IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2267

GEORGE JAMES TREPAL,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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REPLY TO CLAIM I

A. INADMISSIBLE HEARSAY OF AGENT BROUGHTON

Respondent concedes that DEA agent Broughton was not a chemist and did not have personal knowledge regarding the production of methamphetamine from Thallium III Nitrate but obtained his knowledge only "through a review of a DEA publication" (Response at 5). Respondent nevertheless argues that Broughton's testimony regarding the chemistry of methamphetamine production was properly admitted (Response at 7). Throughout the Response, Respondent presents no citations to authority establishing that Broughton's testimony was not hearsay or met some hearsay exception.

Respondent first argues that the issue here is "whether the trial judge abused his discretion in admitting this testimony" (Response at 7). This is not the proper standard of review. Mr. Trepal's claim does not involve only the improper admission of evidence but the denial of a constitutional right--his right of confrontation. An issue of constitutional magnitude is a mixed question of law and fact reviewable *de novo*. Stephens v. State, 748 So. 2d 1028, 1032-33 (Fla. 1999). Even if this claim is reviewed under an abuse of discretion standard, it is clear that Broughton's testimony was hearsay and that the trial court therefore abused its discretion in admitting that testimony.

Respondent argues, "Agent Broughton was an expert in the

investigation of clandestine drug labs, and was qualified to testify as to these matters" (Response at 7). The State made the same argument at trial (R. 3470). However, during Broughton's proffered testimony and during his testimony before the jury, the State never offered Broughton as an expert in anything (See R. 3459-69, 3475-85). The court never found Broughton to be an expert of any kind, but simply ruled, "the testimony of Mr. Broughton . . . is admissible" (R. 3472).

Thus, Respondent's next argument--that Broughton could rely on the DEA pamphlet "just as an expert can rely on reference books and materials" (Response at 7)--is untenable. Broughton was not an expert. Even if he had experience "in the investigation of clandestine drug labs" (Response at 7), this experience did not translate into a knowledge of chemistry, as he himself admitted (R. 3466 ["I am not a chemist by training . . . [and] have a layman's knowledge of the chemicals"]).

Respondent avoids the facts that the questions the State asked Broughton were about chemistry and that the whole purpose of Broughton's testimony was to show that Mr. Trepal had the "knowledge and opportunity" to manufacture Thallium I Nitrate (R. 3435). Without his testimony regarding the chemistry of methamphetamine production, Broughton had nothing relevant to offer in the prosecution of Mr. Trepal.

Respondent argues, "The fact that the underlying document was deemed hearsay is not a basis for exclusion of Broughton's testimony" (Response at 7). Respondent is referring to the fact that the trial court ruled that the DEA publication upon which Broughton relied was hearsay (R. 3450, 3472). Respondent does not explain this conclusory argument. If the document was hearsay and the hearsay document was the only source of Broughton's testimony (as Respondent concedes), that testimony was clearly hearsay. Significantly, Respondent does not argue that the DEA publication was not hearsay or was improperly excluded.

Respondent concedes that "[t]he purpose of [Broughton's] testimony was to establish Trepal's knowledge of, and access to, thallium," but argues that "it was not necessary for Broughton to be able to describe the chemical reactions involved in the methamphetamine manufacturing process in order to establish the relevance or be cross-examined on the significance of these facts" (Response at 7). Broughton was allowed to testify based not upon his own personal knowledge but based upon hearsay from a DEA publication. Thus, the defense was unable to cross-examine Broughton regarding the accuracy of his chemistry testimony. On cross-examination, Broughton testified he was not a chemist, did not know what chemical reaction thallium causes in the course of making P-2-P, had never performed this process, and had never seen it performed (R. 3483, 3485). Since

Broughton was not a chemist, the defense had no way to test the accuracy of his testimony regarding the chemical process about which he testified and which was the whole purpose of his testimony.

Respondent argues that Mr. Trepal's confrontation right was not violated because "the jury heard the basis of Broughton's knowledge and could weigh that in consideration of his testimony" (Response at 7). Respondent must mean that the jury heard that Broughton's chemistry testimony came from a DEA publication, but Respondent does not explain how that fact assured protection of Mr. Trepal's confrontation right. The chemistry facts which Broughton recited were never subjected to cross-examination, because Broughton had no personal knowledge of those facts and could not elaborate upon them.

Finally, Respondent argues, "given the other substantial testimony in this case with regard to Trepal's knowledge of chemistry and access to chemicals, any possible error would clearly be harmless" (Response at 7). This summary statement does not meet Respondent's burden of establishing harmless error. "The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

The whole purpose of presenting Broughton's testimony was to link Mr. Trepal to Thallium I Nitrate, which the state contended was the chemical contained in the brown bottle found in Mr. Trepal's garage (Q206) and in the Coke bottles found in the Carr home. From Mr. Trepal's Rule 3.850 proceedings, it is now known that the testimony of FBI chemist Roger Martz regarding the contents of Q206 and the Coke bottles was not true. The postconviction judge found only a "possibility" that the bottles contained Thallium I Nitrate (2PCR. 2680), and Martz himself admitted his results as to Q206 were "debatable" (2PCR. 3013).

Nevertheless, at trial, the State used Broughton to link Mr. Trepal to the Martz trial testimony. Without Broughton's chemistry testimony, no evidence linked Mr. Trepal to Q206 or the Coke bottles. Without Broughton's chemistry testimony, Broughton's and Warren's highly inflammatory testimony about Mr. Trepal's involvement in an illegal methamphetamine lab would have been irrelevant and therefore excluded. Respondent has not shown beyond a reasonable doubt that admission of Broughton's hearsay testimony was harmless.

B. FAILURE TO ADDRESS INADMISSIBLE HEARSAY CLAIM

Respondent argues that this issue was presented on direct appeal and therefore should not be revisited (Response at 6). First, Respondent argues that since appellate counsel raised the claim, "counsel cannot have been ineffective" (Response at 6). However, as

Mr. Trepal's petition explains, on direct appeal this issue was buried within a Williams rule issue (Petition at 13-14). Because of this ineffective presentation, this Court addressed only the Williams rule issue and did not address the hearsay/Confrontation Clause issue. Appellate counsel has a duty to make an effective presentation, which did not occur here. Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985).

Second, Respondent argues that Parker v. State, 643 So. 2d 1032 (Fla. 1994), "provides no authority for review of previously rejected claims that are alleged in later proceedings to have been incorrectly resolved" (Response at 6). Contrary to Respondent's argument, Parker does establish that this Court has jurisdiction to review claims which were previously erroneously resolved. This is precisely what happened in Parker. Respondent seems to believe that some other court must find that this Court erred on direct appeal before this Court may revisit a claim (Response at 6). However, it is of no moment to this Court's jurisdiction that in Parker the United States Supreme Court found this Court's previous disposition of the claim at issue to be erroneous. This Court itself has the jurisdiction to determine that the previous resolution of a claim was erroneous and to revisit the claim. The Court has done so in Rule 3.850 proceedings. State v. Mills, 788 So. 2d 249 (Fla. 2001) (new evidence required revisiting factual resolution of challenge to

override); Lightbourne v. State, 742 So. 2d 238 (Fla. 1999) (new evidence required revisiting previous factual resolution of Brady claim); Porter v. State, 723 So. 2d 191 (Fla. 1998) (relief granted on judge bias claim because new evidence established that prior factual resolution of claim was erroneous). In habeas corpus proceedings, this Court has even broader jurisdiction than it does in Rule 3.850 proceedings, since the Court's habeas corpus jurisdiction derives from Florida's Constitution. Article V, sections 3(b)(1), (7) &(9), Florida Constitution. The Court has jurisidiction to correct a failing in its review process such as that presented here.

REPLY TO CLAIM II

A. THE STATE'S REPEATED PRESENTATION OF INADMISSIBLE, IRRELEVANT, INFLAMMATORY AND UNFAIRLY PREJUDICIAL EVIDENCE.

The State's case against Mr. Trepal depended entirely upon "coincidences" and upon putting Mr. Trepal into "the class of people who *could have* committed this crime," as the prosecutor repeatedly argued in closing (See Petition at 17-18). This prosecution strategy of "coincidences" and "class" led the State to introduce numerous pieces of "evidence" which were never connected to the crime against the Carr family, which were never shown to have existed at the time of the crime, and which were no more consistent with guilt than innocence.

Showing a profound misunderstanding of legally relevant evidence, Respondent argues, "Trepal's argument on this issue is completely circular: he claims that the evidence was not probative of any fact but was highly prejudicial because it incriminated him *in the charged offenses*" (Response at 10) (emphasis in original). However, a few sentences after this argument, Respondent makes a telling statement: "all of this testimony is seemingly innocent by itself" (Response at 10). This is exactly Mr. Trepal's point: the improperly admitted "evidence" was entirely innocent and was never connected to the crime or the time of the crime, but a lay juror who is not equipped to assess the probative worth of the evidence could

well see it as incriminating. This is the reason for rules of evidence--to keep unreliable, unfairly prejudicial, confusing or misleading evidence away from jurors who are not trained to assess its value. Respondent clearly does not understand the difference between legally relevant evidence and unfairly prejudicial, confusing, misleading or remote evidence.

Respondent does not explain how admittedly "innocent" evidence is probative of Mr. Trepal's guilt. Respondent's cursory discussion of some of the evidence challenged in Mr. Trepal's petition is not helpful. For example, Respondent asserts, "The voodoo pamphlet Trepal prepared for the Mensa murder weekend was hauntingly similar to a threatening note received by the Carr family prior to the poisonings" (Response at 10). This is Respondent's sole argument that this evidence was relevant. Respondent does not address the facts that the voodoo pamphlet was produced some six months *after* the poisonings and that the State never established that it existed before the poisonings.

To be legally relevant, evidence "must have some logical tendency to prove or disprove a fact which is of consequence to the outcome of the case." Stephens v. State, 787 So. 2d 747, 759 (Fla. 2001). In order to have a "logical tendency to prove or disprove" a material fact, evidence must have some connection to the commission of the crime and cannot simply raise an incriminating innuendo. In a

circumstantial evidence case such as Mr. Trepal's, evidence must have sufficient quality to justify reasonable inferences. Evidence such as the voodoo pamphlet and other matters challenged in this claim which were never shown to have existed at the time of the crime or to be in any way connected to the Carrs does not provide the basis for reasonable inferences.

Respondent specifically addresses only one other type of evidence challenged in Mr. Trepal's petition, arguing, "Trepal's knowledge of and access to chemicals and chemistry materials and equipment demonstrated his opportunity to commit these offenses" (Response at 10-11). Again, Respondent makes no argument regarding the facts that the State never showed that the chemicals and chemistry equipment found in Mr. Trepal's Sebring home had been in Mr. Trepal's Alturas home at the time of the Carr poisonings. Respondent makes no argument regarding the fact that none of the chemicals found in Mr. Trepal's Sebring home was thallium. This "evidence," unconnected in time or place to the offenses, raised only innuendo about Mr. Trepal, but had no "logical tendency" to prove a material fact.

Respondent misses the point of Mr. Trepal's citation to Merritt v. State, 523 So. 2d 573 (Fla. 1988) (Response at 11; see Petition at 25). Respondent argues Merritt is inapplicable because the evidence which Mr. Trepal challenges did not show a prior bad act (Response at

11). However, Mr. Trepal cited Merritt for the general proposition that evidence which is no more consistent with guilt than with innocence is not probative evidence. Merritt involved evidence of flight as showing consciousness of guilt; Mr. Trepal's case involves evidence of Mr. Trepal's behavior as showing consciousness of guilt (See Petition at 23-25). The evidence of Mr. Trepal's behavior presented as showing his "guilty mind" was no more consistent with guilt than with innocence, and should not have been admitted.

Respondent does not address the numerous other items of evidence challenged in this claim. Thus, Respondent has no justification for the admission of photographs of scrapes around the Carrs' screen door and testimony about how easy it was to open the locked door, although the State never showed that anyone--much less Mr. Trepal--gained illicit entry to the house through this door. Respondent has no justification for testimony that Mr. Trepal preferred Coca Cola, when the State never connected Mr. Trepal to the Coke bottles in the Carr house and when Travis Carr testified that he bought an 8-pack of Cokes days before the poisonings. Respondent has no justification for testimony that six years before the poisonings Mr. Trepal owned an antique bottle capper. Respondent has no justification for testimony that a package of gloves was found in Mr. Trepal's garage a year and a half after the poisonings. Respondent has no justification for evidence that a roll of stamps was found in

Mr. Trepal's Sebring home a year and a half after the poisonings in Alturas. Respondent has no justification for evidence that Diana Carr owned and had read THE PALE HORSE, which was never connected to Mr. Trepal.

Respondent's failure to present any cogent argument justifying admission of all the improper evidence challenged in Mr. Trepal's petition demonstrates that the trial court abused its discretion in admitting this evidence. Evidence which is never shown to have existed at the time or place of the crimes and which is never connected to the crime except by innuendo has no "logical tendency" to prove a material fact and is therefore irrelevant.

Finally, Respondent argues that Mr. Trepal "does not identify any frivolous issue from his direct appeal which could have been foregone in order to raise this claim" (Response at 12). Respondent cites no cases requiring Mr. Trepal to identify such claims. The caselaw requires Mr. Trepal to identify omissions and show prejudice. Mr. Trepal has identified the omission of this preserved claim from his direct appeal and has shown prejudice--as Respondent's weak arguments against the claim establish, the claim was meritorious and would have prevailed on appeal.

B. IMPROPER LIMITATIONS ON THE CROSS-EXAMINATION OF STATE WITNESSES.

Respondent first argues that "the limitation of cross-examination is subject to an abuse of discretion standard" (Response

at 12). This is not the proper standard of review. Mr. Trepal's claim involves the denial of a constitutional right--his right of confrontation. An issue of constitutional magnitude is a mixed question of law and fact reviewable *de novo*. Stephens v. State, 748 So. 2d 1028, 1032-33 (Fla. 1999). Even if this claim is reviewed under an abuse of discretion standard, it is clear that the trial court abused its discretion in limiting cross-examination.

Regarding the limitations on the defense cross-examination of Diana Carr, Respondent argues that the proposed questioning was correctly found to be beyond the scope of direct examination because Mr. Trepal has not identified any direct testimony "which either directly or indirectly addressed any of these general subject matters" (Response at 13). Respondent contends that Zerquera v. State, 549 So. 2d 189 (Fla. 1989), does not support Mr. Trepal's claim because "Zerquera simply applied the well established law that cross-examination is appropriate on any subject matter discussed in direct examination" (Id. at 13-14). Contrary to Respondent's argument, Zerquera does not refer to any direct testimony of the codefendant or investigating detective which directly or indirectly opened the subject matter of where the bullets were found. See Zerquera, 549 So. 2d at 192. Rather, in its discussion of the facts giving rise to the issue, this Court pointed only to the facts that the trial court had not allowed cross-examination regarding where the

bullets were found and that "[o]ther evidence presented by the state implied that the bullets were Zerquera's." Id. The Court then relied upon Coxwell v. State, 361 So. 2d 148, 151 (Fla. 1978), for the principles that cross-examination is not limited to "specific facts developed by the direct examination," that cross-examination "should always be allowed relative to the details of an event . . . a portion only of which has been testified to on direct examination," and that cross-examination extends "to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief." Zerquera, 549 So. 2d at 192. Zerquera makes clear that an issue which is part of the case is a proper subject for cross-examination.

Respondent is wrong to argue that Zerquera referred to the state's presentation of evidence that the bullets belonged to Zerquera only as part of the harmless error discussion and not as part of the finding of error (Response at 14). In discussing the facts giving rise to the error, Zerquera clearly states, "Other evidence presented by the state implied that the bullets were Zerquera's." Zerquera, 549 So. 2d at 192.

Respondent argues that the State's withdrawal of Diana Carr's immunity for cross-examination or for testimony as a defense witness was proper under the state immunity statute (Response at 14-15). However, fundamental fairness trumps the statute, and Respondent does

not address this due process and Confrontation Clause issue.

As to the limitations on cross-examination regarding the status of Peggy and Pye Carr's marriage, Respondent argues Mr. Trepal "cites no authority to suggest that the admission of evidence is governed by a defendant's view of what is fair rather than the evidence code" (Response at 15). Mr. Trepal's argument does not depend upon his view of what is fair, but upon caselaw from this Court and the United States Supreme Court (See Petition at 44, citing cases). As Respondent has not addressed the individual limitations identified in the Petition, Mr. Trepal relies upon the discussion in the Petition.

C. IMPROPER JURY INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES.

Respondent accuses Mr. Trepal of misstating the record regarding defense arguments on the aggravating factors (Response at 17-18). To the contrary, the Petition accurately describes the record and provides citations. Respondent is particularly concerned that the Petition states that trial counsel argued that "cold, calculated and premeditated" was "vague and overbroad" (Response at 18). However, the Petition quotes a defense pre-trial motion which argued that this aggravator "provides insufficient meaningful standards to separate by definition such homicide from every premeditated murder" (R. 5079-81). This is an argument that the aggravator is vague and overbroad.

Respondent appears bothered that some of Mr. Trepal's

objections to the aggravators were contained in a pre-trial motion (Response at 17). Pre-trial motions are a proper means of raising objections.

CONCLUSION

For all of the reasons discussed herein and in his petition, Mr. Trepal respectfully urges the Court to grant habeas corpus relief.

I HEREBY CERTIFY that a true copy of the foregoing Reply has been furnished by United States Mail, first class postage prepaid, to Carol Dittmar, Asst. Attorney General, Department of Legal Affairs, 2002 North Lois Avenue, Suite 700, Tampa, FL 33607-2366, on April 17, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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