ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

ZANE FLOYD,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 44868

FILED

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APPELLANT'S REPLY BRIEF

APPEAL FROM DENIAL OF PETITION FOR
WRIT OF HABEAS CORPUS (POST CONVICTION)

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05-25215

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FACTUAL MATTERS

The State has accepted as accurate the Statement of Facts and Statement of the Case provided by FLOYD in the Opening Brief. The State, however, refuses to accept that the allegations made by FLOYD entitled him to relief, or at the very least an evidentiary hearing.

The prosecution, rather than addressing the issues raised in the Opening brief chooses to attack matters that were raised for purposes of preserving the record on behalf of FLOYD. (Ans. Brf. p. 2) The challenge to the selection of jurors in Clark County is an ongoing issue that at some point will be litigated in a different forum. Clearly the issue has been preserved without being argued in the Opening brief herein. Argument of a red herring issue by the prosecutor only serves to show that the State would prefer to divert attention from the other issues raised by FLOYD.

The State incorrectly asserts that FLOYD claims that appellate counsel was ineffective for failing to raise the issue of ineffective assistance of counsel in the direct appeal. FLOYD correctly asserted that appellate counsel should have raised a number of substantive claims in the direct appeal despite the failures of trial counsel to object or otherwise make a record. FLOYD did not claim that appellate counsel should have raised an ineffective claim in the direct appeal. It is significant that the State failed to refer to the record or cite to FLOYD'S Opening Brief in support of this allegation. This is obviously because no such claim was raised in light of this Court's decision in Gibbons v. State, 97 Nev. 520, 634 P.2d 1214 (1984).

ARGUMENT

I.

IT WAS AN ABUSE OF DISCRETION TO DENY FLOYD AN EVIDENTIARY HEARING ON HIS PETITION FOR POST CONVICTION HABEAS CORPUS

FLOYD stands by the points and authorities contained in the Opening Brief regarding the need for an evidentiary hearing to establish his claims of ineffective trial and appellate counsel.

II.

FLOYD RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

The issues raised by FLOYD in the post conviction habeas corpus were two fold: first, that trial counsel should have made the proper objections and preserved the issues for appellate review; and second, that appellate counsel should have raised the issues even in the absence of objection. (Op. Brf. p. 11-12) Nowhere did FLOYD claim that appellate counsel should have raised the issue of ineffective trial counsel in the direct appeal.

A. *Trial counsel failed to make contemporaneous objections on valid issues during trial and appellate counsel failed to raise these issues on direct appeal, both failures being in violation of FLOYD'S' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.*

(1) Improper argument during the Opening Statement at the Penalty Hearing.

The State takes the position that the comments made by the prosecutor concerning mitigating factors were proper and therefore trial counsel was proper in not objecting. Further, the State argues by addressing mitigating factors in his Opening remarks, defense counsel waived the right to further raise the issue. Finally, the State falls back onto the "strategic choices" are almost unchallengeable argument under Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). Clearly counsel for the State must have a crystal ball because there is nothing in the record to support that the failure to object was a strategic decision, as opposed to

deficient performance and thus ineffective assistance of counsel. An evidentiary hearing would have been very helpful in this area.

Reference to mitigating circumstances and specifically statutory mitigating circumstances as "excuses' violated right to individualized sentencing under the Eighth and Fourteenth Amendments. Penry v. Lynaugh, 492 U.S. 302, 326-28 (1989). See also, State v. Bey, 709 N.E.2d 484, 497 (Ohio, 1999). The arguments made by the prosecution minimized the existence and utilization of mitigating circumstances in the weighing process. In Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000) the Nevada Supreme Court reversed a death penalty based in part on the argument of the prosecution against the existence of mitigation. In Hollaway the Court stated:

> "The United States Supreme Court has held that to ensure that jurors have reliably determined death to be the appropriate punishment for a defendant, 'the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.' *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989). In *Penry*, the absence of instructions informing the jury that it could consider and give effect to certain mitigating evidence caused the Court to conclude that:
>
> > 'the jury was not provided with a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision. Our reasoning in [Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982),] thus compels a remand for resentencing so that we do not risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'"

Hollaway, 116 Nev. 732, 744, 6 P.3d 987 (2000). The Court then went on to command that a jury instruction be given in all capital cases directing the jury to make an independent and objective analysis of all relevant evidence and that arguments of counsel do not relieve the jurors of this responsibility.

Apparently the State in its Answering Brief expects that a capital defendant be able to prove that the jury did not follow the jury instruction. The history of jurisprudence in Nevada establishes no such burden, but rather requires that the improper instruction is subject to a harmless error analysis. Thomas v. State, 120 Nev.Ad.Op. 7 (2004).

It is ridiculous for the State to argue that the statements of personal opinion by the prosecutors were even close to the proper statements by defense counsel. A simple comparison proves the point:

> Prosecutor: "...I trust you will agree with Mr. Bell and myself that for his crimes he deserves a penalty of death." (7 APP 2018)
>
> Defense Counsel: Mr. Hedges and I will be back and we'll be asking you to save a life." (7 APP 2044)

In Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985) the Court found that

> "(Because the jury is empowered to exercise its discretion in determining punishment, it is wrong for the prosecutor to undermine that discretion by implying that he, or another high authority, has already made the careful decision required. This kind of abuse unfairly plays upon the jury's susceptibility to credit the prosecutor's viewpoint.)"

The prosecution did more than imply that a higher authority had already made the decision, they were told that District Attorney Stewart Bell had already made his decision that the just penalty was death.

(2) The statutory scheme adopted by Nevada fails to properly limit victim impact statements.

FLOYD asserts that the parties have set forth their relative position on this issue, but reiterates that despite the ruling of the District Court limiting the victim impact testimony in it's discretion

that failure of any statutory guidelines renders the entire process unconstitutional under the Eighth Amendment. See, Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980).

(3) The prosecutor committed misconduct during the penalty phase of FLOYD'S trial by appealing to the passions and prejudice of the jurors and by denigrating the proper consideration of mitigating factors.

The State refers to the Motion in Limine that was filed before trial to prevent improper argument and prosecutorial misconduct. (RA 57-155; Ans. Brf. p. 13) Such a Motion does not substitute for contemporaneous objection during the course of the trial and penalty hearing, as reflected by the opinion. Floyd v. State, 118 Nev. 156, 173, 42 P.3d 249 (2002). The State defends the failure to raise issues in the direct appeal as professional discretion to only argue a "select group of merit-laden issues." If the state will stipulate that the failure to raise issues will never be a procedural bar under NRS 34.810(1)(b) then FLOYD would agree. Unfortunately the State argues that a capital defendant should only raise a few selected issues and then that all other issues are waived on any State or Federal post conviction proceedings. The State simply wants to have it's cake and eat it too.

The State cites to the concurring opinion of Justice Frankfurter in Johnson v. United States, 318 U.S. 189, 202, 63 S.Ct. 549, 555 (1943) for the proposition that "to turn a trial into a quest for error r no more promotes the ends of justice than to acquiesce in law standards of criminal prosecution." Unfortunately the recurring misconduct in capital cases in Nevada shows an acquiesce to intentional misconduct and law standards.

The State's selective reference to the concurring opinion of Justice Frankfurter in Johnson, supra, is curiously misplaced. Johnson was on trial for federal tax evasion for receiving money from numbers games for protection against police interference in New Jersey in 1935. The majority opinion found that no errors had occurred despite numerous objections and motions by the defense that the cross-examination of the defendant by the prosecutor violated a number of constitutional rights of the defendant. Id. 318 U.S. at 191-193, 63 S.Ct. at 551. For the State to suggest that the obligation to object and look for error in a capital case is in any way similar to the defense of a corrupt political leader in New Jersey in 1935 is ridiculous. The State seems unable to understand the oft used adage that "death is different."

As usual the state falls back to the standard position that even if there was prosecutorial misconduct, it was harmless. (Ans. Brf. p. 15) The State cites to Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962). The decision in Garner related to the guilt of the defendant and was a drug case not a capital case wherein the error occurred during the penalty hearing. Nonetheless, the Court made a number of comments that are pertinent to the case at bar:

> "Certain 'off limit' statements by the prosecutor are more harmful than others. Some expressions clearly tend to influence or prejudice a jury, while others would not. In this regard compare *State v. Rodriguez*, 31 Nev. 342, 102 P. 863, with the later decision of *State v. Petty*, supra, where this factor was recognized. And, or course, the gravity of the crime charged appears to be a relevant consideration. Some appellate courts assign greater significance to errors committed in capital cases than to errors occurring in trials for lesser offenses. Finally, there lurks beneath the surface a police consideration, namely, the supervisory function of the appellate court in maintaining the standards of the trial bench and bar, to the end that all defendants will be accorded a fair trial."

Garner, 78 Nev. at 375. And further the Court stated:

> "We deem appropriate the following language of Judge Jerome Frank in a dissenting opinion, *United States v. Antonelli Fireworks Co.*, 2 Cir., 155 F.2d 631, 661: 'This court has several times used vigorous language in denouncing government counsel for such conduct as that of the United States Attorney here. But, each time it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. * * * If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, 'Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. * * *. The deprecatory words we use in our opinions on such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking.'"

Id. at 376.

To deny relief for blatant misconduct and improper agreement is doing nothing more than condoning the improper actions of the prosecution. The only remedy to the conduct is reversal of sentences and or convictions.

B. *Trial counsel failed to object and appellate counsel failed to raise on direct appeal a number of improper jury instructions. The failure to object and raise issues on direct appeal constituted ineffective assistance of counsel. The specific instruction that should have been raised were the following*:

(1) The "anti-sympathy" instruction.

FLOYD submits this issue based on the argument and authorities contained in the Opening Brief.

(2) Trial counsel failed to request an instruction during the penalty phase that correctly defined the use of "character" evidence for the jury.

The State argues that there was no character evidence offered at

the penalty hearing, but in describing the evidence that was presented describes a great deal of evidence that was not related to aggravating circumstances. Perhaps it would have been appropriate to reference the extraneous evidence as non-aggravating circumstance evidence to encompass the full gambit of the evidence that could not be used in the weighing process.

Character evidence concerning FLOYD was introduced during the trial portion of the case also and the jury was allowed to consider this evidence at the penalty hearing without being properly instructed on its use. The majority of the testimony of Tracie Carter went to facts not relevant to the charges but rather to portray FLOYD as a bad person with "sick little fantasies". (9 ROA 1634) There was also testimony about pornographic videos found in FLOYD'S room. (9 ROA 1747-51)

In a capital case it is essential that the jury be properly instructed on the proper use of evidence to avoid arbitrary and capricious results based on prejudicial and inflammatory evidence. See e.g., Francis v. Franklin, 471 U.S. 307, 107 S.Ct. 1965, 85 L.Ed.2d 344 (1985). FLOYD'S jury was not properly instructed under Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000) and his conviction must therefore be reversed.

C. ***Other objections and motions that trial counsel failed to make at trial and that were not raised on direct appeal, were the following:***

(1) Trial counsel failed to object and move to strike overlapping aggravating circumstances and appellate counsel failed to raise the issue on direct appeal.

FLOYD submits this issue on the authorities and arguments

contained in his Opening Brief.

(2) The malice instruction given to the jury contained an unconstitutional presumption that relieved the State of it's burden of proof and violated FLOYD'S presumption of innocence.

FLOYD submits this issue on the authorities and arguments contained in his Opening Brief.

CONCLUSION

Based on the authorities herein contained and in the Opening Brief heretofore filed with the Court, it is respectfully requested that the Court reverse the conviction and sentence of ZANE FLOYD and remand the matter to District Court for a new trial.

Dated this 21 day of December, 2005.

RESPECTFULLY SUBMITTED:
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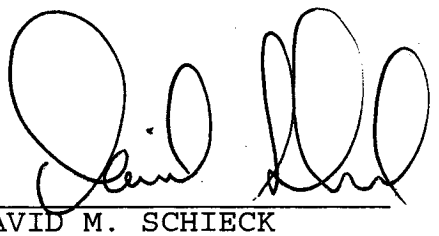
CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: 12/21/05



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CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Reply Brief was made this 21 day of ~~July~~ DECEMBER, 2005, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

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