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MAR 4 1986
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

PHILLIP DYLAN HOLLAND,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondents.

Case No. 68-320

ON DISCRETIONAY REVIEW FROM THE DISTRICT COURT
OF APPEALS, FOR THE FOURTH DISTRICT STATE OF FLOIRDA

JURISDICTIONAL BRIEF OF PETITIONER

PHILLIP DYLAN HOLLAND, Pro'se
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Belle Glades, Florida 33430

Assisted by Paralegal
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Issue.

WHETHER THE DISTRICT COURTS DECISION CONFLICTS WITH THIS COURTS DECISION OF MORGAN v. STATE, 475 So.2d 681 (Fla. 1985) LIVINGSTON v. STATE, 458 So.2d 235 (Fla. 1984), and ALLEN v. STATE, ___ So.2d ___, (11 FLW 299)(Fla. 1st DCA 1986) A DECISION OF THE FIRST DISTRICT COURT OF APPEALS ON THE SAME POINT OF LAW? 5

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EPILOGUE

The Petitioner, PHILLIP DYLAN HOLLAND, was the Appellant in the District Court of Appeals for the Fourth District, Case No. 85-2583, which was pursuant to a denial of the Petitioners Motion for Post-Conviction Relief in the trial court of the Seventeenth Judicial Circuit, Broward County Florida, the Honorable Robert W. Tyson, Jr. Circuit Judge.

The Appellant below will be referred to in this Brief as the Petitioner, the Appellee below, to wit, The State of Florida, will be reffered to as the Respondent for purposes of this Jurisdictional Brief.

A separate Appendix with appropriate index is submitted under separate cover and will be referred to in this Brief as (appendix).

There was no Oral Arguments below, and therefore no transcripts of the District Court proceedings for purposes of review in this Honorable Court. The Petitioner is proceeding thusfar pro'se, and has not been appointed counsel by any court in any of the proceedings relating to this litigation herein.

STATEMENT OF THE CASE AND FACTS

On October 25, 1984, Petitioner filed a Motion for Post-Conviction Relief in the Circuit Court of the Seventeenth Judicial Circuit, Broward County, before the Honorable Robert W. Tyson, Jr., Circuit Judge.

On January 17, 1985, the Trial Court ordered the State Attorney and the Petitioners Defense Counsel to respond to the allegations contained in the Petitioners Motion for Post-Conviction Relief, premised upon the applicable rules when the Motion was filed in October 25, 1984, inter alia, Rule 3.850. Fla. R. Crim. P.

On or about March 19, 1985, the Petitioner filed a Motion for Hearing and a Motion for the appointment of counsel in light of the order by the Trial Court that a response was due by the Defendants Counsel and the State Attorney. No repsonse was made by the Trial Court to the Motions.

On or about July 22, 1985, the Petitioner applied for a Writ of Mandamus to the District Court of Appeals for the Fourth District. On September 3rd 1985, the District Court granted the Petitioners Writ of Mandamus directing the Trial Court to rule on the Petitioners Motion ffor Post-Conviction Relief.

The issues in the Petitioners motion was the denial of the effective assistance of counsel, and denial of a fair trial, when the Trial Court sent the jury home after they had started their deliberation. The latter issue was raised on direct appeal, but this Court thrity days later, after direct appeal affirmance by the Fourth District Court of Florida, rendered the decision of Livingston v. State, 458 So.2d 235 (Fla. 1984), which was an appealed case from the Seventeenth Judicial Circuit also. There this Court held, that separation of the jury overnight after the jury had started their deliberations in a Capital Case is per se fundamental reversable error grounded in the Sixth Amendment of the U.S. Constitution, and requres a granting of a new trial, also prejudice of the entrie proceedings is presumed.

The first issue of counsel being ineffective was premissed upon the fact, that he conceded the guilt of the Petitioner to the jury, that he was guilty of murder.

The Trial Court denied the motion but required the Defense Counsel to file a Response regarding ineffective assistance of counsel which was done by the Defense Counsel.

Petitioner subsequently submitted a Notice of Supplemental Authority of this Courts decision of Morgan v. State, 475 So.2d 681 (Fla. 1985), which held that a hearing is required when the Court orders a response to refute the allegations in dispute.

Petitioner filed a timely Notice of Appeal to the District Court of Appeals on November 18, 1985. The District Court affirmed the Trial Court, holding that the error was harmless, though, Petitioner was facially correct, concerning the error committed by the Trial Court (see appendix under separate cover).

A Motion for Rehearing and Rehearing En Banc by the Petitioner was filed but presumably out of time, though the Petitioner had filed an extension of time due to circumstance beyond his control. Petitioner subsequently sought Review in this Court by due notice on February 11, 1986.

Also, prior to the Notice in the Court, Petitioner submitted Supplemental Authority of the decision of the First District on the same point of law regarding counsel, Allen v. State, ___So.2d___(11 FLW 299, Opinion January 30, 1986)(Fla. 1st DCA 1986).

Petitioner also submitted February 25, 1986, Motions for Appointment of Counsel and a Stay of Proceedings pending resolution of Petitioners motion for Appointment of Counsel.

This Brief follows.

SUMMARY OF THE ARGUEMENT

The Petitioner will argue that the Decision of the District Court below conflicts with two prior decisions of this court and that of the District Court of Appeals for the First District of Florida.

The Petitioner will argue that the proceedings in the trial court which was affirmed by the District Court is contrary to provision of Rule 3.850., Florida Rules of Criminal Procedure, which does not permit a Defense Attorney filing any response to an allegation in a Motion for Post-Conviction Relief, where there are issues of dispute unresolvable by the record or the files in the case.

And finally that the Sixth Amendment of the United States Constitution prohibits one's own trial attorney conceding his clients guilt to the jury during the guilt/innocense stage of the proceedings, and that a new trial is required out of fundamental fairness.

ARGUMENT

Issue:

WHETHER THE DISTRICT COURTS DECISION CONFLICTS WITH THIS COURTS DECISION OF MORGAN v. STATE, 475 So.2d 681 (Fla. 1985) LIVINGSTON v. STATE, 458 So.2d 235 (Fla. 1984), and ALLEN v. STATE, ___ So.2d ___, (11 FLW 299)(Fla. 1st DCA 1986) A DECISION OF THE FIRST DISTRICT COURT OF APPEALS ON THE SAME POINT OF LAW?

In Morgan v. State supra, this Court held when analysing Rule 3.850 Fla. R. Crim. P., that "unless the motion and the files and records of the case conculsively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served iupon the presecuting attorney of the court, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that ...there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable tocollateral attacK, the court shall vacate and set the judgment saside and shall discharge the prisoner or resentence him or grant him a new trial or correct the sentence as may appear appropriate"., Id at 475 So.2d at 682 (Fla. 1985).

As this Court determine the rule does not contemplate the consideration of a response by the state nor any resolution of factual matter without an evidentiary hearing. Further, the Rule does not permit or allow the submitting of a response by the Defendants very own trial attorney. Quite the contrary. In fact the Amended Rule 3.850, see 460 So.2d 907 (Fla. 1984), only permits the court to order the State Attorney to make any response to the allegations in the motion.

Therefore, the District Court claim that the error of the Trial Court is harmless is totally in conflict withthe Rules of Post-Conviction Relief

3.850., Fla. R. Crim. P., and the decision of this Court in Morgan supra.

Second, the decision effectively conflicts with decision of this Court in Livingston v. State supra., where this Court stated in quoting from the Supreme Court of Washington, that "jurors might be subjected to any number of prejudicial influences whenever the jury is allowed to separate. A juror allowed to returned home overnight might be prejudiced by any of the myriadd influences on his life. Who can say how a juror might be influenced by contact with his family and friends, or exposure to the various news and entertainment media during an evening at home? In our opinion, jurors are especially sensitive to prejudicial influences during deliberations. While still hearing evidence, it is probably easier for jurors to keep an open mind. Moreover, the impact of potential prejudiceial influences will be dissipated by subsequent evidence, the arguments, and instructions. But when the jurors have heard all theevidencee,, and have been focused onto the issues before them by the arguments of the parties and instruction, the potential for prejudice nincreases substantially. A chance remark by a jurors spouse or a program watched on television during the jurors 12 hours at home would have more immediacy then the evidence. There is a very real possibility that the jurors recollection of the evidence or perception of it might be distorted by such influences received subsequent to the conclusion of the evidence. Of course it is usually impossible to determine whether such influences actually prejudice a juror against the defendant in a particular case. The juror mhimself may well be unaware of the subtile influences which affect his decision. For this reason, admonition and instruction of the jury is probably ineffective in ameliorating the prejudicial effects of separation during the deliberations. For this reason also, the use of juror affidavits to prove a probability of prejudice is of dubious value; a juror cannot swear to being prejudiced by influences of which he is unaware", Livingston, supra at 238-239, quoting State v. Smalls, 99 Wash.2d at 765, 665, P.2d at 390-91.

This error which the District Court is affirming through the decision of the Trial Court's denial of the Petitioners Motion for Post-Conviction Relief is totally in conflict with the decision of Livingston, supra., and the dictates of the Sixth Amendment of the United States Constitution.

Third, the District Court decision also conflicts with the decision of the First District Court of Appeals which held that "summary denial of a facially sufficient motion for post-conviction relief is improper unless the court attaches to its order the portions of the record refuting the allegations".

The allegation in Allen supra., was that "counsel deliberately sabotaged his defense by conceding his guilt at trial". Allen supra., at (11 FLW at 299), (Fla. 1st DCA 1986).

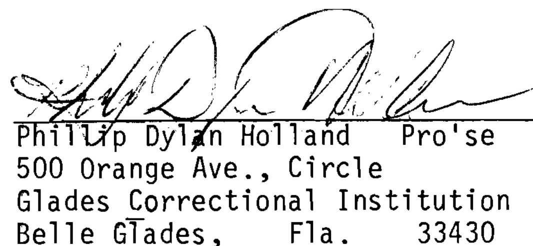
The Petitioners counsel in the instant case did absolutely the same thing, and the District Courts Affirmance of the denial from the Petitioners Motion for Post-Conviction Relief, is in conflict with the decision of Allen supra., and the Sixth Amendment of the United States Constitution, regarding the representation of counsel in criminal trials, Strickland v. Washington, 466 U.S. 759, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cf. Young v. Zant, 677 F.2d at 799 (11th Cir. 1982); Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983).

The jurisdiction of this court would be properly exercise if it were to accept review of the District Courts decision affirming the denial of the Petitioners motion for Post-Conviction Relief.

CONCLUSION

WHEREFORE, the Petitioner, having submitted reasonable cause for the Courts jurisdiction to be invoked in the instant proceeding, moves in all respect that jurisdiction of the case will above all be accepted in order that the fair administration of justice will be carried out with uniformity throughout the State, in the spirit of justice.

Respectfully submitted



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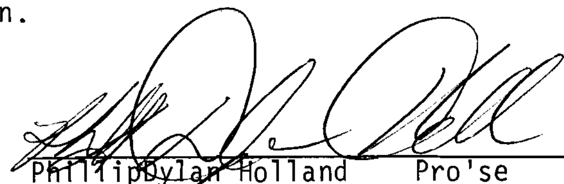
CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the afore has been furnished to Counsel for the Respondent, RICHARD G. BARTMON, Ass't Attorney General, 111 Georgia Ave., Room 204, Department of Legal Affairs, West Palm Beach, Florida 33401, this 26 day of February, 1986, by U.S. Mail, through the Officials at Glades Correctional Institution.



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