IN THE SUPREME COURT OF FLORIDA

CASE NO. 64791

THE STATE OF FLORIDA,

Appellant,

vs.

BEAUFORD WHITE,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

BRIEF OF APPELLANT, THE STATE OF FLORIDA

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PREFACE

The Appellant, The State of Florida, was the plaintiff in the trial court below. The Appellee, Beauford White, was the defendant in the trial court below. In this brief the parties will be referred to as they appeared before the trial court.

The following symbols are used in this brief:

(T) - For the Transcript-of-Proceedings.

(R) - For the Record-on-Appeal.

The previous opinion of this court upon the Defendant's direct appeal is reported at White v. State, 403 So.2d 331 (Fla. 1981). The undersigned counsel during the course of the proceedings below introduced into the record herein, the entire record-on-appeal and transcript-of-proceedings in White v. State. Since this Court decided White and is possessed of the White record, said record is not in the present record to avoid redundancy.

I

STATEMENT OF THE CASE

The Defendant was charged by indictment with six counts of first degree murder; two counts of attempted first degree murder and four counts of robbery arising out of the so-called "Carol City Killings," which occurred on July 27, 1977. See, White v. State, 403 So.2d 331 at 333 (Fla. 1981). After a trial by jury, the Defendant was convicted as charged. Id. at 334. Subsequent to the penalty phase of the trial, the jury unanimously recommended that the Defendant be sentenced to life imprisonment. Id. However, the trial court upon receipt of a presentence investigation report sentenced the Defendant to death. Id.

Relative to the present appeal, the Defendant contended in his original direct appeal from his sentences of death in White v. State, supra that the death penalty was unconstitutional as applied to him because the evidence did not show that he had a purpose to kill:

> "[T]he defendant contends that the Florida death penalty statute violates the eighth amendment prohibition against cruel and unusual punishment under the United States Constitution in that it permits the infliction of death upon a defendant who lacks a purpose to cause the death of his victim. Defendant cites as authority Justice White's dissenting opinion in Lockett v.

> Ohio, 438 U.S. 586, 625, 98 S.Ct. 2954, 2973, 57 L.Ed.2d 973 (1978). wherein Justice White states: 'The value of capital punishment as a deterrent to those lacking a purpose to kill is extremely attenuated.'"
>
> Id at 335.

This court citing Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), concluded that a majority of the United States Supreme Court had not adopted the view that the death penalty may not be constitutionally applied under the circumstances of thue present case. Id, at 335-336. In sustaining various aspects of the death penalty herein, this Court specially noted that, "[i]n reaching our conclusion we note that we are also influenced by the magnitude of the criminal conduct." Id. at 339. In particular, this Court emphasized the particular facts of the Defendant's active participation in the robberies and murders herein: (1) the Defendant's motel room was used as a place to plan the crimes and to divide the loot after the murders; (2) when it was discussed whether to kill the victims, the Defendant was opposed to the killings, but that after it was decided to kill the victims the Defendant did nothing to prevent or otherwise disassociate himself from the killings; (3) the Defendant guarded the victims and discussed the search of the house and the victims and the ultimate disposition of the bodies; (4) the Defendant stood

by while the victims were shot one by one and (5) the Defendant returned to his motel room with the other killers and divided the loot from the killings. 403 So.2d at 338-339. In rejecting the Defendant's argument that it was improper to override the jury's verdict in the present case, this court specially noted that:

> "The only colorable mitigating circumstance was the non-statutory consideration that the defendant was not the triggerman. We do not believe however, that this factor alone outweighs the enormity of the aggravating facts, especially in light of the defendant's full cooperation in the robberies and complete acquiescence in the cold-blooded systematic murder or attempted murder of eight individuals." [Emphasis added].
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> Id at 340.

In the Defendant's Petition for a Writ of Certiorari in the United States Supreme Court, the defendant vigorously contended that the pending decision of the Court eventually issued in Enmund v. Florida, ___U.S.___, 102 S.Ct. 3368, 73 L.Ed.2d __ (1982) prohibited the application of the death penalty to the Defendant in the circumstances of the present case. See Record on Appeal ("Response in Opposition to Motion for Post-Conviction Relief", Composite Exhibit C). On July 6, 1983, the United States Supreme Court denied the Defendant's Petition for a Writ of Certiorari to this court. White v. Florida, ___U.S.__, 103 S.Ct. 3571 (1983).

On January 19, 1984, Governor Robert Graham of Florida signed a death warrant ordering the Defendant's execution, which has been scheduled for February 7, 1984. On or about January 23, 1984, the Defendant filed a motion based upon Enmund pursuant to Rule 3.850 Florida Rules of Criminal Procedure seeking to set aside the six sentences of death imposed upon him. After receiving the State's "Response in Opposition to Motion for Post-Conviction Relief" and hearing two days of argument, the trial court granted the Defendant's motion and vacated his sentences of death. In the trial court's ruling on the record, the trial court found: (1) that the change indicated by Enmund was sufficient under Witt to permit consideration of the Defendant's Rule 3.850 Motion; (2) that Enmund prohibits the application of the death penalty herein; (3) that the trial court would withhold resentencing the Defendant until this Court could review the present matter and (4) that the Defendant's execution would be stayed pending consideration by this Court. The present appeal follows.

II

POINT ON APPEAL

WHETHER THE TRIAL COURT HAS ERRED IN GRANTING THE DEFENDANT'S MOTION PURSUANT TO RULE 3.850.

III

ARGUMENT

THE TRIAL COURT HAS MANIFESTLY ERRED IN GRANTING THE DEFENDANT'S RULE 3.850 MOTION.

As the basis for the Defendant's Motion for Post-Conviction Relief, the Defendant contends that the decision of the Unites States Supreme Court in Enmund v. Florida, ___U.S.___, 102 S.Ct. 3368, 73 L.Ed.2d ___ (1982), represents a "change in the law" within the meaning of Witt v. State, 387 So.2d 1922 (Fla. 1980), sufficient to permit reconsideration of the constitutionality of the death penalty as applied herein under Enmund. In Enmund the defendant, a "wheelman", was not present at the scene of the killings nor was there any evidence that he knew the victims would be killed. 102 S.Ct. at 3370-3371. A sharply divided plurality opinion overturned the death penalty as applied Enmund holding, that because the death penalty was imposed upon Enmund without respect to whether he, "intended or contemplated that life would be taken," the death penalty must be set aside. 102 S.Ct. at 3379. Justice O'Connor joined by the Chief Justice, Justice Powell and Justice Rehnquist filed a sixteen page dissent contending that the Eighth Amendment should not prohibit a state from executing a convicted felony murderer, whether he was present or not for the killings. Id. at 3379-3394.

A.

First of all, as the State contended below, the Defendant has fully litigated this issue on his direct appeal. At pages 49-52 of his main brief on direct appeal and at page 9 of his reply brief on direct appeal, the Defendant argued vigorously that he should not be sentenced to death because he did not intend the death of the victims, citing Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), as quoted by the court in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). In disposing of the claim that the death penalty was unconstitutional as applied to the Defendant because it was based upon a felony theory and the claim that the Defendant had no intent to kill, this court explained that:

> "[W]e note that we have already decided the reasonableness of taking into account as an aggravating circumstance the fact that the murder was committed during the commission of another serious felony. See State v. Dixon. Second, the defendant's argument overlooks the plurality opinion in Lockett v. Ohio, which states that the Constitution neither forbids a state from enacting felony-murder statutes nor from making aiders and abetters equally responsible with principals. Id. at 602, 98 S.Ct. 2963. In response to Justice White's argument that a defendant must possess an intent to cause the death of the victim to impose the death penalty, Judge Rehnquist in a separate opinion stated that centuries of common law doctrine establishing felony murder and the relationship between aiders and abettors would have to be rejected

> to adopt this view. Id. at 635, 98 S.Ct. at 2976. A majority of the United States Supreme Court obviously has not adopted the view that the death penalty may not constitutionally be imposed under the circumstances existing in the instant case. To the contrary, in striking down Ohio's death penalty statute because it limited consideration of relevant mitigating circumstances to thos statutorily listed, the Court specifically distinguished Florida's death penalty statute by noting that it permitted the sentencer to consider any apect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor. Id. at 606-07, 98 S.Ct. at 2965-75. Thus, at least implicitly, the Court recognized the continuing vitality of Proffitt v. State, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), upholding the constitutionality of Florida's death statute, in the context of a claim which was similar to the eighth amendment claim raised by the defendant in the instant case."
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> 403 So.2d at 336.

However, in the Defendant's Petition for a Writ of Certiorari, the Defendant was severely critical of this Court in White v. State, claiming that, "the Supreme Court of Florida rather cavalierly deemed the trial court's analysis of aggravating circumstances to be 'harmless error'"[Emphasis added]. See, Record-on-Appeal ("Response in

Opposition to Motion for Post-Conviction Relief," Composite Exhibit C). The Defendant then argued vigorously that Lockett v. Ohio and the pending decision in Enmund v. Florida, prohibited the application of the death penalty to the Defendant in the circumstances of the case at bar. Id. On July 6, 1983, the United States Supreme Court denied the Defendant's Petition for a Writ of Certiorari. See, White v. Florida, ___U.S.__, 103 S.Ct. 3571 (1981). On August 3, 1983, Justice Powell denied the Defendant's application for suspension of the order denying certiorari based upon Enmund v. Florida. See, Appendix attached hereto.

Assuming arguendo, that Enmund v. Florida represents a "change in the law "within the meaning of Witt, it is evident that this issue was fully litigated before this Court and certiorari was denied. It is of course well settled that a Defendant may not retry issues previously litigated on direct appeal through the vehicle of collateral relief. See, Sullivan v. State, ___So.2d___ (Fla. 1983), Fla. S.Ct. Case No. S64,501, 64,523 and 64,522, opinion filed November 21, 1983; McCrae v. State, ___So.2d__ (Fla. 1983), Fla. S.Ct. Case No. 63,797, opinion filed September 15, 1983; Thompson v. State, 410 So.2d 500 (Fla. 1982). In Thompson v. State, supra, the court specifically noted the rule thus:

> "Collateral relief proceedings may not be used as a vehicle to raise for the first time, issues that the petitioner could have raised during the initial appeal on the merits, nor may they be used to re-try issues previously litigated on direct appeal. [citing inter alia] Witt v. State, 387 So.2d 922 (Fla. 1980)." [Emphasis added].
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> 433 So.2d at 616.

Under Thompson v. State, in the foregoing authority, the Defendant's Rule 3.850 motion should have been summarily denied by the trial court[1].

B.

Secondly, the trial court has manifestly erred in granting the Defendant's motion to vacate in view of this court's decisions in Ruffin v. State, 420 So.2d 591 (Fla. 1982) and Hall v. State, 420 So.2d 872 (Fla. 1982), which plainly distinguish Enmund upon crimes similar to that in the case at bar. Hall and Ruffin kidnapped a woman who was seven months pregnant; drove her to a wooded area; raped

[1]The State would additionally contend that the ruling in Enmund v. Florida does not represent a "change in the law" sufficient within the meaning of Witt v. State, to permit reconsideration in state court of the Defendant's present constutitional complaint. Instead, as plainly reflected in this Court's consideration of this issue and the Defendant's argument on direct appeal, the substantive authority and analysis upon which Enmund is based, was already in existence at the time the Enmund Court issued its opinion. Therefore Enmund does not reprsent a "change in the law," but rather, merely an "evolutionary refinement in the criminal law," which is not sufficient under Witt to permit reconsideration of the Defendant's constitutional claims. See, Witt, 387 So.2d at 929.

her and shot her to death. In Ruffin, this court distinguished Enmund stating that:

> "The trial court properly rejected [the Enmund] argument and correctly found Enmund distinguishable and inapplicable to Ruffin's case because Enmund was not present at the scene nor did he intend a killing or anticipate the use of lethal force."
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> 420 So.2d at 594.

The Ruffin court however also adopted the trial court's reasoning that the defendant knew the victim would be killed:

> In contrast, Ruffin was present, he assisted co-defendant Hall in the kidnapping of Carol Hurst, raped her along with his partner, knew that Hall was going to kill her and made no effort to interfere with the killing and then continued on the joint venture, utilizing Mrs. Hurst's vehicle to drive to the convenience store...where Deputy Coburn was murdered and Ruffin continued his partnership with Hall by firing a gun at pursuing Deputy James." [Emphasis added]
>
> Id.

Similarly in Hall, the court also distinguished Enmund against the claim that Hall was only an aider and abettor to the underlying felony, holding that:

> "We agree with the trial court that Enmund is distinguishable from the instant case. Hall provided the weapon used to kill Mrs. Hurst and was present at her death.
>
> Additionally, Enmund was an aider and abettor only to the underlying felony. Hall, on the other hand, was an aider and abettor to the homicide as well as the underlying felony."
>
> 420 So.2d at 874.

The Hall court further reached the alternative conclusion that the evidence supported a finding of intent by Hall:

> "There is no doubt in the Court's mind that Hall intended Mrs. Hurst's death."
>
> 420 So.2d at 874.

In the present case, as in Ruffin, and Hall, the Defendant was certainly present at the scene of the murders and was an aider and abettor to the homicides not just to the underlying felony. Furthermore, as in Hall and Ruffin there clearly was use of lethal force by the Defendant and his accomplices. Finally, it cannot be disputed that the Defendant did in fact oppose any killing of the victims. However, as in Ruffin, after the decision was reached to kill the victims, he certainly knew that the victims would be killed and he stood idly by as the victims were murdered or their murder was attempted and then joined his buddies in splitting the loot from the grisly murders. The present

circumstances are squarely governed by this Court's analysis in Ruffin and Hall and therefore the trial court has manifestly erred in vacating the death penalty herein[2]. See also Hall v. Wainwright, 565 F.Supp. 1222 (N.D. Fla. 1983)("Enmund, however, is inapplicable to the facts of this case. In Enmund the defendant was not present at the scene and the killing was not found to be premeditated").

C.

Finally, the State submits that there was ample evidence in the present case from which any rational trier-of-fact and this Court could readily conclude that the Defendant knew and intended that the victims would be murdered. The Defendant discussed the killing of the victims; he did nothing to prevent or otherwise disassociate himself from the killings after a decision was made to kill each of the victims; the victims were guarded by the Defendant and he discussed both the search of the house and

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[2]Additionally, although certainly not dispositive, it cannot be reasonably ignored that the United States Supreme Court was made wholly aware of the Defendant's complain under Enmund and declined the Defendant's Petition for Certiorari to this Court. Furthermore, as reflected in the recent dissent of Justices Marshall and Brennan in Newton v. Missouri, ___U.S.___, 103 S.Ct. 185 (1983), the Court again declined a complaint of error under Enmund involving a death sentence for a non-triggerman, who was present at the scene. The undersigned also expresses a reasoned professional judgment that the 4-1 plurality decision with four vigorous dissents in Enmund will not be extended to the present circumstances and does not wholly vitiate felony/murder penalties.

the victims and the disposition of their bodies and finally the Defendant stood by while the victims were shot one by one. Finally, the Defendant planned the murder in the Defendant's motel room and then returned to the motel room to divide the loot from the killings with Francois and Ferguson. There was also throughout the present transaction a clear intent that "lethal force" would be used. Therefore assuming any applicability of Enmund, by its very terms, Enmund does not preclude the imposition of the death penalty under the circumstances of the case at bar. See also Ruffin v. State; Hall v. State, supra.

IV

CONCLUSION

WHEREFORE, upon the foregoing, the APPELLANT, THE STATE OF FLORIDA, prays that this Honorable Court will issue its order reversing the trial court's granting of the Defendant's Motion pursuant to Rule 3.850, Florida Rules of Criminal Procedure and further that this Honorable Court will vacate the stay of execution herein.

RESPECTFULLY SUBMITTED, on this 30th day of January, 1984, at Miami, Dade County, Florida.

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V

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLANT was caused to be delivered by hand-delivery to MR. THOMAS G. MURRAY, Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125, on the 30th day of January, 1984.

CALVIN L. FOX, Esquire
Assistant Attorney General

vbm/