IN THE SUPREME COURT OF FLORIDA

No. SC18-1174

Lower Court Case No. 2011-CF-11A

JOHNNY MACK SKETO CALHOUN,

Petitioner,

v.

JULIE JONES
SECRETARY, DEPARTMENT OF CORRECTIONS,

Appellee.

PETITION FOR WRIT OF HABEAS CORPUS

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record: "T" refers to the transcript of trial proceedings; "R" refers to the record on direct appeal to this Court; "RB" refers to the Respondent's Response to Petition for Writ of Habeas Corpus. All other references will be self-explanatory.

ARGUMENT IN REPLY

I. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE TRIAL COURT'S EXCLUSION OF MR. CALHOUN'S STATEMENT RELATED TO WHERE AND WHEN HE WAS IN THE WOODS WITH LAW ENFORCEMENT.

To persuade this Court to deny Mr. Calhoun's claim, Respondent relies on this Court's holding on direct appeal regarding two statements made by Mr. Calhoun that were misconstrued by the State at trial in violation of the rule of completeness. (RB.13). Respondent is correct that this Court's holding on direct appeal was that "[t]he statements with which Mr. Calhoun asserts error were only two statements out of an extensive record." *Id*. However, Mr. Calhoun's claim in his Petition for Writ of Habeas Corpus is that appellate counsel was ineffective for failing to raise a *third* statement by Mr. Calhoun that was so misconstrued by the State that it amounted to a confession.

In Mr. Calhoun's direct appeal, this Court found that the trial court abused its discretion in allowing the State to ask Lieutenant Raley about certain statements Mr. Calhoun made during his interrogation without admitting the entire interview under

the rule of completeness. *Calhoun v. State*, 138 So. 3d 350, 359 (Fla. 2013). This Court then found that based on the two statements presented by Mr. Calhoun's appellate counsel "any error in excluding these statements is harmless beyond a reasonable doubt because there is no reasonable probability that exclusion of the redacted statements affected the outcome of the jury's verdict." *Id*. at 360.

This Court's holding on direct appeal exposes appellate counsel's error in omitting from the rule of completeness argument Mr. Calhoun's statement about being in the woods with law enforcement. The statement not pled by appellate counsel on direct appeal was used by the State at trial to argue that Mr. Calhoun was in the woods in Alabama near the victim's burned body and car when he said he was close enough reach out and touch law enforcement. What Mr. Calhoun actually said, and what the trial court erred in not admitting, was that he was close enough to reach out and touch law enforcement in the woods *in Florida* near the Bethlehem Campground. When this statement is taken into consideration with the other two statements pled on direct appeal, the trial court's error in excluding Calhoun's statements because they were self-serving without first making a determination based on fairness is fundamental error "that reaches down to the validity of the trial itself to extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Anderson v. State*, 841 So. 2d 390, 403 (Fla. 2003).

The trial court allowed the State to admit only a partial and misleading statement about Mr. Calhoun in the woods with law enforcement and then the State portrayed that partial and misleading statement in closing argument as Mr. Calhoun's confession to the victim's murder. Respondent relies on this Court's holding on direct appeal regarding the other two statements as cumulative to persuade this Court to deny his request for habeas relief (RB.13-14), but the addition of this statement about Mr. Calhoun in the woods with law enforcement is pivotal to this Court' analysis of harmless error. A confession, or in Mr. Calhoun's case a false confession, is not cumulative to any of the other evidence elicited during Mr. Calhoun's trial. The case against Mr. Calhoun was purely circumstantial and there is more than a reasonable probability that Mr. Calhoun's "confession," as misconstrued by the State of Florida, affected the jury's verdict. Appellate counsel's failure to include this statement in the rule of completeness argument on direct appeal fell outside the range of professionally acceptable performance and there can be no confidence in the correctness of the appellate process.

II. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE FLAWED JURY INSTRUCTION REGARDING VENUE AND JURISDICTION GIVEN IN MR. CALHOUN'S CASE.

Respondent argues that this claim is waived and should be denied because trial counsel agreed to the jury instructions. (RB.15). Counsel cannot request an

erroneous jury instruction as a tactical decision and then argue fundamental error on appeal. *Armstrong v. State*, 579 So. 2d 734, 735 (Fla. 1991).

Fundamental error occurs when the error "has affected the proceedings to such an extent it equates to a violation of the defendant's right to due process of law." *Jaimes v. State*, 51 So. 3d 445, 448 (Fla. 2010). It is "axiomatic" that "fundamental error may be raised at any time, 'before trial, after trial, on appeal, or by habeas corpus.'" *Tucker v. State*, 459 So. 2d 306, 307 (Fla. 1984) (quoting *State v. Gary*, 435 So. 2d 816, 818 (Fla. 1983)). Fundamental error "should be applied only in the rare cases where a jurisdictional error appears, or where the interest of justice present a compelling demand for it's application." *Ray v. State*, 403 So. 2d 956, 960 (Fla. 1981).

Such an error occurred here. First, the trial court erroneously gave an instruction on venue. There was no dispute that if Florida had jurisdiction to prosecute Mr. Calhoun, Holmes County was the proper venue. The issue was jurisdiction, not venue, and the venue instruction was unnecessary and confusing. Second, the trial court gave the jury a jurisdiction instruction that misstated the law because it allowed jurisdiction to be found without a finding by the jury that the intent to commit murder originated in Florida.

The trial court's error in the venue and jurisdiction jury instructions was fundamental error. This Court has previously held that errors in jury instructions are

fundamental where the erroneous instruction is "pertinent or material to what the jury must consider". *Stewart v. State*, 420 So. 2d 862, 863 (Fla. 1982). Moreover, invited error as discussed by Respondent (RB.15) does not apply to fundamental errors involving jury instructions. *King v. State*, 800 So. 2d 734, 737 (Fla. Dist. Ct. App. 2001). *King* limits fundamental errors in jury instructions to errors that pertain to elements of the crime, and only elements that are disputed in the case. *Id*. In Mr. Calhoun's case, jurisdiction is both a disputed issue and an element of the charged crime.

Respondent's reliance on *Boyd v. State*, 200 So. 3d 685 (Fla. 2015) is misplaced. *Boyd* is distinguishable from Mr. Calhoun's case because the defendant injected error into the record when he deliberately provoked an outburst from a spectator during his testimony at the penalty phase of his trial. *Id.* at 701. Moreover, his attorney testified at the evidentiary hearing that he made a tactical decision not to move for a mistrial in response to the outburst because he saw the outburst as an opportunity to exploit his theory of the case. *Id.* In Mr. Calhoun's case, the error was committed by the trial court when he delivered the jury instructions, and the trial counsel's failure to object to those instructions was not a tactical decision.

Respondent is incorrect that *Lane v. State*, 388 So. 2d 1022 (Fla. 1980) was the sole source of the jury instruction on jurisdiction requested by Mr. Calhoun's trial counsel. (RB.16). Trial counsel actually combined instructions from both *Lane*

and *Conrad v. State*, 262 Ind. 446, 450, 317 N.E.2d 789, 791 (1974).[1] (T.1129). The State objected to the following portion based on *Conrad*:

> If you find from the evidence that the killing of Mia Chay Brown occurred in the State of Alabama, but that the killing was not part of a common plan, design, and intent to kidnap and kill said Mia Chay Brown which originated in Holmes County, Florida and was not part of one continuous course of action by the defendant which originated and commenced in Holmes County, Florida, but that the intent to kill was arrived at and the fatal blow struck in the State of Alabama and that such intent and action originated there after the commission of the offense of kidnapping in the State of Florida and that the same was not part of one continuous plan, design and intent, and not the result of one continuous course of action by the defendant, but was a separate and independent set of acts occurring outside of the State of Florida, then the State of Florida would have no jurisdiction to prosecute the defendant for the offense of First Degree Murder as charged in Count 1 of the Indictment and you must find the defendant not guilty as to Count 1 of the Indictment.
>
> (R.941)

This instruction makes clear that if the intent to kill was arrived at in Alabama, then the State of Florida would not have jurisdiction. This instruction accurately reflects the statutory language on jurisdiction, which requires that either the result or the intent occur in Florida for jurisdiction to be proper. Fla. Stat. § 910.005 (2).

This proper instruction of the Florida law on jurisdiction was not put before the jury. The State objected to the above paragraph from *Conrad* and the trial court

[1] Trial counsel refers to the case only as *Conrad*, but it is cited in *Lane* and the *Conrad* opinion contains the exact language of the proposed jury instruction with Indiana and Ohio as the jurisdictions.

sustained the objection. (T.1118). Instead, the trial court gave the instruction crafted by the prosecutor which allowed the jury to find jurisdiction based *solely* on the victim being taken against her will from Florida. (R.940, T.1236-37). Even the instruction Respondent included in her response brief would have been preferable to what was actually delivered to Mr. Calhoun's jury as it makes clear that the if only one element of the crime occurs in the jurisdiction it has to be part of a "continuous plan, design, and intent leading to the eventual death of the victim." (RB.17).

It is difficult to know what happened leading up to the victim's death in Alabama. *Calhoun v. State*, 138 So. 3d 350, 362 (Fla. 2013). That was the reason this Court struck the Avoid Arrest- aggravator, but it also underscores why appellate counsel's failure to raise the faulty jurisdiction instruction was so prejudicial to Mr. Calhoun. It is difficult to isolate when Mr. Calhoun's criminal act turned from false imprisonment to kidnapping with an intent to kill. Florida does not have jurisdiction for the victim's murder without definitive proof that the intent to kill originated in Florida.

III. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF IMPROPER INTRODUCTION OF VICTIM IMPACT EVIDENCE DURING THE GUILT PHASE OF MR. CALHOUN'S CAPITAL TRIAL.

In addressing the improper victim impact evidence that was introduced through the State's first two witnesses, Respondent omits the victim's employment history and photograph that were entered into evidence. Additionally, Respondent

refers to "the victim's unique signature" without discussing the multitude of hearts that made her signature so special. (RB.20). At Mr. Calhoun's trial, the State emphasized this special, sweet detail about her signature to evoke feelings of the "resultant loss to the community's members." Fla. Stat. § 921.141(9).

Respondent also does not address Mr. Calhoun's argument that this was an unnecessarily prejudicial way to establish the identity of the victim. The identity of the victim's body was never disputed at trial and the issue of her signature was pretense for putting improper victim impact evidence before the jury in violation of Mr. Calhoun's due process rights. This is evident because the State did not ask any questions that would properly authenticate the signature.

Trial counsel's failure to object to the State's introduction of this improper victim impact evidence was fundamental error because the evidence injected Mr. Calhoun's trial from the start with sympathy for the sweet girl who added extra little hearts all over her signature. The improper testimony about the victim's heart-accented signature "reached down into the validity" of Mr. Calhoun's trial and his conviction would not have been obtained on the State's purely circumstantial evidence without the assistance of trial counsel's error. *See State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991).

CONCLUSION

For the reasons set forth in Mr. Calhoun's Petition for Writ of Habeas Corpus and this Reply, Mr. Calhoun respectfully urges this Court to grant habeas relief and set aside his conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2018, the foregoing was electronically served via the e-portal to Assistant Attorney General Lisa Hopkins at lisa.hopkins@myfloridalegal.com and capapp@myfloridalegal.com.

/s/ Stacy R. Biggart
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CERTIFICATION OF FONT

This is to certify that the foregoing Initial Brief of Appellant has been reproduced in Times New Roman 14-point font, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

/s/ Stacy R. Biggart
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