IN THE SUPREME COURT OF FLORIDA

FLOYD MORGAN,

Defendant/Appellant,

vs. CASE NO.: 63,[illegible]

STATE OF FLORIDA, CIRCUIT CASE NO.: 77-141-CF

Plaintiff/Appellee.

INITIAL BRIEF OF APPELLANT FLOYD MORGAN

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REFERENCES

Appellant will be referred to as "Appellant" and Appellee will be referred to as the "State" or "prosecution".

Record since filing Rule 3.850 Motion will be referred to as: (R).

Record of the trial will be referred to as: (TR).

STATEMENT OF THE CASE

On November 28, 1977, Appellant was charged by indictment with first degree murder. Trial by jury commenced on June 12, 1978, and concluded on June 14, 1978. A verdict of guilty was returned.

The penalty phase of the trial was held on June 15, 1978, and the jury (7-5) returned an advisory sentence of death. On July 17, 1978, the lower court imposed the sentence of death.

A direct appeal was taken to this Court. This Court affirmed Mr. Morgan's judgment of conviction and sentence of death. Morgan v. State, 415 So.2d 6 (Fla. 1982). Rehearing was denied on July 9, 1982. Certiorari was denied by the United States Supreme Court on November 29, 1982. Floyd Morgan v. Florida, _____U.S._____, (Case No. 82-4419).

Thereupon, executive clemency proceedings were commenced. On January 25, 1983, a hearing was held before the Board of Executive Clemency. At that time the Board elected to have a workshop on post-traumatic stress syndrome, and as of this date, a death warrant has not been signed.

Appellant on January 24, 1983, filed in the lower court his motion to vacate judgment and sentence (R-1). On February 8, 1983, the lower court issued an Order Establishing Initial Procedure for Consideration of Motion for Post-Conviction

Relief. (R-15). On February 22, 1983, State's Response to Petitioner's Motion for Post-Conviction Relief was filed. (R-17). On March 18, 1983, the lower court's Order denying Petitioner's Motion for Post-Conviction Relief was entered without an evidentiary hearing. (R-61).

STATEMENT OF THE FACTS

For a summary of evidence at the July, 1978, trial, Appellant respectfully refers the Court to Pages 2 through 5 of his Rule 3.850 motion. (R-2-5). Additional facts will be discussed as the arguments that follow are presented.

POINT ONE

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

Appellant's Rule 3.850 Motion states claims not refuted by the trial record which require an evidentiary hearing with respect thereto.

The trial judge denied Appellant's Rule 3.850 motion without granting an evidentiary hearing. A Rule 3.850 motion may be denied without an evidentiary hearing only when the motion and the portion of the record relied upon conclusively show that the defendant is entitled to no relief. Graham v. State, 372 So.2d 1363, 1366 (Fla. 1979). Under Fla. R. App. P. 9.140(g), the trial court's denial cannot stand "(u)nless the record shows conclusively that the Appellant is entitled to no relief. . ." No such showing can be made on this record.

Several of the claims made in Appellant's Rule 3.850 motion are based on factual assertions outside of the trial record. There was no evidentiary hearing at which the facts could be developed or tested. The record indicates that Appellant must be granted an opportunity to substantiate the allegations in his motion. Accordingly, there was no basis whatsoever for denying the motion with respect to those claims which require an evidentiary hearing, and this Court must remand to permit the holding of an evidentiary hearing.

A. APPELLANT WAS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Appellant's Rule 3.850 motion alleges numerous specific overt acts and omissions on the part of trial counsel. (R-5-9).

The list of inadequacies in investigation, preparation, and conduct are extensive. An evidentiary hearing is required to address the nature and effect of the errors and omissions. The record as it stands simply does not show conclusively that Appellant is entitled to no relief.

The following allegations were set forth in Appellant's Rule 3.850 motion alleging ineffective assistance of trial counsel. It is Appellant's contention that the below-stated grounds demonstrate the necessity of an evidentiary hearing in which Appellant has the opportunity to substantiate those grounds raised.

1. Defense counsel failed to listen to the tape recording in Inspector Achett's possession in which Petitioner gave a statement regarding the incident.

a) Defense counsel failed to investigate the bases for a Motion to Suppress Petitioner's statement and failed to file a Motion to Suppress.

b) Defense counsel did argue evidence of involuntariness to the jury; however, he did not present all factual claims which would underlie a Motion to Suppress to the trial judge.

2. Defense counsel failed to prepare for and negligently composed his closing argument.

a) Defense counsel forgot to argue the State's failure to call the witness Robitaille, when the theory of the defense was the State's failure to meet their burden of proof.

b) Defense counsel argued in his closing argument that this was a fight to the finish, which is common in prison. (TR-579). This argument became the basis for the State's argument that by defense counsel's own words there was evidence that the Defendant developed the premeditated intent to kill during the act of stabbing Joe Saylor. (TR-595).

c) Such argument by defense counsel was a specific omission measurably below the standards of competent counsel since defense counsel failed to consider the logical conclusion of the argument he advanced.

d) Defense counsel failed to explain the fact and the law to the Petitioner and to give him advice within the realm of reasonably competent attorneys on the likelihood of conviction and the possibility of a death sentence. He failed to give the Petitioner competent advice on the advisability of accepting the benefits of a plea bargain tendered by the State.

e) Defense counsel failed to object to the State's time limitation on closing argument, thus allowing Petitioner to be deprived of his right to be heard without objection or argument

in the court below, when such eventually formed the basis for the Florida Supreme Court's affirmance of the Court's ruling that defense counsel not be allowed to reopen his closing argument. The Court announced this limitation at Page TR-542.

3. Defense counsel failed to assert prejudice in the trial court proceeding over the prosecutorial pre-indictment delay.

a) Petitioner was prejudiced because, due to the lapse of time between the commission of the offense and the indictment, Petitioner was unable to realistically deal with the prosecution of the offense.

b) Petitioner, due to the lapse of time, was under the misconception that the situation was to be handled administratively.

c) Therefore, when counsel was eventually appointed, Petitioner was unable to realistically discuss the prospects of a plea bargain.

4. Defense counsel failed to assert prejudice in the trial court proceeding arising from the loss of witnesses and the impossibility to investigate matters solely within the knowledge of these witnesses.

a) Inmate Southwick escaped and the other prisoners were not willing to be forthcoming with evidence regarding the Petitioner's emotional and mental state.

5. Defense counsel failed to assert that he was unable to question and marshall the witnesses regarding the provocation of the Petitioner.

6. Defense counsel failed to preserve the Petitioner's right to due process of law as later asserted in his pro se motion. His ability to defend had been damaged due to the delay. Since United States v. Morrison, 449 U.S. 361 (1981), states that a remedy for a violation of the Petitioner's right to adequate counsel must be tailored to the harm caused, and since most of the harm went to the penalty phase of the trial, the State must be prohibited from executing the sentence of death here.

7. Petitioner requested counsel at the time he was interrogated and offered counsel pursuant to Miranda, and after the Petitioner affirmatively requested counsel (TR-448), the State is responsible for not providing this indigent with counsel for a period of over six months. Unlike other effective assistance of counsel cases, here the harm is directly attributable to the State's affirmative action and its responsibility and failure to provide counsel.

8. During the penalty phase of the trial defense counsel failed to conduct a substantial investigation into mitigating circumstances and develop available witnesses to testify as to those mitigating circumstances.

a) Defense counsel failed to call as witnesses to present mitigating circumstances two prison guards, John G. Sapp and Dale Harden, whom Petitioner saved during the Garment Factory Riots and any members of Petitioner's family. Defense

counsel failed to contact Petitioner's family prior to or at any stage during the trial court proceedings. He failed to investigate the source of information that Petitioner's family was capable of providing regarding Petitioner's past and present. He failed to offer into evidence the testimony and/or statements of any family members for the purpose of presenting mitigating circumstances at the penalty phase of the trial court proceedings. Trial counsel also failed to develop as witnesses and investigate information available from the Veteran's administration. Defense counsel failed to investigate the possibility of Petitioner's suffering from post-traumatic stress syndrome as a result of his participation in the Vietnam War. Defense counsel could have and should have presented the expert testimony of personnel from the Veteran's Administration to testify to the fact that Petitioner was severely traumatized by his Vietnam experience. Additionally, defense counsel failed to present testimony to substantiate those mitigating factors that he did raise during the penalty phase of the trial.

b) Defense counsel failed to object to the prosecutor's argument in closing that the mitigating circumstances were limited to those statutorily enumerated (TR-678, 683, 684-685), even though defense counsel had earlier asserted to the trial court that mitigating circumstances were flexible whereas the aggravating circumstances were limited to the statute (TR-648).

c) Defense counsel failed to object when the court removed the Petitioner from the courthouse and from the presence of the jury before dismissing the jury after the verdict of guilty was announced (TR-603), thus prejudicing the Petitioner in the eyes of the jury before the penalty phase of the trial in violation of the Petitioner's right to be present. Florida Rules of Criminal Procedure 3.180, Sixth Amendment, United States Constitution.

d) Defense counsel failed to explain or introduce evidence as to the meaning of the phase "bug out", which was used several times throughout the trial in conjunction with the Petitioner's psychological state of being prior to committing the offense (TR-512-513).

e) Defense counsel argued the stress of prison life with no evidence (TR-513, 692-693), when such was readily available.

f) Defense counsel failed to investigate the high probability of Petitioner suffering from brain damage, due to a prison record notation of head injuries and evidence in psychological reports that Petitioner was reported as being egged on by other inmates. Joanna Byers, a clinical psychologist, recommended on December 23, 1973, that Petitioner receive a thorough neurological workup, with an electroencephalogram (EEG) to verify indications of organic disturbance. Dr. Byers noted enough signs of visuo-motor-coordination difficulties to suggest

minimal brain dysfunction or possibly a dysrythmia or petit mal epilepsy. Defense counsel failed to investigate the possibility of brain damage as detailed above and follow through with a request for an EEG and other physical and psychological evaluations. Furthermore, defense counsel failed to object to the loss of evidence concerning the Petitioner's mental state due to the delay in prosecution.

g) Defense counsel failed to investigate the circumstances of the Petitioner's prior conviction and to offer evidence relating to the less than heinous nature of the crime in that Petitioner had utilized a method of torture brought to his knowledge by the Vietcong, in that this was a symbolic gesture used by the Vietcong to say "we have been here". Defense counsel further failed to elicit information that would have shown that medical negligence was involved as relating to the death of the victim and that the Petitioner was drunk at the time the offense occurred.

The trial court denied Appellant's claims of ineffective assistance of counsel on a three-part basis. The first ground for denial was that those allegations asserted failed to rise to a level of substantial and serious deficiency measurably below that of competent counsel (R-61). It is Appellant's contention that the aforementioned allegations raise specific omissions or overt acts by the trial counsel that amounted to a substantial and serious deficiency measurably below that of competent counsel.

The Florida Supreme Court in the landmark case of Knight v. State, 394 So.2d 997 (Fla. 1981), articulated the appropriate standards for determining whether a defendant has been provided with reasonably effective assistance of counsel. Those standards are as follows:

First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.

Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. As was explained by Judge Leventhal in DeCoster III: "To be 'below average' is not enough, for that is self evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts or omissions deviated from a checklist of standards." 624 F.2d at 215. We recognize that in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances.

Third, the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. In the case of appellate counsel, this

means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error. This requirement that a defendant has the burden to show prejudice is the rule in the majority of other jurisdictions.

Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the State still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. This opportunity to rebut applies even if a constitutional violation has been established. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); DeCoster III.

Although Knight dealt specifically with appellate counsel it has been repeatedly recognized that those principles enunciated in Knight are the guiding precepts to be used in determining whether effective assistance of counsel has been rendered in post-conviction proceedings.

In addition to the specific standards set forth in Knight, the Florida Supreme Court in Meeks v. State, 382 So.2d 673 (Fla. 1980) expressly addressed the test applicable to trial counsel when alleging ineffective assistance of counsel. The court states: ". . . when ineffective assistance of counsel is asserted, the burden is on the person seeking collateral relief to specifically allege and establish the grounds for relief and to establish whether these grounds resulted in prejudice

to that person." Foxworth v. State, 267 So.2d 647 (Fla. 1972), cer. denied, 411 U.S. 987, 93 S.Ct. 2276, 36 L.Ed.2d 965 (1973). Second, the appropriate test to be applied in determining whether defendant was afforded effective assistance of counsel is not "sham and mockery", but whether counsel was reasonably likely to render and did render reasonably effective counsel based on the totality of the circumstances. United States v. Gray, 565 F.2d 881 (5th Cir.), cert. denied, 435 U.S. 955, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1978), emphasis added.

Appellant respectfully submits that based upon the totality of the circumstances and the fact that this above-styled cause was a death penalty case, the transgressions and omissions of counsel were measurably below that of competent counsel; therefore, Appellant's Rule 3.850 allegations were sufficient to warrant an evidentiary hearing.

Second, the trial court stated that the aforementioned allegations were matters indicative of choices and decisions concerning trial tactics and strategy (R-61). Appellant respectfully contends that whether these were matters of judgment or lack of preparation is a factual dispute that is not resolved by the record; and accordingly, requires an evidentiary hearing.

Third, the trial court stated that the allegations fail to demonstrate prejudice likely to effect the outcome of the trial. The allegations alleged in Appellant's Rule 3.850

when considered under the totality of circumstances and the fact that this cause involves the imposition of the death penalty clearly demonstrates prejudice that may very well have effected the outcome of the proceedings.

A carefully delineated procedure has been established for consideration of motions pursuant to Rule 3.850. See State v. Weeks, 166 So.2d 892 (Fla. 1964). Under this procedure, the trial court must initially consider the motion to determine if it sets forth allegations sufficient to constitute a legal basis for relief. If the motion on its face states grounds for relief, the trial court must then look at the files and records in the case to ascertain whether they conclusively reveal that the movant is entitled to no relief. In making this determination, the Court may not look to matters outside the official court records.

When the files and records fail to refute conclusively the factual allegations in the motion, the trial court must hold a prompt hearing, determine the issues and make findings of fact and conclusions of law. See, e.g., Meeks v. State, 382 So.2d 673 (Fla. 1980); Martin v. State, 349 So.2d 226 (Fla. 4th DCA 1977); Bagley v. State, 336 So.2d 1236 (Fla. 4th DCA 1976); Brown v. State, 390 So.2d 447 (Fla. 5th DCA 1980). The same standard applies to the appellate court's review where a hearing has been denied in a 3.850 proceeding. Rule 9.140(g), Fla.R.App.P.

The trial court made incorrect factual assumptions without the benefit of an evidentiary hearing by denying the Appellant's motion on the aforementioned grounds. The allegations presented in Appellant's motion cannot be said to show he is "conclusively" entitled to no relief, as was determined by the trial court judge.

Furthermore, the trial court established an unorthodox procedure, not mentioned in Rule 3.850, Fla. R. Crim. P., in that the court required the State to respond to Appellant's Rule 3.850 motion. The court in its order stated that:

> Rule 3.850 Fla. R. Crim. P., the authority for the motion, makes no provision for a response thereto by the State. Ordinarily a response will serve no useful purpose. Such is not true of this motion covering 13 typewritten pages and citing approximately 54 examples of trial counsel's alleged ineffectiveness, many of which raise, or attempt to raise, questions of both fact and law. This Court has no authority to modify or amend any rule of procedure, nor does it pretend to do so. However, a response by the State will facilitate a fair consideration and orderly disposition of the motion and may aid the Court in determing whether the motion is facially sufficient to warrant hearing thereon (R-15).

By conducting the procedure in this manner, the trial court afforded the Appellant no opportunity to rebut those factual assertions made in the State's response to Petitioner's Motion for Post-Conviction Relief. As a result of this procedure, the entire record consists of Appellant's facially sufficient

allegations and the State's response thereto in the nature of a one-sided evidentiary showing.

The record is devoid of any evidence presented on Appellant's behalf in support of the allegations raised by the motion. The State attached to its response matters of an evidentiary nature which should have only properly been presented to the court in an evidentiary hearing. Appellant was not afforded the similar opportunity to produce evidence, thus, the court's unorthodox procedure did not afford the Appellant a full and fair hearing in violation of State and Federally protected rights of due process of the laws.

When the State needed to resort to factual matters to refute the Appellant's allegations, such constituted a prima facie showing for the need of an evidentiary hearing on the motion. By the trial court's procedure, it substituted a one-sided evidentiary showing by the State in lieu of an evidentiary hearing as provided for by the Florida Rules of Criminal Procedure; and under these Rules, this procedure should not be sanctioned by this Honorable Court.

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

The trial court denied Appellant an evidentiary hearing and the opportunity to present evidence as to the fact that Appellant was made to stand trial with correctional officers on his jury. Appellant was denied the right, by the trial court ruling, to present evidence that in most other prison murder cases submitted to a jury and not resulting in the death sentence, were tried before a venire from which correctional officers were excused by the Court. Because of the trial court's failure to excuse the correctional officers, Appellant's death sentence is unreliable and wholly arbitrary and capricious, failing to meet safeguards required by the Eighth and and Fourteenth Amendments for the constitutional imposition of the death penalty.

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

Appellant raised in his Rule 3.850 motion the issue of whether the Florida death penalty statute violates the Eighth and Fourteenth Amendments because it fails to challenge jury discretion, permits the interjection of irrelevant factors into the sentencing process by the jury and the trial judge, fails to provide for fully individualized determinations of sentence and permits unguided re-sentencing by the Supreme Court of Florida (R-10).

The Court declined to rule specifically on this issue and included it in the Order denying Appellant's motion under the guise of several general categories of denial. However, these issues concern the constitutionality in the application of our capital sentencing statute and as such are cognizable in post-conviction proceedings.

The trial court's ruling that the issues in Paragraph 24 of the motion were not cognizable overlooked fundamental principles of Florida law. First, Henry v. State, 377 So.2d 692 (Fla. 1979), holds that issues regarding the unconstitutional application of the death penalty "can properly be raised as a subject for consideration in a proceeding for post-conviction relief." 377 So.2d at 692. See also Straight v. State, 422 So.2d 827 (Fla. 1982); Hall v. State, 420 So.2d 872 (Fla. 1982); Ruffin v. State, 420 So.2d 591 (Fla. 1982). And this is how it must be

since, though a statute has been upheld as constitutional on its face, it is only after the statute is applied in "concrete cases" that "all of its nuances" may be known and "more specific constitutional challenges" can be addressed. Zant v. Stephens, _____U.S._____, 102 S.Ct. 1856, 1857 (1982). See also Godfrey v. Georgia, supra. The claims presented herein each fall within that "as applied" category and present substantial merit.

As alleged in Paragraph 24 of Appellant's Rule 3.850 motion, until October 1, 1981, Florida rules of practice required instructions on lesser degrees of homicide regardless of the evidentiary basis for such instructions. §919.14, 919.16 Fla. Stat. (1965), adopted as Florida Rules of Criminal Procedure 3.490 and 3.510 (1968). See Brown v. State, 206 So.2d 377 (Fla. 1968).

While some defendants benefitted from this practice, others did not. Moreover, because jury pardons were granted solely on the whim of a particular jury, decisions to remove capital defendants from eligibility for a death sentence, by conviction of a lesser offense despite the evidence, were inherently arbitrary. It is precisely this kind of arbitrariness, the exercise of jury discretion in the guilt phase without any guidance provided by evidence, which has come to be condemned by the Supreme Court of the United States.

On October 1, 1981, the Florida Supreme Court ended this consistent practice by approving amendments to the Rules of Criminal Procedure which, inter alia, prohibited instructions on lesser included offenses and attempts unless such instructions were supported by the evidence. In Re Florida Rules of Criminal Procedure, 403 So.2d 979 (Fla. 1981).

Appellant's case was tried prior to October 1, 1981, during the period in which lesser included offenses had to be charged even in the absence of evidence to support them. Consistent with Florida law, the jury in Petitioner's case was instructed on all degrees of homicide and the lesser included offense of manslaughter (TR-598-607, 620-626). By requiring the jury to be instructed on lesser included offenses where there was not even a scintilla of evidence to support verdicts on the lesser offenses, Florida law invited jurors to dispense mercy wherever they deemed mercy appropriate. Without question, in light of this invitation, Florida juries did grant "jury pardon[s]," Bailey v. State, 224 So.2d 296, 297 (Fla. 1969), in capital murder cases prior to October 1, 1981. See e.g., Killen v. State, 92 So.2d 825 (Fla. 1957); Hodella v. State, 158 Fla. 94, 27 So.2d 674 (1946).

The practice of instructing jurors on lesser included offenses even where there is no evidence to support verdicts on such offenses "inevitably leads to arbitrary results." Hopper v. Evans, _____U.S._____, 102 S.Ct. 2049, 2053, 72 L.Ed.2d 367 (1982).

In Hopper, the Supreme Court addressed this very issue. John Evans was convicted of capital murder and sentenced to death at a time when Alabama law precluded instructions on lesser included offenses in capital murder cases. This statutory preclusion was subsequently declared unconstitutional in Beck v. Alabama, 447 U.S. 625 (1980). Evans' conviction was thereafter set aside by the United States Court of Appeals for the Fifth Circuit, which interpreted Beck as requiring instructions on lesser offenses in every case, even in one such as Evans', which had no evidentiary basis for such instructions. Evans v. Britton, 628 F.2d 400 (5th Cir. 1980), modified, 639 F.2d 221 (5th Cir. 1981). The Supreme Court overturned the decision of the Fifth Circuit, however, because the Fifth Circuit had misconstrued Beck as requiring instructions on lesser offenses in every case. Instead, the Court held that Beck, and due process, "requires that a lesser included offense instruction be given only when the evidence warrants such an instruction." Hopper v. Evans, _____U.S. at _____, 102 S.Ct. at 2053, 72 L.Ed.2d at 373. The reason for the rule, as described by Chief Justice Burger for the Court, was that instructions on lesser included offenses which had no evidentiary support inevitably led to arbitrary results. Id.

Accordingly, a capital sentencing system such as Florida's, which rests upon a guilt-determining process in which a lesser included offense instruction is required to be given even when there is no evidentiary support for that instruction, must fail. It is

precisely the system which John Evans argued had been mandated by Beck, and it is precisely such a system which Hopper held would violate the Eighth and Fourteenth Amendments.

Therefore, the Florida death penalty scheme as applied is inherently arbitrary and must be declared unconstitutional.

Although this Court recently decided in Hitchcox v. State, _____So.2d_____ (1983) (Case No. 63,667), that there were no valid grounds for this argument, Appellant respectfully submits this argument in light of Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), which holds that to preserve pertinent issues for Federal proceedings a Defendant must have exhausted all claims in State Court or return to State Court to exhaust any and all existing claims that are being submitted in Federal proceedings.

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

Appellant submits that his death sentence is unreliable and wholly arbitrary and caprious, failing to meet the safeguards required by the Eighth and Fourteenth Amendments for the constitutional imposition of the death penalty due to the fact that there is no proportionality review in Florida death cases.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), the landmark decision interpreting Florida's capital sentencing statute, the Florida Supreme Court in its decision set forth a strong commitment to the doctrine of proportionality review. The court in Dixon stated:

> "Review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." Id. at 10.

However, the Florida Supreme Court eight years later in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), states:

> "Neither of our sentence review fuctions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the

> findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation."

This position is a departure from this court's commitment to the doctrine of proportionality review as mandated in Dixon. In earlier cases this court required, by virtue of Florida Statutes, to weigh both the aggravating and the mitigating circumstances as shown in the record for the purpose of determining whether or not the death penalty was warranted in the particular case. See Halliwell v. State, 323 So.2d 557 (Fla. 1975); see also Proffitt v. Florida, 428 U.S. _____, 96 S.Ct. _____, _____ L.Ed.2d _____ ( ).

The Florida Supreme Court has therefore departed from its own precedent in that the current policy as reflected by Brown is to not reweigh the aggravating and mitigating circumstances in reviewing a death penalty case. In the case at bar, the Court did not review this case to determine if the sentence imposed was proportionate to other similar cases under the same similar circumstances. The Court failed to consider those similar cases in which the defendant was given a life sentence, which was the very purpose of the directive issued in Dixon v. State. In Dixon the court stated:

> "We also consider it reasonable to require that a finding that life imprisonment be imposed rather than death should be supported in writing by the trial judge. This we do require under our constitutional power to regulate practice and procedure in the courts. Fla. Const., art. V, §2(a), F.S.A. . . ., requiring these findings by the judge provides an additional safeguard for the defendant sentenced to death in that it provides a standard for life imprisonement against which to measure the standard for death established in the defendant's case, and again avoids the possibility of discriminatory sentences of death."283 So.2d at 8.

In Appellant's appellate brief, attached as an appendix, Appellant attempted to provide materials to allow this Court to review life cases to determine whether the sentence Appellant received was proportionate to that received in the cited cases. However, these materials were stricken from the brief and never considered by this Court.

In Morgan v. State, 415 So.2d 6 (Fla. 1982), this court in reviewing the third aggravating circumstance found by the trial court judge stated that "the third aggravating circumstance is also supported. The evidence showed that death was caused by one or more of ten stab wounds inflicted upon the victim by Appellant." The court then proceeds to cite three cases in which multiple stab wounds were inflicted and the victim was alive and suffering. Yet, if the aggravating circumstance had been reweighed, as the court's precedent suggests, it would have been determined that the third aggravating circumstance in the case at bar had nothing to do with

the number of stab wounds inflicted upon the victim.

In Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), cert. denied, _____U.S._____, 103 S.Ct. 1450, the court considered the issue of whether the California Supreme Court's failure to conduct a proportionality review rendered the defendant's death penalty sentence unconstitutional.

The Harris court notes that the United State Supreme Court has approved proportionality review whether provided for by statute or case law. The court further states that the United States Supreme Court has reviewed cases to determine whether the penalty imposed was proportionate to "other sentences imposed for similar crimes." Id. at 1196. The purpose of this proportionality review was to prevent the "arbitrary and capricious application" of the death penalty.

The Harris court stated that although the California Supreme Court stated that it would review each death penalty sentence and determine whether the application of the penalty was proportionate to that of similar crimes, it did not do so in this case. Furthermore, the court had stated that they were "'fully prepared to afford whatever kind of proportionality review' is constitutionally mandated by the Supreme Court." Therefore, by the California Supreme Court's denying the defendant a proportional review of his case as compared with other similar cases, the defendant's sentence was vacated and remanded. The Harris court stated that:

> As the Supreme Court has explained, Furman did "not require that all sentencing discretion be eliminated, but only that it be 'directed and limited,' so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a 'meaningful basis for distinguishing the . . . cases in which it is imposed from . . . the many in which it is not.'" Lockett v. Ohio, 438 U.S. 586, 601, 98 S.Ct. 2954, 2963, 57 L.Ed.2d 973 (1978), citing Gregg v. Georgia, 428 U.S. at 188-89, 96 S.Ct. at 2932-33.

As it stands presently, there is no proportionality review in Florida, ahtough the procedure and precedent was established in Dixon. See Proffitt v. Florida, supra. The refusal by this court to conduct an adequate proportionality review in the case subjudice resulted in Appellant receiving a sentence that is unreliable and wholly arbitrary and capricious, failing to meet the safeguards required by the Eighth and Fourteenth Amendments to the United States Constitution.

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

Appellant alleged in Paragraph 24(B) that his rights to equal protection of the laws, as guaranteed by the Fourteenth Amendment of the United States Constitution were denied because the identical factual circumstances related by Appellant's trial judge to support an aggravating circumstance of "heinous, atrocious or cruel" to that of the Appellant in the case of Demps v. State reached totally different and diametrical results in the Florida Supreme Court. See Demps v. State, 395 So.2d 501 (Fla. 1981) (R-11).

The trial court found as an aggravating circumstance in Petitioner's case that the murder was especially "heinous, atrocious or cruel":

> "Defendant's senseless killing of his fellow inmate was extremely offensive and cruel and demonstrated total disregard for the life and safety of his victim. It was especially cruel because the victim has been denied his right to live and his right to return to society, his family and friends after satisfying his societal debt for the crime for which he was imprisoned. The fact that he was an inmate makes his life no less precious than that of any other citizen in a free society. Furthermore, one confined to a penal institution has little or no opportunity to flee from or exercise the right of self-defense against homicidal assaults such as that seen here. It is the Court's opinion there are very strong aggravating circumstances under this condition."
> (Judge's sentencing order)

The first three sentences of this finding are practically verbatim to the finding the trial judge made as to presence of this aggravating circumstance in the murder of Alfred Sturgis while sentencing Bennie Demps to death, three months before the order in Petitioner's case was entered. (See 395 So.2d at 505 n. 8). In Demps v. State, the Florida Supreme Court found that of the four aggravating circumstances the trial court found applicable to this case, two of these findings were erroneous. The trial court's basis for the finding of the aggravating circumstance concerning "heinous, atrocious or cruel" was as follows:

> "The crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. 'Heinous' means extremely wicked or shockingly evil. 'Atrocious' means outrageously wicked and vile. 'Cruel' means designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others; pitiless.
>
> Defendant Demps senseless killing of his fellow inmate was extremely offensive and cruel and demonstrated total disregard for the life and safety of victim Alfred Sturgis. It was especially cruel because the victim has been denied his right to live and his right to return to society, his family and friends after payment for the crime he committed which resulted in his imprisonment; and the fact that he was an inmate does not make his life any less precious than any citizen in a free society.
>
> It is the Court's opinion there are very strong aggravating circumstances under this condition."

In Petitioner's case, the Florida Supreme Court upheld the trial court's finding of an aggravating circumstance worded in the exact same way in which the trial court in Demps based its finding of an aggravating circumstance. Yet the Florida Supreme Court found this finding of an aggravating circumstance in Demps to be erroneous.

The Eighth and Fourteenth Amendments to the United States Constitution requires that laws should be applied in an equal manner, but in fact it is arbitrary and capricious that the reasons and facts to support a decision of law in one case when identical to the reasons and facts supporting the same conclusion of law in another case come to such different and diametrically opposed results. The Florida Supreme Court has given an unconstitutional construction to this aggravating circumstance as applied in Petitioner's case in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

In the landmark case of Yich Wo v. Hopkins, 118 U.S. 356 6 S.Ct. 1064, 30 L.Ed. 220 (1886), the United States Supreme Court set forth the basic foundations upon which our case law dealing with discrimination in the administration of a neutral law is dealt with. The Court stated that:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to

> make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Therefore, in Morgan v. State, 415 So.2d 6 (Fla. 1982), the Florida Supreme Court reached a result diametrically opposed to that reached in Demps, yet based upon the exact same wording used by both trial courts as a basis for the finding of an existing aggravating circumstance.

At Appellant's trial, the trial judge had no inclination as to what decision the Florida Supreme Court would render in Demps v. State, supra, or in Morgan v. State, supra; however, after having the benefit of reviewing the decisions and evaluating to what extent he relied upon the trial judge's sentencing order in Demps, the trial judge should have the opportunity to review and determine whether Appellant was denied equal protection of the laws. Therefore, this argument has not been presented and argued at the trial court level, and the trial judge should have the opportunity to review his actions and determine if Appellant's sentence should be vacated based upon a denial of equal protection of the laws at the trial court level.

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

Since the finding of the third aggravating circumstance is in violation of Appellant's constitutional right to equal protection of the laws, then the sentence of death must be vacated and new sentencing proceedings be instituted where an unconstitutional construction of this aggravating circumstance will not be considered. The foregoing action requires an examination of Florida's "Elledge rules."

In Elledge v. State, 346 So.2d 998 (Fla. 1977), the Florida Supreme Court announced a pair of rules to govern its review of cases in which a death sentence is marred by the trial judge's improper consideration of nonstatutory or legally erroneous statutory aggravating circumstances. First, reversal is required in such cases, despite the presence of one or more valid statutory aggravating circumstances, if a mitigating circumstance was found. That is so, the court reasoned, because the Florida statute requires a weighing of valid aggravating circumstances against mitigating circumstances, and "regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going to the equation which might tip the scales of the weighing process in favor of death." Id. at 1003. Second, reversal is not required if one or more valid aggravating circumstances have been found, "where there are

no mitigating circumstances. The absence of mitigating circumstances becomes important, because, so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute." Id. at 1002-03 (emphasis in original).

In Elledge, it did "not expressly appear from the specific findings of fact that the trial judge found the existence of mitigating circumstances. His written findings expressly negate the existence of certain mitigating circumstances." Id. at 1003. But because his sentencing order recited that, "'after weighing the aggravating and mitigating circumstances,'" he had reached the "'opinion that insufficient mitigating circumstances exist to outweigh the aggravating circumstances,'" ibid., the Florida Supreme Court concluded that he "implicitly found some mitigating circumstances to exist," ibid. (emphasis in original).

In the case at bar, mitigating evidence was proffered by the Appellant during the sentencing proceedings. The trial court judge made, however, a finding that there were no mitigating circumstances present in this case.

In Lewis v. State, 398 So.2d 432 (Fla. 1981), the trial judge found four statutory aggravating circumstances and no mitigating circumstances. Id. at 438. This Court found three of the four aggravating circumstances unsupported by the record and remanded it for the trial judge's reconsideration of sentencing as

to whether the one remaining aggravating circumstance justified the imposition of the death penalty. The distinguishing factor in the Lewis case was the fact that the jury recommended a life sentence as opposed to the judge's finding of no mitigating circumstances and the imposition of a death sentence; however, the foremost consideration in the present case is whether the judge would have imposed the death penalty if he had only considered the two permissible aggravating circumstances. Clearly, five members of the jury had found mitigating circumstances in Mr. Morgan's case since the jury recommendation was only 7-5 in favor of the death penalty.

Therefore, based upon the Lewis court's reasoning, this case should be remanded to the trial judge for the purpose of reconsideration of the sentence and to consider the remaining aggravating circumstances against the mitigating evidence proffered at the sentencing proceedings.

The Florida Supreme Court, however, has reached an apparently contrary result in several other cases, without attempting to reconcile them with the Lewis decision. See Bolender v. State, _____So.2d_____ (Fla. 1982); White v. State, 403 So.2d 331 (Fla. 1981); Johnson v. State, 393 So.2d 1069 (Fla. 1980); Dobbert v. State, 375 So.2d 1060 (Fla. 1979).

There are several reasons why the Elledge rules cannot constitutionally be considered and applied under these circumstances, despite the trial court's failure to find any mitigating circumstances.

First, if Lewis is regarded as having been implicitly overruled and not merely disregarded by the contrary decisions in the aforementioned decisions, then the Elledge rule requiring affirmance in the absence of a finding of mitigating circumstances plainly falls afoul of Lockett v. Ohio, supra. For Lewis is the only case in which the Florida Supreme Court has reversed a death sentence under Elledge because of the existence of non-statutory mitigating circumstances. In Ford v. State, 374 So.2d 496, 503 (Fla. 1979), the court expressly refused to reverse a death sentence despite "error in assessment of some of the statutory aggravating factors," because "there being no mitigating factors present, death is presumed to be the appropriate penalty [under] Elledge . . . ." It did so while simultaneiously acknowledging the "testimony favorable to Appellant's character and prior behavior presented by the defense in mitigation during the sentencing trial." Ibid. Thus, with the exception of Lewis, it appears that this court has decided that nonstatutory mitigating factors which can (and, indeed, must) be considered by the advisory jury and sentencing judge are not "mitigating circumstances" within the Elledge rules. This precedent cannot be reconciled with Lockett, supra.

Second, the announced "state-law premises", Zant v. Stephens, _____U.S._____, _____S.Ct._____, 72 L.Ed.2d 222, 226 (1982), of the Elledge rules establish their unconstitutionality for a reason that appears a fortiori from Justice Stevens' recent

observations concerning a less glaring deficiency in North Carolina's capital sentencing procedures. Smith v. North Carolina, _____U.S._____, 51 U.S.L.W. 3418 (U.S., Nov. 29, 1982)(opinion of Justice Stevens on denial of certiorari). Elledge says that findings of nonstatutory or other improper aggravating circumstances may be disregarded if there are no mitigating circumstances and "there are some [valid] statutory aggravating circumstances, [because] there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute." Elledge v. State, supra, 346 So.2d at 1003 (emphasis in original). This necessarily means that, in the absence of mitigating circumstances, the statutory "weighing process" consists of weighing zero in mitigation against anything at all in aggravation; it does not matter what in aggravation, since the whole point of Elledge's reasoning is that the quantity and quality of aggravation is irrelevant "so long as there are some statutory aggravating circumstances," ibid., and nothing mitigating to weigh against them. But death may not be thus decreed by a process which asks merely whether aggravation outweighs mitigation, without asking also whether the amount and kind of aggravation justify a capital sentence. To do so would require death even though the aggravation is borderline in the determination of aggravating circumstances. Under this circumstance, it is not enough to establish that the defendant is any more deserving

of a death sentence than any other capital offender, and therefore not enough "to distinguish this case ... from the many cases in which [death] ... was not [inflicted]," Godfrey v. Georgia, supra, 446 U.S. at 433 -- because, in any situation to which Elledge's "weighing process" applies, this indistinguishable borderline aggravation necessarily outweighs zero in mitigation. Such a weighing process misses the whole point, and violates the constitutional premise, of this Court's repeated insistence upon an individualized sentencing inquiry in capital cases "in order to ensure the reliability, under Eighth Amendment standards, of the determination that 'death is the appropriate punishment in a specific case.'" Lockett v. Ohio, supra, 438 U.S. at 601, quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Under Woodson and Lockett, the ultimate, indispensable constitutional inquiry must be the appropriateness of a death sentence for the defendant at bar, not some defective abstract weighing process whereby the death penalty will always be imposed.

Third, if the "weighing process" envisaged by the Florida statute is to escape the preceding objection, it must be because the sufficiency, and not merely the existence, of aggravating circumstances is to be considered, even where no mitigating factors are found. In Proffitt, this Court clearly assumed that that was the way in which the Florida statute worked, describing it (in its own words) as requiring that a death sentence

be based upon the two findings "'(a) [t]hat sufficient [statutory] aggravating circumstances exist ... and (b) [t]hat there are insufficient [statutory] mitigating circumstances ... to outweigh the aggravating circumstances.'" Proffitt v. Florida, supra, 428 U.S. at 250 (bracketed material and elipses in original; emphasis added).

Consequently, based upon the foregoing analysis, 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. Even in the absence of a finding by the trial court judge that there were no mitigating circumstances, it is constitutionally required that the sentence must determine whether the aggravating circumstances present are sufficient to warrant the death penalty. Application of the Elledge rule to the Appellant would deny him his rights to due process and equal protection of the laws, guaranteed under the Fourteenth Amendment to the United States Constitution and his right under the Eighth Amendment to the United States Constitution, including his right to an individualized sentencing determination.

CONCLUSION

The order of the lower court denying Appellant's motion to vacate judgment and sentence without a hearing must be reversed.

Respectfully submitted,

BY _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail, to William Cervone, State Attorney's Office, P. O. Box 1437, Gainesville, Florida, 32602, this 17th day of June, 1983.

_____
ATTORNEY