IN THE SUPREME COURT OF THE STATE OF FLORIDA

PHILLIP ATKINS,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

CASE NO. ~~61,851~~ 65974

BRIEF OF APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT IN AND FOR
POLK COUNTY, FLORIDA

JIM SMITH
ATTORNEY GENERAL

WILLIAM E. TAYLOR
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

WT/ctc

TABLE OF CONTENTS

TABLE OF CITATIONS

POINT ON APPEAL

WHETHER THE TRIAL JUDGE PROPERLY REWEIGHED AND RE-EVALUATED AGGRAVATING AND MITIGATING CIRCUMSTANCES IN IMPOSING THE DEATH PENALTY.

STATEMENT OF THE CASE AND FACTS

The Appellee will accept the Statement of the Case and Facts submitted by the Appellant, and relies as well on the Statement of Facts set down by this Honorable Court in Atkins v. State, 452 So.2d 529 (Fla. 1984).

PRELIMINARY STATEMENT

Reference to the Record, in order to follow the numbering system of the Appellant, will be made as follows:

(1) References to the original trial and sentencing transcript will be referred to by the letter "R" followed by the appropriate page number;

(2) References to the subsequent resentencing will be referred to as T2 followed by the appropriate page number.

ARGUMENT

ISSUE

WHETHER THE TRIAL JUDGE PROPERLY REWEIGHED AND RE-EVALUATED AGGRAVATING AND MITIGATING CIRCUMSTANCES IN IMPOSING THE DEATH PENALTY.

The Appellee will begin by stating that there is no disagreement with the cases cited by the Appellant, however, the Appellee believes that those cases are not even remotely on point with the matter sub judice, and if each case is read in its entirety, it becomes obvious that the principles which they espouse as regards what constitutes a fair sentencing have been followed sub judice. These cases, when read in context in fact support the position of the Appellee and not the Appellant.

The Appellee will review and discuss each of the cases presented by the Appellant, one by one, to compare the facts in those cases with the matter sub judice and will ask this Honorable Court to not only review the record of the sentencing held on September 11, 1984, but also to take judicial notice of the original sentencing phase and previously filed briefs in this matter, since clearly the information and arguments presented at that proceeding would still have been part of the trial judge's consideration since he is the same judge that sat originally.

It is important to note that there was no new factual information presented at the hearing on September 11, 1984 which would have changed the background information which the judge could have considered in making his determination. In Hargrave v. State, 366 So.2d 1 (FSC 1978) at page 5, this Honorable Court stated:

> However, this Court's role is not and should not be to cast aside that careful deliberation which the matter of sentence has already received by the jury and the trial judge, unless there has been a material departure by either of them from their proper functions. . .

The hearing of September 11th relied only on legal argument and flawed logic in an attempt to convince the judge that his original findings had been incorrect.

No new mitigating factors, either statutory or non-statutory were presented and he argued only that if the judge found that the mitigating factor regarding his ability to conform his conduct to law was found, then the judge must find also the extreme mental and emotional disturbance existed. (T2 - 17).

If that logic were in fact correct, then there would not be two separate mitigating factors in any case. A ruling of this nature would force trial courts in the future to give a defendant credit for both mitigating factors or for

neither in fear that to do otherwise would cause reversal. The trial judge sub judice considered and discussed both mitigating factors but found that only one existed. This is not inconsistent and the attorney for the defendant both at trial and at the appellate level provided no valid case authority to support this logic.

In the case of Lucas v. State, 417 So.2d 250 (1982) upon which the Appellant primarily relies, this Honorable Court cited with approval Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) and Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). In summary, the Court stated at page 251:

> "For the dual responsibility to be fulfilled the trial court must exercise a reasoned judgment in weighing the appropriate aggravating and mitigating circumstances in imposing the death sentence. To satisfactorily perform our responsibility we must be able to discern from the record that the trial judge fulfilled that responsibility."

In Lucas, supra, this Honorable Court felt that from the record that was available, it was impossible for the Court to re-examine the reasoning process upon which the trial court relied. Most importantly, this Court felt that any presumption or supposition supporting the trial court's ruling in Lucas had been negated by a statement that the Court made. At

page 251 of this Court's opinion it states:

> " In a dialogue with counsel the trial judge expressed his belief that all this Court mandated was cleaning up the language of his order. Although this statement could have been facetious, it tends to negate any supposition that he used reasoned judgment in reweighing the factors. There is nothing in the record to demonstrate that he engaged in a reasoned consideration."
>
> (Emphasis added).

Sub judice, a review of the sentencing of September 11th shows no words by the trial judge that indicate that he thought this was only a "cleaning up" process and further, he states at T2 - 19:

> THE COURT: Gentlemen, I intend to dispose of this matter this afternoon. However, I want to reflect on matters that counsel have argued and organize my thoughts and the proposed order. Court will be in recess.

When court reconvened, the defense counsel waived a reading into the record of the judge's finding of facts and the Court stated at T2 - 20:

> THE COURT: Essentially, the Court has, of course, deleted the findings as required by the State Supreme Court. The other findings are essentially the same and its the Court's conclusion that the death penalty should be imposed in this case even after the mitigating circumstance.

If we recall that this trial judge presided at the original sentencing and could not only remember those proceedings but had the opportunity to review the testimony that was given as well as oral argument given at that time, and that he took time at the September 11th hearing to recess and reflect, it is clear that the case of Lucas, supra is not on point.

Further, it appears from the footnotes in the Lucas case that the findings that were written in that case were of a conclusory nature, whereas the findings in the matter sub judice elaborated with specificity that allowed this Honorable Court to evaluate the judge's basis for resentencing.

The Appellant cites Proffitt, supra for the proposition that the trial judge and the Florida Supreme Court have a "keen and deep responsibility" in imposing and reviewing the death sentence and also that there should be an "informed, focused, guided and objective inquiry" into the question of whether he should be sentenced to death and also the proposition that the death sentence should not be "wantonly or freakishly" imposed.

The Appellant does not indicate with specificity how he feels these requirements of Proffitt have not been applied sub judice other than the fact that the written findings were

not substantially different. It is critical to note, however, that the written findings would have to be essentially the same since no new facts were presented at the sentencing of September 11th or even presented by the Appellant in his brief to this Court to show that those facts were incorrect or incomplete. He is, in effect, asking nothing more than that the trial judge on resentencing be required to not use his original findings in part and to rewrite his findings even though nothing is presented to him that could be added or deleted from those findings.

The Appellant cites the case of Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982) and refers to the question of what may "tip the balance". The case of Eddings is so dissimilar from the one sub judice that it is only with difficulty that it can be superimposed upon the matter sub judice. In Eddings, the Court was concerned because the trial court found as a matter of law that it could not consider in mitigation the circumstances of the defendant's upbringing and emotional disturbance even though substantial evidence had been presented in that regard.

Sub judice, there were no mitigating factors which the Court felt as a matter of law could not be considered.

No non-statutory mitigating circumstances were presented as to the defendant's upbringing since the record shows that he had a reasonably good life. (R. 1057 - 1096 with particular emphasis on R. 1065 and R. 1105-1119). As to the emotional disturbance, the trial court sub judice did consider this as a statutory mitigating circumstance and, in fact, held that his ability to conform his conduct to law was substantially impaired in that he found society frightening, was ridden with anxiety, etc. This means, of course, that the emotional disturbances that the defendant experienced were considered in mitigation as a statutory mitigating factor and that his upbringing, had it been cruel as in Eddings, would have been considered as a non-statutory mitigating factor, but there was no evidence to show a traumatic childhood.

In the case of Jones v. State, 332 So.2d 615 (FSC 1976) on which the Appellant relies, all twelve members of the jury felt that the Appellant should not die in the electric chair and the judge did not follow that recommendation of the jury. The defendant in that case was a chronic paranoid psychotic who believed that people were trying to kill him and he had no significant prior criminal history. These facts are totally disparate with the matter sub judice. Sub judice, the defendant

had a personality disorder which caused him to find the world a frightening place and cause anxiety, but this was presented only to support the fact that under the circumstances, he may have panicked. This, however, was considered by the trial court sub judice in mitigation having to do with his inability to conform his conduct to law. The level of emotional disorder between the case sub judice and that in the Jones case are of a totally different magnitude and in the case sub judice, the Court did consider the emotional problems in mitigation.

Further, in the Jones case, the defendant had no significant criminal history but in the case sub judice, while he had no significant criminal history, the trial court's written finding of facts clearly reflect that the Court gave this reduced weight, as it properly could, since he had a significant history of sexual contact with young boys. (R. 1097 - 1103). The case of Smith v. State, 407 So.2d 894 (FSC 1981) at page 900, 901 indicate that this would have been permissible even to the point of totally negating a mitigating factor. The Appellee would also bring to this Court's attention at this point that at T2 - 14, the Appellant did not challenge the judge giving less than full weight to this mitigating factor and at T2 - 18, 19, defense counsel states that he has

no other objections to the findings of the Court. Also, unlike the Jones case, the trial judge sub judice did not override the jury's recommendation for life imprisonment, but, in fact, concurred with the jury that the death sentence was appropriate.

The Appellant relies on Holmes v. State, 429 So.2d 297 (Fla. 1983) at page 5 of his brief to support the proposition that a psychological disturbance existing at the time of a capital felony was relevant in mitigation. The Appellee will not disagree with that but again asks this Court to note the facts in the Holmes case. In that case, the defendant pled guilty and at the sentencing phase, there was no jury recommendation to be either overriden or conformed to. Apparently, the defendant in that case had been examined by two psychiatrists who would have testified that the defendant had been emotionally disturbed at the time of the murder but there was no reference to this evidence by defense counsel at the sentencing phase. This Honorable Court in the Holmes case stated only that a psychological disturbance at the time of the capital felony case may be relevant in mitigation and reversed the sentencing portion of that case due to counsel being substantially deficient in not having brought that to the attention of the trial court. That case, then, has no precedential value in the matter sub judice with the exception of this Honorable Court's finding that a psychological disturbance may be relevant in mitigation.

Sub judice, the psychological disturbance of the defendant was taken into consideration when the trial judge found that Atkins was substantially impaired in his ability to conform his conduct to law.

As to the question of whether the trial judge did not give adequate consideration to the fact that the defendant was intoxicated at the time of the crime, it is important to remember that the trial judge did not refuse to consider this but, in fact, after considering the evidence, refused to find it as a mitigating factor in this particular case. This is far from unreasonable since there was conflicting testimony in the record in this regard. While it is true that there was self-serving testimony presented by the defendant concerning his having used beer and drugs on the day in question, there was also testimony from the individuals that encountered Atkins before, during and after the event to indicate that at the time he was arrested (shortly after the crime occurred), he was totally coherent and did not appear intoxicated. (R. 458, 558, 569, 585, 621, 630, 639, 643, 650, 654, 656, 735, 741, 753). There was certainly nothing in the record to show that he was intoxicated to a level that would have required this to be used in mitigation.

This is especially true when one considers that the case sub judice does not deal with the override of a jury

recommendation and, in fact, both the jury and the judge heard the testimony both by the defense and the State regarding whether or not the defendant was intoxicated.

This argument presented by the Appellant appears primarily to be a disagreement by the defendant as to how the judge and jury should have interpreted and resolved conflicts in the evidence and nothing more. This Honorable Court has dealt with this problem of weighing evidence many times and the question has clearly been resolved in the case of Hargrave, supra at page 5, 6, Smith, supra at page 901, and Lucas v. State, 376 So.2d 1149 (FSC 1979) at page 1153.

The Appellant at page 5 of his brief also relies on Menendez v. State, 419 So.2d 312 (FSC 1982) and tries to equate the facts in Menendez to the matter sub judice. At page 5 of his brief he states:

> "That is exactly the situation in the instant case. There was no evidence of premeditation and the only other possible criminal activity, were unsubstantiated hearsay allegations of homosexual conduct. There's nothing to even indicate that if such activities had taken place, that there was anything unlawful about them, in view of recent U.S. Supreme Court rulings on sexual conduct."

In Menendez, there was one proper aggravating circumstance (that the murder occurred during the course of a robbery)

and one mitigating circumstance (that the defendant had no significant previous criminal history). This Honorable Court, at page 315 of that opinion, states that there was no direct evidence of premeditated murder. Sub judice, the Court is faced with an entirely different situation. There was evidence of premeditation in that the victim sub judice suffered two separate beatings separated in time and space, and the boy died as a result of the second beating where he received thirty blows. (R. 432, 436, 444, 459, 474 - 477, 479). The record shows that the second beating was administered and the boy was left in a secluded area, specifically so that he could never tell his parents about what had occurred. (R. 769 - 791 and specifically 785 - 786). See also Hargrave, supra at page 5 where the victim was rendered harmless and then killed. Also, the Court in the Menendez case had a mitigating circumstance of no substantial prior criminal history, and while that same mitigating circumstance was found sub judice, the judge gave it diminished weight due to the defendant's previous sexual contact with young boys. While it is true that aggravating circumstances must be shown to exist to the exclusion of a reasonable doubt, there is no law or case authority to support the fact that the same test is required to determine if mitigating circumstances exist.

Certainly there is none to say that a judge cannot give reduced weight to mitigating circumstances when it appears from the record to a degree less than that needed to prove an aggravating circumstance.

By analogy, in any criminal case, the jury is instructed to return a guilty verdict if the evidence precludes all reasonable doubt. This, however, does not mean that every fact presented to the jury that goes into the ultimate conclusion must be beyond a reasonable doubt. In all cases, hearsay is admitted, circumstantial evidence is admitted, and the jury determines the weight of those pieces of evidence (not that each piece is proven beyond and to the exclusion of a reasonable doubt) in deciding guilt beyond reasonable doubt.

The final case upon which the Appellant relies is Washington v. State, 432 So.2d 44 (FSC 1983) and argues that the trial court speculated about the commission of the offense and was not even sure that the victim was conscious after the first blow. Again, Washington is a matter of a jury override where the jury recommended life and the judge sentenced the defendant to death. In Washington, this Honorable Court vacated the sentence on two bases: First, that the jury override was improper (which does not apply in the case sub judice)

and second, while there was proof of premeditation, there was not proof beyond a reasonable doubt as to the fact that it was cold, calculated and premeditated. Sub judice, the trial court found that the murder was heinous, atrocious or cruel and did not find that it was cold, calculated and premeditated. There was proof beyond a reasonable doubt in the matter sub judice not only that the killing was premeditated, but that it was heinous, atrocious or cruel. There is evidence in the record that the boy survived the first blows and was telling the defendant that he was going to tell his mother. (R. 785, 786). Some distance and time later, the second more severe beating occurred and yet the boy still did not die. (R. 387). He was, in fact, left in an isolated area where he was found writhing on the ground with digested blood in his stomach to indicate that some long period of time had elapsed. (R. 478). Since the young boy died, it is impossible for him to tell us the exact level of the pain which he experienced, but from all of these facts, it would not be improper to consider that the evidence shows beyond a reasonable doubt that he suffered extreme pain, and hence, the crime was cruel. Even if this Court, however, were to determine there was uncertainty as to the level of pain and fear that the boy experienced prior to finally dying,

the heinous and atrocious elements of this aggravating factor cannot be denied. Those elements do not deal with pain but go to the nature of the crime and all of the surrounding circumstances.

In the case of State v. Dixon, 283 So.2d 1 (FSC 1973), the Court at page 9 deals with what constitutes heinous and atrocious as well as what constitutes cruel. It is important to note that this is written in the disjunctive. The Court states:

> "Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others."

The Appellee will argue that the crime sub judice was heinous, atrocious and cruel; however, based on this Court's determination in Dixon as to definitions of heinous and atrocious, this aggravating factor clearly must be applicable.

The Appellee would ask leave of this Court to quote from the Appellee's originally filed brief in this matter wherein

the State argued:

> "The Randomhouse Dictionary, copyright 1978, published by Ballentine Books defines pitiless at page 681 as "feeling or showing not pity, implacable, merciless.
>
> The Appellant beat the child brutally twice over a period of time and left him writhing on the deserted road. (R. 387 - 391, 396).
>
> Since the victim is dead, we can only rely on circumstantial evidence to prove the terror and pain suffered by the child, but the facts are clear that the acts were done in a pitiless manner as required by Dixon, supra. If one wishes to test this statement's validity, one need only ask what signs of pity or mercy were shown by the Appellant.
>
> The fact that the victim was a child, in and of itself cannot be considered to make this crime more heinous, atrocious or cruel. However, it does bring into play another consideration which the Appellee will attempt to illustrate by analogy. If one is shown to murder a cripple or bedridden individual, the act would certainly be considered more evil and wicked, not because of the age of the victim, but because of the relative disparite positions of the victim and the accused.
>
> One is powerless to resist when this disparity exists, and this brings into focus more clearly the craven nature and cowardice of the one who takes advantage of the situation to carry out his evil intent. Similarly, while the life of a six year old is no more valuable than an adult, the fact that due to his

> age and size he is utterly unable to resist the onslaught of a 26 year old man with a steel bar, makes the act as reprehensible as killing an invalid.
>
> Nothing prohibits this factor from being considered by the judge and jury when determining the penalty for the crime and goes to the issue of heinous, atrocious and cruel as much as does the more obvious considerations such as pain, suffering, method, etc."

When the record is examined, one must ask how, even if this crime was not cruel in the sense of pain, it can be considered anything less than heinous and atrocious?

CONCLUSION

The Appellee believes that the Record sub judice and the legal argument presented herein clearly show that the trial court did reweigh the aggravating and mitigating circumstances as directed and since no new evidence was presented, could only come to the same conclusion as that originally arrived at. The trial judge did not use speculation in determining that the child had suffered pain; however, even if this Court were to determine that doubt existed about the pain, the heinous, atrocious or cruel aggravating factor must still be applied since pursuant to Dixon, supra, the crime was heinous and atrocious. The trial judge properly considered the Appellant's personality disorders when he stated as a statutory mitigating factor that the Appellant's ability to conform his conduct to law was substantially impaired. The trial judge did not fail to consider what the Appellant refers to as the drug-impaired condition of his mind and, in fact, discussed that in his finding of fact. The judge was obviously unconvinced as to the degree and, therefore, refused to apply this mitigating factor. The trial judge did apply the mitigating factor dealing with no substantial criminal history but again, properly weighed that factor in light of the evidence concerning the defendant's previous sexual history with young boys.

It is clear that the trial judge in the second sentencing phase abided by this Honorable Court's ruling and that no error has been shown to cause reversal.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

WILLIAM E. TAYLOR
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR THE APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Regular Mail to Jack T. Edmund, Esquire and Marshall G. Slaughter, Esquire, P.O. Box 226, 245 So. Central Avenue, Bartow, Florida 33830 on this 15 day of January, 1985.

Of Counsel for the Appellee