never presented to the trial court by the prosecutor when he argued for the admission of the domestic abuse evidence. Thus, these arguments must be

[5]While the State never explains how a prior abusive relationship with an unrelated girlfriend could demonstrate that Mr. Zack somehow formed the heightened premeditation required to find the cold, calculated and premeditated aggravator, it is difficult to imagine that the time and distance that occurred between his relationship with his girlfriend could have any bearing on the events that occurred with Ms. Smith in regards to the statutory aggravators.

disregarded.

The State also argues that the testimony was harmless. The State's argument is not supported by the record. Dr. McClaren testified that Mr. Zack was violent towards women, "harbored a significant anger directed towards women" and based upon hearsay, repeatedly abused the woman with whom he had the longest relationship in his life. (T. 2025-31). Certainly such testimony was highly prejudicial.

Furthermore, the State's suggestion that appellate counsel would not have realized that the admission of the evidence was prejudicial error because Perry had not yet been decided by this Court, is ridiculous. Trial counsel made repeated, lengthy, and impassioned pleas to the trial court to disallow the introduction of the evidence. Even without Perry or any other case, based upon the record and common sense, appellate counsel should have known that the testimony was highly improper and prejudicial.

The State's attempt to distinguish Perry from Mr. Zack's case is absurd. The State argues that in Perry, the jury heard about one beating of the victim, whereas in Mr. Zack's case the jury only heard that he hit his girlfriend all the time, but did not hear any other specifics (Response at 30). The State fails to realize that in Perry, the actual victim of

the beating testified and also explained that Perry was intoxicated at the time of the beating. Thus, it is likely that in fact, the testimony of Mr. Zack's abuse was more prejudicial because there was no explanation of Mr. Zack's state of mind during the abuse and it was repeated.

Further, the State, without ever directly requesting that this Court reverse itself, states that this Court erred in granting Perry relief because the "harmless error analysis was entirely dependent on the mistaken notion that the error was constitutional in nature" (Response at 31). While the State's fails to understand the constitutional underpinnings of Proffitt, this Court has repeatedly found that the introduction of non-statutory aggravation can constitute reversible error. In Mr. Zack's case the error is evident. Appellate counsel was ineffective in failing to raise this claim. Mr. Zack is entitled to habeas relief.

CLAIM V

THE COURT ERRED IN ADMITTING EVIDENCE OF OTHER CRIMES TO PROVE MR. ZACK'S GUILT AND ARGUE FOR THE DEATH PENALTY. THE INTRODUCTION OF THE EVIDENCE VIOLATED MR. ZACK'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO ADEQUATELY PRESENT THIS ISSUE.

The State refuses to address Mr. Zack's claim that appellate counsel failed to raise the issue of the improper manner for which the evidence of other crimes was used at the

trial and the fact that the evidence was used to support aggravating factors. Instead, the State attempts to characterize Mr. Zack's claim as a complaint about the "adequacy" of the claim regarding Williams Rule evidence on direct appeal (Response at 41). However, Mr. Zack does not complain about the Court's ruling that Williams Rule evidence was admitted. Trial counsel objected to the manner in which the Williams Rule evidence was admitted and the fact that it was used to support aggravating factors was error. Thus, contrary to the State's argument, the "law of the case" does not prevent or limit this Court from addressing Mr. Zack's claim (Response at 42).

Mr. Zack's claim is that the way in which the prosecutor introduced the Williams Rule evidence was improper. Ten witnesses testified about the Okaloosa crimes and the jury heard Mr. Zack's tape recorded statement about what occurred in Okaloosa County. Additionally, photos and slides were admitted into evidence that graphically showed the Okaloosa victim's injuries. Later, in the penalty phase, Dr. McClaren testified in great detail about his knowledge of the Okaloosa crimes and how they demonstrated that Mr. Zack formed the specific intent required to prove first degree murder in the Escambia homicide.

The State also argued that the Williams Rule testimony and evidence was necessary to show identity. Such a statement is ridiculous in light of the fact that Mr. Zack confessed.

The State's use of photographs and Dr. McClaren's testimony was repetitious and prejudicial. Appellate counsel was ineffective in failing to raise this claim.

Furthermore, Mr. Zack's claim that the Williams Rule evidence was improper to support aggravating factors is a totally independent claim and one that appellate counsel ineffectively failed to raise. Trial counsel objected to the State's reliance on the Okaloosa crimes in the penalty phase.

This Court does not allow evidence of prior crimes, for which the defendant was not convicted, to be considered as evidence to support aggravating factors. Finney v. State, 660 So. 2d 674, 681 (Fla. 1995)(quoting Power v. State, 605 So. 2d 856, 864 (Fla. 1992).

The evidence of the Okaloosa crimes constituted non-statutory aggravation. As stated previously, this Court has held: "We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977).

The trial court erred in allowing the State to present

and argue the evidence of other crimes to support the aggravating factors and in relying on the evidence in the court's sentencing order. Appellate counsel was ineffective in failing to raise this claim. Mr. Zack is entitled to habeas relief.

CLAIM VI

MR. ZACK'S RIGHT TO A FAIR TRIAL UNDER THE DUE PROCESS CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WAS VIOLATED WHEN THE TRIAL COURT ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE. APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO PRESENT THIS CLAIM.

The State argues that the Mr. Zack did not properly preserve his objection to the baseball cap being admitted, because the proper request would have been to cover the logo and confederate bars, rather than object to the cap itself (Response at 47). The State's argument is not based on any authority and is ridiculous. Such a remedy demonstrates the lack of probative value of the cap since the prosecutor argued that the cap was necessary to link Mr. Zack to the victim's boyfriend's car. Had the cap been "covered" surely the victim's boyfriend would have been unable to identify it in any meaningful way. Mr. Zack's claim was properly preserved.

In fact, the State essentially concedes that the baseball cap was unnecessary to prove any issue in the case (Response at 48). Because, as the State admits, this was a DNA case,

identity was not an issue (Id.). Likewise, Mr. Zack provided a taped statement admitting that he caused Ms. Smith's death by stabbing her. There was no legitimate purpose for introducing the baseball cap. The baseball cap was introduced solely to inflame and place bad character evidence before the jury.

The baseball cap was highly prejudicial, particularly in light of the prosecutor's argument that the cap illustrated that "this is how [Mr. Zack] considers himself in the day following – the two days following having committed two murders." (T. 1406).

Trial counsel properly preserved this issue. Appellate counsel was ineffective in failing to raise this claim. Mr. Zack is entitled to habeas relief.

CONCLUSION AND RELIEF SOUGHT

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **REPLY TO AMENDED RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, Florida, 32399-1050, counsel of record, on August 17, 2004.

CERTIFICATE OF TYPE SIZE AND STYLE

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