IN THE SUPREME COURT OF FLORIDA

Case No. 66859

RAYMOND ROBERT CLARK,

Appellant,

-v-

STATE OF FLORIDA,

Appellee.

EMERGENCY APPEAL FROM THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR PINELLAS COUNTY
CRIMINAL DIVISION

INITIAL BRIEF OF APPELLANT

NEAL R. LEWIS
1899 South Bayshore Drive
Miami, Florida 33133
(305) 854-0050

RICHARD HERSCH
5901 S.W. 74th Street
Suite 300
Miami, Florida 33143
(305) 667-1009

PATRICE TALISMAN
169 East Flagler Street
Suite 1414
Miami, Florida 33141
(305) 374-8171

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

ADDITIONAL AUTHORITIES

INTRODUCTION

The appellant, RAYMOND ROBERT CLARK, was the defendant in the trial court and was prosecuted by the appellee, the State of Florida. These parties will be referred to as the appellant and the appellee respectively. The record of the trial will be designated by the symbol "O.R." and the record of the proceedings on appellant's 3.850 motion by the symbol "R". All emphasis is added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellant and co-defendant, Ty Johnston, were charged with the kidnapping and murder of David G. Drake on April 27, 1977. At trial, Johnston's testimony formed the basis of the appellee's case. Johnston had previously entered into plea negotiations with the appellee allowing him to plead guilty to second degree murder in order to avoid the possibility of a death sentence and twenty-five year minimum mandatory sentence. (O.R. 1366) In exchange for his plea, Johnston agreed to testify on behalf of the appellee and against Raymond Clark. (O.R. 1367)

Johnston's testimony related that he and Clark sought to obtain funds for their return to California on April 27, 1977. (O.R. 1367-69) They drove into several bank parking lots in search of a potential victim, eventually abducting a bank patron. (O.R. 1373) Johnston testified that he drove Clark's Blazer while Clark directed the victim to drive to several secluded areas. (O.R. 1375-6) It was at one of these areas that the victim's body was eventually found.

While evidence was presented that Raymond Clark made efforts to cash a check drawn on the victim's bank account and that Clark attempted to extort money from the victim's family, the only evidence bearing directly on the events immediately preceding the victim's death came from Ty Johnston. Raymond Clark presented no defense at trial, nor was any evidence offered in the sentencing phase of the proceedings.

Although Johnston's testimony was that Raymond Clark fired the fatal shots, Mr. Clark, at sentencing, stated to the court that, in fact, it was Johnston who killed the victim. The killing was not planned, intended or contemplated by Raymond Robert Clark, nor did he expect Johnston to use lethal force.

As previously set forth in the initial appeal before this Court, the facts reveal that trial commenced on September 20, 1977, after jury selection. On September 25, 1977, appellant Raymond Robert Clark was convicted in the Circuit Court on one count of murder in the first degree, kidnapping and extortion in violation of §782.04(1), §787.01, and §836.05, Florida Statutes respectively. Following the jury's verdict, on the 26th day of September, 1977, the court conducted a separate sentencing proceeding before the trial jury as required by §921.141, Florida Statutes, Appointed counsel's trial partner, Martin Murry, presented an allocution to the court in support of mitigation, however, no witnesses were called during this phase of the proceedings.

The trial court instructed the jury as to their responsibilities in determining whether sufficient mitigating

factors existed as it related to their decision regarding the death penalty or life imprisonment. The court also instructed the jury that they were limited to the seven mitigating factors established by the Florida Statute 921.141(6). Trial record 3201-3202. The jury then retired, thus instructed, and returned a verdict recommending the death of Raymond Clark.

Trial counsel believed, based upon her extensive trial experience in this Circuit, and consultations with several attorneys who had reached the penalty stage in capital cases, that the defendant was limited to presentation of facts relating directly to the mitigating factors enumerated by statute. (See Record of 3.850 hearing March 23, 1983, at page 81; Affidavit of counsel, Appendix IX.)

Mr. Clark was also sentenced to life on the kidnapping count and 15 years on the extortion count. The extortion and kidnapping sentences were to run consecutively. (O.R. 1478-9)

A motion for new trial was timely filed and the same was denied by the trial judge on October 24, 1977. Appeal was taken to the Supreme Court of Florida, pursuant to Florida Rules of Appellate Procedure, 9.030(a)(1)(A)(i). The judgment and sentence were affirmed by the Supreme Court of Florida on November 21, 1979. (379 So.2d 97). A petition for rehearing was denied February 18, 1980.

Pursuant to Rule 3.850, Fla.R.Cr.P., motion was filed with the trial judge to vacate the sentence imposed. Hearing on the motion was held on March 23, 1983. This motion was denied by order dated July 8, 1983. An appeal to the Supreme Court of

Florida, pursuant to Rule 9.030(a)(1)(A)(i) was filed on July 13, 1983. This Court denied the appeal of the initial 3.850 motion on October 18, 1984 (Clark v. State, 460 So.2d 886 (Fla. 1984)); rehearing was denied January 15, 1985.

On April 8, 1985 Clark filed his second 3.850 motion based upon significant changes in the law since his initial 3.850 motion. A hearing was scheduled before the Honorable Judge Robert E. Beach, to determine whether an evidentiary hearing was required on this new motion. Argument was held April 10, 1985, at 2:00 p.m. At the time of this writing it was assumed that either the state or the defendant would appeal Judge Beach's ruling. Assigned counsel were informed that this cause would be argued orally before this Court at 8:00 a.m., on April 12, 1985. Due to the emergency nature of this appeal, certain record references were unavailable and the appeal brief itself is merely a "bare bones" attempt to invite the Court's attention to these recent Supreme Court decisions which substantially effect the constitutional rights denied appellant.

ARGUMENT

I.

THIS COURT'S REFUSAL TO ALLOW APPELLANT A CONFIDENTIAL PSYCHIATRIC EXPERT VIOLATED CLARK'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION.

On February 26, 1985, the United States Supreme Court announced its decision in Ake v. Oklahoma, 53 U.S.L.W. 4179 (U.S.S.Ct. Feb. 26, 1985) reversing 663 P.2d 1 (Okla. 1983). The holding of that decision is that

> when a defendant demonstrates to a trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense.

53 U.S.L.W. at 4183.

This holding is based on the recognition that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding it must take steps to assure that the defendant has a fair opportunity to present his defense. This principle, in turn, is grounded on the Fourteenth Amendment's guarantee of fundamental fairness. This guarantee derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake. Id. at 4181. In this context meaningful participation means that a State must provide an indigent defendant access to the raw materials integral to the building of an effective defense -- the State must provide the basic

tools of an adequate defense. Id at 4181-4182. (See also Affidavit of Dr. Owen E. Heninger, Appendix X.)

Where the defendant's mental condition is in question, the participation of a psychiatrist in the preparation of the defense is one of these basic tools:

> . . . when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, both through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, Solesbee v. Balkcom, 339 U.S. 9, 12 (1950), and tell the jury why their observations are relevant. . . . Through this process of investigation, interpretation and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.
>
> * * *
>
> By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them. It is for this reason that States rely on psychiatrists as examiners, consultants, and witnesses, and that private individuals do as well, when they can afford to do so. In so saying, we neither approve nor disapprove the widespread reliance on psychiatrists but instead recognize the unfairness of a contrary holding in light of the evolving practice.
>
> The foregoing leads inexorably to the conclusion that, without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense,

> to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. [footnote omitted]

53 U.S.L.W. 4182, 4183 (1985).

This tool is essential to the defense in both the guilt and the sentencing phases.

Thus, the State has the obligation to provide an indigent defendant a psychiatrist not only to conduct an examination but also to "assist in [the] evaluation, preparation and presentation of the defense" (53 U.S.L.W. at 4185) -- to gather facts, analyze information, help determine whether the insanity defense is viable, help defense counsel prepare for cross-examination of the State's psychiatrists, and interpret the answers of those psychiatrists.

This conclusion is clear not only from the language of the opinion cited above, but also from the court's disagreement with United States ex rel Smith v. Baldi, 344 U.S. 561 (1953), and Justice Rehnquist's dissent. In Smith, a neutral psychiatrist examined the defendant as to his insanity and testified at trial. On that basis, the Court found that no additional assistance was necessary. Thirty years later, however, the Court in Ake, held that Smith is not controlling:

> That case was decided at a time when indigent defendants in state courts had no constitutional right to even the presence of counsel. Our recognition since then of elemental constitutional rights, each of which has enhanced the ability of an indigent defendant to attain a fair hearing, has signaled our increased commitment to assuring meaningful access to the judicial process. Also, neither trial practice nor legislative treatment of the role of insanity in the criminal process sits paralyzed simply because this Court has once addressed them, and we would

> surely be remiss to ignore the extraordinarily enhanced role of psychiatry in criminal law today. Shifts in all these areas since the time in Smith convince us that the opinion in that case was addressed to altogether different variables, and that we are not limited by it in considering whether fundamental fairness today requires a different result.

53 U.S.L.W. at 4184.

Second, Justice Rehnquist in his dissent stated:

> Finally, even if I were to agree with the Court that some right to a state-appointed psychiatrist should be recognized here, I would not grant the broad right to 'access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.' Ante, at 13. Since any 'unfairness' in these cases would arise from the fact that the only competent witnesses on the question are being hired by the State, all the defendant should be entitled to is one competent opinion -- whatever the witness' conclusion -- from a psychiatrist who acts independently of the prosecutor's office. Although the independent psychiatrist should be available to answer defense counsel's questions prior to trial, and to testify if called, I see no reason why the defendant should be entitled to an opposing view, or to a 'defense' advocate. (Emphasis in the original.)

Thus, it is clear that Ake stands for the proposition that an indigent defendant is denied due process when he is not provided with a psychiatrist to assist in the evaluation, preparation, and presentation of the defense. Provision of a psychiatric examination by the State is not sufficient to meet the requirements of due process.

APPLICATION OF AKE TO INSTANT CASE

The Ake court's holding requires that a defendant make a threshold showing to the trial court that his sanity is likely to be a significant factor in his defense. At that point, the

need for the assistance of a psychiatric expert in the trial state is apparent:

> It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance the defendant might have a reasonable chance of success.

53 U.S.L.W. at 4183.

In the instant case it is clear that the threshold test was met by the defendant. Trial counsel was aware of the prior opinion rendered by Dr. Heninger. Additionally, the defendant's appearance and his adamant refusal to conform his appearance for trial alarmed counsel. During voir dire, defendant's own counsel referred to the defendant as a "Charles Manson look alike" and a "California weirdo." (This reference was seized upon and used by the prosecutor in the penalty phase of the trial. Record 3171. See also, defense counsel's reference in the penalty phase to the defendant "looking like a California cuckoo or weirdo". Record 3196.) It was noted in the trial Court's order of July 8, 1983 that Susan Schaeffer is held in high regard as a trial advocate and as an attorney. It cannot be said that Ms. Schaeffer would file a motion for a psychiatric expert unless she had a well-founded reason to believe one necessary.

The record reveals that Judge John S. Andrews was not willing to provide, at State expense, a psychiatrist for a confidential examination of the defendant. Perhaps anticipating a fundamental change effecting the constitutionality of this appointment, Judge Andrews stated, in response to counsel's

authority for the appointment being the Fourteenth Amendment as follows:

> THE COURT: Then let the Supreme Court decide that, Ms. Schaeffer. Okay? This is what they get paid for.

Record 3228.

The court felt that a psychiatrist would be required to give his report not only to the defense counsel, but to the court and more importantly, the prosecutor as well. This was not what defense counsel had requested, and this is the need to which Ake speaks. Defense counsel was merely requesting the tools necessary for preparation of the case. The purpose of the psychiatric expert was to evaluate the merits of and to assist in the preparation of an insanity defense, and to assist at the sentencing phase. Significantly, it was the confidentiality of the expert that was at issue at hearing on defendant's motion for psychiatric expert, not that a psychiatric expert was needed.

Just as the court opined in Gideon v. Wainwright, 372 U.S. 335 (1963), a defendant charged with a crime who has the wherewithal will hire the best lawyer available to prepare and present his defense. There are few, if any, pecunious defendants charged with capital crimes who would fail to obtain the services of a mental health professional to assist them if their only serious avenue of defense to those charges was one based upon the defense of insanity. This issue has previously been raised and dismissed by this Court.

The absence of an expert witness, as in the instant case, "goes to the very trustworthiness of the criminal justice

process." United States v. Theriault, 440 F.2d 713, 717 (5th Cir. 1971), cert. denied 411 U.S. 984 (1973). Individual attorneys, no matter how skilled in the law, are not experts as to an individual's psychiatric problems or mental deficiencies. As the Supreme Court has stated, the symptoms of insanity are "elusive and often deceptive." Solesbee v. Balkcom, 339 U.S. 9, 12 (1950). Elements of a patient's medical or personal history that may seem insignificant to a lawyer, may have great meaning to a psychiatrist or psychologist; without an expert's help a lawyer may not know what questions should be asked. (Cf. Goldstein & Fine, The Indigent Accused, the Psychiatrist, and the Insanity Defense, 110 U. Pa. L. Rev. 1061, 1066 (1962).

The United States Supreme Court's opinion in Ake also stressed the importance of a psychiatric expert at the sentencing stage of the capital case:

> We have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case. The State, too, has a profound interest in assuring that its ultimate sanction is not erroneously imposed, and we do not see why monetary consideration should be more persuasive in this context than at trial. The variable on which we must focus is, therefore, the probable value that the assistance of a psychiatrist will have in this area, and the risk attendant on its absence.
>
> This Court has upheld the practice in many States in placing before the jury psychiatric testimony on the question of future dangerousness, see Barefoot v. Estelle, 463 U.S. 800, 896-905 (1983), at least where the defendant has had access to an expert of his own, id., at 899, n.5. In so holding the Court relied, in part, on the assumption that the fact finder would have before it both the views of the prosecutor's psychiatrist and the 'opposing views of the defendant's doctors' and would therefore be competent to 'uncover, recognize, and take due account of. . . shortcomings' and predictions on this point. Id. at 899. Without a psychiatrist's assistance, the defendant cannot offer a well informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating

> factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.

53 U.S.L.W. at 4183.

To that end, expert assistance is no less essential and therefore must be no less available at sentencing, than it is at trial:

> A capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format . . . that counsel's role in the proceeding is comparable to counsel's role at trial -- to ensure that the adversarial testing process works to produce a just result under the standards governing decision. Strickland v. Washington, __U.S.__, 80 L.Ed.2d 674 at 693.

As with Ake, supra, Clark needed a psychiatrist at the time of sentencing to set forth at least three statutory mitigating factors as well as non-statutory mitigating factors. The failure to have an independent psychiatric expert was compounded in that the prosecutor, noting that his argument could not be refuted in the penalty phase, stated as follows:

> . . . Dr. Heninger did not say he was suffering at this time. There were no doctors appointed in this case to make that determination . . .

(Record 3181-3182 attached as Appendix VIII.) Thus, the absence of a psychiatric expert on the defense team was clearly prejudicial to the defendant.

RETROACTIVITY OF AKE

This Court has set forth the criteria for retroactive application of law changes with respect to post-conviction relief. In Witt v. State, 387 So.2d. 922, 931 (Fla. 1982) the Court stated as follows:

> To summarize, we today hold that an alleged change of law will not be considered in a capital case under Rule 3.850 unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.

This Court then went on to state that most of the law changes of "fundamental significance" will fall within two broad categories:

> The first are those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties. This category is exemplified by Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), which held that the imposition of the death penalty for the crime of rape of an adult woman is forbidden by the eighth amendment as cruel and unusual punishment. The second are those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter. Gideon v. Wainwright, of course, is the prime example of a law change included within this category.

Id. at 929.

It is apparent that the instant case does not fit into the first category. This Court has noted that the essential considerations under the second category delineated by Storwall and Linkletter, in determining whether retroactive application, are essentially these:

> a) The purpose to be served by the new rule; b) the extent of reliance on the old rule, and; c) the effect on the administration of justice of a retroactive application of the new rule.

Witt v. State, 387 So.2d at 926. In the instant case an examination of these factors mandates retroactivity.

The purpose to be served by the rule is that of enhancing the truthfinding process in a capital trial. The United States Supreme Court in addressing this interest stated:

> The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. 53 U.S.L.W. at 4182.

This can be no less so in a capital case. Notwithstanding this Court's previously stated affinity for decisional finality, it makes little sense to press for finality where an uninformed decision has been made.

As to the next factor, there is virtually no reliance on the rule in existence before Ake. First, it has been nearly five years since the relief requested by Clark in Ake has been mandatory in Florida. Just six months after this Court denied Clark relief on his direct appeal, Fla.R.Cr.P. 3.216 was placed into effect. In re Rules of Criminal Procedure, 389 So.2d 610 (Fla. 1980). Second, decisional law in Florida had existed since December, 1977 allowing for appointment of an independent psychiatric expert. Pouncy v. State, 353 So.2d 640 (Fla. 3d DCA 1977). Consequently, it is clear that there is currently no reliance at all on the pre-Ake, pre-Pouncy rule.

Finally, the impact on the administration of justice should retroactive effect be given to Ake is, at worst, minimal. For the past five years, the relief requested by Clark has been routinely given. There are few defendants, if any, whose cause is still being litigated that could take advantage of a retroactive application of Ake.[1] Obviously there is no

---

[1] This Court could, quite reasonably, require that a request of Ake relief had been made at the trial level and preserved on appeal. See Toscano v. State, 393 So.2d __ (Fla. 1980).

floodgate of defendants which would be opened by giving retroactive application in this case. It is believed that Clark may be the only litigant to have preserved the issue of the appointment of a psychiatrist to assist in his defense.

It cannot be ignored that Clark's raising of the instant issue is not of recent date. Clark didn't just "jump on the bandwagon". Trial counsel astutely perceived the need for a psychiatric expert and an impending change of law. To deny Clark this relief, needed to make his trial and sentencing a fair truth finding process, simply because he was a little ahead of time in his request, would in and of itself constitute a denial of due process rights and a denial of the fundamental fairness guaranteed a defendant under the Fourteenth Amendment.

Based upon their ruling in Ake, supra, the Supreme Court, in the case of Bowden v. Francis, Warden, __U.S.__ slip opinion 83-7032 (March 25, 1985), vacated the judgment and remanded the case to the United States Court of Appeals for the Eleventh Circuit, for further consideration. The facts of Bowden, supra, are almost indistinguishable from those in the instant case. Due to these recent decisions, appellant is required to have the facts of his case reviewed in light of the Supreme Court's dictate.

ARGUMENT II.

THE DEFENDANT WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS DUE TO THE OPERATION OF STATE LAW WHERE HIS COUNSEL JUSTIFIABLY LABORED UNDER THE ASSUMPTION THAT SHE WAS PRECLUDED FROM PRESENTING ANY MITIGATING CIRCUMSTANCES AT SENTENCING OUTSIDE OF THOSE ENUMERATED IN FLORIDA STATUTES 921.141(6).

Both Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) recognize a capital defendant's constitutional right to a sentencing determination in which the admissibility of evidence in mitigation of sentence is unrestricted. Yet, in the instant case, defendant's counsel was operating on the assumption that evidence of non-statutory mitigating circumstances was inadmissible. However reasonable that assumption might have been as a matter of statutory interpretation, as well as review of pertinent case law, it operated to preclude petitioner's counsel from presenting, the judge from admitting, and the jury from considering mitigating evidence relevant to the sentencing decision. These preclusions therefore violated petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

It must be recognized that defendant's claims rest upon two separate bases. First, state law precluded the presentation of evidence outside of the specifically enumerated mitigating factors. Cooper v. State, 336 So.2d 1133 (Fla. 1976). Second, inasmuch as counsel labored under the assumption that she was so precluded, state law rendered her ineffective and violated the

defendant's rights under the Sixth and Fourteenth Amendments. Significantly it must be noted that the identical post-Cooper, pre-Lockett situation is being reviewed by an en banc panel of the Eleventh Circuit. Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984) rehearing en banc granted January 8, 1985, case number 83-3578. (Counsel realizes that this issue has been presented both on direct appeal and on the appeal from the denial by the trial court of the defendant's initial motion to vacate pursuant to Fla.R.Cr.P. 3.850. This Court is asked however, to again review this issue in light of the Supreme Court's decision.)

In addition to the argument set forth above, this issue too becomes part and parcel of the trial judge's denial of the appointment of an independent psychiatric expert. From the record of the court below, the affidavit of Dr. Harry Krop (Record ___) reveals that mitigating psychological or psychiatric evidence could be presented on behalf of the defendant. The lack of an independent psychiatrist, as set forth in Argument I, rendered the penalty phase of the trial a foregone conclusion in that these mitigating factors were never brought before the jury nor the sentencing judge. One must speculate, then, as to what the outcome might have been had this information been available and presented at the appropriate time. This procedure runs contrary to the teachings of the Supreme Courts of both Florida and the United States. See, Elledge v. State, 346 So.2d 998 (Fla. 1977); Miller v. State, 332 So.2d 65 (Fla. 1976); Furman v. Georgia, 408 U.S. 238, 33

L.Ed.2d 346 (1972); Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913 (1976). When a verdict has consequences of the magnitude contemplated in the instant case -- death by electrocution -- that final pronouncement must come from facts, and not guesswork.

> . . . [T]he procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. . . .

State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

Only a new trial can bring to light the facts necessary for a jury to make a reasoned determination both of guilt and punishment, and for these reasons justice requires the same in the instant case.

CONCLUSION

Based on the reasons and authorities set forth above, it is respectfully submitted that the order denying the Rule 3.850 motion should be reversed.

Respectfully submitted,

NEAL R. LEWIS
1899 South Bayshore Drive
Miami, Florida 33133
(305) 854-0050

RICHARD HERSCH
5901 S.W. 74th Street
Suite 300
Miami, Florida 33143
(305) 667-1009

PATRICE A. TALISMAN
169 W. Flagler Street
Suite 1414
Miami, Florida 33131

Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the office of Michael Kotler, Esq., Assistant Attorney General, 1313 Tampa Street, Tampa, Florida 33602, this 10th day of April, 1985.

NEAL R. LEWIS