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IN THE SUPREME COURT OF FLORIDA

TIMOTHY C. PALMES, :
Appellant, :
vs. : CASE NO. _____
STATE OF FLORIDA, :
Appellee. :

ANSWER BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

On October 28, 1976, Palmes was indicted for the first degree murder of James Stone in Duval County, Florida, and on April 8, 1977, was convicted of said crime. Palmes waived an advisory sentencing jury and the trial court imposed a sentence of death on June 22, 1977. The Florida Supreme Court affirmed the judgment and sentence in Palmes v. State, 397 So.2d 648 (Fla. 1981) cert. denied Palmes v. Florida, 454 U.S. 882 (1981).

Following a number of pleadings filed in the Federal District Court, Middle District of Florida, Jacksonville Division, pursuant to the signing of a first death warrant by Governor Bob Graham, Palmes returned to the state trial court and filed his first Motion for Post-Conviction Relief in the Circuit Court, in and for the Fourth Judicial Circuit in Jacksonville, Florida. On October 15, 1982, a hearing was held on said Motion to Vacate by Judge Oakley. On that date Judge Oakley denied the Motion to Vacate. An appeal followed and the Florida Supreme Court on January 6, 1983, affirming the denial of Palmes' Motion to Vacate. Palmes v. State, 425 So.2d 4 (Fla. 1983).

A second amended Petition for Writ of Habeas Corpus was filed in the federal court and on August 11, 1983, following oral argument on June 16, 1983, the Court denied Palmes' Second Amended Petition for Writ of Habeas Corpus. An appeal was taken to the Eleventh Circuit Court of Appeals and a panel of that court affirmed said denial February 17, 1984. Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984), cert. denied, Palmes v. Wainwright,

__U.S.__, (October 1, 1984); rehearing denied __U.S.__, (October 29, 1984).

On October 9, 1984, Governor Bob Graham signed a second death warrant setting the date of execution to occur during the week of November 1, 1984, through November 8, 1984. Palmes filed a second Motion for Post Conviction Relief in the trial court October 30, 1984. Hearing on said motion was set for October 31, 1984, and on that same day said Motion was denied summarily. Notice of Appeal was also filed October 31, 1984.

The facts pertinent to the issues before the Court may be found in Palmes v. State, 397 So.2d at 650-651.

POINT ON APPEAL

THE TRIAL COURT DID NOT ERR IN DENYING
PALMES AN EVIDENTIARY HEARING AND DENYING
HIS SECOND MOTION FOR POST-CONVICTION RELIEF.

ARGUMENT

Palmes raised four grounds which he argues required vacation of his death sentence in his second motion for post conviction relief. Specifically he asserted:

- 1) He was denied due process by the failure to disclose promises and threats made to Jane Albert, an accomplice of Mr. Palmes and the chief prosecution witness against him;
- 2) He was denied his Sixth, Eighth and Fourteenth Amendment rights caused by the improper dismissal of juror Miss Lee Clifton;
- 3) He was denied his right to a public trial as guaranteed under the Sixth and Fourteenth Amendments and Article I, Sec. 16 of the Florida Constitution by the closure of the courtroom and exclusion of the general public during the trial testimony of Stephanie Albert;
- 4) His Eighth and Fourteenth Amendment rights were violated by the Florida law in effect at the time of trial which required the trial court to instruct the jury on all lesser included offenses regardless of the presence or absence of evidence to support

the instructions.

The trial court in summarily rejecting claims (2), (3) and (4) found that they were not cognizable claims pursuant to a Rule 3.850 Motion.

Claims which could or should have been raised on direct appeal are not claims which can be raised for post-conviction review. As such, the trial court was correct in summarily denying relief.

Palmes v. State, 425 So.2d 4 (Fla. 1983); McCrae v. State, 437 So.2d 1388 (Fla. 1983); Sullivan v. State, 441 So.2d 609 (Fla. 1983); Smith v. State, __ So.2d __ (Fla. 1984) 9 F.L.W. 442; Morgan v. State, __ So.2d __ (Fla. 1984) 9 F.L.W. 428; Adams v. State, __ So.2d __ (Fla. 1984) 9 F.L.W. 357.

Moreover, the claims raised in Palmes' second Motion for Post-Conviction relief constituted an abuse of the post conviction process because these claims were known or could have been known and could have been raised on direct appeal or on a previous Rule 3.850 Motion. Smith v. State, __ So.2d __ (Fla. 1984) 9 F.L.W. 279; State v. Washington, __ So.2d __ (Fla. 1984) 9 F.L.W. 293.

The trial court would have been equally justified in so finding in the instant circumstances.

Palmes asserted in claim (1) that he was denied due process by the failure to disclose promises and threats made to Jane Albert. In support of this contention, Palmes attached to his motion to vacate a sworn statement of Rosalyn Watts,

Palmes' sister, obtained October 25, 1984.

The trial court equally rejected this claim and specifically found after reviewing those portions of the trial record concerning Jane Albert's trial testimony and especially the inquiries made by both the state and prosecution regarding the granting of immunity, (TR 302, 476-479) no violation of due process occurred.

Both the state and the defense during the course of trial brought to the attention of the court and jury the fact that Jane Albert received immunity from prosecution of first degree murder in exchange for her testimony in behalf of the state's case against Timothy Palmes. The sworn statements prepared by Ms. Watts neither added nor detracted from Jane Albert's testimony at trial or the credibility of that testimony viewed by the jury.

The trial court concluded that no Brady v. Maryland, 373 U.S. 220 (1963), occurred because the record demonstrated that trial counsel knew about the grant of immunity to Jane Albert and made it known to the jury. The Court reasoned, that all defense counsel needed to do, was ask whether any threats or promises were made and said information would have come to light.

The state argued alternative theories to the trial court. First that the allegation was legally insufficient as a matter of law. Palmes admitted that the immunity factor was known and presented to the jury, but asserted that other promises or threats would have impeached further the credibility of Jane

Albert's testimony. In support of this, Palmes provided a sworn statement by Palmes' sister, Ms. Watts, that Jane Albert on October 19, 1984, informed her that promises were made and threats about her daughter also were made.

The state argued and would submit herein that the hearsay statement of Ms. Watts could not and did not meet the necessary threshold to demonstrate any wrongdoing on anyone's part. A casual review of the statement reveals that although Ms. Watt said Jane said promises were made, she could not say whether said promises were made before or after Jane's testimony. Moreover, there was no allegation in said statement that the state intentionally, or unintentionally, withheld information from the defense counsel. Lastly, allegations concerning the "threats to take Stephanie away" were evidently known to Palmes' sister pre-trial (Sworn Statement pp. 13-14) and therefore could not have logically constituted the basis of a Brady violation. In light of this Court's decisions in Christopher v. State, 416 So.2d 450, 454-455 (Fla. 1982); Antone v. State, 382 So.2d 1205 (Fla. 1980), and Booker v. State, 413 So.2d 756 (Fla. 1982), relief must be denied.

Second, even if Ms. Watts' sworn statement is considered as "newly discovered evidence," a Rule 3.850 motion was not the proper procedure to entertain the claim. Booker v. State, supra at 757. Where "newly or recently discovered evidence" is alleged in a Rule 3.850 motion, the Florida Supreme Court has held the allegation is legally insufficient and does not

"require that the trial judge attach specific portions of the record or grant an evidentiary hearing." 413 So.2d at 757.

Third, assuming arguendo that the claim does meet a threshold Brady allegation and assuming all allegations are true, pursuant to United States v. Agurs, 427 U.S. 97 (1976), no relief may be granted. This Court in a similar situation in Antone v. State, 382 So.2d 1205, 1214-1215 (Fla. 1980), discussed in detail the three circumstances where a Brady violation could occur, citing United State v. Agurs, supra. After reviewing the first two situations, which the State would submit this Court should find equally not applicable to this case as it did in or Antone, supra, the Court reviewed the third situation.

The Court observed:

"The third situation occurs when a general request for Brady information has been made and a failure to disclose has followed. In this situation, the standard of "materialilty" which Agurs states must be applied is as follows:

'The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.'

427 U.S. at 112-13, 96 S.Ct. at 2402 [footnotes omitted]."

382 So.2d at 1215

Applying this test to the instant case, there is no justifiable basis upon which relief could or should obtain. Here, as in Antone, this information would have provided cumulative impeachment as to Jane Albert's credibility. Evidence to impeach Jane Albert's testimony was before the jury. Jane Albert testified at trial because she was given immunity from prosecution for first degree murder. This evidence "would have added little" to Palmes' effort to assail her credibility. The "undisclosed" promises and threats clearly fail to meet the Agurs test of materiality and therefore relief is not mandated.

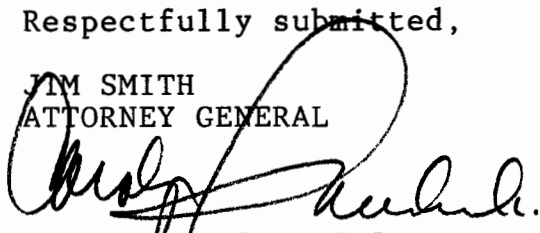
Reliance on the Supreme Court's decision in Giglio v. United States, 405 U.S. 150 (1972) is equally misplaced. See United States v. Antone, 603 F.2d 566 (5th Cir. 1979), United States v. Ochs, 548 F.Supp. 502, 530-531 (D.C.N.Y., 1982).

CONCLUSION

Therefore, based on the foregoing this Court should affirm the trial court's denial without evidentiary hearing of Palmes' second Motion for Post Conviction Relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee 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.

A handwritten signature in cursive script, appearing to read "Carol A. Rusk". The signature is written in black ink and is positioned above the typed name "Carol A. Rusk".

Carol A. Rusk
Of Counsel