IN THE SUPREME COURT OF FLORIDA

PHILLIP DYLAN HOLLAND,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 68,320
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This Court has accepted discretionary review jurisdiction to review the decision of the Fourth District Court of Appeal, affirming the summary denial of petitioner's Rule 3.850 motion without an evidentiary hearing. References to the record in the District Court will be designated by use of the symbol "R" followed by the appropriate page number in parentheses. The pages will be referred to as though that record were consecutively numbered, which it is not. References to the original trial transcript will be designated by use of the words "Trial Transcript" followed by the appropriate page number in parentheses. Petitioner, who is the movant in the trial court and the appellant in the District Court of Appeal will be referred to herein as petitioner. The respondent, STATE OF FLORIDA, will be referred to as the state.

STATEMENT OF THE CASE AND FACTS

On July 7, 1986, this Court accepted conflict jurisdiction to review the decision of the District Court of Appeal, Fourth District in petitioner's case in Holland v. State, 484 So.2d 596 (Fla. 4th DCA 1986). The district court's decision affirmed the summary denial of petitioner's Rule 3.850 motion even though the district court found that petitioner was technically entitled to an evidentiary hearing under Morgan v. State, 475 So.2d 681 (Fla. 1985).

In 1981, petitioner was charged by a one count indictment with premeditated murder of George Blumish. He pled not guilty, proceeded to trial by jury and was convicted as charged (R-6, Petitioner's Motion for Post-Conviction Relief). Petitioner took a direct appeal to the District Court of Appeal, Fourth District, which affirmed without written decision. Holland v. State, 455 So.2d 1042 (Fla. 1984).

On October 29, 1984, petitioner filed a pro se motion for post-conviction relief in the Circuit Court alleging two grounds: denial of effective assistance of counsel in that, "Counsel for the defense on representing [petitioner] stated to the jury, prior to their rendering a verdict of [petitioner's] guilt or innocence that I was guilty"; the second ground asserted fundamental error in the trial court's allowing the jury to go home during their deliberations, which ground had also been asserted on direct appeal.

In July of 1985, petitioner filed a writ of mandamus in the district court asking that the trial judge be ordered to rule on

his previously filed motion for post-conviction relief (R-13, Motion for Leave to Proceed in Forma Pauperis for petition for writ of mandamus or alternative writ, R-15-17). In his petition for mandamus petitioner alleged he had repeatedly attempted to have the trial court hold an evidentiary hearing during the times that he had been returned to Broward County to testify in federal proceedings.

On January 17, 1985, the trial court had entered an order requesting the Office of the Public Defender in Broward County and the State Attorney's Office to respond to petitioner's motion for post-conviction relief which had previously been filed (R-25).

Thereafter, petitioner filed a pro se motion for an evidentiary Hearing and a Request for Appointment of Counsel stating that he was being aided by inmate legal assistants, had no ability to argue his case on his own, believed he had presented a meritorious claim and that an evidentiary hearing and substantial research were necessary which required the appointment of counsel (R-26-27). On or about November 1, 1985, the circuit judge entered a two page written order denying petitioner's motion for post-conviction relief on both grounds (R-37-38, Petitioner's Appendix - 2-3). The court did not attach any portions of the record which might demonstrate that petitioner was not entitled to any relief.

Petitioner timely filed his appeal to the district court on November 15, 1985, along with Statement of Judicial Acts to be Reviewed. Number 10 of the Statement of Judicial Acts specified

that the trial court erred because counsel's argument to the jury that petitioner was guilty violated Young v. Zant, 677 F.2d at 799 (11th Cir. 1982) (R-4).

In accordance with the rule, no briefs were filed with the district court. On January 15, 1986, the court entered its decision in this case which read as follows:

> Mr. Holland's motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850 was denied without an evidentiary hearing. Holland appeals, contending that he was entitled to a hearing under authority of Morgan v. State, 475 So.2d 681 (Fla. 1985). Facially, Holland is correct. However our review leaves us convinced that the error was harmless according to applicable criteria and that no purpose would be served by remanding for a hearing. Palmes v. State, 397 So.2d 648 (Fla. 1981) and Recinos v. State, 420 So.2d 95 (Fla. 3d DCA 1982). See also Section 924.33, Florida Statutes (1984).
>
> Affirmed.

Holland v. State, 484 So.2d 596 (Fla. 4th DCA 1986).

Petitioner requested an extension of time in which to file a motion for rehearing, which was granted by the district court (Petitioner's Appendix - 24).

On February 5, 1986, petitioner filed his motion for rehearing or rehearing en banc arguing the merits of his claim of ineffective assistance of counsel and that he was entitled to an evidentiary hearing since the trial court had failed to attach copies of the record to show that petitioner was not entitled to any relief. (Petitioner's Appendix - 5-23).

Petitioner's motion for rehearing was denied (Petitioner's Appendix - 5, Denial of Motion for Rehearing).

Petitioner timely filed a Notice of petition for review in the Fourth District Court of Appeal to invoke this Court's discretionary jurisdiction under the Florida Constitution. Petitioner served his pro se Brief on Jurisdiction on February 26, 1986. On July 7, 1986, this Court determined to accept jurisdiction and appointed the Public Defender of the Fifteenth Judicial Circuit to file petitioner's brief on the merits.

SUMMARY OF ARGUMENT

Petitioner's motion for post-conviction relief stated a facially sufficient claim which the trial court could not deny without attaching portions of the record or holding an evidentiary hearing. It did neither. The district court then erred and placed itself squarely in conflict with Morgan by ruling that petitioner was entitled to an evidentiary hearing under Morgan but that the error was harmless. There is no basis for the district court to hold the error harmless without reviewing portions of the record of the trial proceedings or an evidentiary hearing to determine whether petitioner's defense counsel had conceded petitioner's guilt in closing argument to the jury in violation of petitioner's Sixth Amendment right to effective assistance of counsel.

ARGUMENT

POINT ON APPEAL

THE DISTRICT COURT ERRED IN AFFIRMING THE SUMMARY DENIAL OF PETITIONER'S 3.850, WITHOUT AN EVIDENTIARY HEARING, AND WITHOUT ANY ATTACHED PORTIONS OF THE RECORD, TO REFUTE HIS CLAIM THAT COUNSEL'S CONCESSION OF HIS GUILT AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL.

In its decision affirming the summary denial of Holland's 3.850 motion, the district court said that facially Holland was entitled to an evidentiary hearing under Morgan v. State, 475 So.2d 681 (Fla. 1985). Like Morgan, petitioner here filed his 3.850 motion before the January 1, 1985, amendments to the rule took effect. The Florida Bar re: Amendment to Rules of Criminal Procedure (Rule 3.850), 460 So.2d 907 (Fla. 1984). Morgan v. State holds that a facially sufficient 3.850 claim, not refuted by the files and records of the case, entitles the defendant to an evidentiary hearing. No other procedures may be utilized by the trial judge in initially considering whether to deny a facially sufficient motion. As in Morgan, the trial judge here called for a response by the state (Original Record from District Court at 24) to resolve a disputed issue of ineffective assistance of counsel, whether "counsel for the defense on representing [petitioner] stated to the jury, prior to their rendering a verdict of guilt or innocence that [petitioner] was guilty." (District Court Record at 9, Petitioner's Motion for Post-Conviction Relief).

This claim that defense counsel conceded the defendant's guilt at trial states a facially sufficient basis for post-conviction relief under ineffective assistance of counsel. Allen v. State, 482 So.2d 529 (Fla. 1st DCA 1986). For petitioner to be technically correct, as the district court found, that he was entitled to an evidentiary hearing under Morgan, his 3.850 must have stated a facially sufficient claim which the trial court denied without attaching portions of the record that conclusively demonstrated petitioner was entitled to no relief. In Allen v. State, supra, the district court reversed a summary denial of such a claim for the trial judge to attach portions of the record showing the defendant was entitled to no relief or to hold an evidentiary hearing. Under Morgan, the district court was precluded from drawing the conclusion, as it did based on Palmes v. State, 397 So.2d 648 (Fla. 1981) and Recinos v. State, 420 So.2d 95 (Fla. 3d DCA 1982), that the error was harmless without reviewing an evidentiary hearing or without reviewing any attached portions of the record. No portions of the record were attached to the trial court's order and no evidentiary hearing granted or held so Morgan precluded the district court's disposing of the trial court's procedural errors by terming the denial of an evidentiary hearing "harmless."

There is no record support for the district court's conclusion that the error in denying the hearing is harmless. In order to affirm the trial court's finding that but for the concession on page 812, the entirety of closing argument does not reveal

concession of guilt (Petitioner's Appendix at page 2), the district court would necessarily have to review those portions of the record that support the trial judge's conclusion.

The trial court's order refers to a comment of defense counsel conceding the defendant's guilt which appears at 812 of the transcript but the order denying post-conviction relief otherwise found that defense counsel had argued vigorously against a finding of guilt (Petitioner's Appendix at 2). On rehearing to the district court, petitioner pointed out that the defense counsel had conceded that the defendant was guilty of third degree murder at page 849 of the trial transcript (Petitioner's Appendix at page 8). Even though petitioner had asserted justifiable homicide and lack of intent to steal the limousine as his defense in his trial testimony (see Petitioner's Appendix - 17,19-22, Motion for Rehearing). Defense counsel's argument in closing that the defendant committed murder while stealing the limousine conceded all facts necessary to find the defendant guilty of first degree felony murder during a robbery:

> Now even if you believe everything the state presents and has presented and you believe all our arguments, you still only have someone trying to steal a limousine that's worth $50,000, and therefore, committing grand theft, and therefore, guilty of third degree murder. Even if you believe everything the State presents, there is no evidence whatsoever that he intended, or premeditated or planned to commit a robbery or first degree murder, but if you even think he wanted to steal that limousine, that's grand theft. And that's third degree murder, if you intend to steal something over $100 and in the course of it someone dies and it's not justifiable.

> So even in the best case and analysis, even if you view everything their way, he tried to steal the limousine. He's only guilty of third degree murder, but I ask you to look closely at the evidence and analyze it and take your time. Remember how we talked during jury selection about how you should take your time.

(Trial Record at 848-849, Petitioner's Appendix at 17).

The district court concluded that the error was harmless because under Palmes even constitutional error restricting presentation of evidence, or under Recinos, such a denial of the Sixth Amendment right to consult with counsel during a recess in the defendant's direct testimony, may be harmless. Here, there was no record basis to conclude that the defense attorney's argument was otherwise vigorous and that if considered in its entirety argued against guilt. Perhaps the district court's conclusion that the error was harmless was a finding that it was alright for the defense attorney to concede guilt because the defendant was guilty. Both conclusions of law would be error on this record under the decision of Morgan v. State.

A defense attorney's error of conceding the defendant's guilt may be considered per se reversible error even though defendant's counsel only admitted guilt of a lesser-included offense. State v. Harbison, 337 S.E.2d 504 (N.C. 1985). In Harbison, the defendant was charged with second degree murder but maintained he acted in self-defense. Although one of the defendant's attorneys had argued in closing for a not guilty verdict on justifiable homicide, his co-counsel had argued that the defendant was guilty of manslaughter. The Supreme Court of North Carolina held that "ineffective assistance of counsel per

se in violation of the Sixth Amendment has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." State v. Harbison, at 507-508. See also, Commonwealth v. Street, 446 N.E.2d 670 (Mass. 1983), where counsel abandoned a valid insanity defense and argued for a lesser of second degree murder was found to be ineffective in leaving the client "denuded of a defense." Id. at 673. Commonwealth v. Westmoreland, 446 N.E.2d 663 (Mass. 1983).

At the very least, the trial court here was required to hold a hearing or attach portions of the record of closing argument to resolve contested factual issue: was defense counsel's concession of guilt at transcript page 812 and further concession of guilt of third degree murder at transcript page 848, as pointed out by petitioner on rehearing, the only concessions of guilt[1] and were those that occurred a substantial concession of petitioner's guilt in violation of his Sixth Amendment rights? In petitioner's case, an admission that the murder occurred while the defendant was trying to steal the limo is a complete concession to all facts necessary to find guilt of robbery and thus defendant's guilt of first degree murder under the felony murder rule. Petitioner's defense of justifiable homicide in the fight with the limousine driver was hardly a meaningful defense when

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[1] Petitioner's appellate counsel would argue that throughout closing argument trial counsel refused to argue against first degree felony-murder (robbery) because it was not charged in the indictment and that a concession of guilt of third degree theft-murder is tantamount to a guilty plea but the district court record does not contain any trial transcript of the closing arguments of counsel.

the defense attorney conceded, contrary to the defendant's testimony, that the defendant was in the course of stealing the limousine when the driver died (Appendix at 17, Trial Record at 849). Since justifiable use of deadly force is not an available defense to a person engaged in committing a robbery, counsel's concession that petitioner was committing a theft when he justifiably stabbed the limo driver, was a denial of ineffective assistance of counsel. See People v. Hattery, 488 N.E.2d 513 (Ill. 1985) (Counsel's reliance on the unavailable defense of compulsion to first degree murder is ineffective assistance of counsel).

A defense counsel's concession of the defendant's guilt to the jury, where the defendant had a plausible defense to malice murder that he killed the victim out of heat of passion and where the defendant had a plausible defense to robbery, that he did not form the intent to steal or rob prior to the fatal assault, is ineffective assistance of counsel. Young v. Zant, 677 F.2d 792 (11th Cir. 1982). Under the new bifurcated procedures for trying capital cases, there can be no possible discernible reasons for conceding the defendant's guilt. Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983).

Nor did the trial court attach portions of the record to demonstrate any consent on petitioner's part to his counsel's concession of the defendant's guilt of first degree felony murder. In Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981), the Court held that defense counsel may not stipulate to facts which

amount to a functional equivalent of a guilty plea and that such conduct amounted to ineffective assistance of counsel. Consent to counsel's argument that the defendant is guilty may not be presumed from a silent record nor obtained without the protection of an on-the-record inquiry required by Boynkin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), Wiley v. Sowders, supra. Where defense counsel's strategy to concede guilt is totally at odds with the defendant's plea of not guilty, the defendant's consent may not be presumed from a silent record. People v. Hattery, 488 N.E.2d 513 (Ill. 1985).

Other states have also adopted the Wiley rule, that defense counsel may not present argument which is the functional equivalent of a plea of guilty without showing on the record that the defendant consents to such argument. See People v. Fisher, 326 N.W.2d 537 (Mich.App. 1982). People v. Carter, 354 N.E.2d 482 (Ill.1st DCA 1976), People v. Duke, 395 N.Y.S.2d 200 (1977). Commonwealth v. Street, supra, Commonwealth v. Westmoreland, supra, which find that although counsel may stipulate to a particular element of the charge or issue of proof if he believes it tactically wise, his argument may not amount to a functional guilty plea. See also State v. Caldwell, 671 S.W.2d 459 (Tenn. 1984), adopting the Wiley rule but finding the facts asserted there did not amount to a concession of the client's guilt.

In State v. Wiplinger, 343 N.W.2d 861 (Minn. 1984), the Supreme Court adopted a similar rule of per se reversible error as did the North Carolina Supreme Court in State v. Harbison.

There the Minnesota Court held that if defense counsel impliedly admits a defendant's guilt without the defendant's permission or acquiescence, then the defendant should be given a new trial even if it could be said that the defendant would have been convicted in any event. Although Wiplinger was a direct appeal, appellant's claim is clearly cognizable here on a 3.850, Allen v. State, supra. The Florida courts do not consider claims of ineffective assistance of counsel on direct appeal, State v. Barber, 301 So.2d 7 (Fla. 1974), Williams v. State, 438 So.2d 781 (Fla. 1983). Claims should first be presented to the trial court before they may be presented to a court of appeal. Capers v. State, 433 So.2d 1323 (Fla. 3d DCA 1983).

In conclusion, petitioner's motion for post-conviction relief stated a facially sufficient claim which the trial court could not deny without attaching portions of the record or holding an evidentiary hearing. It did neither. The district court then erred and placed itself squarely in conflict with Morgan by ruling that petitioner was entitled to an evidentiary hearing under Morgan but that the error was harmless. There is no basis for the district court to hold the error harmless without reviewing portions of the record of the trial proceedings or an evidentiary hearing to determine whether petitioner's defense counsel had conceded petitioner's guilt in closing argument to the jury in violation of petitioner's Sixth Amendment right to effective assistance of counsel. Where a capital defendant by his testimony as well as his plea seeks a not guilty

verdict, the defense counsel, even though faced with strong evidence of guilt, may not concede in closing to the jury that the defendant is guilty. Francis v. Spraggins, supra. The decision of the district court finding the error in petitioner's case harmless should be quashed, reversed and remanded for petitioner to be granted an evidentiary hearing on his facially sufficient claim of ineffective assistance of counsel.

CONCLUSION

Based on the foregoing, petitioner requests this Court to quash the decision of the District Court of Appeal and remand with directions to hold an evidentiary hearing on petitioner's facially sufficient claim of ineffective assistance of counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to RICHARD BARTMON, Assistant Attorney General, Counsel for Respondent, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 2nd day of September, 1986.

Margaret Good

MARGARET GOOD
Assistant Public Defender