IN THE SUPREME COURT OF FLORIDA

SONNIE BOY OATS, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 65,381

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY

ANSWER BRIEF OF APPELLEE

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STATEMENT OF FACTS

On February 23, 1984, this Court rendered its opinion affirming a judgment of conviction for first degree murder but set aside Appellant's sentence of death and remanded the cause to the trial court for the entry of a new sentencing order in accordance with the views expressed in the Court's opinion. (R 1744-1753). Prior to the resentencing Appellant's counsel below filed a motion entitled, "objection to sentencing on the grounds of insanity" (R 1762-1765). This motion was filed in April of 1984. The motion reiterated the findings of three mental health experts, specifically alluding to the testimony at the penalty phase in the original sentencing of Dr. Frank Carrera. (Dr. Carrera was the only psychiatrist to testify at the penalty phase and he testified on behalf of Appellant). The motion also reiterated some of Appellant's family members' testimony at the original penalty phase. The motion concluded that based upon the first trial and a retrial, case no. 79-1352 in February of 1982 and based upon the personal contact that the attorney had with the Appellant, the attorney concluded that he had reason to believe that the Appellant was and is presently insane.

A hearing was held pursuant to this motion on April 26, 1984. Defense attorney simply stated that he had had a conversation with Appellant in April of 1984 and his conversations confirmed his belief in Appellant's insanity. He maintained he could not disclose the conversations (R 1797). The Court made the following observations regarding Appellant's

mental status and behavior:

> I think personally, Mr. Oats is a lot smarter than he wants people to think he is. I think he is smart when he wants to be smart and not so smart when he wants people to think he is not so smart.
>
> Mr. Oats, you understand what I'm talking about, don't you?
>
> No (the defendant shakes head negatively)
>
> The Court: He said no, sir, so I know he does. I mean, knowing him Mr. Fox (Appellant's defense counsel) for along time, I think he knows whats going on. (R 1803).

Subsequently in this hearing Appellant was called to testify, Appellant in a somewhat uncertain fashion maintained that he was present in the courtroom because "something about overturned death sentences." He then described that he was suppose to come back and get a retrial or "get another trial or something." He maintained he remembered the trial in 1981. He also disclosed that the judge could pass a new sentence either death or a lighter sentence. (R 1805-1808). On cross-examination Appellant knew his age and where he was and recognized his attorney (R 1808-1809).

The state attorney then pointed out to the trial court that the parties had met over a month ago in the judge's chambers and no mention of Appellant's insanity had been discussed until just before the actual sentencing. The judge acknowledged that the state attorney's statement was true. Additionally the parties, as well as the judge, acknowledged

that no motion had been filed until the actual day of sentencing (R 1811-1812). After argument and the evidence was presented the Court made the following finding:

> ...because of his demeanor the prior reports of psychiatrists and psychologists and the testimony of the defendant, has satisfied the Court that the defendant is sane, and therefore your motion only on those grounds is denied. (R 1812-1814).

The record discloses that Appellant presented no other evidence in support of his motion.

Inasmuch as the motion was predicated totally on the past trials of Appellant and especially the testimony of Dr. Frank Carrera who testified at the first penalty phase (with the exception of the undisclosed conversations that Appellant's defense counsel alluded to in the April 24, 1984 hearing) Appellee would set forth a summary of part of the transcript of the testimony of the penalty phase in the first trial which occurred on February 10, 1981. As mentioned before, Dr. Frank Carrera was called on behalf of Appellant. He was stipulated as an expert in psychiatry (R 1149-1150). He testified he examined Appellant and found him competent mentally to stand trial and that he was legally sane at the time of the crimes (the other crimes referred to would be case no. 79-1352). (R 1150-1151). His findings were based upon reports received from the public defenders office as well as information obtained from the Appellant himself (R 1151). Dr. Carrera testified into detail regarding Appellant's headaches, his history of family neglect and abuse, and his poor

work record (R 1151-1155). Dr. Carrera then opined that Appellant's medical history was unremarkable (R 1155). Although Appellant told the doctor that he did drink heavily the Appellant also stated that there were no periods of blackouts despite this drinking nor did he have any memory lapses. Appellant also said he had never actually been drunk (R 1157). He admitted to being a heavy marijuana smoker. (R 1157).

Dr. Carrera told the jury and the judge that Appellant had been a bedwetter until age thirteen (13). The doctor suggested that the Appellant was suffering from impulse disorders but that it was of a moderate degree. Appellant was not psychotic but rather his problems were described as neurosis by the doctor. (R 1157-1158). The doctor then described one incident where Appellant had started a fire as well as his cruelty to animals (R 1161). Then the doctor testified that Appellant's intelligience was either in the low average range or possibly the upper part of the borderline range of intelligience. His mental age was roughly age twelve (12) or about a seventh grade level (R 1162-1163).

On cross-examination the doctor admitted that Appellant's seventh grade level mentality could be indicative of a very poor school system as opposed to his actual intelligience. (R 1166). The doctor also divulged that the Appellant had actually denied committing either of the crimes (R 1168). The state attorney then asked the doctor that based upon his examination, if he had formed an opinion as to whether

Appellant was under the influence of any extreme mental or emotional disturbance at the time that the present offense occurred to which the doctor responded no (R 1173).

Next, V. Gant, Appellant's sister testified on his behalf. During the direct testimony the state attorney objected to a question propounded to his sister. At this juncture, Appellant himself stated:

> Hey, let her answer the question, man. (R 1177).

Appellant's aunt then testified on his behalf. She told the judge and jury about the child abuse and physical beatings suffered by Appellant at the hands of his custodian (another aunt). (R 1180-1185). She then described Appellant's mental status as follows:

> --I--I just can't explain it--he's not himself. (R 1187)

She maintained that he was not normal but offered no other facts or evidence to support that conclusion.

Appellant's mother also testified on his behalf at the penalty phase. During the cross-examination Appellant's mother maintained that it was the codefendant that shot the store clerk and not her son. She said the codefendant told her that he did it. The codefendant according to Appellant's mother had gloves on but after the shooting her son had picked up the gun. The state attorney then confronted her with the fact that the fingerprints indicated that her son was the one present at the crime. She answered, "well, Adell (the codefendent was there with him too." At this juncture the

the Appellant himself stated:

> She just told you he had gloves on didn't she? (R 1203)

Finally Appellant himself testified. He initially apologized for his outbursts in court to the judge (R 1221). He then detailed his family background and reiterated the child abuse suffered at the hands of this aunt. (R 1221-1228).

Thereafter the jury recommended a sentence of death (R 1274). Then Appellant wanted to present further evidence to the court, i.e., his father. The State urged the judge to proceed with the sentencing and made the following comments:

> Mr. Oldham (the state attorney): ...now, the only reason --unless he's mentally incompetent or there is some mental reason why he should not be sentenced, there is no reason not to sentence him today, unless he has that disability. (R 1280-1281).

At this point the defense attorney mentioned some psychiatric reports and told the court that if the judge would consider them then "... I wouldn't have any other evidence." (R 1282).

After the evidence had been heard in the penalty phase there was a charge conference. Appellant requested a number of jury instructions but did not object to any instructions regarding aggravating factors (R 1209-1217).

During the presentation of the evidence, at the penalty phase, Appellant did not object to having a burglary conviction admitted into evidence after it was altered to reflect that it indeed was a burglary conviction as opposed

to a robbery conviction (R 1130-1131). Again no objection was interposed to a conviction of robbery with a firearm and attempted first degree murder until after the evidence was admitted (R 1132,1139).

During the actual jury instructions presented at the penalty phase the trial court told the jury that one of the mitigating factors was that the defendant had no sufficient history of prior criminal activity (R 1265).

POINT I

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION FILED PURSUANT TO FLORIDA RULES CRIMINAL PROCEDURE 3.740 BECAUSE THERE WERE NOT REASONABLE GROUNDS TO BELIEVE THAT THE APPELLANT WAS PRESENTLY INSANE.

ARGUMENT

Appellant maintains that the trial court abused his discretion in not appointing mental health experts and holding a hearing pursuant to Fla. R. Crim. P. 3.740(a). This contention is made despite the fact that there was no competency issue to stand trial at the initial trial. Nor did the Appellant rely upon an insanity defense at the time of the crime. The only mental health expert to testify, Dr. Carrera, (who testified on behalf of Appellant) found the Appellant compentent to stand trial and legally sane at the time of the crime (R 1151). Dr. Carrera also testified that Appellant had no memory lapses nor did he report being drunk despite his heavy drinking (R 1157). Although the doctor maintained that Appellant had an impulse disorder he also opined that this was not a psychotic reality but was only indicative of a neurotic disorder (R 1157-1158).

The Appellant interjected certain comments during the testimony of witnesses on his behalf at the original penalty phase hearing (R 1177,1203). These comments reflect that the Appellant had a very clear understanding of what was happening. To corroborate this contention the Appellant even apologized to the court prior to his testimony for these

out-bursts (R 1221). This Court can compare Appellant's original testimony at the penalty phase (R 1221-1228) to the testimony presented in April of 1984 (R 1803-1809). The trial court had the benefit of hearing both testimonies and was well within his discretion to determine that Appellant's subsequent testimony at his second sentencing was insincere.

Appellant's attorney failed to bring this issue up at any time until the day of resentencing period. This despite the fact that there was a conference regarding this resentencing a month prior to the actual sentencing date (R 1811-1812).

This delay becomes even more puzzling when viewed from the prospective of the allegations and motion itself. Appellant's counsel alleged in his motion that based upon his personal contact with his client he had reason to believe that Appellant was and is presently insane (R 1765). Yet the defense counsel at the hearing could not disclose any conversations to the trial court which would give the trial court reason to believe that the Appellant was presently insane. (R 1797). The only information the trial court had was the past trial and the past examinations as well as Appellant's present testimony. Other than Appellant's very brief testimony all the allegations pointing to Appellant's alleged insanity could have been utilized during the first penalty phase. In fact the state attorney urged the trial court to proceed with sentencing (at the first sentencing) unless there was some evidence of present insanity (R 1805). At that point

Appellant presented nothing and he was indeed sentenced. Appellee submits that Appellant's counsels conduct itself is an indication that this motion had no merit. In any event there was absolutely nothing new for the trial court to consider and in view of the testimony of Dr. Carrera and the trial court's opportunity to see Appellant, the judge correctly found that there was no reasonable grounds to believe that the Appellant was presently insane (R 1814).

Appellant relies upon Stines v. State, 409 So.2d 234 (Fla. 1st DCA 1982). In Stines a doctor testified that the defendant was presently incompetent to proceed to sentencing and should get hospitilization. But the trial court found no reasonable grounds to grant a motion pursuant to Fla. R. Crim. P. 3.740 based upon a two year old medical report. In the case at bar the trial court was presented with no new findings by any mental health experts.

Appellant also relies on Schlicher v. State, 422 So.2d 1046 (Fla. 4th DCA 1982). This case is distinguishable because the defendant actually tried to commit suicide seven times. In Schlicher there was no indication that there had been any prior examinations of the defendant by a psychologist or psychitrist. In the case at bar the trial court had the benefit of Dr. Carrera's testimony (who testified on behalf of Appellant). Dr. Carrera found the Appelalnt compentent, legally sane at the time of the crime, and suffering no impairment at the time of the crime. (1150-1151, 1173)

Appellant relies upon State v. Hamilton, 448 So.2d

1007, 1008 (Fla. 1984). Again this case is readily distinguishable. Florida Rule Criminal Procedure 3.216(a) is unequivocal that when a counsel for an indigent has reason to believe that his client may be imcompetent or insane then he is entitled to have one expert appointed. The rule gives no discretion to the trial court unlike Fla. R. Crim. P. 3.740. This Court correctly pointed out that Fla. R. Crim. P. 3.216 is designed to give an indigent the same protection as a solvent defendant. It is more in line of a discovery process. In any event the attorney/client priviledge would be more crucial under this rule because the defendant has not been convicted yet as opposed to Fla. R. Crim. P. 3.740. (One wonders why Appellant did not utilize this rule unless Appellant's attorney had no reason to believe that his client was presently incompetent or insane).

Appellee would urge this court to follow the holding in Gray v. State, 310 So.2d 320 (Fla. 3d DCA 1975) where the Third District held that the rule clearly placed the matter within the sound judicial discretion of the trial court. Since no evidence was offered to the trial court the motion to appoint experts under the rule in question was denied by the trial court and affirmed. See, also Coney v. State, 348 So.2d 672, 674-675 (Fla. 3d DCA 1977), Baranko v. State, 428 So.2d 324 (Fla. 1st DCA 1983), and Duke v. State, 444 So.2d 492 (Fla. 2d DCA 1984).

In Williams v. State, 34 So. 279, 283-286 (Fla. 1903) a defendant wanted a hearing regarding his insanity

prior to being sentenced. The trial court had heard all of the psychiatrist's testimony at trial. The judge had ample time to observe the demeanor of the defendant at trial. There had been no suggestion that the defendant was imcompetent to stand trial. The Appellate court found no abuse in denying this motion to have an insanity hearing prior to sentencing. The case at bar is analogous.

In Grissom v. Wainwright, 494 F.2d 30 (5th Cir. 1974) a defendant brought a habeas corpus petition because a trial court refused to have a competency hearing to determine if defendant could stand trial. Defendant's own psychiatrist said that the defendant was competent to stand trial. Approximately six months later the trial was held. No other insanity or competency evidence was presented. The Fifth Circuit held that there must be some evidence presented which would be sufficient to raise a bonafide and reasonable doubt to defendant's competency. The court quoted from Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973) as follows:

> Courts in habeas corpus proceedings should not consider claims of mental incompetency to stand trial where the facts are not sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the defendant to meaningfully participate and cooperate with counsel during a criminal trial. 483 F.2d at 1043.

In affirming the trial court, the Fifth Circuit noted that it was significant that the defendant in Grissom and his attorney did not present any evidence prior to or during the trial

suggesting that the defendant was incompetent to stand trial. Appellee submits that a motion to determine competency to stand trial is in the same posture as a motion under Fla. R. Crim. P. 3.740. As in Grissom, it is significant to note that Appellant never brought forth the issue of competency (either to stand trial or to be sentenced at the first trial) until the actual day of the resentencing. Appellee submits that under the facts there are no reasonable grounds to grant Appellant's motion and as such the trial court was correct.

POINT II

THE TRIAL COURT WAS CORRECT IN REFUSING TO RECONVENE A JURY FOR RESENTENCING.

ARGUMENT

Appellant argues that the trial court should have reconvened a sentencing jury after this Court issued its opinion in Oats v. State, 446 So.2d 90, 95 (Fla. 1984). Appellant filed and argued a motion to reconvene a jury (R 1816-1834).

As this Court noted in Oats three of the six aggravating factors were improper. Since the trial court found one mitigating factor (i.e., Appellant's age of twenty-two (22) the cause was remanded for the trial court to reweigh the remaining aggravating factors with the one mitigating factor.

The trial court originally found that the murder was committed while Appellant was engaged in a robbery and that the murder was committed for pecuniary gain. It is clear and this Court so stated that only one of these factors could be utilized. Yet, this Court noted in Oats that, "the State proved both of these factors but the trial court erred by doubling up on them." Id. at 95. Clearly it was permissible for the jury to have heard the evidence at trial regarding the murder and the ensuing robbery. No objections were interposed to the jury instructions regardingin both of these aggravating factors (R 1209-1217). Evidence was presented at the penalty phase regarding the two aggravating

factors. It would be redundant and futile to reconvene a jury on this basis.

This Court also held that this murder (i.e., a pistol shot straight to the head) could not be considered heinous, atroscious or cruel. Appellee would first contend that in the evidence on this point was heard solely at trial. Again, reconvening a jury for sentencing purposes would be futile and Appellee has not asked nor is entitled to a new trial. Secondly, the case of Menendez v. State, 368 So.2d 1278 (Fla. 1979) would preclude a jury being reconvened. In Menendez only one aggravating factor out of seven was found proper on review (three of the factors were non statutory aggravating factors). One of the improper findings was that the murder was heinous, atroscious, or cruel. But the court found no error in the jury instructions nor the evidence it considered. Therefore it was not essential to have a new jury reconvene. Likewise, in the case at bar, the finding that the murder was heinous, atroscious or cruel was improper. Circumstances in the case at bar are even more compelling to deny a motion to reconvene a jury.

Next Appellant argues that the jury should be reconvened to reconsider the convictions admitted into evidence at the original penalty phase. The first conviction pertained to the charges of robbery with a firearm and attempted first degree murder. At the time this Court held in Oats that it was improper to admit this conviction because it had not been affirmed on appeal. In the interim between the original

imposition of the death sentence and the opinion in Oats, the case had been retried and Appellant's conviction had been affirmed on appeal. This Court held in Oats that since this evidence would now be admissible, a new jury sentencing panel would not be necessary.

But another conviction was admitted into evidence. (i.e., burglary) to demonstrate that Appellant had committed a felony involving the use or threat of violence. This Court held that burglary could not be used to prove this aggravating factor. Under Quince v. State, 414 So.2d 185,188 (Fla. 1982) it is permissible for the State to admit the past criminal record of a defendant to dispell the mitigating circumstance of no past significant criminal history. In the case at bar the jury was instructed that a mitigating factor could be that the defendant had no sufficient history of prior criminal acitivity. (R 1265). Clearly this conviction could have and should have been admitted to dispell this possible mitigating circumstance. Appellee notes that not only did the Appellant fail to object to this instruction (indeed they could not because the instruction would be apropos to the robbery/attempted murder conviction) but no objection was interposed regarding the admissibility of the burglary conviction itself (R 1130-1131).

Appellant should find no comfort in the case of Elledge v. State, 346 So.2d 998, 1002-1003 (Fla. 1977). In Elledge evidence of a confession to a murder for which a conviction had not been obtained was admitted into evidence at

the penalty phase. Clearly the jury should not have heard this evidence and therefore a jury had to be reconvened. In the case at bar none of this evidence (most all of it heard at trial) was inadmissible. Further, the evidence and comensurate jury instructions were not objected to. Objections interposed at the point of the directed verdict or to the effect that the facts did not support certain aggravating factors are not apropos. Under the law of Sims v. State, 444 So.2d 922,924 (Fla. 1984) (where the defendant did not object to a prosecutor's remarks and therefore failed to preserve the point for review), Appellant has not preserved any of these points for reveiw.

Furthermore the case of Barclay v. State, 411 So.2d 1310 (Fla. 1981), Barclay v. Florida, 101 S.Ct. 3418 (1983) and Francois v. State, 407 So.2d 885 (Fla. 1981), cert. denied 102 S.Ct. 3511 hold that where no mitigating factors have been found and some aggravating factors have been sustained, a death sentence will be affirmed. In the case at bar, the situation is analogous. Although the trial court did need to reweigh the one mitigating factor, certainly there would be no purpose in reconvening a jury.

A more compelling reason not to grant Appellant's motion to reconvene a jury concerns the issue of res adjudicata. In Lucas v. State, 417 So.2d 250, 252 (Fla. 1982) where the defendant wanted a new jury upon this Court's order remanding the cause for resentencing, this Court held in affirming the denial by trial court of Appellant's motion to reconvene a

jury:

> We do not fault the trial judge for following the letter of our mandate in this regard.

In Green v. Massey, 384 So.2d 24, 28 (Fla. 1980) this Court explained that all points of law which had been adjudicated became the law of the case and are, except in exceptional circumstances, no longer open for discussion or consideration in subsequent proceedings. The law of the case under the present circumstances is that the trial court must reweigh the one mitigating factor with the three remaining aggravating factors. This Court has already found that the evidence and jury instructions presented to the jury panel at the sentencing phase was proper. Therefore under this doctrine alone the Appellant is precluded from advancing this motion.

POINT III

THE TRIAL COURT WAS CORRECT IN NOT REVIEWING THE ISSUES RAISED IN DIRECT APPEAL AND DECIDED BY THIS COURT IN OATS V. STATE, 446 SO.2D 90 (FLA. 1984) AND THE TRIAL COURT HAD THE DISCRETION TO RE-WEIGH THE REMAINING AGGRAVATING FACTORS AGAINST THE ONE MITIGATING FACTOR AND RESENTENCE THE APPELLANT TO DEATH BY ELECTROCUTION.

ARGUMENT

Initially in this point, Appellant complains that there were no facts in the Oats, supra opinion to support this Court's holding affirming the remaining aggravating factors. Appellant maintains that there were absolutely no factors from this Court to base the initial appeal brief. The mandate of this Court in Oats was not to relitigate every issue regarding the penalty phase that was argued in the initial appeal. Again, Appellee would cite the case of Greene v. Massey, supra, and its holding to the effect that all points of law that have been adjudicated become the law of the case and are no longer open for discussion or consideration in subsequent proceedings.

Turning to specifics Appellant argues that the only proof of a prior violent felony conviction was through a clerk of the court who violated the rule of sequestration. This issue was raised in Appellant's Initial Brief and resolved in Oats. (App. 1). Next Appellant maintains that the jury heard impermissible evidence regarding the prior convictions. Appellee would refer this Court to point two of Appellee's

response brief in this cause, supra.

Then Appellant argues that the mere fact that a witness is killed is not enough to invoke § 921.141(e), Fla. Stat. (1981) (i.e., killing a witness to avoid or prevent lawful arrest). Again this exact issue was raised in the initial brief and decided by this Court already (App. 1). Then Appellant argues that the evidence was not sufficient to show that the murder was cold, calculated, and premeditated. This argument again is a duplicate of the argument cited in the Appellant's initial brief (App 2-3). Appellant again argues that the trial court should have found a mitigating circumstance to the effect that the Appellant was under the domination of a codefendant. Again this issue was raised and resolved (App. 3). Finally, Appellant argues that his hardship and abuse suffered as a child should have been a mitigating circumstance found by the trial court. Once again this issue was raised and resolved in the prior proceeding (App. 3)[1]

This Court's opinion in Oats was not a mandate to relitigate and review all issues raised in the initial brief. All the issues raised in this point have been decided adversly to Appellant and cannot be relitigated.

Although Appellant has not directly raised this

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[1] In any event Dr. Carrera, a psychiatrist testifying on behalf of Appellant at the penalty phase stated that this consideration was not a mitigating factor (R 1173).

issue, inasmuch as this Court reviews all issues in death sentence cases and this point in Appellant's brief raises the implication of the issue, Appellee will address the issue of whether the trial court had the discretion to reweigh the remaining aggravating factors against the one mitigating factor and still impose the death sentence at the resentencing hearing.

In Sireci v. State, 399 So.2d 964, 971-972 (Fla. 1981) the defendant contended that the trial court failed to consider certain mitigating factors. This Court held that the findings of the trial court were factual matters which should not be disturbed unless there is an absence or lack of a substantial competent evidence to support these findings. In the case at bar, this Court has already found that there was substantial, competent evidence to support the remaining aggravating factors. Daughtery v. State, 419 So.2d 1067, 1070-1071 (Fla. 1982) is another case where this court held that it is within the province of a trial court to decide whether a particular mitigating circumstance in sentencing has been proven and the weight to be given that circumstance. In Smith v. State, 407 So.2d 894 , 901 (Fla. 1982) cert. denied 102 S.Ct. 2260 the defendant claimed the trial court erred regarding not finding a mitigating circumstance of extreme emotional or mental distress. In rejecting this argument, this Supreme Court held that whether a mitigating circumstance is proven and the weight to be given that circumstance lies within the discretions of the judge and jury. Simply

disagreeing with the force and effect given to the evidence will not be grounds to disturb the trial court's findings as long as those findings are based upon substantial, competent evidence. In the case at bar four aggravating factors remain: 1.) Appellant was convicted of another felony involving the use or threat of violence (i.e., the robbery and attempted murder), 2.) The murder was committed while Appellant was engaged in a robbery, 3.) The murder was committed to avoid lawful arrest or to effectuate an escape, 4.) The murder was cold, calculated, and done in a premeditated manner without any pretense of moral or legal justification. This Honorable Court has resolved these issues and found substantial evidence to uphold the findings of these remaining aggravating factors. It was certainly within the discretion and province of the trial court to weigh these four factors against the one mitigating factor (i.e. Appellant's age of twenty-two) and determine that the death sentence was appropriate.

POINT IV

THE LAW OF THE CASE PRECLUDES THE ISSUE OF WHETHER THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED AND UNDER THE CIRCUMSTANCES OF THIS CASE THE SENTENCING STATUTE IS NOT UNCONSTITUTIONAL ON ITS FACE OR AS APPLIED.

ARGUMENT

Appellant candidly admits that the issues presented in point four have been rejected. Nevertheless Appellant urges reconsideration of these issues.

The points that Appellant raises now were not raised during his direct appeal. These issues do not pertain to the specific facts in the case at bar but are rather general challenges to Florida's capital sentencing statute. In any event these issues are precluded by this Court's opinion in Oats v. State, 446 So.2d 90 (Fla. 1984). The law of the case in that opinion is clear; the sentence is lawful in all respects except for the improper consideration of three aggravating factors. Where the facts continue to be the same, whatever once was established between the same parties continues to be the law of the case. This principle was announced in Alford v. Summerlin, 423 So.2d 482 (Fla. 1st DCA 1982). The facts, of course, continue to be the same in the case at bar. In Hicks v. State, 156 So.2d 22 (Fla. 1st DCA 1963) a defendant moved for a new trial. Prior to the new trial the defendant filed a writ of prohibition to the district court to prohibit retrial. The district court ruled the defendant was estopped

and that the new trial was permissible. The defendant was tried again and found guilty. On appeal the defendant again raised the double jeopardy issue. The First District held that the decision in the writ was final on the issues and was binding alike upon the court as well as the defendants. Id at 23. (reversed on other grounds). In the case at bar this Court has already upheld the constitutionality of the statute on its face and as applied by virtue of allowing the trial court to resentence the Appellant. Hence, under the law of the case doctrine, Appellant is precluded from raising these issues. (compare Smith v. Kemp 715 F.2d 1459 (11th Cir. 1983) where it was held an abuse of a habeas corpus writ to file successive applications based on the same general grounds but supported by different facts. Also compare Wainwright v. Ford, 104 S.Ct. 3498 (1984) where a defendant's claim that the death penalty was based upon racial discrimination was dismissed on a habeas corpus petition because the defendant had failed to raise the claim in his first habeas corpus petition.) Appellee submits that this Court's opinion in Oats was not an invitation for Appellant upon resentencing to relitigate all the issues previously decided by this Court.

First, Appellant asserts that the statute fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors. This contention has been rejected in Lightborne v. State, 438 So.2d 380 (Fla. 1983) and State v. Dixon, 283 So.2d 1 (Fla. 1973)

Appellant contends that the statute does not pro-

vide a defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the State seeks to rely. These arguments were rejected in Sireci v. State, 399 So.2d 964, 965-966 (Fla. 1981) and Menendez v. State, supra.

Appellant contends that the Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or a substantial majority thus resulting in an arbitrary and unreliable application of the death sentence. The record does not disclose what the majority was in the advisory sentence. Indeed the recommendation could have been unanimous. An objection such as this cannot rest on mere conjecture or speculation.

Appellant reiterates the argument that the sentencing statute should not exclude jurors who are opposed to capital punishment. This issue has been decided adversely against Appellant in Riley v. State, 366 So.2d 19 (Fla. 1979).

Appellant challenges the validity of § 921.141(5)(i) Fla. Stat. (1979) (cold and calculated). Again this challenge has been rejected in Harris v. State, 438 So.2d 787 (Fla. 1983) and Jent v. State, 408 So.2d 1024 (Fla. 1981).

Appellant asserts that death sentences must be reviewed to insure that similar results are reached in similar cases. Although this Honorable Court is under no constitutional duty to reexamine the sentence and compare it to past capital cases (See, Pulley v. Harris, 104 S.Ct. 871 [1984]) this Court has assumed the duty of this type of review (See, State v.

Dixon, supra).

Although all of these arguments in point four have been rejected, Appellee urges this Court to reject these arguments not only based upon there lack of merit but because the law of the case has previously been decided.

CONCLUSION

Based on the arguments and authorities presented herein, Appellee respectfully prays this Honorable Court affirm the sentence of the trial court in all respects.

Respectfully submitted,

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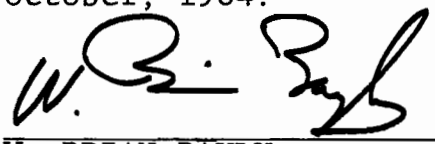
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief has been furnished, by delivery, to Christopher S. Quarles, Assistant Public Defender, Counsel for Appellant, this 4th day of October, 1984.



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