

IN THE SUPREME COURT OF FLORIDA

FILED

S. D. J. WHITE

NOV 1 1984

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

TIMOTHY C. PALMES, :

Petitioner, :

vs. :

Case No. 66,099

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

Respondent. :

RESPONSE TO PETITION FOR WRIT
OF HABEAS CORPUS

Comes now Respondent, by and through undersigned counsel and files this Response to Petitioner's Petition for Writ of Habeas Corpus and would show:

I.

Petitioner is in the lawful custody of Respondent pursuant to a valid judgment and sentence of death imposed April 8, 1977, and June 22, 1977, respectively. This Court affirmed the judgment and sentence imposed in Palmes v. State, 397 So.2d 648 (Fla. 1981), cert. den. Palmes v. Florida, 454 U.S. 882 (1981).

II.

On October 9, 1984, Governor Bob Graham signed a second death warrant setting the date of execution to occur during the week commencing November 1, 1984, and ending November 8, 1984. On October 30, 1984, Petitioner filed the instant petition.

The facts germane to the judgment and sentence entered may be found in Palmes v. State, supra at 650-651.

III.

Petitioner argues one issue in his petition. Specifically, that this Court has failed to conduct comparative proportionality review of his sentence and that the failure to do so has resulted in a denial of due process and equal protection of the law and the improper imposition of the death sentence. He argues that the death sentence cannot stand 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."

Petitioner acknowledges that this Court upheld the death sentence upon direct review, but asserts that the failure to address specifically in writing resulted in a denial of due process and equal protection and the "unsupportable infliction of punishment contrary to the Eighth Amendment to the United States Constitution."

IV.

Reasons for Denying Relief

Respondent would submit Petitioner has already suffered an adverse ruling on this very issue by this Court. As a sub-claim to Issue VII in his first appeal from the denial of his initial Rule 3.850, Petitioner argued that the death sentence imposed violated his constitutional rights. Specially, Petitioner contended that this Court, in affirming the death sentence, failed to give adequate consideration to the "disparity of treatment between the co-defendants and Jane Alpert(sic)." Petitioner's brief p.30. (Case No. 62,770).

While this Court did not specifically address this sub-issue the Court held:

"As was set out above, appellant argues that the sentencing statute has been arbitrarily applied in his case and that his sentence is a misapplication of that statute. We conclude as a matter of law that this contention is without merit. The statute, as we have already held by the affirmance of the sentence, was correctly followed. Measured by the applicable standards, the sentence imposed was the appropriate sentence under the circumstances." Palmer v. State, 425 So.2d 4,6 (Fla. 1983).

Similarly, the Eleventh Circuit Court of Appeals in Palmer v. Wainwright, 725 F.2d 1511, 1524 (11th Cir. 1984), cert.den. Palmer v. Wainwright, __U.S.__ (Oct. 1, 1984), reh. den. __U.S.__ (Oct. 29, 1984), denied Petitioner relief on this claim. The Court held:

"Finally, appellant claims that his sentence violates the eighth and fourteenth amendments because it is so disproportionate to the grant of immunity to Jane Alpert. Ronald Straight, another actor in this murder scheme was also sentenced to death. The Supreme Court has stated that discretionary decisions of state prosecutors to grant immunity to some participants of a crime and not others is not arbitrary or cruel and unusual

under the constitution. See Gregg v. Georgia, 428 U.S. 153, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976) (Justices Stewart, Powell, and Stevens); Proffitt v. Florida, 428 U.S. at 254, 96 S.Ct. at 2967. Appellant's claim that Jane Alpert was not similarly punished is not a cognizable basis for relief."

725 F.2d at 1524.

Moreover, assuming arguendo that this claim is properly before the Court, there has been no disparity of punishment imposed sub judice.

Petitioner's sentence was not disproportionate to Jane Albert's "punishment", because Jane Albert was never indicted for any crime, let alone convicted and sentenced to a lesser sentence. There exists no Supreme Court decision that "suggests that the decision to afford an individual mercy or immunity violates the constitutional rights of another." The fact that this prosecutorial decision involves the grant of immunity, rather than "a plea bargain or a pardon," has not resulted in a constitutionally distinguishable difference that would mandate relief. See Gregg v. Georgia, 428 U.S. 153 (1976), and Proffitt v. Florida, 428 U.S. 242, 254 (1976). Clearly the imposition of the death penalty herein does not violate the Eighth or Fourteenth Amendments despite the award of immunity to Jane Albert.

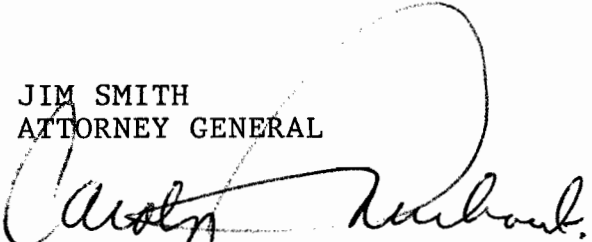
Moreover, realistically if proportionality is truly at issue, this case stands for that proposition. Ronald Straight, a co-defendant, indicted, tried and convicted, was similarly given a death sentence for the murder of James Stone.

Terminally, this Court has recently had a rash of such claims concerning proportionality of death sentences under consideration and rejected each in kind. A similar result must obtain herein. Henry v. Wainwright, ___So.2d___ (Fla. 1984), 9 F.L.W. 399,400; see also, Christopher v. State, 416 So.2d 450 (Fla. 1982); Armstrong v. State, 429 So.2d 287 (Fla. 1983), and Thompson v. State, 410 So.2d 500 (Fla. 1982).

Based on the foregoing, Respondent would urge this Court deny Petitioner relief.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



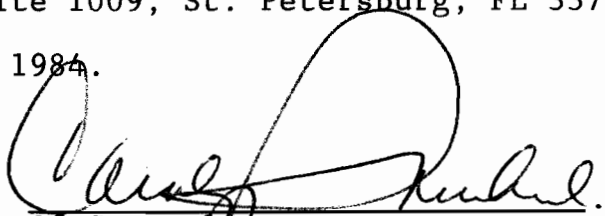
Carolyn M. Snurkowski
Bureau Chief

401 N.W. Second Avenue,
Suite 820
Miami, Florida 33128

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Habeas Corpus has been forwarded to Tom McCoun, Esquire, Louderback, McCoun & Helinger, 1 Plaza Place NE, Suite 1009, St. Petersburg, FL 33701 this 1st day of November, 1984.



Of Counsel

Counsel for Respondent