IN THE SUPREME COURT
STATE OF FLORIDA

Case No: 66099

TIMOTHY C. PALMES,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Respondent.
_____/

PETITION FOR WRIT OF HABEAS CORPUS

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ATTORNEY FOR PETITIONER

Comparative Disproportionality Review

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The Petitioner, TIMOTHY C. PALMES, presently confined in the Florida State Prison under a judgment and sentence of death and presently scheduled to be executed by the State of Florida on Wednesday, November 7, 1984 respectfully petitions this Court pursuant to Rules 9.030(a)(3) and 9.100 Florida Rules of Appellate Procedure, for the issuance of a Writ of Habeas Corpus.

In this Petition, Mr. Palmes seeks this Court's review of its original order entered in 1981 upholding his death sentence. Palmes v. State, 397 So.2d 648. Specifically, Petitioner asserts that this Court has failed to conduct comparative proportionality review of his sentence and that the failure of this Court to conduct such review under the circumstances of this case resulted in a denial of due process and equal protection of the law and the improper imposition of the death sentence contrary to the Eighth Amendment of the United States Constitution. Petitioner has also filed a Motion to Vacate Judgment and Sentence pursuant to Rule 3.850 R.Cr.P. in the Circuit Court for the Fourth Judicial Circuit. Several other issues are raised therein.

I. JURISDICTION.

Petitioner files this original application for extraordinary relief under Rule 9.100(a), Florida Rules

of Appellate Procedure. This Court has original jurisdiction pursuant to Article V §3(b)9 and Rule 9.030(a)(3), Florida Rules of Appellate Procedure.

The issue raised concerns the constitutionality, both State and Federal of the imposition of the sentence of death in the Petitioner's case.

II. FACTS UPON WHICH PETITIONER RELIES.

A. Course of Prior Proceedings.

The Petitioner was convicted of the first degree murder of James Stone in the Circuit Court of the Fourth Judicial Circuit for Duval County, Florida on April 8, 1977. Petitioner waived his right to an advisory sentence recommendation by the trial jury and a sentencing hearing in front of the trial judge was held on June 22, 1977. The Petitioner was sentenced to death by electrocution.

The Petitioner appealed to the Florida Supreme Court. The Court affirmed Petitioner's judgment and sentence on March 5, 1981. Palmes v. State, 397 So.2d 648 (Fla. 1981). The United States Supreme Court denied the Petitioner's Petition for Writ of Certiorari on October 5, 1981. Palmes v. State, 454 U.S. 882 (1981).

On September 29, 1980 the Petitioner had joined with numerous other death sentenced prisoners in a Petition for Writ of Habeas Corpus filed in the Florida Supreme Court. The Petition challenged the Florida Supreme Court's review of the extra-record material in capital appeals. Relief was denied. Brown, et al. v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied, 70 L.Ed 407 (1981).

On May 18, 1982 the Governor of the State of Florida signed a Death Warrant authorizing the Petitioner's execution for the week of June 14, 1982.

On June 7, 1982 the Petitioner filed a Petition for Writ of Habeas Corpus in the Federal District Court,

Middle District of Florida, Jacksonville Division, raising a single issue concerning the Florida Supreme Court's ex parte review of the extra-record material as raised in Brown, et al. v. Wainwright, supra. On June 11, 1982 the District Court denied the Petition for Writ of Habeas Corpus, but entered a stay of execution pending a resolution of the Brown issue. Additionally, the District Court granted Petitioner leave to file an Amended Petition raising additional constitutional claims.

On August 11, 1982 the Petitioner filed an Amended Petition for Writ of Habeas Corpus. On September 17, 1982 the District Court ordered Petitioner to return to the State Court to exhaust State remedies on the issues raised in the Amended Petition.

The Petitioner filed a Motion to Vacate Judgment and Sentence in the Circuit Court in and for the Fourth Judicial Circuit in Jacksonville, Florida. On October 15, 1982 a hearing was held on the Petitioner's Motion to Vacate. The Motion was denied the same date by Circuit Judge Thomas D. Oakley.

The Petitioner appealed the denial of the Motion to Vacate to the Florida Supreme Court. The Florida Supreme Court affirmed the decision of Judge Oakley on January 6, 1983. Palmes v. State, 425 So.2d 4 (Fla. 1983).

The Petitioner filed a Second Amended Petition for Writ of Habeas Corpus in the District Court on January 25, 1983. By Order dated May 26, 1983 the District Court denied the Petitioner's Motion for Evidentiary Hearing. Oral arguments on the Second Amended Petition were held on June 16, 1983. On August 11, 1983 the District Court denied the Petitioner's Second Amended Petition for Writ of Habeas Corpus.

The Petitioner appealed the denial to the Eleventh Circuit Court of Appeals. A panel of the Eleventh

Circuit affirmed the district court ruling on February 17, 1984. Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984). Petitioner filed a Suggestion for Rehearing En Banc on March 8, 1984. The Suggestion was denied by Order dated March 21, 1984.

Petitioner on or about May 25, 1984 filed a Petition for Writ of Certiorari in the United States Supreme Court. The Petition was denied by Order dated October 1, 1984. A Petition for Rehearing together with an Application for Suspension of the Order Denying Certiorari and an Application for Stay of Execution were filed on October 22, 1984, and denied by Order dated October 29, 1984.

B. Facts Relevant to Petitioner's Claim.

In this Court's opinion denying Mr. Palmes' direct appeal the Court made the following findings regarding the facts of this homicide,

> Appellant lived in an apartment with his girlfriend Jane Albert, her daughter Stephanie, and a friend, Ronald Straight. The appellant became acquainted with Ms. Albert's employer James Stone. The evidence showed that appellant, Albert, and Straight plotted the murder and robbery of Stone.
>
> On October 3, 1976 the appellant, Straight, and Albert purchased lumber, hardware, and cement from which appellant built a box large enough to hold a man's body. The next day Albert told her employer that a girl named Nancy was waiting for him at the apartment. She then called appellant to let him know that Stone was on his way. Appellant told Stephanie to answer the door and tell Mr. Stone that Nancy was waiting in the back bedroom. Ronald Straight waited behind the front door with a gun. After Stone entered the apartment, Straight directed him to the back bedroom where appellant was waiting. The two men then bound Stone's hands and feet with wire and taped his mouth. They placed a garbage bag over his head and hit him with a hammer and stabbed him approximately eighteen times. This sequence of events took about a half an hour. At one point appellant had the child, Stephanie, come into the room and observe the victim lying in the burial box, mortally wounded.
>
> The next day appellant and Straight moved their possessions, together with the box containing the body, out of the apartment and into a rental truck. They took

> possession of the victim's watch, credit cards, and car. Albert took about $3100 in cash from Stone's furniture store. They spent that night at a motel. The next day appellant and Straight drove the rental truck to the Buckman Bridge and threw the box into the St. John's River. The appellant, Straight, Albert and her daughter fled to California in the victim's automobile.
>
> Police apprehended them in California. Appellant was brought back to Florida and placed in the Duval County Jail. On October 22, 1976 police officers advised him of his constitutional rights and questioned him. On October 24, 1976 the officers again advised appellant of his constitutional rights and interrogated him further. They read to him excerpts from a statement made by Jane Albert. He refused to make any statement until after he had spoken to her. Although he declined to sign a written waiver of his rights, he did not request an attorney and he voluntarily answered questions. Afterwards he showed the police officers the place on the bridge where the body was dropped. On October 28, 1976 an indictment was returned accusing appellant of murder in the first degree. On October 29, the appellant asked to see the investigating officers. After again being advised of his rights, the appellant specifically stated that he did not want to see a lawyer. He signed a waiver and made a detailed statement of his participation in the murder. The statement was recorded and signed.

The chief prosecution witness against Mr. Palmes was his girlfriend, Jane Albert. Jane Albert had received a grant of immunity from prosecutor Ralph Greene subsequent to her arrest in California. (Tr 302, 476-479). During its case in chief and in fact during Albert's testimony, the prosecutor acknowledged that Albert was in fact an "accomplice" of Mr. Palmes and Mr. Straight in this homicide. In fact she was much more than a mere accomplice.

Jane Albert's testimony established that she was a part of this homicide from the beginning (Tr 246-496). Not only was she aware of the plan to kill the victim, she willingly agreed to participate in the murder. (Tr 256-57, 259-61, 322, 323) In order to carry out the plan to rob the victim and dispose of his body by placing it in a box and throwing it in the St. John's River, all three of the individuals

went shopping for the material to build the box. Jane Albert testified that she had written the check for the lumber used to build the box. (Tr 324) At the time she did this she knew full well that the purpose of buying the lumber was to build a box in which to dispose of the victim's body. (Tr 329)

Albert's part in the homicide scheme was to take the money from the victim's business and to see that the victim went to the murder site. (Tr 260) Albert was successful at both of these tasks. After an initial ruse to get the victim to her apartment failed she testified that she called Mr. Palmes and assured him that she would still get the victim there. (Tr 264, 265) She did this by informing the victim that Palmes and Straight were out of town, (Tr 267-269) and by telling the victim that his fifteen year old lover was waiting for him at Albert's apartment. (Tr 268)

After the murder, Jane Albert stole approximately $3,100.00 from the victim's business. (Tr 177) She purchased some luggage so that they could pack (Tr 267) and helped packed their belongings that evening. (Tr 277) Albert was called several times by the victim's wife and informed her that she did not know where the victim was, that he was out closing accounts. (Tr 276, 347) At the apartment, Albert attempted to clean up the blood. (Tr 289) Once they moved out of the apartment, Albert paid for a motel room where they all celebrated and partied. (Tr 293, 361)

In his closing remarks to the jury, the prosecutor acknowledged that Albert "is bad" and that "she was part and parcel with the plot to kill Stone" (Tr 1031) and was "just as guilty" as the others. (Tr 1032)

III. NATURE OF THE RELIEF SOUGHT.

Petitioner seeks an order of this Court granting

an immediate stay of execution pending full review of this matter. Petitioner further requests this Court vacate his unconsititutional sentence of death and grant such further relief as is proper.

IV. REASONS FOR GRANTING THE WRIT OF HABEAS CORPUS.

At trial and in Petitioner's direct appeal to this Court, he argued that the sentence of death could not be upheld because of the incredible disparity existing between the sentence of death and the grant of immunity given to an equally culpable co-conspirator and perpetrator. While this Court upheld the sentence of death upon a review of the aggravating and mitigating facts it did not address the proportionality argument at all.[1/]

Although it has been decided that the United States Constitution does not require proportionality review in every capital sentencing scheme, [Pulley v. Harris, 104 S.Ct. 871 (1981)] Florida, has since the adoption of its post-Furman capital sentencing scheme required comparative proportionality review of all capital murder sentences. Dixon v. State, 283 So.2d 1 (Fla. 1973); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). This requirement of comparative proportionality review was relied upon by the United States Supreme

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1/ Petitioner is fully cognizant of this Court's position as set out in Messer v. State, 439 So.2d 875 (Fla. 1983), and Booker v. State, 441 So.2d 148 (Fla. 1983), that it need not in its written opinion "explicitly compare each death sentence with past capital cases." However, Petitioner believes that under the circumstances of his case the failure to conduct porportionality review and to address the issue in its written opinion results in a denial of both due process and equal protection of the law and ultimately in the irrational and unsupportable infliction of punishment contrary to the Eighth Amendment to the United States Constitution.

Court in upholding Florida's post-Furman statute against an attack that the statute violated the Eighth and Fourteenth Amendments. Proffitt v. Florida, 428 U.S. 242 (1978). Clearly its significance to that Court was the fact that such review could assure "consistency, fairness and rationality in the evenhanded operation of the state law." Proffitt i.d. at 260.

Petitioner submits that it is not enough that such a procedural safeguard exists. Having granted each capital appellant the right, this Court must act beyond the acknowledgment of the procedural right to insure that due process and equal protection are in fact achieved so as to assure that the punishment does not violate the ban against cruel and unusual punishment as announced in Furman v. Georgia, 409 U.S. 15 (1972). What is sought to be achieved is the avoidance of the arbitrary and unequal application of the death penalty. The failure to do this violates the Eighth Amendment. Although a review of aggravating and mitigating factors in Petitioner's case would arguably justify the death sentence, a comparative proportionality review of Petitioner's case with a co-perpetrator and others does not. Without a rational basis to support the unequal treatment of Petitioner as compared to Jane Albert, the sentence of death should not be upheld.

Petitioner respectfully submits that this Court has failed to assure either fairness or consistency, much less rationality in its affirmance of Petitioner's death sentence and where the application of Florida's capital sentencing scheme results in the unequal, inconsistent treatment of equally culpable perpetrators, principles of due process and equal protection as they relate to the Eighth Amendment ban on cruel and unusual punishment are invoked. Whether invoked

pursuant to Article I §§2, 9 of the Florida Constitution or pursuant to the Fourteenth Amendment to the United States Constitution, these principles were intended to insure that there would be no arbitrary deprivation of life or liberty and that equal protection would be given to all under similar circumstances in the enjoyment of their personal and civil rights. See, Yick Wo v. Hopkins, 118 U.S. 356 (1886). As these principles relate to the Eighth Amendment, they require the avoidance of the arbitrary and unequal application of capital punishment. See, Furman v. Georgia, supra, Douglas, J. concurring. Where as here, equally culpable perpetrators are treated to such disparate treatment, that is, where one is relieved of any prosecution and punishment at all and the other receives a sentence of death, these principles should require that absent some rational and compelling reason for the disparity, the sentence of death should not stand.

Such a rational basis for the disparity in treatment between Mr. Palmes and Jane Albert is conspicuously absent in this case. Without Jane Albert this homicide would not and could not have occurred. As set out in the facts above, Jane Albert participated fully in both the planning and execution of this homicide. The sole reason the victim went to the location where he was killed was because Jane Albert lured him into going there. The chief reason for the homicide was the theft of the victim's money and property. This theft of the victim's property was accomplished almost exclusively by Jane Albert. That Albert did not strike the victim with a hammer or plunge a knife into the victim does not lessen her culpability in the slightest. The cold, calculated manner in which she performed her duties under the plan reflect a clear determination that another human being was to die. There simply

does not exist a rationally discernable difference between Albert's participation and Palmes' participation by which the disparate treatment could be justified. See, Antone v. State, 382 So.2d 1205 (Fla. 1980).

In Dixon v. State, supra, this Court assured that,

> "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 the light of other decisions and determine whether or not the punishment is too great.

In McCaskill v. State, supra, the Court in reviewing two death sentences stated, ". . . our final responsibility in this cause is to review the case in light of the other decisions and determine whether or not the punishment is too great."

In many prior cases, the Court has struck down a death sentence which was not warranted by the facts or the law or which was wholly disproportionate to other homicides of similar character or effect, for example, see Swan v. State, 322 So.2d 485 (Fla. 1975); Huckaby v. State, 343 So.2d 29 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Jones v. State, 332 So.2d 615 (Fla. 1976); Burch v. State, 343 So.2d 831 (Fla. 1977); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Provence v. State, 337 So.2d 783 (Fla. 1976); Slater v. State, 316 So.2d 539 (Fla. 1975); Phippen v. State, 389 So.2d 991 (Fla. 1980); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Halliwell v. State, 323 So.2d 557 (Fla. 1975) Barfield v. State, 402 So.2d 377 (Fla. 1981); Blair v. State, 406 So.2d 1103 (Fla. 1981); Kampf v. State, 371 So.2d 1007 (Fla. 1979).

In other cases this Court has affirmed jury overrides

or otherwise upheld death sentences where the weight of the evidence and the review for proportionality indicated death was the appropriate penalty, Barclay v. State, 343 So.2d 1266; White v. State, 403 So.2d 331 (Fla. 1981); Salvatore v. State, 366 So.2d 745 (Fla. 1979); Smith v. State, 365 So.2d 704 (Fla. 1978); Jackson v. State, 366 So.2d 752 (Fla. 1978).

In each of these cases it is manifestly clear even if not explicity stated that the Court went beyond merely checking for procedural regularity and actually performed its comparative review function.

The disposition of an accomplice's case must be considered in making this comparative review. In Gafford v. State, 387 So.2d 333 (Fla. 1980), this Court stated that, "[d]epending upon the circumstances of a particular case, the sentence of an accomplice may affect the imposition of a death sentence." (cites omitted) Additionally, the sentences handed out in other capital offenses must also be reviewed. McCaskill v. State, supra, at 1278, 1279.

Several cases which illustrate this are Halliwell v. State, 323 So.2d 557 (Fla. 1975) Malloy v. State, 382 So.2d 1190 (Fla. 1979); Swan v. State, 322 So.2d 485 (Fla. 1975); Slater v. State, 316 So.2d 539 (Fla. 1975).

In Halliwell, supra, this Court was faced with a factual situation which in many respects was remarkably similar to Mr. Palmes' case. There the victim was beat to death by Halliwell who was having an affair with the victim's wife and who was angry at the victim for having mistreated his wife. Halliwell beat the victim to death with a breaker bar and thereafter mutilated and dismembered the body and disposed of the body parts in various containers. Halliwell, as Petitioner Palmes did, confessed after his arrest

and tried to exonerate his lover. At trial however, Halliwell as Mr. Palmes' did, denied his responsibility and indicated the murder had been committed by his lover. This Court reversed the sentence of death finding that the murder was "nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court."

In Swan v. State, supra, the victim, a person of previous poor health, was severely beaten during a robbery. She was left to die with her hands, neck and left foot tied so that efforts to free herself could have choked her to death. She subsequently died from the severe beating. After jury recommendation of life for both Swan and his co-defendant, the judge sentenced the co-defendant to life. Swan was sentenced to death. In reviewing the sentence of death, this Court stated,

> While we recognize that the statute leaves the sentencing to the trial court, there is a specific duty imposed on this Court to consider the record in order to assure that the punishment accorded, a criminal will meet the standards prescribed in Furman v. Georgia. Having considered the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of death.

In Malloy v. State, supra, three individuals were nearly equally culpable in the execution style slaying of two victims. Two of the perpetrators negotiated deals with the State Attorney allowing them to plead to lesser charges and sentences of five to ten years in exchange for their testimony at trial. The appellant was sentenced to death. In performing its sentence review function, this Court determined that each participating individual was guilty of two execution style murders, "which ordinarily should result in the imposition of the death penalty." Nevertheless, the jury had recommended life.

This Court found that,

> "[u]nder the circumstances of this case it was reasonable to conclude that all participants were equally culpable since there was no reason to bind, gag and blindfold the victims and take them miles away to an unrelated building unless there was an agreement between the three to murder the victims. It is also reasonable to conclude that the jury may have reached its recommendation because of the relatively equal complicity of the other participants and the plea bargains made with them by the State.
>
> Because of the jury's recommendation of a life sentence and the fact that there is a reasonable basis for its recommendation, we must agree that to impose the death sentence on the appellant would not be consistent with other sentences imposed in similar circumstances in accordance with the principles laid down by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242 . . ."

Likewise in Slater v. State, 316 So.2d 539 (Fla. 1975), this Court reviewed the imposition of a death sentence against one of three persons responsible for the murder of a hotel manager shot during a robbery. Two accomplices entered pleas. One, Charlie Ware received a life sentence. The second, Larry Gore pleaded to robbery and received five years. Both were called as witnesses against the appellant Slater. The evidence showed that accomplice Ware was the "triggerman". Gore drove the getaway car. Slater was with Ware during the robbery and grabbed the money box. In performing its sentence review this Court could not affirm the sentence of death stating,

> "The Court that tried the appellant also permitted the "triggerman", Ware, to enter a plea of nolo contendere to the charge of first degree murder for which he was sentenced to life imprisonment. The record clearly reflects that the defendant/appellant Slater, was an accomplice and did not have the murder weapon in his hand . . .
>
> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law . . . (citing both State v. Dixon and Furman v. Georgia.)"

Petitioner believes that his case, when viewed

comparatively with other capital decisions, calls for the imposition of the due process and equal protection principles relied upon in Slater and necessarily required by Dixon v. State and Furman v. Georgia if death is not going to be a cruel and unusual punishment. In Mr. Palmes' case, absent some discernable and rational difference between the culpability of Mr. Palmes and Jane Albert, the sentence of death imposed upon Mr. Palmes is fundamentally unfair. Such unequal treatment before the law should not be allowed to stand.

Finally, Petitioner asserts that due process requires more than assurances by this Court that proportionality review is required and performed under Florida's death penalty scheme. The mere fact that the procedural right to have proportionality review exists does not assure that arbitrary and unequal results are not occurring in the application of Florida's capital punishment scheme. As in Petitioner's case, the absence of an opinion evidencing this Court's consideration of the proportionality issue frustrates constitutional review of the matter both in this Court on habeas review and in the federal courts either on direct appeal or on review through habeas corpus. It is submitted that due process requires more than mere assurances that the right exists and should require an explicit demonstration by this Court that such review occurred.

The federal standards for determining whether available procedures satisfy the requirements of due process are set out in Matthews v. Eldridge, 424 U. S. 319 (1976). In sum, the Supreme Court requires an analysis of (1) the private interest which is affected by the government action; (2) the risk of the erroneous deprivation of such interest through the procedures used and (3) the government's interest.

The private interest affected by this Court's procedures is that of life or death. Few private interests could be more compelling than Petitioner's interest in not being executed for a crime that similarly situated persons are not executed for. Against this private interest the State's interest against adopting the requirement of written opinion on the proportionality issue is minimal. If the procedure is already being followed it is only slightly more burdensome to write on the subject. The risk of erroneous result is too great not to require more procedural safeguards.

Absent a requirement that proportionality review be explicated in this Court's opinion on direct review, there is simply no way to gauge whether the Florida capital punishment scheme is in fact avoiding the arbitrary and unequal application of its death sentence as required under the Eighth and Fourteenth Amendments to our Constitution.

CONCLUSION

For the above stated reasons, Petitioner requests this Court to (1) adopt a procedure whereby comparative proportionality review will be explicated in each opinion of this Court in a capital case; (2) conduct a comparative proportionality review in Petitioner's case and thereafter set aside the judgment and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by US MAIL/EXPRESS MAIL to the Office of Jim Smith, Attorney General, c/o Carolyn Snurkowski, Assistant Attorney General, 401 N.W. Second Avenue, Suite 820, Miami, Florida 33128, this 30th day of October, 1984.

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