

MIDDLE STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

JOE EDWIN ROGERS, JR.,

Petitioner,

v.

No. 8:17-cv-2680-T-33SPF

SECRETARY, DEPARTMENT OF  
CORRECTIONS,

Respondent,

\_\_\_\_\_ /

SUPPLEMENTAL RESPONSE

COMES NOW, Respondent, pursuant to this Court's August 23, 2018, order, and files this supplemental response to Grounds One, Two and Five of Petitioner's Federal Petition for Habeas Corpus Relief, and states:

1: Petitioner claims denial of his right to counsel because trial counsel was ineffective for failing to file a motion to suppress the images retrieved from the CD that Schlaegal gave to Officers Sam Riley and Cristopher Connell. Specifically, he argues that the officer should have obtained a search warrant before using the ENCASE software to engage an enhanced search of the CD containing the pornographic images. He argues that 1)

Schlaegel was an agent of the State, and 2) even if Schlaegel was not an agent of the State, the search exceeded the bounds of the private search, and thus violated Petitioner's right to privacy. The post-conviction court addressed this claim in the January 27, 2014, order summarily denying post-conviction relief. It stated, "Thus, for the Defendant to show that he is entitled to relief on his claim of ineffective assistance of counsel, arising out of counsel's failure to file a motion to suppress, the Defendant must show that the motion to suppress the CD would have been meritorious."

a. In the July 24, 2014, post-conviction motion, Petitioner argued that trial counsel should have argued that the CD should have been suppressed on the grounds that Schlaegel was as an agent and at the direction of the State of authorities. He argues that when she told law enforcement about the pornography, they instructed her to locate the disc. This issue was presented to the post-conviction court, and it ruled:

Based on the testimony of Schlaegel, this Court finds that the CDs and the subsequent search of the contents of such, was not obtained in violation of the Defendant's protections against unreasonable search and seizure under the Fourth Amendment. Although a degree of State action was certainly present as the police knew of, acquiesced in, and encouraged Schlaegel to obtain evidence that would later be used against the Defendant, the record reflects that Schlaegel was acting to

further her own interest; permitting the search to retain its private character.

The post-conviction court summarily denied Petitioner's motion, and Petitioner appealed. He argued in his initial brief that, generally, he was entitled to an evidentiary hearing on all the claims raised in his first post-conviction motion. The trial court affirmed the summarily denial of most of Petitioner's claims, but ordered an evidentiary hearing on claims (1)(a) Trial counsel was ineffective for putting a defense strategy based on a misunderstanding of the law, and (1)(d) Trial counsel was ineffective for failing to allow Petitioner to testify on his own behalf.

This claim has been properly presented to the state court, and found to be without merit. The post-conviction court made a finding, based on Schlaegel's trial testimony, that she was not acting as an agent of the State. Petitioner conceded this in his reply brief. (Reply brief, page 4). This would not have been a justifiable basis on which to move to suppress the CD, and therefore, trial counsel cannot be deemed deficient for failing to do so. This ruling is not contrary to nor an unreasonable application of Federal law, nor is an unreasonable determination of the facts in light of the evidence presented in state court. Therefore, this claim must fail.

b. In Petitioner's July 24, 2013, post-conviction motion, prepared by counsel, he argued that a search without a warrant infringed on his expectation of privacy, and that the law enforcement officer exceeded the scope of the original private search. It does not appear that the trial court ruled on this specific issue. He did not raise this issue in his initial brief. He did raise it in his reply brief for the first time. Respondent submits that this issue is not properly exhausted in state court because he never obtained the trial court's ruling on this argument. When he appealed, he abandoned this issue. To be preserved, the issue or legal argument must be raised and ruled on by the trial court. Rhodes v State, 986 So. 2d 501, 515 (Fla. 2002). The fact that he raised the issue in his reply brief does not resurrect this argument. An issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief. Hoskins v State, 75 So. 3d 250, 257 (Fla. 2011).

Respondent submits that this issue has not been exhausted. Therefore, it must be addressed under the cause and prejudice exception to overcome the resulting procedural default pursuant to Martinez v Ryan, 566 U.S. 1 (2012). In Martinez, the Supreme Court enunciated a narrow exception to the rule that the lack of an attorney or attorney error in state post-conviction proceedings does not establish cause to excuse the procedural

default. It applies only where 1) state law requires a prisoner to raise ineffective trial-counsel claims during an initial collateral proceeding and precludes those claims on direct appeal; 2) the prisoner failed to properly raise ineffective - trial-counsel claims during the initial collateral proceeding; 2) the prisoner either did not have counsel or his counsel was ineffective during those initial state collateral proceedings; and 4) failing to excuse the prisoner's procedural default would result in the loss of a substantial ineffective-trial-counsel claim. Lambrix v Sec., F.D.O.C., 851 F.3d 1158 (11<sup>th</sup> Cir. 2017).

This Court has directed to Respondent to address whether this is a substantial claim and if post-conviction counsel was ineffective for failing to raise it. A claim is substantial if it has some merit. Martinez, 566 U.S. at 14. For the purposes of determining whether post-conviction counsel was ineffective, a petitioner must show more than the mere fact they failed to raise potentially meritorious claims; he must show that no competent counsel, in the exercise of reasonable professional judgment, would have omitted those claims. Hittson v GDCP Warden, 759 F. 3d 1210, 1263 (11<sup>th</sup> Cir. 2014).

Presently, this claim does not constitute a substantial claim. In United States v Jacobson, 466 U.S. 109 (1984) Federal Express employees observed that one of its packages had been damages while in transit. Upon opening the package, they

discovered a white powder which field tested positive for cocaine. The United States Supreme Court held that once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of now-nonprivate information. Id. at 117. In United States v Simpson, 904 F. 2d 607 (11<sup>th</sup> Cir.), the Eleventh Circuit found that the FBI's search of a box containing pornographic images and magazines did not exceed the scope of the prior private searches just because it was more thorough. In other words, the private search, which was more limited, yielded several pornographic images. The FBI was permitted to conduct a more thorough search of the container which yielded many more images. In United States v Runyan, 275 F. 3d 449 (5<sup>th</sup> Cir. 2001), the Fifth Circuit Court of Appeals applied this holding to a scenario where pornographic images were discovered on a CD discovered by a private search and other CDs. The court found that the law enforcement officers exceeded the scope of the private search when they examined the unopened CDs, but found that officers do not exceed the private search simply because the conduct a more thorough search of a CD that has already been opened.

Recently, in United States v Avery, 2016WL 8671970, (N.D. Georgia 2016) (unpublished), the court considered the right to privacy regarding civil/business documents, but applying the

same case law. It found that all of the documents placed on the SD card, a container, after a private search of a server destroyed any privacy as to the contents of that container. It was not necessary for the private searcher to have looked at each item contained on and copied from the office server in order to justify the Government examining all of the documents.

Petitioner cited United States v Crist, 627 F. Supp. 576 (M.D. Pa. 2008). A private party, perusing the defendant's computer, uncovered what they believed to be child porn. This party turned the computer over the government, which then conducted a full scale forensics search of the hard drive using the EnCase software. The Court held that the government use of the forensics program exceeded the private party's search of only opening a few files. The Court reasoned that forensics program was a much broader search and completely different in character. Therefore, Runyon did not apply to that situation. However, the Crist court observed that Runyon found no issue with the search of a single disc when compared with the search of an entire computer. A disc is classified as a single container, and thus, "The look-see confirmation that the information on one disk was what the private parties had seen was upheld because it was merely a more thorough investigation of what a private searcher had told the police." Id. at 584. In

other words, a hard drive search is not analogous to an individual disc.

Presently, all of the pornographic images were found on a single disc which was admitted into evidence as Exhibit B. (Trial transcript, p. 177, 182, 190, 207, 217, 276). Thus, under United States Supreme Court law, the law enforcement officer's search did not exceed the scope of the private search because it was merely a more thorough search of the container. A motion to suppress based on this ground would not have been granted. Therefore, defense counsel cannot be deemed deficient for failing to file one. Likewise, Petitioner is unable to demonstrate any prejudice because counsel is not required to file a non-meritorious motion. Applying the Martinez standard, Petitioner is unable to demonstrate that no competent counsel would have failed to file a motion to suppress on this basis. Therefore, Petitioner is unable to demonstrate cause and prejudice sufficient to overcome the procedural default.

2. Petitioner claims that the appellate counsel was ineffective for failing to argue that the jury failed to return non-unanimous verdicts. Specifically, the State submitted 178 child pornographic images but charged 125 counts of possession of child pornography. This claim was raised in his state habeas

petition which was certified as mailed on June 9, 2016.

(Appendix II). On June 27, 2016, the Fifth District Court of Appeal dismissed it. (Appendix JJ). Petitioner filed a motion for rehearing on July 8, 2016. (Appendix KK). On August 1, 2016, the Fifth District Court of Appeal denied the motion. (Appendix LL).

The first question is whether this claim is not cognizable on federal habeas review because it was procedurally barred by Florida's procedural rules. Fla.R.App.P. 9.141(d)(5) provides:

A petition alleging ineffective assistance of appellate counsel on direct review shall not be filed more than two years after the judgment and sentence become final on direct review unless it alleges under oath with a specific factual basis that the Petitioner was affirmatively misled about the results of the appeal by counsel. In no case shall a petition alleging ineffective assistance of appellate counsel on direct review be filed more than 4 years after the judgment and sentence become final on direct review.

In the state petition, Petitioner acknowledged that the petition was filed outside the two-year time window, but argued that the four-year time window should apply. (Appendix II). He argued as the specific factual basis that Attorney Zyzk had already discovered the best issues, and if the appellate court did not reverse on those issues, they would not reverse on any other issues. Petitioner stated, "Based upon this exchange, Appellant believed that he would be successful in overturning his

convictions and sentences on direct review.” (Appendix II, p. 2). He also stated that following the affirmance on appeal, he consulted with Attorney Napire, but he never got back with Petitioner. (Appendix II, p. 3).

First, Respondent submits that the foregoing does not meet the requirements of Fla.R.App.P. 9.141(d)(5). That requires that the petitioner be affirmatively misled about the results of the appeal by counsel. Presently, Petitioner does not allege this. Rather, he asserts that his attorney advised him that she raised what she deemed the most meritorious issues. This did not constitute misadvice regarding the results of the appeal, and thus, was insufficient to extend the time limit to four years.

Second, a claim may be exhausted but procedurally defaulted if it is based on an independent and adequate state procedural grounds. The last state court rendering a judgment in the case must clearly and expressly state that it is relying on a state procedural rule. This Court observed in its August 23, 2018, order, the Fifth District Court of Appeal dismissed Petitioner’s state habeas petition, but did not expressly state that the petition was untimely or otherwise procedurally barred, or cite any procedural rule.

Respondent believes that the Fifth District Court of Appeal’s dismissal is an adequate, independent state procedural

ground that renders this claim procedurally defaulted. The trial court noted the filing date in its order and dismissed the petitioner rather than denied it. The fact that it was dismissed means that it rejected Petitioner's claim that he was entitled to an extension of the two-year time limit. The petition was docketed on June 15, 2017, by the appellate court, and denied 12 days later. Petitioner specifically asked the court to reconsider the time limit in his motion for rehearing, and the court the denied it. This supports the conclusion that it was denied as untimely. If this claim is deemed procedurally defaulted, Petitioner is unable to show cause and prejudice to excuse the default. The Supreme Court has declined to extend Martinez to claim of ineffective assistance of appellate counsel. Davila v Davis, 137 S. Ct. 2058 (2017).

Third, the claim concerning non-unanimous verdicts was not preserved for appeal. It does not appear that trial counsel raised any objection at trial. Therefore, this issue was not preserved for appellate review.

Fourth, because it was not preserved in the trial court, appellate counsel would have had to argue that it constituted fundamental error. Respondents submit that error, if any, is not fundamental. Detective Christopher Connell described each pornographic photograph individually and specifically as it was

entered into evidence. (App. C, p. 292-332). It is clear from the description that each one was, beyond a reasonable doubt, a pornographic image containing children and infants engaged in explicit sexual activity. Respondent would also observe that the trial court repeated and specifically instructed the jury that the verdict must be unanimous, and that each crime required a separate verdict. (Appendix C, p. 399-401). For example:

Only one verdict may be returned to each crime charged. This verdict must be unanimous, that is, all of you must agree to the same verdict.

(Appendix C, p. 400).

The separate crime is charged in each count and while they have been tried together, each crime and the evidence applicable to it must be considered separately and a separate verdict returned as to each. A finding of guilty or not guilty as to one crime must not affect your verdict as to the other crimes charged.

(Appendix C, p. 401). It does not appear that the prosecutor encouraged the jury that a non-unanimous verdict was acceptable, and the trial court specifically instructed them that a unanimous verdict was required as to each count. The law presumes that the jury has followed all of the trial court's instructions, in absence of evidence to the contrary. Davis v State, 121 So. 3d 462, 491 (Fla. 2013). Garzon v State, 939 So. 2d 278 (Fla. 4<sup>th</sup> DCA 2006). Even if there was error, it does not rise to the level of fundamental error that should have raised

on appellate review. Hayward v State, 24 So. 3d 17, 41 (Fla. 2009) (fundamental error is an error that goes to the foundation of the case and is equivalent to a denial of due process.).

3. Petitioner claims denial of his right to counsel because trial counsel was ineffective for failing to redact portions of the tape recorded conversation between Appellant and Schlaegel.

This Court points to the following three statements: 1) Schlaegel believed that Appellant was a danger to their daughter; 2) Schlaegel stated as fact that that Petitioner possessed child pornography and her therapist's reaction to this; and 3) Schlaegel made statements regarding Appellant's interest in teen pornography and his addiction to pornography. This Court has directed Respondent to address whether the defaulted claim of ineffective assistance of trial counsel is substantial, and whether post-conviction counsel was ineffective in not raising it.

As to Petitioner's history with pornography, the court observed that part of Petitioner's trial defense was that he possessed lawful pornography, was aware of it on the CD, but was not aware of the child pornography:

Part of the defense's case was that the Defendant possessed pornography, but only legal material; any illegal, child

pornography, if possessed by the Defendant was unknowing.

(Appendix R, p. 10-11). Further, the court stated:

Because the evidence of "collateral crimes" in which the Defendant complains of, includes information that defense had already admitted to the jury and was consistent with the case put on by the defense, the Defendant cannot now argue that the presentation of the audio, which recites these facts, was highly prejudicial. Accordingly, the court finds that the Defendant has failed to establish that counsel's failure to object or move to exclude evidence of Defendant's history with pornography, amounts to deficient performance under Strickland.

(Appendix E, p. 11).

Petitioner is unable to meet the deficiency representation prong of Strickland. The statements that Petitioner made admitting to knowing that he had downloaded child pornography, albeit unknowingly, and his inappropriate sexual interest in pictures of under aged girls were relevant and admissible at trial.

Despite Schlaegel stating that she had concerns for her young daughter, they were not directed to any specific abuse by Petitioner, but rather the victimization of all the children and Schlaegel's dislike of all pornography. She expressly stated that she had seen nothing to indicate that Petitioner had any sexual interest in their daughter and there were no signs of

abuse on the daughter when examined by a medical professional.  
(402, 405-406, 426-427).

Petitioner is unable to meet the prejudice prong of Strickland. The audiotape demonstrated Schaegel's hostility to Petitioner, and this was a key part of the defense. He asserted that she was acting out of malice and revenge, and thus her testimony was not worthy of believe. (TT. 379-380, 383). Defense counsel also argued that the jury heard the whole tape, and not once did Schlaegel mention the specific CD containing the images giving rise to the charges. Thus, defense counsel used the fact that the jury heard the unredacted tape in support of its defense.

Finally, the statements that Petitioner argues should have been redacted as inadmissible were minor statements made during the course a lengthy audio recording. They were never mentioned again by either party and there was no stamp of approval by authoritative law enforcement witnesses.

Petitioner is unable to show that this claim is substantial, or that there is no competent counsel that would have failed to move to redact the audiotape on the grounds asserted in this petition. Petitioner is not shown cause and prejudice under Martinez, and this claim remains procedurally barred.

CONCLUSION

Respondents request this Court deny the present habeas petition for the reasons set forth in the Response and Supplemental Response.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Supplemental Reply has been electronically filed with the Middle District and has been sent to Rachel Bushey, Attorney for Petitioner, via e-mail to [reb@markjobrien.com](mailto:reb@markjobrien.com) and via U. S. Mail to 511 W. Bay St., Ste. 330, Tampa, FL, 33606-3533 this 7<sup>th</sup> day of November, 2018.

/s Allison Morris  
Allison Morris