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IN THE SUPREME COURT OF THE STATE OF FLORIDA

WILLIE JASPER DARDEN,
Appellant,

v. Case No.

STATE OF FLORIDA,
Appellee.
_____/

SUMMARY BRIEF ON MERITS AND APPLICATION FOR STAY OF EXECUTION PENDING APPEAL

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STATEMENT OF THE CASE AND FACTS

On Friday, August 30, 1985, Mr. Darden filed a Motion For Post Conviction Relief and an Application for a stay of Execution and supporting memorandum in the Circuit Court for the Tenth Judicial Circuit, in and for Polk County, Florida. The motion raises eight grounds for relief. (The Motion for Post-Conviction Relief and the Memorandum of Law In Support of Motion for Stay of Execution are contained in the Appendix, submitted herewith). Hearing was set for Tuesday, September 2, 1985. The state filed a three page response on the morning of the hearing. The stay application was heard before the Honorable John Dewell, the Judge who tried the case in 1974.

Defendant below argued all of the grounds were appropriately raised in this 'successor' motion because they either comprehend new or different grounds for relief as permitted under Rule 3.850 prior to January 1, 1985, or were based on a fundamental change in the law occurring since this case was previously before the Courts. The state's written response argued in general terms that the Court should dismiss the motion as successive or otherwise refuse to rule on the merits of the claim. At the hearing, the state addressed the merits of each of the claims raised. The Trial Court denied the application for a stay and the Motion for Post-Conviction Relief, rejected the state's assertion that the claims were not cognizable on this Rule 3.850 motion, and issued an opinion from the bench addressing each of the claims on their merits. A Notice of Appeal was filed by Mr. Darden. The state did not file a notice of cross-appeal of the Court's ruling that

the issues were cognizable. All of the allegations of the motion and the affidavits attached thereto were treated as being true, for purposes of considering the motion.

ARGUMENT AND CITATIONS OF AUTHORITY

INTRODUCTION

The factual and legal bases of each of the claims are set forth in detail in the Motion for Post-Conviction Relief and Memorandum of Law in Support of Motion for Stay of Execution, contained in the Appendix submitted herewith, and incorporated by reference. This summary brief addresses the relevant matters occurring during the Rule 3.850 hearing in the trial court.

Claim I.

THE TRIAL COURT'S USE OF A NON-RECORD PSYCHOLOGICAL EVALUATION IN IMPOSING THE SENTENCE OF DEATH WHEN THE EVALUATION WAS OBTAINED WITHOUT THE DEFENDANT'S WAIVER OF HIS RIGHT TO BE FREE FROM SELF-INCRIMINATION, OR TO CONFRONT THE AUTHOR OF THE REPORT, VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In his opinion on this claim, Judge Dewell clearly and unequivocally reiterated his statement in the findings supporting the death sentence, that he considered non-record psychological evaluations in determining that none of the "mental mitigating" factors existed. The Court noted the evaluations were not confidential, and expressed doubt whether the plurality opinion of Gardner v. Florida, 430 U.S. 349 (1977), was binding. Noting he had not considered any "confidential" information, that he only used the reports to determine whether any mitigating facts might exist, and that trial counsel had requested or agreed to the reports (although not their use at sentencing), the Court

denied this claim on its merits.

This case is now indistiguishable from Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), and that opinion requires the vacation of the death sentence in this case. As noted in the accompanying memorandum, in Proffitt, also, the trial court contended it was using the psychological reports to determine whether there was an absence of mitigating factors, 685 F.2d at 1255, and trial counsel had requested the report. It made no difference there, and it makes no difference here, what the non-record reports are used for. If they are used in determining death is an appropriate sentence, they still affect the weighing process and the reliability of the determination death is an appropriate sentence, and render any death sentence based in part on them invalid. Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430 U.S. 349 (1977).

That the reports were not confidential makes no difference here. The need for reliability has been breached by the consideration of non-record, nonconfrontable material, and the confrontation error is all the more egregious here where trial counsel explicitly refused to introduce the reports into evidence and was thus unable to submit the reports to adversarial testing and argument as described in the accompanying memorandum;

> [T]he [Gardner Court] expressly recognized the importance of participation by counsel and adversarial debate to eliciting the truth and 'evaluating the relevance and significance of aggravating and mitigating evidence.' The Supreme Court's emphasis in Gardner and other capital sentencing cases on the reliability of the factfinding under-

> lying the decision whether to impose the death penalty convinces us that the right to cross-examine adverse witnesses applies to capital sentencing hearings....When expert witnesses are employed, cross-examination is even more crucial to ensuring accurate fact-finding.

Id. at 1254

The reasons why this claim is cognizable in this motion are set forth fully in the "Memorandum of Law in Support of Application for Stay of Execution'," contained in the Appendix.

CLAIM II.

THE PREPARATION FOR AND CONDUCT OF THE SENTENCING HEARING ROBBED THE JURY AND JUDGE OF THE ABILITY TO CONDUCT INDIVIDUALIZED SENTENCING, AND THE RESULTING LACK OF CONFIDENCE IN THE DEATH DECISION IS A DIRECT VIOLATION OF THE SIXTH AND EIGHTH AMENDMENTS.

Judge Dewell correctly noted he had considered nonstatutory mitigating circumstances in determining a death sentence was appropriate. However, he also considered as true the allegation supported by the record of the federal court hearing that trial counsel conducted no investigation into non-statutory mitigating circumstances in 1973-74, because of their understanding of the Florida capital sentencing statute: they believed that the statute limited mitigating evidence to that evidence probative of a statutory mitigaing circumstance. The trial court then considered the proffered nonstatutory mitigating circumstances as true, found them to be true and available to counsel in 1973, had counsel investigated, and denied the claim on the merits because he concluded that the proffered evidence they would not have

affected the outcome of the proceeding.

The finding of the trial court that state law operated to preclude the preparation and presentation to the sentencer of nonstatutory mitigating places this case squarely within the recent en banc decisions of the Eleventh Circuit in Songer v. Wainwright, No. 85-3064 (11th Cir. Aug. 16, 1985), and Hitchcock v. Wainwright, No 83-3578 (11th Cir. Aug. 28, 1985). Hitchcock now requires the Court to conduct a balancing test to determine whether the Eighth Amendment requires a new sentencing hearing, Slip op. at 6. The proffered evidence requires an evidentiary hearing.

Last week in Harvard v. State, this Court entered an order staying Mr. Harvard's execution because of this Court's recognition, and concern over the implications, of Songer and Hitchcock. Harvard involved a Songer claim; Darden involves a Hitchcock claim. The record before the Court is clear, and the findings on all fours with Hitchcock. Trial counsel did not investigate nonstatutory mitigating circumstances, because the statute convinced them that they could not present any such evidence. The record is now replete with non-statutory mitigaing evidence, proferred at the hearing below. The effect of that evidence on the sentencing determination, in a critical lifedefendanteath weighing process, must be considered in an unhurried and judicious manner, unfettered by an imminent execution. A stay of execution is particularly appropriate under this claim, so that Mr. Darden, like Mr. Harvard, can receive the deliberate and considered judgment by this Court of the effects of Hitchcock and Songer.

In any event, Mr. Darden continues to assert that where, as here, an Eighth Amendment violation exists because of the operation of state law, the Supreme Court does not require a showing of prejudice. Eddings v. Oklahoma, 455 U.S. 104, 119 (1982). In Eddings, Justice O'Connor noted in her concurring opinion that she "disagree[s] with the suggestion in the dissent that remanding this case would serve no useful purpose. . . . [W]e may not speculate as to whether the [sentencer] . . . considered all of the mitigating factors and found them insufficient. . . Woodson [v. North Carolina, 428 U.S. 280 (1976)] and Lockett requires us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court. " Id. at 119.

Claims III and IV

Appellant relies on the argument set forth in the Memorandum in Support of the Application for Stay of Execution for this Claim contained in the Appendix, submitted herewith), noting the defects in the instructions are now relevant to the weighing process required by Hitchcock, and are further evidence of the unreliability of the sentencing process in light of trial counsel's reasonable failure to investigate, present, or argue nonstatutory mitigating circumstances.

Claim V

The trial court noted it was appropriate only for this Court to rule on this claim. Appellant relies on his argument in the Memorandum, contained in the Appendix.

Claim VI

COMMENTS BY THE TRIAL JUDGE REDUCED THE JURORS' SENSE OF RESPONSIBILITY WITH REGARD TO THEIR FUNCTION AT SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

> "It will be my decision to whether or not,my determination alone as to whether or not this defendant should go to the electric chair."

[R. 27]. It was clearly not the sole responsibility of the trial court to determine whether Mr. Darden should be electrocuted. If Mr. Darden dies tomorrow, it should be because the sentencers acted with a true sense of their awesome responsibility, in making the life/death determination.

In Florida, it is the trial judge's determination alone that condemns a person to death only when reasonable persons could not disagree the jurors' recommendation was clearly wrong. Tedder v. State, 322 So.2d 908 (Fla. 1975). Conversely, it is to be the jurors' "determination alone as to whether or not this defendant should go to the electric chair unless no reasonable person could have found as did the jury. It is clearly misleading under Florida law to tell the jury otherwise, which is what the judge repeatedly did. [R. 42, 849, 408, 874-5, 876, 874, 898, 900, 901]. See Motion for Post-Conviction Relief.

This new claim is based on Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), wherein the Supreme Court required resentencing when prosecutorial arguments reduced the jurors' recognition of their "truly awesome responsibility," Id. at 2646, and it could not be said the argument had no effect on the

sentencing decision. The prosecutor's statement to the jury that their recommendation was not final was misleading, and requires resentencing. This misinformation was sufficient to have "some effect" on sentence.

And so it is here. The jury was told that "you act as advisors to the Court which has the final discretion and responsibility in the matter, and I have the power of independent judgment." [R. 898]. The judge is not so free and the jury has more responsibility for sentencing than it was told. Tedder. After countless remarks denigrating the jurors' roles, the judge admittedly did tell the jury later that he would give their decision "great weight". However, this was too little, too late. Too little, because the recommendation is entitled to more than great weight -- it must be followed, unless no reasonable person could so recommend. It was too late, as in Caldwell, because a few correct (or as here, more nearly correct), statements of law cannot overcome the pervasively incorrect earlier statements.

Resentencing is required.

Claim VII

The state informed the jury that it wished it could see Mr. Darden with his face blown off, "blown away by a shotgun", with his throat slit, and killed in a car wreck. Short of that, a leash around his neck would be sufficient, but for the fact that the Division of Corrections was incompetent to effectively leash, so Mr. Darden would just have to be killed. These were the mild arguments.

This Court addressed these arguments on direct appeal, and a

majority found them acceptable at guilt-innocence. Caldwell requires reanalysis to determine whether the comments had "no effect" on sentencing. This standard is much lower than the one petitioner was held to on direct appeal when he convinced two members of this Court that his guilt-innocence determination was fundamentally unreliable. The execution should be stayed for deliberate consideration of the impact of Caldwell.

WHEREFORE, Appellant respectfully requests this Court grant a stay of execution to allow full briefing and deliberative consideration of the matters set forth in the appeal from the denial of the Motion to Vacate Judgment and Sentence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was delivered by hand to Richard W. Prospect, office of the Attorney General, Department of Legal Affairs, 401 South Monroe St., Tallahassee, Florida, this 3 day of September, 1985.