66,176

IN THE SUPREME COURT OF FLORIDA

GARY ELDON ALVORD,

Petitioner,

v.

CASE NO.

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

Respondent.

FILED
SID J. WHITE
NOV 1984
CLERK, SUPREME COURT
By Chief Deputy Clerk

RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF

COMES NOW the Respondent, by and through the undersigned Assistant Attorneys General and in response to the petition for extraordinary relief filed herein alleges.

I.

INTRODUCTION

This pleading is being filed in conjunction with respondent's response in opposition to petitioner's application for a stay of execution. Both pleadings are being drafted on an anticipatory basis; that is, due to the abbreviated time schedule, respondent has not yet received any of petitioner's pleadings. Therefore, both responses have been drafted based upon what counsel anticipate will be raised in the pleadings to be filed by petitioner. Respondent requests leave of this Court to file such supplemental responses as may be required.

STATEMENT OF THE CASE AND FACTS

Petitioner/Appellant, GARY ELDON ALVORD, was charged by indictment in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, with three counts of first degree murder on August 1, 1973 (Trial Rec. 1, 2). The indictment charged that Gary Eldon Alvord, a/k/a Paul Robert Brock, a/k/a Gary Eldon Venczel, murdered Georgia Tulley, Ann Herrmann and Lynn Herrman on June 17, 1973. This cause proceeded to trial on the indictment and on April 4, 1974, the jury returned a verdict finding Alvord "guilty as charged in the indictment" (Trial Rec. 88). Following the penalty phase of the trial, the jury returned a recommendation to the trial court that it impose the death penalty upon Alvord under each

count of the indictment (Trial Rec. 89). On April 9, 1974, the trial judge imposed the death penalty upon Alvord on each count in the indictment, (Trial Rec. 100, 101) and filed an order setting out his findings of fact in support of the imposition of the death sentence (Trial Rec. 97 - 99).

Alvord filed a timely notice of direct appeal to the Florida Supreme Court raising the following grounds for relief:

1. WHETHER THE IMPOSITION OF THE DEATH SENTENCE PURSUANT TO FLORIDA STATUTES 775.082; 782.04; and 921.141 CONTRAVENES THE FLORIDA AND UNITED STATES CONSTITUTIONS.

2. WHETHER THE PROVISIONS OF THE FLORIDA STATUTES ALLOWING THE JURY TO ENTER AN ADVISORY OPINION ON THE QUESTION OF THE SENTENCE TO BE IMPOSED IN A CAPITAL CASE BY A SIMPLE MAJORITY VOTE VIOLATES A DEFENDANT'S RIGHT TO TRIAL BY JURY AS GUARANTEED BY FLORIDA AND UNITED STATES CONSTITUTION.

3. WHETHER THE TRIAL JUDGE ERRED IN PERMITTING DON DUFORE TO RELATE THE STATEMENT ALLEGEDLY MADE TO HIM BY THE DEFENDANT.

4. WHETHER THE TRIAL JUDGE ERRED IN ADMITTING THE FACT THAT ONE OF THE MURDER VICTIMS WAS FOUND TO HAVE SPERM IN HER VAGINA.

5. WHETHER THE TRIAL JUDGE ERRED IN ALLOWING TESTIMONY THAT THE DEFENDANT OWNED A GUN AT THE TIME THE MURDERS WERE COMMITTED.

6. WHETHER THE TRIAL JUDGE ERRED IN ALLOWING DR. ROBEY TO TESTIFY THAT THE DEFENDANT WAS SANE AT THE TIME HE ALLEGEDLY COMMITTED THE CRIME OF RAPE IN MICHIGAN.

7. WHETHER THE EVIDENCE PRESENTED AT TRIAL, INCLUDING THE PENALTY PHASE OF THE TRIAL, WARRANTS THE IMPOSITION OF THE DEATH PENALTY.

Alvord's conviction and sentence were confirmed by the Florida Supreme Court. Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. den. 428 U.S. 923 (1976). Alvord next filed a motion for reduction of sentence pursuant to Rule 3.800(b), Florida Rules of Criminal Procedure in the Circuit Court in and for Hillsborough County, Florida. The motion was presented to that court on November 29, 1976, and denied by the trial court on December 3, 1976. A petition for writ of mandamus was filed with the Florida Supreme Court and denied without hearing on March 10, 1977.

On October 6, 1978, Alvord filed a motion for post-conviction relief in the trial court pursuant to Rule 3.850, Florida Rules of Criminal Procedure, and on October 24, 1978, a first supplement to

the motion for post conviction relief was filed (3.850 Rec. 225 - 257; 300 - 301). The 3.850 motion raised the following grounds for relief:

1. INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON APPEAL.
2. DENIAL OF AN ADEQUATE PSYCHIATRIC EVALUATION.
3. MIRANDA VIOLATIONS.
4. DEATH PENALTY UNCONSTITUTIONAL AS APPLIED.
5. DEATH PENALTY VIOLATES EQUAL PROTECTION.
6. DEATH PENALTY UNCONSTITUTIONAL BECAUSE IT COERCES GUILTY PLEAS.
7. DEATH PENALTY "TOO GREAT" IN THIS CASE.
8. SECTION 921.141, FLORIDA STATUTES (1973) VIOLATES ARTICLE V, SECTION 2(a) OF THE FLORIDA CONSTITUTION.
9. DEATH PENALTY IN THIS CASE VIOLATES ARTICLE I, SECTION 917 OF THE FLORIDA CONSTITUTION.
10. DEATH PENALTY IS ARBITRARILY AND DISCRIMINATORILY IMPOSED.
11. WITHERSPOON VIOLATION.
12. UNFETTERED JUDICIAL DISCRETION IN THE IMPOSITION OF THIS DEATH PENALTY.
13 DENIAL OF DUE PROCESS AT THE EXECUTIVE CLEMENCY HEARING.
14. LOCKETT V. OHIO, VIOLATION.

Following a full and fair evidentiary hearing in state court, the trial court denied the motion for post-conviction relief (3.850 Rec. 342 - 351).

During the pendency of Alvord's 3.850 proceeding the Governor of the State of Florida invoked §922.07, Florida Statutes and entered executive order number 79-53 directing that Alvord be examined by three psychiatrists to determine whether Alvord understood the nature and effect of the death penalty and why it was to be imposed upon him. Alvord vigorously fought this procedure, filing a motion for protective order, petition for writ of mandamus, and petition for common law certiorari, before ultimately, through attorney William J. Sheppard refusing to speak with the psychiatrists. See Respondent's Composite Exhibit I.

Alvord appealed the denial of his 3.850 motion to the Florida Supreme Court, raising the following issues:

I. WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION FOR POST CONVICTION RELIEF ON THOSE ISSUES IT MADE FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT THERETO.

A. On the issue of failure to respond to Alvord's pro se plea to have the public defender removed as counsel and have substitute counsel appointed.

B. On the issue of incompetent counsel for not filing a notice of intent to claim insanity as a defense.

C. On the issue of failure to instruct the jury _sua sponte_ that Alvord had a past history of _mental illness_ and had previously been adjudicated insane and was presumed insane until such presumption was overcome by proof beyond every reasonable doubt that the defendant was in fact sane at the time he allegedly committed the offense for which he was on trial.

II. WHETHER THE TRIAL COURT ERRED IN DENYING ALVORD'S MOTION FOR POST-CONVICTION RELIEF ON THOSE ISSUES IT MADE NO FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT THERETO.

A. Incompetent counsel on appeal for failure to raise the following issues:

1. Whether the trial court erred in setting aside its order of committment sending defendant to the state institution for the insane for observation to determine his sanity and for denying defendant's motion for same thereby disregarding _Fla. R. Crim. P._ 3.210 and denying _Defendant's right_ to due process and fair trial.

2. Whether the trial court erred in allowing Dr. Ames Robey to examine Defendant and testify regarding Defendant's mental condition in violation of his Fifth, Sixth and Fourteenth Amendment rights and Article I, Section 9, of the _Florida Constitution_.

3. Whether the trial court erred in allowing Dr. Ames Robey to testify regarding Defendants past criminal history during the sentencing phase of the trial since this testimony violated Section 90.242, _Florida Statutes_ (1973), and _mentioned crimes for which_ Defendant had not been convicted or which were not capital felonies or felonies involving the use or threat of use of violence to another person in violation of Section 921.141, _Florida Statutes_ (1973).

B. Denial of Adequate Psychiatric Examination.

C. _Miranda_ violation.

D. Death penalty unconstitutional as applied.

E. Death penalty violates equal protection.

F. Death penalty-coerced guilty pleas.

G. Death penalty "too great" in this case.

H. Section 921.141, Florida Statutes (1973) violates Article V, Section 2(a) of the Florida Constitution.

I. Death Penalty arbitrarily and discriminatorily imposed.

J. Witherspoon: Jury selection process in this case produced a death prone jury.

K. Unfettered judicial discretion in the imposition of this death sentence.

L. Restriction of consideration of mitigating circumstances.

The denial of the motion for post-conviction relief was affirmed by the Florida Supreme Court on April 9, 1981. Alvord v. State, 396 So.2d 184 (Fla. 1981).

A death warrant authorizing the Superintendent of Florida State Prison to execute Alvord was signed by the Honorable Bob Graham, Governor of the State of Florida, and Petitioner was scheduled to be executed on May 6, 1981.

On April 21, 1981, Alvord filed a Petition for leave to proceed in forma pauperis, a Petition for Writ of habeas corpus pursuant to 28 U.S.C. Section 2254 and Application for a stay of execution in the United States District Court for the Middle District of Florida, Tampa, Division (R. 1 - 48).[1] The Petition for writ of habeas corpus raised the following grounds:

I. INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON APPEAL.

II. DENIAL OF ADEQUATE PSYCHIATRIC EXAMINATION.

III. USE OF UNDISCLOSED MATERIAL BY THE FLORIDA SUPREME COURT: THE BROWN ISSUE.

IV. MIRANDA VIOLATION.

V. DEATH PENALTY UNCONSTITUTIONAL AS APPLIED.

VI. DEATH PENALTY VIOLATES EQUAL PROTECTION.

VII. DEATH PENALTY-COERCED GUILTY PLEAS.

VIII. DEATH PENALTY "TOO GREAT" IN THIS CASE.

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1 Reference is to the record on appeal in Alvord v. Wainwright, 11th Cir. Case No. 83-3345, U.S.D.C., Middle District of Florida, Tampa Division, Case No. 81-366-CIV-T-K.

IX. DEATH PENALTY ARBITRARILY AND DISCRIMINATORILY IMPOSED.

X. JURY SELECTION PROCESS IN THIS CASE PRODUCED A DEATH PRONE JURY (WITHERSPOON).

XI. UNFETTERED SENTENCING DISCRETION AND NON-STATUTORY AGGRAVATING FACTORS.

XII. RESTRICTION OF CONSIDERATION OF MITIGATING CIRCUMSTANCES (LOCKETT).

An evidentiary hearing was held in this cause on May 13, and 14, 1982. On March 23, 1983, the district court entered an order setting aside Alvord's death sentence based on the trial court's consideration of a non-statutory aggravating factor; denying habeas corpus relief on Alvord's claims challenging the constitutionality of his conviction, and directing the State of Florida to conduct a new sentencing hearing on Alvord in a timely fashion. Alvord v. Wainwright, 564 F.Supp 459 (MD Fla. 1983). Wainwright appealed to the Eleventh Circuit Court of Appeals that portion of the District court's order setting aside Alvord's death sentence. Alvord took a cross-appeal to the Eleventh Circuit raising six issues. These were:

I.

WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT GARY ELDON ALVORD RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

II.

WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT GARY ELDON ALVORD RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

III.

WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT GARY ELDON ALVORD RECEIVED AN ADEQUATE PSYCHIATRIC EXAMINATION FOR THE PURPOSE OF DETERMINING COMPETENCY TO STAND TRIAL AND SANITY AT THE TIME OF THE TRIAL.

IV.

WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT PETITIONER'S MIRANDA RIGHTS WERE NOT VIOLATED.

V.

WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THERE WAS NO RESTRICTION IN CONSIDERATION OF MITIGATING CIRCUMSTANCES.

VI.

WHETHER THE FLORIDA SUPREME COURT CONDUCTED AN ADEQUATE PROPOSITIONALITY REVIEW OF THIS CASE.

On February 10, 1984 the Court of Appeals entered an Order reversing that portion of the district court's order granting relief and affirming that portion of the order denying relief. Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984). A motion for rehearing and rehearing en banc was denied on April 25, 1984, after vacating and substituting an opinion relating to the Miranda issue raised by Alvord. Alvord v. Wainwright, 731 F.2d 1486 (11th Cir. 1984). Alvord then filed a Petition for Writ of Certiorari in the United States Supreme Court. That Court denied relief. Alvord v. Wainwright, Case No. 83-6807, decision filed October 29, 1984.

On November 2, 1984 the Honorable Bob Graham, Governor, State of Florida signed a death warrant authorizing the Superintendent of Florida State Prison to execute Petitioner. The warrant is effective from 12:00 p.m., Friday, November 23, 1984 until 12:00 p.m., Friday, November 30, 1984. Petitioner's execution is presently scheduled for 7:00 a.m., Thursday, November 29, 1984.

On November 16, 1984, William J. Sheppard, Esq, counsel for Alvord hand delivered a letter to Governor Graham setting forth Sheppard's belief that Alvord is presently insane and requesting that the governor examine Alvord pursuant to §922.07.

The state trial records and the transcript of the evidenitary hearings held in the federal district court disclose additional pertinent facts.

Alvord was tried in 1970 for kidnapping and rape in Michigan, found not guilty by reason of insanity, and committed to the custody of the Michigan Departmente of Mental Health. Petitioner escaped from Michigan's Ionia State Hospital in January, 1973 and eventually made his way to Tampa, Florida. He was indicted on August 1, 1973 for the june 1973 murders of three women, and Thomas Meyers, Esq., a part-time public defender in the Circuit Court for Hillsborough County, was appointed to represent him. Petitioner was found competent to stand trial. Alvord plead not guilty and took the stand at trial to present an unsupported alibi defense. The state presented circumstantial evidence, a statement made by Alvord upon his arrest,

and the testimony of Alvord's girlfriend, to whom he allegedly confessed the crimes. Alvord was convicted on all three counts of first degree murder.

Respondent will also rely on the facts set forth by the Florida Supreme Court in Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. den. 428 U.S. 923 (1976).

III

ARGUMENT

A. Section 922.07 is the sole means by which a prisoner's competency to be executed is determined.

The contention of petitioner that, separate and apart from the procedure outlined in §922.07 Fla. Stat. there is a common law right to a determination of a prisoner's competency to be executed, which as a corollary entitles him to certain due process guarantees, is erroneous. It is true that the early state judicial decisions recognized such right, and provided that application for a determination of sanity to be executed should be addressed to the trial court, "there being no statute covering the subject." Ex Parte Chesser, 93 Fla. 291, 111 So. 720, 721 (1927); State ex rel Debb v. Fabisinski, 111 Fla. 454, 152 So. 207, 211 (1933). In Hysler v. State, 136 Fla. 563, 187 So. 261 (1939), the court reaffirmed Ex Parte Chesser, supra, and again held that on the question of sanity to be executed, application should be made to the trial court for a determination.

Following the decison in Hysler, the legislature enacted what is now §922.07, Fla. Stat., which sets forth the proceedings to be followed by the Governor when a person under sentence of death appears to be insane. It is an accepted rule of statutory construction that the legislature is presumed to be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute. Mains Ins. Co. v. Wiggins, 349 So.2d 638, 642 (1 DCA Fla. 1977), Bermudez v. Fla. Power and Light Co., 433 So.2d 565, 567 (Fla. 3 DCA 1983). Aware that previously, applications for determinations of sanity to be executed were to made to the trial court, the legislature enacted a statute which decreed this function would be henceforth fulfilled by the Governor. This statute is now the

controlling law within its sphere of operation DeGeorge v. State, 358 So.2d 217, 220 (Fla. 4th DCA 1978). The governor's authority to determine sanity, with the aid of an appointed commission of three psychiatrists as outlined in §922.07, is entirely appropriate. Solesbee v. Balkcom, 339 U.S. 9 (1950). Thus, Florida has accepted the legal proposition that an insane person cannot be executed and has provided through §922.07, the means to invoke it.

In Goode v. Wainwright, 448 So.2d 999 (Fla. 1984), this Court addressed the issue, agreed "that an insane person cannot be executed," (Id. at 1001), and held that §922.07 sets forth "the procedure to be followed when a person under sentence of death appears to be insane. The execution of capital punishment is an executive function and the legislature was authorized to prescribe the procedure to be followed by the Governor in the event someone claims to be insane." Thus, in Goode this Court held under §922.07 the Governor can make the determination; Goode does not stand for the proposition that the issue of sanity to be executed can be raised independently in the state judicial system. See also Ford v. Wainwright, 451 So.2d 471 (Fla. 1984).

As respondent has discussed, §922.07 Fla. Stat. by its terms outlines the "proceedings when [a] person under sentence of death appears to be insane," and it provides the exclusive means by which the sanity of a condemned prisoner is to be determined. It does not coexist with any separate right to a judicial determiation. The statute, which delegates the function of determining sanity in these circumstances to the Governor, is akin to the clemency power which likewise reposes exclusively in the Chief executive. Sullivan v. Askew, 348 So.2d 312 (Fla. 1977); Spinkellink v. Wainwright, 578 F.2d 582, 617 - 619 (5th Cir. 1978). Since in Goode and Ford, the Florida Supreme Court held the statute comports with due process that should end the matter.

Petitioner is expected to argue that his position is somehow different because he was once found not guilty by reason of insanity in Michigan. This does not change the fact that Alvord was found competent to stand trial in the instant cause and has never prevailed on his claims that he was entitled to a more extensive psychiatric examination or that he received ineffective assistance of

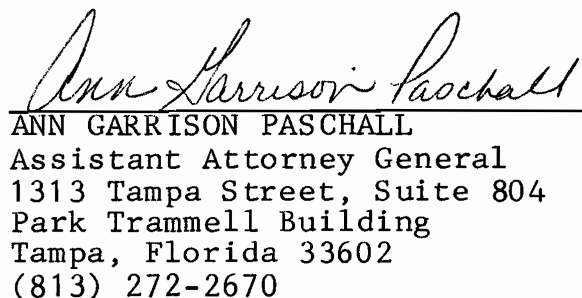
counsel. See Alvord v. State, 396 So.2d 184 (Fla. 1981). Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984).

If anything, Petitioner fails to provide a convincing explanation regarding why he neglected to present the claim of his present insanity at any stage of the extensive earlier proceedings in this cause. Nor does it explain Petitioner's failure to cooperate when the governor attempted to lay this potential claim to rest by having Petitioner examined in 1979.

WHEREFORE, based on the foregoing arguments and authorities, Respondent respectfully requests that this Court deny the instant petition and the motion for stay of execution.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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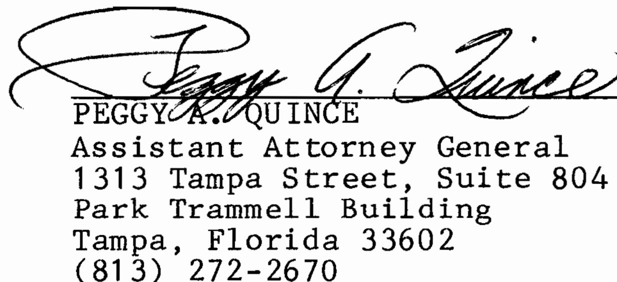

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to William J. Sheppard, Esq. 215 Washington Street, Jacksonville, Florida 32202, this 20th day of November, 1984.

OF COUNSEL FOR RESPONDENT.