IN THE SUPREME COURT OF FLORIDA

ROBERT LARRY GIBSON,

Appellant,

V.

STATE OF FLORIDA,

Appellee.

CASE NO. 65,030

APPEAL FROM CIRCUIT COURT, CRIMINAL DIVISION OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
Circuit Court Case No, 76-5794

APPELLANT'S REPLY BRIEF

Phillip S. Davis, Esquire
1395-97 Northwest 15th Street
Miami, Florida 33125
ATTORNEY FOR APPELLANT

APPELLANT IS PRESENTLY ON DEATH ROW

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ARGUMENT

SUMMARY OF ARGUMENT

Appellant herein readopts his statement of the case and any arguments made in his initial brief. The appellant also makes the following arguments:

1. Appellant received and was prejudiced by ineffective counsel at several specific points of the trial.

2. Appellant should be allowed to argue the lack of effective counsel on direct appeal or have the case remanded to the trial court for an evidentiary hearing, and,

3. The court's failure to grant defense counsel's request for a continuance just prior to the penalty phase of the trial amounted to palpable abuse.

I. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

According to Strickland vs. Washington, 42V.S.L.W.4565 (1984), the appellant must show: 1. Specific acts on the part of his attorney that fell below the reasonable attorney standard, and;

2. That he was prejudiced thereby.

This occurred during at least three stages of this case.

First in October and November of 1981, appellant was adjudicated not competant to stand trial. The court, however, purported to adopt the testimony of Dr. Joseph Fallon, Jr., to support its decision regarding the five year hearing as required by Fla.R.Crim. P.3.213. Dr. Fallon never testified that the appellant would become competent to stand trial in the forseable future. In fact he stated the following:

> ...I think that when Robert Gibson is removed from this (the Court) environmnet and he's not comfronted with the alleged offenses, the stress of interacting with the attorney, the stress of interacting in the courtroom, when he is not confronted with that type of environment, but rather when he is at the hospital or to a lesser extent in the jail, that those things are removed. They don't help generate the stress that his is incapable apparently of tolerating. So it seems that by removing him from this atmosphere, sending him up to the hospital, you see lessening; the symtomatologhy analysis: bring him back, him back into the environment, start the process all over again. The stress becomes too much. He has too much difficulty in handling it.

This statement appears to say that if Robert Gibson where to regain conpetance, it would certainly dissipate by the time of the trial because of appellant's avoidance approach mental disorder.

Appellant's counsel, however, failed to move for a dismissal under Fla.R.Crim. P.3.213.

Second, just before the guilt phase, appellant was adjudged competent by the court without a hearing. According to Bruce J. Winnick and Terry L. DeMeo, 35 U. Miami L. Rev. 31 (1980), the determining factor for competance is appellant's state of mind at trial. Because of appellant's avoidance-approach mental disorder and previous fluctuations in appellant's competency states, defense counsel should have requested a competency hearing just prior to trial.

Third, appellant was effectively denied a penalty phase hearing by his counsel's failure to prepare appropriately. Counsel here simply failed to put on any case for his client as mandated by the Sixth Amendment of the United States. If he had, the jury would have found that the appellant had a harsh and alienating childhood, a history of mental illness, and evidence of brain damage. Woodson v. North Carolina, 428 U.S. 280 (1976), and Holmes v. State, 429 So. 2d 297 (Fl 1983).

In all of the above situations appellant was clearly prejudiced, he could have obtained a dismissal on the first two grounds and a life sentence on the other. However, he was denied the opportunity to even attempt to do so by his counsel's lack of effectiveness; which surely amounted to a breakdown in the adversarial process. Moreover, this is not a case based on mere inference but on actual failure of performance. See U.S. v. Cronic, L.W. 4560 1984. In sum, the above situations indicate, not a purposeful trial strategy as in

Strickland, but a lack of one.

II. APPELLANT SHOULD BE ALLOWED TO MAKE HIS FIRST ARGUMENT AS TO INEFFECTIVENESS OF COUNSEL AT THIS TIME OR AT A SUBSEQUENT EVIDENTIARY HEARING IN THE TRIAL COURT.

American courts have long recognized the right of a defendant to be competent at his trial and to have a penalty phase hearing in a capital murder case as fundamental rights inherent in the Sixth Amendment's right to a fair trial. Dusky V. United States, 362 US 402 (1960) Profitt V. Florida 428 U.S. 242 (1976), Jurek V. Texas, 96 S CT 2950 1976, and Woodson, Supra, as compared with Furman, V. Georgia 408 U.S. 238 (1972). Also, this court denied appellant's right to return to the trial court for an evidentiary hearing. Therefore, appellant should be allowed to raise his arguments as to ineffective counsel at this time.

Otherwise, appellant, requests this court to allow him to return to the trial court for an evidentiary hearing without prejudice to appellant's right to appeal. Fla. R. Crim. P.3.850.

III. THE TRIAL COURT'S DENIAL OF DEFENSE COUNSEL'S REQUEST FOR A CONTINUANCE AMOUNTED TO PALPABLE ABUSE.

The trial court's failure to grant appellant's request for continuance amounted to palpable abuse. Magill v. State, 386 So. 2d 1188 (FL 1980). The court was well aware of the importance of the penalty phase was to this capital murder/insanity case. There was no indication in the record that the trial court admonished the attorneys to be ready for a penalty phase hearing immediately following the guilt phase. She was also well aware of defense counsel's failure to prepare for the former. Thus, appellant was effectively denied a penalty phase hearing due to the trial court's abuse of discretion and his attorney's lack of preparation.

CONCLUSION

The appellant here was denied his rights to effective counsel, and he should be allowed to argue the same on direct appeal or at a subsequent evidentiary hearing at the trial court level. Finally, the trial court abused its discretion in failing to allow defense counsel to continue the case and prepare for the crucial penalty phase. Therefore, it is respecfully submitted that the judgment of the trial court be reversed.

Respecfully submitted,

PHILLIP S. DAVIS
Attorney for the Appellant
1395-97 N.W. 15th Street
Miami, Florida 33126
(305) 326-0850

RANDI ROBBINS
Co-Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF was furnished by mail The Clerk of Florida Supreme Court, Supreme Court Bldg, Tallahassee, Florida 32301 on this 21st day of February of 1985, and Calianne P. Lantz, Esq, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Ave. Suite#820, Miami, Florida 33128.

By: PHILLIP S. DAVIS, Esq

RANDI ROBBINS, Esq.