IN THE SUPREME COURT OF MISSISSIPPI
No. 2007-DP-01218

WILLIAM WILSON — APPELLANT

v.

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF APPELLANT

APPEALED FROM LEE COUNTY CIRCUIT COURT

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I. THE TRIAL COURT ABUSED ITS DISCRETION AND ARBITRARILY AND CAPRICIOUSLY REFUSED TO ACCEPT WILSON'S GUILTY PLEA THEREBY PREVENTING WILSON FROM ACCEPTING A PLEA BARGAIN AGREEMENT THAT WOULD HAVE SPARED HIS LIFE OR IN THE ALTERNATIVE WILSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL RESULTING IN HIS LOSS OF THE PLEA BARGAIN ALL IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

The State rests its argument heavily on a restriction from challenging guilty pleas on direct appeal. *Brief of Appellee* at 12. The sum of the argument against the first issue brought by Wilson before this Court centers around the knowing and intelligent plea made by Wilson on May 24, 2007. However, the State fails to address the crux of this first issue which is not the validity of Wilson's second plea, but the arbitrary refusal of the first plea agreement on March 5, 2007. The issue is not that Wilson knowingly, voluntarily, and intelligently entered the plea on May 24, 2007 the issue is whether that plea should have never occurred.

As discussed in the opening brief, the court was satisfied that the plea Wilson entered on March 5, 2007 had been knowingly, voluntarily, and intelligently made. According to the State's summation of this issue, this would have made Wilson's plea valid, and, therefore, unchallengeable. At this point, Wilson admitted to the court that he was not "totally satisfied" with his representation. T. 204. From this admission, the court erroneously based its decision to refuse the plea. The court did not conduct an investigation or any type of inquiry into this "dissatisfaction", even following a letter sent by Wilson, detailing his grievances with his counsel. T. 208. Yet the court reconvened and allowed a second plea agreement without any improvement in the quality of Wilson's representation. T. 217.

Using the State's Loden correlation, Wilson similarly did voluntarily, knowingly, and intelligently plea to charges in the indictment. Loden v. State, 971 So.2d 548, 555 (Miss. 2007). This is where the similarities end. In the instant case, Wilson is not, in essence, challenging the

guilty plea. Wilson, unlike Loden, was refused his initial plea based on the court's abuse of discretion. Therefore, Wilson is not challenging his plea of guilty, but, rather, challenging the court's erroneous decision not to accept his valid plea on March 5, 2007.

In the alternative, if this Court should find that the trial court did not err in the refusal to accept the first plea, it must hold that the trial court erred in failing to ensure effective assistance of counsel. The court was keenly aware of Wilson's ineffective assistance of counsel as it was apparently the sole basis for the court's refusal to accept of the March 5 plea. T. 204-05. With this knowledge of ineffective assistance of counsel, this Court must hold that the trial court did not adequately fulfill its obligation to ensure adequate representation to Wilson.

While the State chose not to address the issue of ineffective assistance of counsel in its analysis, this Court must consider that the prejudice to Wilson is evident and this ineffectiveness determines life or death. In Strickland v. Washington, 466 U.S. 668 (1984), the court held that ineffective assistance of counsel can be established by showing that the attorney's representation "fell below an objective standard of reasonableness " id. at 688, and the defendant was "prejudiced" by his attorney's performance. Id. at 692. In this case, as discussed in the opening brief, the second prong of prejudice focuses on whether the ineffective performance affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. 52, 58 (1985). Furthermore, even considering the strict standard protecting attorney performance, the performance, or lack thereof, of Wilson's trial counsel was prejudicial.

Trial counsel's lack of communication prior to the March 5, 2007, hearing was the direct cause of trial court's refusal to accept the first plea agreement. Wilson had accepted the agreement prior to the judge inquiring into his satisfaction with counsel. In the excerpt given in the State's brief, Wilson simply brought his counsel's lack of performance to the attention of the court without the understanding or knowledge that the State could pursue the death penalty.

Brief of Appellee at 12.

Considering the analysis set forth here and in the opening brief, the Court must find that either the trial court arbitrarily and capriciously refused the March 5, 2007 plea agreement or Wilson's lack of effective assistance of counsel was the immediate cause of Wilson's death sentence. The Court must vacate Wilson's death sentence and remand to Lee County Circuit Court for imposition of Life without Parole.

II. THE PROSECUTOR COMMITTED MISCONDUCT BY IMPROPERLY CROSS EXAMINING MITIGATION WITNESSES AND THEREBY DEPRIVED WILSON OF A FUNDAMENTALLY FAIR SENTENCING AND MANDATES HIS DEATH SENTENCE BE VACATED.

The State submits, in response to the second issue brought before this Court, a procedural bar to raising prosecutorial misconduct in cross-examination due to lack of contemporaneous objection. However the procedural bar cannot be applied to this claim. Wilson raises a fundamental federal constitutional issue, the right to confront witnesses, therefore the application of a bar is a federal question. Lee v. Kemna, 534 U.S. 362, 375 (2002) (The adequacy of a state procedural bar is a federal question to be determined by the federal court.).

To apply a procedural bar that bar must be strictly and regularly followed. Bennett v. Mueller, 322 F.3d 573, 585-86 (9th Cir. 2003) (The State has the burden to prove the state rule is strictly and regularly followed.); Valerio v. Crawford, 306 F.3d 742, 776 (9th Cir. 2002); cert. denied 538 U.S. 994 (2003) (The State must establish that the procedural rule was "'well established'" at the time of the alleged default); Finley v. Johnson, 243 F.3d 215, 218 (5th Cir. 2001); Stokes v. Anderson, 123 F.3d 858, 859 (5th Cir. 1997) cert. denied 522 U.S. 1134 (1998) (citing Johnson v. Mississippi, 486 U.S. 578, 587 (1988); Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982)).

The contemporaneous objection procedural bar has not been strictly and regularly followed on claims of failure to object to improper cross-examination. Walker v. State, 740

So.2d 873, 884, ¶ 41 (Miss. 1999) ("Walker did not object to the cross-examination."). Thus the procedural bar relied on by the State cannot be applied to this case.

The State goes further to argue that the improper cross-examination questions were based on a mental evaluation report not contained in the record before this Court. *Brief of Appellee* at 16. The State's position is not entirely clear but in a footnote they suggest that although not in the record this report should be in the record and they attach a copy to their brief. This is clearly an improper attempt to expand the direct appeal record and the State certainly knows this. See, e.g., Havard v. State, *Brief of Appellee* at 22 (citing Read v. State, 430 So.2d 832 (Miss. 1983); Phillips v. State, 421 So.2d 476 (Miss. 1982)).

Moreover, the report could not be used to cross-examine witnesses under any circumstances. Lanier v. State, 533 So.2d 473, 486-90 (Miss. 1988). In Lanier, as in the case *sub judice*, the prosecution used a report from doctors at Whitfield to cross-examine a mitigation witness. This Court held that the report was hearsay and that Lanier's right to confront witnesses was violated by use of the report without calling the doctors to testify. Id. Thus had the report been introduced without Lott testifying this Wilson's federal and state constitutional right to confront witnesses would have been violated. Id.; see also Balfour v. State, 598 So.2d 731, 750 (Miss. 1992) (Defendant was deprived of the Sixth Amendment right to confrontation where report used was hearsay).

To allow this misconduct on behalf of the prosecution would subsequently prejudice Wilson's right to a fundamentally fair legal process. As stated in the opening brief, what may be harmless error in a case where less is at stake becomes reversible error when the penalty is death. Walker v. State, 913 So.2d 198 (Miss. 2005). For the reasons set forth here and in the opening brief, this Court must vacate the death sentence pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and the corresponding

provisions of our state constitution.

III. THE ADMISSION OF TESTIMONY BY DR. STEVEN HAYNE UNDERMINES THE RELIABILITY OF THE DEATH SENTENCE IMPOSED IN THIS CASE AND PRESENTS QUESTIONS OF IMPROPER EXPERT TESTIMONY AND INEFFECTIVE ASSISTANCE OF COUNSEL.

Wilson stands by the argument presented in the *Opening Brief of Appellant.*

IV. THE INTRODUCTION OF IMPROPER VICTIM IMPACT TESTIMONY VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION, ARTICLE 3, SECTIONS 14, 26, AND 28 OF THE MISSISSIPPI CONSTITUTION.

Wilson recognized in his opening brief that victim impact statements have been deemed admissible, but not without limitations. Opinion testimony is simply prejudicial to a defendant and allowing it to be heard was a clear violation of Wilson's fundamental right to fair sentencing. The State places heavy reliance on Payne v. Tennessee, 501 U.S. 808 (1991), but ignores those portions of Booth v. Maryland, 482 U.S. 496 (1987) not overruled by Payne.

In Booth, the Supreme Court held that victim impact testimony which "set[s] forth the family members' opinions and characterizations of the crimes and defendant[s]" should be considered inadmissible. Booth at 508-09. The Payne did not overrule this portion of Booth adding that presenting the family members opinions and characterizations do little more than inflame the jury and divert their attention away from the relevant evidence. Payne at 830. The opinion testimony of the victim's grandfather, Mr. Conlee, fits into this exception to admissibility. He was allowed to give his candid opinion regarding sentencing, which violates Wilson's constitutional right to fair sentencing.

The State also raises the issue of a procedural bar due to lack of contemporaneous objection to the victim impact testimony. The bar has no application to this case. As pointed out in the *Opening Brief* at 16, the defense had filed a pre-trial motion to bar this type testimony and the State conceded the motion. T. 61-62. Having prevailed in excluding this testimony

counsel's failure to object to this improper evidence is inexcusable and unexplainable. The failure to object to this highly prejudicial and inflammatory testimony is clear ineffective assistance of counsel. Humphries v. Ozmint, 366 F.3d 266, 272 (4th Cir.2004) (trial counsel ineffective in capital sentencing for failing to object to victim impact evidence that clearly exceeded the bounds of Payne v. Tennessee); Matthews v. State, 350 S.C. 272, 565 S.E.2d. 766 (2002) (trial counsel found ineffective and held that there can be no strategic reason for not objecting to prosecutor argument which constitutes error of law).

As stated in the *Original Brief of Appellant* and acknowledged by the State, *Brief of Appellee* at 21-22, opinion testimony about the appropriate sentence is constitutionally improper. While the State concedes the evidence presented in this case was erroneously admitted, it argues the error is harmless. *Brief of Appellee* at 21. Although the Fifth Circuit held Booth error subject to harmless error analysis, U.S. v. Bernard, 299 F.3d 467, this case differs from the testimony in Bernard. Neither parent in Bernard asked for the death penalty. Id.

The State bears the burden of proving the introduction of this highly inflammatory testimony is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). The State has not met this burden. The State recites "facts" to support its position without citation to the record.

Moreover in Edwards v. State, 737 So.2d 275, 290 (Miss. 1999), this Court reversed Edward's death sentence because the prosecutor introduced non-statutory aggravation. This Court reversed as a matter of law and did not consider the facts of the crime which were particularly gruesome. Id. Edwards was convicted of killing two people, one of them a two year old child. Edwards, 737 So.2d at 288; see Balfour v. State, 598 So.2d 731,748 (Miss. 1992) (trial court erred as a matter of law by allowing the introduction of non-statutory mitigation).

Mr. Conlee's opinion testimony crossed the line established by this Court, the Supreme

Court of the United States and the Fifth Circuit as well as many sister jurisdictions. The interjection of prejudicial opinion testimony denied Wilson his right to a fundamentally fair trial. "Due process, at a minimum, requires that the state try an individual in an atmosphere free from unnecessarily prejudicial influences that prevent a defendant from receiving fundamental fairness. Handley v. Pitts, 623 F.2d 23, 26 (6th Cir. 1980); see also Gardner v. Florida, 430 U.S. 349, 358 (1977) (any decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion"); cf. Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

Whether considered under Payne and other cases involving victim impact evidence or the dictates of Due Process, the testimony was improper, and for the reasons above as well as those put forth in the *Original Brief of Appellant*, Wilson's death sentences must be vacated.

V. CUMULATIVE ERROR REQUIRES REVERSAL OF THE CONVICTION AND SENTENCE IN THIS MATTER.

Wilson stands by the argument presented in the *Opening Brief of Appellant.*

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the *Original Brief of Appellant* and such other reasons as may appear to the Court on a full review of the record and its statutorily mandated proportionality review, William Wilson respectfully requests this Court vacate the death sentence.

Respectfully submitted this the 9th day of March, 2009.

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CERTIFICATE OF SERVICE

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This the 9th day of March, 2009.

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