No. 20-123216-S

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

ZACHARY JACOB MCFALL
Defendant-Appellant

REPLY BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County, Kansas
Honorable David Debenham, Judge
District Court Case No. 19 CR 1946

Jennifer C. Roth #18858
Kansas Appellate Defender Office
Jayhawk Tower
700 SW Jackson, Suite 900
Topeka, Kansas 66603
(785) 296-5484
(785) 296-2869 fax
adoservice@sbids.org
Attorney for the Appellant

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Zachary replies to some of the points the State made in its brief, and renews his arguments from his original brief.

Reply Issue 1. The court failed in its duty to fully investigate Zachary's request for a new attorney.

In its response to Zachary's Issue 1 ("The district court made errors of fact and law when it denied Zachary's request for new counsel"), the State repeatedly faults Zachary, a teenager not trained in the law, for not identifying for the court such legal/factual concepts as "any and all additional reasons why he believed there was a conflict of interest, irreconcilable disagreement, or potential breakdown in communication between he and defense counsel." Brief of Appellee, 17-18. The State faults Zachary for not telling the court about things he told Dr. Blakely. Brief of Appellee, 17-18. Zachary was forbidden from seeing Dr. Blakely's report, yet the State faults him for not informing the court about Dr. Blakely's observations and concerns. Brief of Appellee, 18-19; (R. 22: 1).[1]

The State repeatedly characterizes what happened at the hearing as Zachary "was given the chance to tell the district court" and "he was given the opportunity" to say why he should get a new attorney. Brief of Appellee, 17-18. But that characterization is unjustifiably generous and lacks important nuance.

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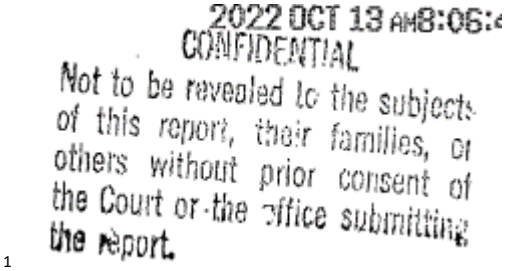
[1] 

(stamped in the upper-right corner of page 1 of Dr. Blakely's report)

The court told Zachary "this is the hearing in which you can tell me why it is you believe you need new counsel at this date." (R. 8: 5). But Zachary didn't get three sentences out before the court interrupted him: "okay, let's talk about that." (R. 8: 5). The rest of what Zachary said was in response to the court's cross-examination. (R. 8: 6-11). Then the court turned to the Zachary's attorney, who was allowed to talk for over twice as long as Zachary, with only one interruption from the court. (R. 8: 12-24). In the end, the court decided the motion from the bench, in a ruling full of legalese. (R. 8: 25-26).

Next, the State goes so far as to say that Dr. Blakely's report had no bearing on the conflict the court was inquiring into: "Notably, the competency evaluation is used to determine whether the Defendant is competent or not. The purpose of the evaluation is not for the district court to comb through to find statements by the Defendant that might support justifiable dissatisfaction." Brief of Appellee, 18.

At the beginning of its argument section, the State correctly notes that an appropriate inquiry into an identified conflict of interest involves two parts: "fully investigating **both** the basis for the defendant's dissatisfaction with counsel **and** the facts necessary for determining whether the dissatisfaction justifies appointing new counsel." Brief of Appellee, 15 (quoting *State v. Staten*, 304 Kan. 957, Syl. ¶ 8, 377 P.3d 427 (2016) (emphasis added). But the State only addresses the first part of the inquiry, and ignores the second.

The law requires the court to investigate facts necessary to determine whether Zachary's dissatisfaction justified a new attorney. And important facts

were right there for the taking, in Dr. Blakely's report. (R. 22: 6-7). Incidentally, contrary to the State's assertion that competency had no bearing on Zachary's conflict with his attorney, Dr. Blakely's professional opinion was Zachary's competency was tied to who his attorney was and how that person interacted with Zachary. (R. 22: 6-7); Brief of Appellant, 25.

There is no evidence the court considered any of Dr. Blakely's concerns. They are absent in the court's ruling on the conflict. (R. 8: 25-26). In its questioning of Zachary, the court did not ask anything about what Zachary shared with Dr. Blakely. (R. 8, generally). The court did not ask Zachary any questions stemming from Dr. Blakely's concerns. (R. 8, generally). In fact, the only mention the court made about the contents of Dr. Blakely's report was during a back-and-forth with Zachary's attorney about his objection to the "dumbass" comment. (R. 8: 3).

Aside from Dr. Blakely's report, the court knew there were problems. Two weeks before the competency/conflict hearing, the court held a hearing on counsel's motions for a competency hearing and to withdraw. (R. 1: 81-83). Zachary's attorney expressed concerns—the same ones that prompted him to request a competency evaluation—about Zachary's understanding, history of mental health, etc. (R. 10: 3-9). The court had in hand a letter Zachary wrote in which he asked for a new attorney. (R. 10: 2, 18-19). The court heard that Zachary's counsel had not produced the promised discovery. (R. 10: 10-13).

Even though it had at least two opportunities to do so, the court did not investigate the facts necessary before denying Zachary a new attorney.

Reply Issue 2. Zachary's attorney abandoned him.

In response to Zachary's Issue 2 ("Trial counsel's failure to function as an advocate at sentencing denied Zachary his Sixth Amendment right to counsel"), the State first argues that this Court does not need to consider Zachary's argument, even if it meets an exception. Brief of Appellee, 21. The State faults a then-17-year-old boy for not personally arguing, in real time, that his attorney was abandoning him during his sentencing hearing. Brief of Appellee, 21.

Unlike *State v. Gray*, 311 Kan. 164, 459 P.3d 165 (2020), counsel's abandonment at sentencing was not a known legal issue when Zachary went to his sentencing—it couldn't have been because sentencing had not happened. This Court should reach Zachary's *Cronic* issue.

The State brings up "ineffective assistance of counsel" in its preservation section, and later points out that Zachary "only argues that the *Cronic* exception applies and does not argue that he can establish deficiency and prejudice under the *Strickland* standard," then says, "[t]hus, he has waived any such argument." Brief of Appellee, 20, 23.

The State attempts to muddy the water by interjecting *Strickland*. As Zachary makes clear, he is not raising an ineffective assistance of counsel issue under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984). His argument is based solely on *Cronic*: "[t]o be clear, at this stage, Zachary is deliberately raising a *Cronic* issue only as to his counsel's performance at sentencing. Should this Court disagree, the Court's analysis should end. Zachary is

not waiving or abandoning any other challenges—he is preserving them for postconviction remedies if necessary." Brief of Appellant, 31.

Finally, the State claims that trial counsel didn't totally abandon Zachary because he pointed out the State's counts were multiplicitous and asked the court for concurrent sentences. Brief of Appellee, 23, 25.

Two legally correct points cannot undo the devastating comments his attorney made—comments that the court adopted. First, it was not defense counsel who brought up that Counts 1 and 2 were multiplicitous—it was the court. (R. 17: 9). Zachary's attorney did not file any post-trial motions, so he did not raise that issue. (R. 1, generally.) Zachary's attorney addressed it only when the court asked him about it. (R. 17: 10-11).

Second, by the time he asked for concurrent sentences, counsel could not do or say anything to overcome what it failed to do before he even walked into court. When Zachary and the attorney walked into sentencing, there was **nothing before the court for its consideration**—there was no motion for Zachary to receive anything but life with no possibility of parole for 50 years.

A final note. In its Issue 1, the State makes a reference to "difficult clients." Brief of Appellee, 19. In its Issue 2, the State adopts Zachary's trial counsel's characterization of his comments at sentencing as "frank", and then uses the phrase "the Defendant's attitude throughout the case." Brief of Appellee, 25.

The State—just like Zachary's attorney—is quick to talk about Zachary's lyrics in his juvenile jail cell, but doesn't mention how he talked to his dad about

them. And the record in this case shows a child asking his attorney to ask the court if he can address the not-double-spaced letter he wrote to the judge, starting with, "Your Honor, I apologize, for taking your time." (R. 10: 19). The record shows this child being polite to the court. See, e.g., (R. 8: 11, 24). The record shows this child telling Dr. Blakely that he hopes God and the judge will help him. (R. 22:2), The record shows the court cross-examining Zachary while he remains respectful. (R. 8: 6-11). Frankly, Zachary showed restraint in the face of grown adults saying certain things to or about him.

Wanting one's attorney to follow through on what he promised, on the record, is not being "difficult." Not taking a plea (that one's conflicted attorney is urging one to take) and having a trial is not "attitude" or being "difficult"—it is a fundamental constitutional right.

Reply Issue 3. The State's comments misstated the law on three key issues.

In response to Zachary's Issue 3 ("The State's comments misstated the law on (1) first-degree murder, (2) aiding and abetting liability, and (3) premeditation"), the State asserts that none of the prosecutor's comments misstated the law, calling them "accurate statement[s] of law." Brief of Appellee, 29-33. Yet the State does not point to any accurate statement made by the prosecutor regarding the heart of Zachary's argument on aiding and abetting: that the State has to prove that the accused had **the same specific intent to commit the crime as the principal**, not just be "in on it." This prosecutorial error was compounded by the lack of a jury instruction on shared intent. See Brief of Appellant, Issue 4, 37-48.

Reply Issue 4. The State's insistence on charging separate counts, contrary to law, invited error on the jury instructions.

In response to Zachary's Issue 4 ("The district court did not properly instruct the jury on how to consider (1) first-degree and second-degree murder and (2) the State's aiding and abetting theory"), the State maintains its trial position that "the State did not charge one count of first-degree murder in the alternative. The State charged two counts of first-degree murder." Brief of Appellee, 41. Similarly, the State claims all of the PIK instructions and verdict forms the court did not give (which Zachary argues is clear error) would not have been legally or factually appropriate anyway "because the murder charges here were not charged in the alternative. The murder charges were charged separately in counts 1 and 2." Brief of Appellee, 39.

The State keeps insisting they are "alternative charges not alternative theories," but that's just not the law. "Premeditated murder and felony murder are not separate and distinct crimes, notwithstanding their considerable differences. They are alternative ways to commit the singular crime of first-degree murder." *State v. Stewart*, 306 Kan. 237, 247, 393 P.3d 1031 (2017). "[K.S.A. 21-5402] establishes but one offense, murder in the first degree, but it provides alternative theories of proving the crime." PIK Crim. 4th 54.130, Notes on Use.

The State invited the error Zachary argues in Issue 4 when it told the court that the (appropriate) PIK instructions should not be given, so the court gave the wrong ones instead. (R. 15: 1005-06). The State committed error in closing

argument when it talked about the "alternative charges" and how they should be considered. See Brief of Appellant, 35-37, 45-46.

The State does not mention its failed attempt to get the court to sentence Zachary for **both** first-degree premeditated murder **and** first-degree felony murder. (R. 17: 8-11). Nor does the State explain why the prosecutor's closing argument took the opposite position: the jury "would find the defendant guilty of murder in the first degree under felony murder as well. So two murders for one homicide. Well, what happens at that point is by operation of law. That doesn't involve you. It will only involve the Judge. The Court will only be able to accept or sentence the defendant as to one of the two." (R. 15: 1044-45).

The record does not reveal the reason(s) why the State chose to charge in a way inconsistent with established law. But the jury is involved—that's how a jury trial works. Jurors determine what, if anything, Zachary is guilty of. And to do that, they needed legally appropriate instructions from the court.

Respectfully submitted,

/s/ Jennifer C. Roth

Jennifer C. Roth #18858
Kansas Appellate Defender Office
700 SW Jackson, Suite 900
Topeka, KS 66603
(785) 296-5484 (voice)
(785) 296-2869 (fax)
adoservice@sbids.org
Attorney for Appellant Zachary McFall

Certificate of Service

I served this Reply Brief of Appellant by e-mailing a copy to Michael F. Kagay, Shawnee County District Attorney, at Da_appeals@snco.us, and to Kris Kobach, Attorney General, at ksagappealsoffice@ag.ks.gov, on June 16, 2023.

/s/ Jennifer C. Roth
Jennifer C. Roth #18858