IN THE SUPREME COURT OF FLORIDA

FLOYD MORGAN,

APPELLANT,

-VS-

CASE NO. 63,679

STATE OF FLORIDA,

APPELLEE.

BRIEF OF APPELLEE

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FLOYD MORGAN,

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Appellee. /

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellee accepts the statement of the case as stated on pages one and two of appellant's brief and that the Notice of Appeal was timely filed.

STATEMENT OF THE FACTS

Appellee accepts the statement of the facts as stated on pages two through five of the motion to vacate which is essentially in accordance with the facts set out in this Court's opinion filed in Morgan v. State, 415 So.2d 7 (Fla.1982), cert.denied, 74 L.Ed. 2d 593 (1982).

ISSUE PRESENTED

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S MOTION TO VACATE ON THE FOLLOWING GROUNDS:

A. THE CIRCUIT COURT DID NOT ERR IN SUMMARILY DENYING THE MOTION TO VACATE ON THE ALLEGATIONS THAT APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

B. APPELLANT WAS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HE WAS MADE TO STAND TRIAL WITH CORRECTIONAL OFFICERS ON HIS JURY.

C. IN LIGHT OF THE U. S. SUPREME COURT'S DECISION IN HOPPER V. EVANS, THE FLORIDA SUPREME COURT'S CAPITAL SENTENCING LAW IS UNCONSTITUTIONAL AS APPLIED AT THE TIME OF APPELLANT'S TRIAL.

D. FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL AS APPLIED BECAUSE THE FLORIDA SUPREME COURT HAS ABANDONED THE CONSTITUTIONAL SAFEGUARD OF PROPORTIONALITY REVIEW.

E. APPELLANT WAS DENIED EQUAL PROTECTION OF THE LAWS AT THE TRIAL COURT LEVEL IN THAT THE IDENTICAL CIRCUMSTANCES RELATED BY APPELLANT'S TRIAL JUDGE TO SUPPORT AN AGGRAVATING CIRCUMSTANCE OF "HEINOUS, ATROCIOUS OR CRUEL" TO THAT OF THE APPELLANT IN DEMPS V. STATE, REACHED TOTALLY DIFFERENT AND DIAMETRICAL RESULTS IN THE FLORIDA SUPREME COURT.

F. THE ELLEDGE RULE,AS FASHIONED BY THE FLORIDA SUPREME COURT, CANNOT CONSTITUTIONALLY PROHIBIT RESENTENCING UPON A FINDING THAT THE THIRD AGGRAVATING CIRCUMSTANCE IN THE CASE AT BAR HAS BEEN UNCONSTITUTIONALLY OR IMPROPERLY APPLIED TO APPELLANT.

ISSUE PRESENTED

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S MOTION TO VACATE ON THE FOLLOWING GROUNDS:

A. THE CIRCUIT COURT DID NOT ERR IN SUMMARILY DENYING THE MOTION TO VACATE ON THE ALLEGATIONS THAT APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

ARGUMENT

Appellant contends the trial judge erred in summarily denying the motion for post-conviction relief because the records did not conclusively refute his allegations of "fact" with respect to the claim that he was denied effective assistance of counsel.

Appellee respectfully disagrees. The trial judge after considering the motion together with the responsive pleading filed by the State of Florida (R 17-34), pursuant to the trial court's order of February 8, 1983 (R 15,16) concluded the allegations of ineffective assistance of trial counsel fell into one of three catagories: (1) acts or omissions which fail to rise to a level of substantial and serious deficiency measurably below that of competent counsel; (2) acts or omissions which relate merely to matters indicative of choices and decisions concerning trial tactics and strategy; and (3) acts or omissions which fail to demonstrate prejudice likely to effect the outcome of the trial (R 61).

It should be observed that while appellant does not argue it was illegal or unlawful for the trial judge to order the

State to file a response to the motion he suggests this was "unorothox." There is nothing in the Florida Rules of Criminal Procedure which forbids a trial judge from requesting a response from the State in order to assist him in determining the issues. Indeed, Rule 3.850 was patterned after the federal habeas corpus act and was created to replace state habeas corpus actions. The federal courts and this Court repeatedly issue orders directing the State or respondent to file responses in such actions to determine whether there is any basis for relief and/or further proceedings. The trial judges should be encouraged to order answers to motions for post conviction relief so the State will be given an opportunity to be heard and so the trial judge can better determine as a neutral magistrate what disposition can be made. Counsel states in the brief that appellant had no opportunity to rebut the matters asserts by the appellee, however, there is nothing to indicate that he filed a motion for leave to file further pleadings and certainly this Court should not presume a request if made would have been denied.

Appellant, relying on Meeks v. State, 382 So.2d 673 (Fla. 1980), urges the trial judge incorrectly disposed of the motion on this issue and that he made ". . . incorrect factual assumptions without the benefit of an evidentiary hearing. . . ." This is not accurate. The trial judge did not make any factual assumptions that were disputed between the parties in disposing of this issue.

Appellant is operating under the misunderstanding that because he has alleged a laundry list of acts and/or omissions that he is entitled to an evidentiary hearing. That is simply not the law. If the motion contains nothing more than nonspecific, vague, conclusory allegations of incompetent representation which either would not entitle the movant to relief even if taken as true, or which are refuted by the record, the movant has failed to present a case of incompetency as a matter of law and a denial of the claim without a hearing is proper. State v. Reynolds, 238 So.2d 598 (Fla.1970); Muhammad v. State, 426 So.2d 533 (Fla.1982); Washington v. State, 397 So.2d 285 (Fla. 1981); Williams v. Maggio, 679 F.2d 381 (5th Cir.1982) and Antone v. Strickland, ___ F.2d ___ (11th Cir.1983), Case No. 82-5120, Opinion filed June 13, 1983, Kravitch, J. concurring. Judge Kravitch in her opinion in Antone, supra, properly observed that there were exceptions to the rule that an evidentiary hearing should normally be conducted on the competency question. She stated:

> ". . . An exception to this general rule is found, however, where the facts alleged by the petitioner, even if proved, would not entitle him to relief. Guice v. Fortenberry, 661 F.2d at 503; Easter v. Estelle, 609 F.2d 756 (5th Cir.1980); Cronnon v. Alabama, 587 F.2d 246 (5th Cir.), cert.denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 792 (1978). Another exception exists where 'the record before the district court was sufficient for a proper examination of [petitioner's] claims.' Winfrey v. Maggio, 664 F.2d 550, 552 (5th Cir.1981). See also Schultz v. Wainwright, 701 F.2d 900 at 901 (11th Cir.1983) (evidentiary hearing not required where the district court can determine merits of claim based on the existing record). . . ."

Slip opinion at 3157.

Moreover, the burden is on the movant to show the necessity for a hearing and he cannot establish the requisite factual dispute by relying upon "speculative and inconcrete claims." Schultz v. Waniwright, supra, at 901.

Appellee is not going to address each specific act or omission and demonstrate why it fails as a matter of law or without a hearing because that was adequately done by the State in the response (R 18-32), which makes specific references to the record and cites appropriate case authorities. Appellee adopts the position advanced therein as a part of this brief by reference thereto.

A reading of the motion, when considered in light of the record before this Court, Raulerson v. State, 420 So.2d 567, 570 (Fla.1982), supports the legal ruling of the trial judge. It is patently clear that appellant is attempting to second-guess the strategy decisions of counsel and is operating under the conception that if counsel committed any unexplained act or omission that he was denied "effective assistance" of counsel. Of course, the courts have repeatedly held that they will not "question counsel's trial strategy and judge his performance incompetent if it was not errorless" Williams v. Maggio, 679 F.2d 281 (5th Cir.1982); Songer v. State, 419 So.2d 1044 (Fla.1982); Muhammad v. State, 426 So.2d 533 (Fla.1982) and that competent counsel need not raise every conceivable constitutional claim. Engle v. Isaac, 456 U.S. 107 (1982).

Appellant complains, for example, that counsel was ineffective because he didn't introduce character evidence which was available by family members at the penalty stage of the proceedings (R 8)--the nature of such evidence not being specified in any manner whatever--and that he was ineffective because he did not secure expert testimony from the Veteran's Administration that appellant was severely traumatized by his Vietnam "experience" (R 8)-- which is in no way deliniated in the motion.

These allegations alone demonstrate the deficiency of the entire motion, in that they are conclusory and do not contain any facts. They merely allege the obvious, to-wit: that such acts were not done.

More importantly, however, is that this Court as well as the Eleventh Circuit Court of Appeals has held the decision to call character witnesses at the penalty stage of a capital trial is a matter of trial strategy. Songer v. State and Francois v. State, supra; Stanley v. Zant, 697 F.2d 955 (11th Cir.1983), citing to Williams v. Maggio.

The allegations relating to the failure to present evidence of post-traumatic stress syndrome is even more offensive. The lawyer accused of incompetency in this case successfully moved for the appointment of experts at state expense to examine the appellant to evaluate the possibility of mitigating circumstances (O.R. 26-27). The medical experts examined this appellant and the findings of Dr. McMahon were presented to the jury at the sentencing phase of the proceeding (O.R. 662-663). Apparently

these experts were unable to discern any relevant mental problem associated to appellant's Vietnam "experience." Obviously, they were ineffective also. In point of fact counsel had to rely on the "experts" in this area for an attorney is not qualified in the field and the law correctly recognizes that a competent attorney is not "required to pursue every path until all conceivable hope withers." Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980); Adams v. Balkom, 688 F.2d 734, 740 (11th Cir.1982). Effective representation did not require counsel to seek until he found an "expert" that could present testimony that today might exist.

Each and every allegation suffers from the same defect as those described above. It also shows that the motion was defective in its legal sufficiency and proves that quantity does not equal quality.

The trial judge did not err in denying a hearing on the ineffectiveness issue.

B. APPELLANT WAS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HE WAS MADE TO STAND TRIAL WITH CORRECTIONAL OFFICERS ON HIS JURY.

ARGUMENT

Appellant contends the trial judge erred in summarily denying his motion to vacate judgment and sentence because the trial judge at trial refused to excuse correctional officers from the venire. See: Motion, paragraph 23(B).

This claim is totally devoid of legal merit and is not cognizable in a collateral proceeding pursuant to Fla.R.Crim.P. 3.850. State v. Matera, 266 So.2d 661 (Fla.1972); Witt v. State, 387 So.2d 922 (Fla.1980); Hargrave v. State, 396 So.2d 1127 (Fla. 1981); and Ford v. State, 407 So.2d 907 (Fla.1981).

The propriety of the trial judge's actions was a matter that could have and should have been raised on direct appeal and under the aforementioned cases is not appropriate for consideration in a collateral proceeding. Indeed, the refusal to exclude "correctional officers" from the venire was raised on direct appeal and rejected by this Court. Morgan v. State, supra, at 9-10. Therefore, the issue is precluded from reconsideration, Carter v. State, 242 So.2d 737 (Fla.1st DCA 1970) under the doctrine of law of the case. Barclay v. State, 411 So.2d 1310 (Fla.1982), affirmed, Barclay v. Florida, ___ U.S. ___ (1983), Case No. 81-6908, Opinion filed July 6, 1983.

Appellant is making a claim of implied bias because none of the jurors selected were shown to have been prejudiced. The Supreme Court of the United States has reputed the implied prejudice in the recent decision rendered in Smith v. Phillips, 455 U.S. 209, 71 L.Ed.2d 78, 85, 102 S.Ct. 940 (1982), citing to Dennis v. United States, 339 U.S. 162, 94 L.Ed.2d 734, 70 S.Ct. 519 (1950). See also: Dobbert v. Florida, 449 U.S. 560, 66 L.Ed.2d 740, 101 S.Ct. 802 (1981). The Supreme Court in Phillips said:

> ". . . A holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible . . . Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury. . . ."

70 L.Ed.2d at 86.

C. IN LIGHT OF THE U. S. SUPREME COURT'S DECISION IN HOPPER V. EVANS, THE FLORIDA SUPREME COURT'S CAPITAL SENTENCING LAW IS UNCONSTITUTIONAL AS APPLIED AT THE TIME OF APPELLANT'S TRIAL.

ARGUMENT

Appellant contends that the Florida Death Penalty statute is unconstitutional because under Brown v. State, 206 So.2d 377 (Fla.1968) the trial judges in this State have been instructing juries on all degrees of homicide regardless of whether there was an evidentiary basis for it.

This claim is likewise without merit. Just as the preceding claim, this issue could have and should have been raised at trial and on direct appeal and therefore is not cognizable under Rule 3.850. This would be true even if Hopper v. Evans, _____ U.S. ___, 102 S.Ct. 2049, 2053 (1982) stood for the proposition assigned to it by counsel. Actually, the court held it was "harmless error" for the trial court not to have instructed on the lesser included offense of second degree murder because there was no evidence in support thereof.

Appellee declines to address the merits of appellant's claim because to do so would result in a waiver of the double "procedural default" and allow appellant to have this issue considered by a federal habeas corpus court. County Court of Ulster County, New York, 442 U.S. 140 (1979); Newsome v. Henderson, 425 U.S. 967 (1976) and Darden v. Wainwright, 513 F.Supp. 937 (M.D.Fla.1981). Appellee simply will not relinquish the legal

right accorded to the State under Wainwright v. Sykes, 433 U.S. 72 (1977)and Engle v.Isaac, 456 U.S. 107 (1982). Appellee asks this Court not to waive the State's rights and that it refuse to reach the merits, notwithstanding Hitchcox v. State, ___ So.2d ___ (1983), Case No. 63,667, 8 F.L.W. 169. Indeed, in Hitchcox, supra, the Court did not reach the issue. It held that Witt v. State, supra, was applicable. See footnote 3, at 169.

Raising the issue at this point does not preserve the issue under Rose v. Lundy, 455 U.S. 509 (1982). Appellant is confusing "exhaustion" with "procedural default." See: Engle v. Isaac, 71 L.Ed.2d at 799, note 28.

D. FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL AS APPLIED BECAUSE THE FLORIDA SUPREME COURT HAS ABANDONED THE CONSTITUTIONAL SAFEGUARD OF PROPORTIONALITY REVIEW.

ARGUMENT

Appellant contends that his death sentence is arbitrary and capricious because this Court has abandoned its function of "proportionality review." (App's Br. at p. 24-28).

Appellee does not find any such allegation contained in the motion for Post Conviction Relief filed by appellant, and, therefore,the issue is not properly before this Court.

More importantly, however, this issue is one which could have and should have been presented by motion to dismiss and is not cognizable by motion pursuant to Rule 3.850. Christopher v. State, 416 So.2d 450 (Fla.1982).

Moreover, this claim has repeatedly been rejected by the federal courts. Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.1978); Ford v. Strickland, 696 F.2d 804 (11th Cir.1983) and Barclay v. Florida, supra. In the motion filed, appellant compared his case with Demps v. State, 395 So.2d 501 (Fla.1981) (Motion, paragraph 22(B)(1)-(6), R 11-13), and claimed he was denied equal protection of the law. First, this matter was raised by appellant in his rehearing petition filed on May 3, 1982, in this Court. Secondly, he cannot claim a denial of equal protection

of the law by comparing cases and demonstrating a mere apparent conflict. Spinkellink v. Wainwright, supra; Ford v. Strickland, supra, at 819; Howard v. Kentucky, 200 U.S. 164 (1906) and Beck v. Washington, 369 U.S. 541 (1962). While appellant was entitled to review in this Court to determine whether the procedural requirements of the statute were complied with and to assure the sentence of death was appropriate in light of similar cases[1], he is not entitled to uniformity of judicial decisions or immunity from judicial error. Beck v. Washington, supra, at 555.

This Court reviewed the findings of the trial judge and found death was appropriate when compared to other cases it has decided. That ends the matter under the law of the case. Barclay and Witt, supra.

Appellant's reliance upon Harris v. Pulley, 692 F.2d 1189 (9th Cir.1982) is totally misplaced if for no other reason than that the Supreme Court of the United States has granted review in said case. Pulley v. Harris, Case No. 82-1095, Review Granted March 23, 1983. 32 Cr.L.Rptr. 4229. Appellant incorrectly stated review was denied. (App's Br. at p. 27). It should be emphasized that "proportionality of review" does not mean equal protection of the laws with respect to each specific finding.

This claim is without merit as a matter of law even if it were properly before this Court.

[1] While this Court did not sustain the finding of heinous, atrocious and cruel in Demps, it nevertheless upheld the sentence of death and thus both killers received equal punishment.

E. APPELLANT WAS DENIED EQUAL PROTECTION OF THE LAWS AT THE TRIAL COURT LEVEL IN THAT THE IDENTICAL CIRCUMSTANCES RELATED BY APPELLANT'S TRIAL JUDGE TO SUPPORT AN AGGRAVATING CIRCUMSTANCE OF "HEINOUS, ATROCIOUS OR CRUEL" TO THAT OF THE APPELLANT IN DEMPS V. STATE, REACHED TOTALLY DIFFERENT AND DIAMETRICAL RESULTS IN THE FLORIDA SUPREME COURT.

ARGUMENT

Appellant urges herein that he was denied equal protection of the law as guaranteed by the Fourteenth Amendment because this Court found the killing in this case was "heinous, atrocious or cruel" whereas in Demps, supra, the Court held such a finding not supported by the evidence.

What has been stated under the preceding section of this brief answers the argument tendered herein. Beck v. Washington, supra. Since both appellant and Demps received death sentences which were affirmed by this Court, appellee submits there can be no denial of equal protection of the law! Of course, the appellant assumes that Demps was correctly decided as to the nature of the homicide.

Alternatively, even if this Court were to reconsider its findings, since there were two other aggravating and no mitigating circumstances found by the sentencer, the sentence of death would still be the only appropriate penalty. Cooper v. State, 336 So.2d 1136 (Fla.1976); Demps v. State, supra, citing to Cooper; Ford v. Strickland, supra, at 814; and Barclay v. Florida, supra.

F. THE ELLEDGE RULE,AS FASHIONED BY THE FLORIDA SUPREME COURT, CANNOT CONSTITUTIONALLY PROHIBIT RESENTENCING UPON A FINDING THAT THE THIRD AGGRAVATING CIRCUMSTANCE IN THE CASE AT BAR HAS BEEN UNCONSTITUTIONALLY OR IMPROPERLY APPLIED TO APPELLANT.

ARGUMENT

Appellant urges that since the finding regarding "heinous, atrocious and cruel" was unsupported by the evidence and improperly found by the sentencer, his sentence of death had to be vacated.

Of course, this presumes facts contrary to that found by this Court on the direct appeal and thus, even if appellant was correct with regard to the soundness of the Elledge [v. State, 346 So.2d 998 (Fla.1977)] rule, his claim is unmeritorious.

As a matter of law, however, counsel's claim that the Elledge rule offends the Constitution is devoid of merit. Ford v. Strickland, 696 F.2d 804, 814-815 (11th Cir.1983); Barclay v. Florida, supra.

Even before Stephens v. Zant, 631 F.2d 311 (5th Cir.1982) and Henry v. Wainwright, 686 F.2d 311 (11th Cir.1982) were vacated by the Supreme Court, Zant v. Stephens, ___ U.S. ___ (1983), Case No. 81-89, Opinion filed June 22, 1983, 33 Cr.L. Rptr. 3195; Wainwright v. Henry, ___ U.S. ___, Case No. 82-840,

Order entered July 6, 1983, 33 Cr.L.Rptr. 4105[2], the Eleventh Circuit Court of Appeals recognized the constitutional validity of the Elledge Rule. Ford v. Strickland, supra; and Antone v. Wainwright, ___ F.2d ___ (11th Cir.1983), Case No. 82-5120, Opinion filed June 13, 1983. Of course, Barclay has foreclosed the argument that appellant's due process or Constitutional rights were violated.

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2 Appellant's brief was submitted prior to either of these rulings and thus did not have the benefit thereof.

CONCLUSION

For the reasons stated hereinabove, the order appealed should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee has been forwarded to Mr. J. Craig Williams, 136 East Bay Street, Suite 301, Jacksonville, FL 32202, via U. S. Mail, this 19th day of July 1983.

Raymond L. Marky
Assistant Attorney General