IN THE SUPREME COURT OF FLORIDA

LARRY JOE JOHNSON,

Appellant,

vs. CASE NO. 66458

STATE OF FLORIDA,

Appellee.
_____/

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The Appellant, Larry Joe Johnson, was convicted of first degree murder and, in accordance with the jury's recommendation, was sentenced to death. The facts of the case are set forth in this Court's opinion in Johnson v. State, 442 So.2d 185 (Fla. 1983), cert. den., ____ U.S. ____, 80 L.Ed.2d 563 (1983).

The Governor of Florida signed a death warrant on January 3, 1985. Execution is scheduled for January 29, 1985, and the warrant expires on January 30, 1985, at noon.

On January 21, 1985, Mr. Johnson filed a "motion to vacate" which, in fact, was a motion pursuant to Fla.R.Crim.P. 3.850. A hearing on said motion was conducted on January 22, 1985 and relief was denied on the 23rd.

The motion raised ten issues. The relevant facts surrounding each are:

Facts: Grounds I and II

(non-presence of defendant)

Mr. Johnson wanted to present the testimony of Dr. McMahon, a psychologist, as proof of a mental mitigating circumstance. Johnson, by prior arrangement with his witness, agreed not to be present in the courtroom during her testimony. (R-901). Johnson, through counsel, announced the agreement to the court. (R-901). The Court heard no objection from Johnson when his lawyer made the announcement. (R-901). Johnson was told he could return whenever he felt. (R-901).

Dr. McMahon then testified that Johnson left the room because it was not to his adavantage to be present during her testimony (R-902) and that his presence could taint subsequent tests. (R-902).

In his 3.850 petition, Johnson misrepresented that he had been "involuntarily removed from the courtroom." He could not support his falsehood at the hearing.

Facts: Ground III

(exclusion of blacks)

Larry Johnson is white, so was his victim. During trial, peremptory challenges were used by the State to exclude some black and some white jurors. There was no contemporaneous "racial bias" objection. A final jury composed of a fairly even black/white division was seated.

In his 3.850 petition, Johnson misrepresented that the State used its peremptory challenges to exclude "blacks" but, in open court, confessed a dearth of proof.

Facts: Ground IV

During the penalty phase, the defense and the State announced to the court that two doctors (whom the State originally intended to use as rebuttal witnesses) had to return to their hospital in Gainesville and, by agreement, would be allowed to testify "out of turn" as a matter of courtesy. (R-779).

The court accepted defense counsel's word, and, notably,

the issue was not appealed.

Facts: Grounds V through X

The motion to vacate requested a chance to reargue points which, (1) had been argued to this court on direct appeal, and (2) additional points which were not preserved by contemporaneous objection at trial and thus were not appealed, and (3) points for which additional cumulative evidence had been located.

Finally, the trial court did not rule "on the merits" of this case. The order states that relief is denied procedurally because:

(1) Petitioner raised claims which, if preserved, could have been raised on appeal.

(2) Petitioner raised as error issues which he is estopped from presenting.

(3) Petitioner raised claims previously argued on appeal.

(4) Petitioner raised claims barred as a matter of law and/or clearly refuted by the record.

SUMMARY OF ARGUMENT

The State was served with Appellant's brief at 5:00 p.m. last evening and had to prepare a response by 3:00 p.m. today. At the outset the State regrets any coarseness in its brief or any undetected errors in citations or diction. These are the products only of a lack of time. Had Mr. Johnson brought some timely petition rather than waiting until the advent of his execution, a better brief would have resulted. Barefoot v. Estelle, ____ U.S., 77 L.Ed.2d 1090 (1983).

The petition for 3.850 relief was summarily rejected, as provided by that rule, because said petition, in addition to its misrepresentations of facts and law, did nothing more than raise arguments which (1) were already raised on direct appeal, or which (2) could or should have been raised on appeal if preserved, or (3) which Johnson was estopped from litigating.

ARGUMENT: POINT I

THE LOWER COURT PROPERLY DENIED APPELLANT AN EVIDENTIARY HEARING.

Persons moving for post conviction (3.850) relief are not entitled to an evidentiary hearing simply because a motion has been brought to the court.

Fla.R.Crim.P. 3.850, as amended effective January 1, 1985, states in relevant part:

> "This rule does not authorize relief based upon grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence."

The rule goes on to state that:

> "If the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing."

This rule, as amended, was recently utilized in disposing of similar claims raised in Raulerson v. State, ____ So.2d ____, (Fla. 1985), case no. 66,419 [January 21, 1985].

In this case, the trial court entered a detailed order which did not, as misrepresented, decide each claim on its "merits."

The order disposed of the Appellant's claims as follows:

(1) Ground One: a claim which could have been appealed, if preserved. Also, a claim refuted on its face by the record, and barred as estopped.

(2) Ground Two: an issue which could have been appealed.

(3) Ground Three: an issue refuted by the record and which should or could have been appealed.

(4) Ground Four: an issue which could or should, if preserved, have been raised on appeal.

(5) Ground Five: a collection of claims either previously appealed, available but not raised on appeal, legally meritless or disproven by the record.

(6) Ground Six: a Witherspoon claim which could have been appealed if preserved, and totally unsupported by the record.

(7) Ground Seven: an issue previously appealed to the Florida Supreme Court, containing additional claims which could have, if preserved, been appealed.

(8) Ground Eight: a claim more befitting coram nobis than 3.850 relief, seeking to relitigate issues raised on appeal.

(9) Ground Nine: a statistical claim which will not support 3.850 relief as a matter of law. [This issue also could, if preserved, have been raised on appeal, incidentally].

(10) Ground Ten: an issue previously raised on direct appeal.

The Court's order included relevant record excerpts conclusively refuting false claims of "involuntary removal from the courtroom" and some "improper" leave to call state witnesses out of turn. Also appendixed was the argument portion of Johnson's brief.

The remaining issues were refuted by the absence of record objections or proffers.

It is interesting to note that at the same time Johnson is misrepresenting some entitlement to an evidentiary hearing on

his 3.850 petition he has also filed a habeas corpus petition alleging ineffective assistance of appellate counsel for not raising several of these same issues on appeal! Thus, Johnson concedes his lack of standing, (entitlement) for an evidentiary hearing.

The lower court was clearly justified in summarily rejecting this case. Christopher v. State, 416 So.2d 450 (Fla. 1982); Palmes v. State, 425 So.2d 4 (Fla. 1983); see also Demps v. State, 416 So.2d 808 (Fla. 1982).

A. VOLUNTARY WITHDRAWAL

The Appellant contends that he was involuntarily removed from the courtroom during the testimony of his own witness, Dr. McMahon.

The Appellant's 3.850 petition grossly misrepresented that his withdrawal was (a) involuntary and (b) a removal. This, as Appellant is well aware, is not true.

The truth, as clearly shown at (R-901-902) is that Johnson, through counsel, asked to leave the courtroom pursuant to a "prior arrangement" with his own witness. Johnson never contested his lawyer's request. The reason for the agreement was set forth by Johnson's witness, Dr. McMahon. She testified that "subsequent testing" could be adversely affected by Johnson's exposure to his charts in open court, and that his presence would not be in his best interest!

No claim of ineffective assistance of trial counsel has been asserted. In addition, we must presume competent counsel:

(a) discussed this with his client.

(b) used the pronoun "we" in reference to his client, the witness and himself.

(c) had prior knowledge of this witness' testimony since she was his witness.

(d) had no need of Mr. Johnson's advice regarding the proper method of questioning his own witness.

Similarly, since she was a friendly witness, Johnson did not need to "confront" her.

On appeal, the factual misrepresentation has been partially abandoned (although the phrase "involuntarily removed" still appears) in favor of a claim regarding Fla.R.Crim.P. 3.180.

The lower court's consideration of that rule did not require an evidentiary hearing (thus we have no reversible error) because the argument presumes voluntary withdrawal from the courtroom.

The voluntary withdrawal of the defendant without a special 3.180 based inquiry was an issue which could, if preserved, have been raised on appeal -- as conceded by Johnson in his Habeas Corpus petition. Thus, no entitlement to relief existed. Raulerson v. State, supra.

More important may be the nature of this claim.

In Richardson v. State, 246 So.2d 771 (Fla. 1971), this court declared that the rules of criminal procedure do not exist to create "procedural escape hatches" for clever defendants. The violation of a mere rule of criminal procedure does not

constitute fundamental error, per se, in any event.

In this case, any "error" regarding Rule 3.180[1] was provoked by the Appellant. If the trial court granted his request, this claim was set up as a consequence, had the request been denied, a "due process" claim alleging judicial interference with a defense witness would have been forthcoming -- along with some affidavit from Dr. McMahon regarding "what I could have said on Johnson's behalf."

Johnson and his attorney, whose competence is unquestioned, deemed it to be a necessary strategy to have Johnson leave the room while his doctor provided candid, exculpatory, testimony.

It is to the credit of Mr. Hunt and appellate counsel that they had the ethics not to raise a 3.180 claim on direct appeal.

In Curry v. Wilson, 405 Fed.2d 110, 113 (9th Cir. 1968), the court said:

> "It would be a perversion of the judicial process to now give Curry the best of two worlds upon the basis of such an alleged statement by his counsel."
>
> "A contrary result would enable counsel for a defendant to try one strategy by deliberately using, for his client's benefit, evidence that could be claimed to be constitutionally tainted and then, if not satisfied with the result, to get a second trial by claiming that the constitutional

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1 The state does not agree Rule 3.180 has been violated. The rule does not address nor seek to regulate strategic decisions by defendants.

> taint required a reversal dispite his tactical decision."

Similarly, in Spaziano v. Florida, ____ U.S. ____, 82 L.Ed. 2d 340 (1984), the Supreme Court found no basis for relief in Spaziano's being "forced" to waive a "limitations" defense in exchange for lesser-offense instructions "required" by Beck v. Alabama, 447 U.S. 625 (1980).

The Supreme Court said that we must look past the verbiage of given "rules" to get to the reasons for those rules and the effect of any rule (or deviation) on the fact finding process and the reliability of any result! (The Court noted that the giving of Beck instructions would "hoodwink" the jury, so the requested waiver of the limitations defense, and Spaziano's tactical "walk or burn" refusal to accept the offer, did not constitute error.).

One would hope lawyers, as officers of the court, would not engage in misrepresentations or sandbagging. Mr. Hunt, as an officer of the court, made a truthful representation of an agreement between counsel, client and witness for the benefit of the defendant. Johnson never objected to this representation. Estelle v. Williams, 425 U.S. 501 (1976).

When this issue was raised in a belated effort to stay Johnson's execution, the trial court was presented with an issue which counsel was estopped from raising on appeal but, had there been some objection or error, which could have been raised on appeal.

Obviously, summary denial was in order.

Finally, Appellant now represents that "the Eleventh Circuit has repeatedly held the defendant's right to be present at a capital trial is so fundamental that it cannot be waived." (Brief, p. 23).

His cited cases, Proffit v. Wainwright, 685 Fed.2d 1227 (11th Cir. 1982) modified on reh'g, 706 Fed.2d 311 (11th Cir. 1983), cert. den., ____ U.S. ____, 104 S.Ct. 508, 78 L.Ed.2d 697; and Hall v. Wainwright, 733 Fed.2d 766 (11th Cir. 1984) do not support this contention.

Originally, Proffitt said waiver was impossible, but altered its opinion to delete this "absolute" rule on rehearing. Hall, (cert. pending), involves a current Eleventh Circuit case which, if affirmed, involves a remand for the purpose of determining the existence of a voluntary waiver. If a voluntary waiver is impossible, why the remand?[2]

Again, this issue is argued at length in the accompanying habeas corpus petition. As far as 3.850 relief is concerned, the issue was not properly before the court. No express violation of a procedural rule occurred. No claim of entitlement to relief may stem from invited error. As a matter of law, Johnson was not entitled to relief from his tactical decisions.

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2 Note that Appellant's cases of Francis and Herzog did not involve voluntary, announced, withdrawals from the courtroom by a (present) defendant.

POINT II

THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES DID NOT AFFORD A BASIS FOR RELIEF.

The Appellant, who is white, (as was his victim) had the affrontery, in possible violation of EC 7-26 and EC 7-27, to represent that the prosecutor used his peremptory challenges to exclude black veniremen on the basis of their race. The Appellant admitted he had no evidence on which to base this unwarranted attack on the integrity of counsel and also conceded that at least three of the State's peremptory challenges were used to exclude white veniremen. (There is no allegation that Mr. Blair is color blind).

The final jury, incidentally, was composed of 5 to 7 blacks and 5 whites.

There was never any allegation of racial bias against any particular juror, black or white. Nor was the peremptory exclusion of a black venireman by defense counsel raised as a racially motivated decision.

Had there been misconduct, and had there been some objection thereto by competent defense counsel, the issue could have been raised on appeal whether or not present counsel agrees with Swain v. Alabama, 380 U.S. 202 (1965).

Given the admitted lack of proof, the unsupported and scandalous nature of the attack, and the availability of this issue (had it existed or been preserved) for direct appeal,

relief pursuant to Fla.R.Crim.P. 3.850 was properly, summarily, denied.

The Appellant, of course, does not mention that State v. Neil, 457 So.2d 481 (Fla. 1984) does not have retroactive application.

POINT III

RELIEF WAS PROPERLY DENIED ON APPELLANT'S CLAIM THAT HE HAS ACCUMULATED MORE EVIDENCE OF POST-TRAUMATIC STRESS DISORDER.

Mr. Johnson's allegedly "traumatic" Vietnam experience of having a prostitute pull a knife on him and seeing a vehicle hit a land mine and his subsequent National Guard accident (getting hit in the head with a "smoke grenade", a non-explosive tin can) were considered by four expert witnesses[3], the sentencing judge and the advisory jury. The issue of mitigation was considered on appeal by this Court.

Johnson petitioned for relief on the theory that his accumulation of additional "PTSD" material and the prospect of different testimony by one psychiatrist entitled him to relief. The Appellant failed to represent that his "PTSD" material dates

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[3] Both psychiatrists and Defense witness Dr. Figley agreed that no direct link between the crime and these incidents exists.

back to the bombing of Hiroshima, and was entirely available at the time of this trial.

In Booker v. State, 413 So.2d 756 (Fla. 1982), this Court held that a claim such as this would not support a petition for 3.850 relief. See also Smith v. State, 400 So.2d 956 (Fla. 1981). New interpretations of extant data do not constitute "newly discovered evidence" either, thus precluding alternative "coram nobis" relief. Booker v.State, supra. Both of these cases were relied upon sub judice, and 3.850 relief was summarily denied. Of course, issues previously argued on appeal cannot be reargued by 3.850.

POINT IV

THE TRIAL COURT PROPERLY REJECTED FACTUALLY AND LEGALLY MERITLESS CLAIMS WHICH EITHER WERE RAISED ON DIRECT APPEAL OR COULD HAVE BEEN RAISED ON DIRECT APPEAL.

Johnson's Petition raised issues which were factually unsupported, legally meritless, already appealed (in some instances) or waived for want of objection (at trial) or presentment on appeal. This "grab-bag" of claims was properly rejected on procedural grounds. Fla.R.Crim.P. 3.850, Raulerson v. State, supra; Christopher v. State, supra.

Taken seriatim:

(1) The arguments of the State Attorney, if offensive in every reported instance,

were appealed or were unavailable for review for want of any contemporaneous objection.

(2) The "Witherspoon" issue was never preserved by contemporaneous objection and is, in any event, unsupported by the record. Wainwright v. Witt, ____ U.S. ____, (1985), case no. 83-1427, January 21, 1985.

(3) The claim that the jury was "misled" in being told its sentencing verdict was advisory and that it should be reached by majority vote was rejected by the court as legally meritless. Smith v. State, ____ So.2d ____ (Fla. 1984), 9 FLW 442, and as one which could have, if preserved, been appealed.

Here, it must be noted that if every perceived error is to be deemed "fundamental," thus sidestepping Rule 3.850, as suggested by Appellant, then this "fundamental" error could have been raised on direct appeal and thus revives the procedural bar of Rule 3.850.

The Appellant contends that the giving of correct jury instructions was fundamental error, knowing this to be untrue.

The Appellant contends that his arguments regarding unobjected-to instructions and/or arguments constitute fundamental error just because he alleges, post-appeal, the existence of fundamental error. He, of course, carefully omits any reference to Clark v. State, 363 So.2d 331 (Fla. 1978) or Castor v. State, 365 So.2d 701 (Fla. 1978) or this Court's decision in this case on direct appeal. He also fails to show error or demonstrable bias.

POINT V

THE APPELLANT'S REPRESENTATION IS IN ERROR.

Johnson stipulated to the calling of two state psychiatrists as witnesses, out of order, as a matter of professional courtesy. Thus, the so-called "anticipatory rebuttal".

The misrepresentation that Battie v. Estelle, 655 Fed.2d 692 (5th Cir. 1981) cannot stand unprotested. That case clearly states:

> "Accordingly, a defendant can invoke the protection of the privilege when he does not introduce mental health expert testimony." (id., at 702, emphasis added).

The record shows that the only reason the State's experts testified first was that, as a matter of courtesy, (so they could return to Gainesville) both lawyers agreed to let them.

This agreed act cannot be perverted (Curry, supra) into some claim of constitutional error just because the State's experts testified first.

In any event, either estoppel or the availability of this issue for appellate review precluded 3.850 relief.

As Appellant notes, Battie can be applied to pre-1981 cases because it merely affirmed pre-existing law and did not create "new" rights. Thus, the issue could and should have been appealed, if preserved, and 3.850 relief is unavailable.

POINT VI

THE TRIAL COURT PROPERLY DENIED REVIEW TO ISSUES PREVIOUSLY APPEALED OR FOR WHICH APPELLATE REVIEW WAS AVAILABLE.

Rather than redundantly create additional "points" reiterating the same principal, suffice it to say that Fla.R.Crim.P. 3.850 simply does not permit endless reargument of complaints raised on appeal (such as whether mitigating circumstances were properly weighed, found or rejected) or de novo assertion of waived appellate issues.

The Appellant is aware of the rule, and is aware that his petition was rejected for its facial deficiency and procedural defaults (or errors) and not on the "merits" of each claim as alleged.

POINT VII

THE WITHERSPOON ISSUE IS NOT A VIABLE BASIS FOR 3.850 RELIEF.

Appellant fails to mention that no "Witherspoon" objection was raised in reaction to the exclusion of veniremen Stephenson and Bellamy. Appellant also neglects to mention that his "Witherspoon" claim has been eliminated, not preserved, by operation of Wainwright v. Witt, ____ U.S. ____ (1985), case no. 83-1427, (January 21, 1985), (which holds that jurors may be

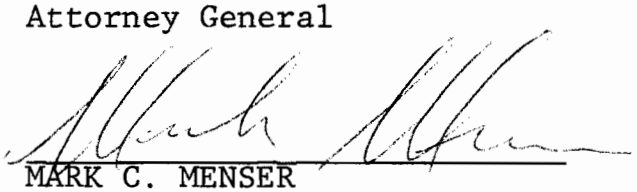
excused for cause even when their "transcript responses" use "indefinite" language -- because the trial judge who observes the juror is in a better position to guage the juror's bias.)

CONCLUSION

Fla.R.Crim.P. 3.850 does not exist as a substitute for appeal or a vehicle to raise issues that (1) were not argued on direct appeal or (2) could have been argued on appeal, if preserved or (3) were unsuccessfully argued on direct appeal.

Respectfully submitted,

JIM SMITH
Attorney General



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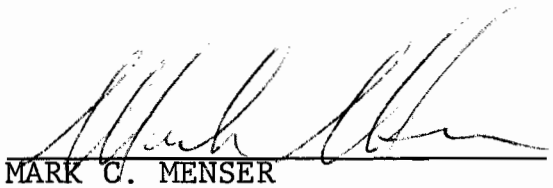
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee has been forwarded by hand delivery to Counsel for Appellant, Baya Harrison, The Murphy House, 317 East Park Avenue, Tallahassee, Florida 32301, this 25th day of January, 1985, and by U.S. Mail to Steve Seliger, Post Office Box 324, Quincy, Florida 32351, this 25th day of January, 1985.



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