IN THE SUPREME COURT OF FLORIDA

WILLIE JASPER DARDEN,

Petitioner,

vs.

CASE NO. 67,555

LOUIE L. WAINWRIGHT, Secretary Department of Corrections, State of Florida, and RICHARD DUGGER, Superintendent, Florida State Prison,

Respondents.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND APPLICATION FOR STAY OF EXECUTION

Petitioner seeks habeas corpus relief alleging ineffective assistance of appellate counsel in two particulars. He contends that his counsel was ineffective for failing to raise and argue appellate points regarding: the finding of the aggravating factor "heinous, atrocious and cruel", instructions given to the jury during the penalty phase of the trial.

Petitioner's appeal was concluded in this Court in **Darden v. State**, 329 So.2d 287 (Fla. 1976). Present counsel for Darden began representation in May of 1979 when the first death warrant was signed by the Governor. It is not until now that any questions regarding the effectiveness of appellate counsel is raised. Since Darden offers neither excuse nor reason for the obvious delay, Respondents suggest that a notion of laches should apply. **C.f. Remp v. State**, 248 So.2d 677 (Fla. 1st DCA 1970), **Babson v. Wainwright**, 376 So.2d 1187 (Fla. 5th DCA 1979).

Also, by utilizing the writ of habeas corpus in this fashion, Petitioner, while not presenting second or successive petitions, is nevertheless abusing that which this Court has clearly stated is not to be used in either an automatic or routine fashion. **State v. White**, 470 So.2d

1377 (Fla. 1985). An abuse is not necessarily restrictive to repeated petitions and can and should, especially in this case, be seriously considered.

Aside from the above, Petitioner's real claim is that appellate counsel failed to adequately attack the proceedings which gave rise to his sentence of death. In response, we quickly note that the obvious appellate approach utilized by Darden's counsel was to attack the statute in general constitutional terms. At that time, it was both reasonable and accepted practice. Indeed, the Motion to Dismiss Indictment filed in October of 1973 (R. 35-41), clearly reflected the then current approach of the organized defense bar to undo capital punishment. To have specifically directed arguments to any particular aspect of the proceedings in this case could have acted to either acknowledge constitutionality of the statute, or in some way, weaken what at that time was at least an arguable position; **Proffitt v. Florida**, 428 U.S. 242 (1976) had not yet been decided.

Besides, in April of 1975, when counsel prepared his brief, had he raised an argument directed to the insufficiency of the evidence to support a finding of heinous, atrocious and cruel, we very obviously would have cited to **Spinkellink v. Wainwright**, 313 So.2d 666 (Fla. 1973) in which this Court specifically approved the identical finding based on the fact that the defendant shot a sleeping man. As other cases were decided, we likewise would have relied upon them in a supplemental fashion to conclusively rebut any such argument. **See, e.g., Proffitt v. Florida, supra** at 255, note 12.

Also, in addition to the above, we would have argued and do argue now that the finding was properly supported by competent evidence. The trial court found that after Darden robbed Mrs. Turman at gunpoint and forced her to the rear of the store, and ". . . her husband suddenly

appeared at the back door of the store, the Defendant coldly, immediately and without warning, shot and killed him at the door. * * * The Defendant then, within a few feet of her dying husband, demanded that Mrs. Turman perform an unnatural sex act upon him". (R. 206) While that act is not one representing torture to the victim, it is undoubtedly within the meaning of this Court's definition as wicked and vile. As the trial court found, this evidence showed the offense to be shocking, cruel and bestial and without any possible justification, excuse or provocation. (R. 207) **Proffit v. Florida, id.**

With regards to the jury instructions aspect of the ineffectiveness claim, we again state that the appellate decision was to attack a statute in constitutional terms rather than focusing on particular aspects of what was alleged to be an unconstitutional process. Moreover, no objection to any jury instruction at the penalty phase was made. Collateral actions cannot be used to present claims not properly preserved for appeal. **Downs v. Wainwright**, Case No. 66,116, opinion filed August 29, 1985. Petitioner implicitly recognizes the lack of objection but contends that the issue is of a fundamental nature which would excuse the lack of objection. However, his reliance on the cited cases is misplaced since all deal with the burden of overcoming the constitutional presumption of innocence. By virtue of the jury's verdict, the presumption of innocence which attached to Darden had vanished.

It is Respondents' contention that the omissions made the basis of the Petition for Writ of Habeas Corpus were in no way a serious deviation from professional norms. **Johnson v. Wainwright**, 463 So.2d 207 (Fla. 1985). At the time of the Petitioner's appeal, professional norms were such that the statute itself was the object of all or most appellate contentions. Even viewing the briefs contained

in Petitioner's appendix , we are confident that additional argument was presented directed to the constitutionality of the statute. The one case, **Taylor v. State**, 294 So.2d 648 (Fla. 1974), while indeed containing an argument (made in 1973) directed to a finding of "heinous, atrocious and cruel," closer examination of the argument actually reveals that the attorney was claiming a total lack of evidence to support the court's **finding** that the defendant shot three times. The debate centered over the **number** of shots, not whether the shooting represented an aggravating factor of heinous, atrocious and cruel. On review of that finding, this Court made no mention of whether it was proper. The sentence was reduced to life because of the apparent haste on the part of the trial judge in determining sentence.

Petitioner is doing nothing more than second-guessing the acts of appellate counsel occurring ten years ago. Certainly the law in this state regarding capital punishment has evolved and undergone change. Part of that evolution, as the Court well knows, contained consistent and repeated constitutional contentions. That the lawyer representing Darden chose to argue what was then thought best to argue was neither unreasonable nor below the norms of other appellate counsel at that time. Most assuredly, nothing Petitioner presents can undermine confidence in the belief that he received not only a fair and reasonable appellate effort on behalf of his attorney, but also an exemplary one.

Petitioner's petition and request for stay of execution should both be denied. **Downs, supra.**

RESPECTFULLY SUBMITTED

JIM SMITH
ATTORNEY GENERAL

RICHARD W. PROSPECT
ASSISTANT ATTORNEY GENERAL

125 North Ridgewood
Daytona Beach, FL 32014
(904) 252-1067

Counsel for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response has been hand delivered to Robert Augustus Harper this 29th day of August, 1985.

Richard W. Prospect