IN THE

SUPREME COURT OF FLORIDA

No. 68580

FILED
SID J. WHITE
APR 11 1986
CLERK, SUPREME COURT
By ______ Chief Deputy Clerk

WILLIAM MIDDLETON, JR.,

Petitioner,

-versus-

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State of Florida,
R.C. DUGGER, Superintendent, Florida State Prison,

Respondents.

APPLICATION FOR EXTRAORDINARY RELIEF, AND FOR WRIT OF HABEAS CORPUS

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COUNSEL FOR PETITIONER

I. INTRODUCTION

This application raises an important constitutional question, currently under consideration by the United States Supreme Court, based upon evidence which this Court has never before considered. This evidence convincingly demonstrates that the death qualification of jurors in capital cases violates the Sixth and Fourteenth Amendments.

William Middleton was convicted of first degree murder and sentenced to death. This Court affirmed his conviction and sentence. Middleton v. State, 426 So.2d 548 (Fla. 1982). He had moved, pretrial, to preclude the State from challenging for cause those jurors who had reservations about capital punishment but who could fairly decide his guilt or innocence (R.26-29). The motion was denied (R.29A). Two jurors were excused for cause who had reservations about capital punishment but who could fairly decide his guilt or innocence (R.107;172). The issue was raised in his motion for new trial (R.169-170) and denied.

In Mabry v. Grigsby, 758 F.2d 226 (8th Cir.1985)(en banc), the Eighth Circuit held that "death qualified" juries, i.e., juries from which jurors had been excluded for cause who had reservations about capital punishment but who could fairly decide guilt or innocence, are unfairly and unconstitutionally prosecution prone. On October 7, 1985, the United States Supreme Court agreed to review that decision, and to decide, for the first time, whether the death qualification of jurors before the guilt/innocence phase of a bifurcated capital trial violates the Sixth and Fourteenth Amendments to the Constitution. Cert. granted sub nom. Lockhart v. McCree, ____ U.S. ____, 106 S.Ct. 59 (1985). The decisions under review are based upon the most extensive record ever compiled on the impartiality of death qualified juries. Based upon the McCree record, it is virtually certain that the United States Supreme Court will decide whether death qualification is constitutionally permissible in the guilt/innocence phase of a capital trial.

On Mr. Middleton's direct appeal, his attorney failed to raise the Gribsby issue, even though it had been raised and preserved in the Trial Court. There was no tactical reason for his failure to do

so; nor is any tactical basis for such an omission within the realm of reason. Mr. Middleton did not receive effective assistance of counsel on appeal and is entitled to a new direct appeal of his conviction and sentence.

II. JURISDICTION

Claim I. This Court's jurisdiction derives from the Florida Constitution. Article V, Section 3(b)(1), (7) and (9) (1981), and Rule 9.030(a)(3), Fla. R. App. R.. *See also* Rule 9.100, Fla. R. App.P.

Claim II. This Court has jurisdiction over claims of ineffective assistance of counsel on appeal. Article V, Section 3(b)(1), (9), Fla. Const. *Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985).

III. FACTUAL BASIS FOR RELIEF

Claim I. The Trial Court "death qualified" Mr. Middleton's trial jury over objection. "Death qualification" refers to the procedure under which prospective jurors are examined at length during voir dire on their attitudes toward the death penalty. All jurors who state that they cannot consider a sentence of death are excluded for cause, not merely from the penalty phase, but also from the guilt-or-innocence phase -- even if their voir dire establishes that they would be entirely fair in determining guilt or innocence.

The Court improperly excluded juror Simmons. The relevant portion of her voir dire was:

> "THE COURT: ... when you go back to that jury room and have that evidence in mind that you heard during this trial, will you apply the law that I give you?
>
> Ms. SIMMONS: I will.
>
> THE COURT: If that law convinces you based on what you heard that the defendant has been proven guilty beyond and to the exclusion of a reasonable doubt of first degree murder, would you return a verdict of first degree murder?
>
> Ms. SIMMONS: Yes.
>
> THE COURT: You could do that?
>
> Ms. SIMMONS: Yes.
>
> * * * * * * *

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THE COURT: ... You have indicated if you find the State proves him guilty of first degree murder you would have no problem of returning a verdict of first degree murder?

Ms. SIMMONS: Yes, I can.

* * * * * *

THE COURT: Let me ask you one more time: if you believe after hearing the evidence that the State has proven the defendant guilty of first degree murder, and he is charged with first degree murder, and if the State proves by enough evidence to meet the law that I give you he is guilty as charged, can you return a verdict of guilty as charged of first degree murder?

Ms. SIMMONS: Yes, but I would worry about it afterwards." (T.102; 104-105; 106).

The Trial Court excused juror Simmons (T.107).

The Court improperly excluded juror O'Brien. The relevant portion of her voir dire was:

"THE COURT: Mrs. O'Brien, did I understand you to indicate in your answers to the lawyers, that first of all, putting aside the feeling that you have about capital punishment, if the State were to prove guilt of the defendant beyond and to the exclusion of a reasonable doubt as to first degree murder you could return a verdict of guilty as to first degree murder?"

Ms. O'BRIEN: Yes.

THE COURT: You could do that?

Ms. O'BRIEN: Yes. " (T.171)

The Trial Court excused juror O'Brien (T.172).

Claim II. On direct appeal, appellate counsel neither briefed nor argued the Gribsby issue. He had no tactical reason for this omission.

IV. RELIEF SOUGHT

Claim I. The Court should set aside Mr. Middleton's conviction and order that he be given a new trial.

Claim II. The Court should order a new appeal for Mr. Middleton.

V. BASIS FOR RELIEF

Claim I. In Grabsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), the District Court found that death qualified juries are more favorable to the prosecution and more likely to convict than are the juries

which ordinarily try criminal cases. The Court also found that death qualification makes juries unrepresentative, because it excludes a distinct group within the community. The Eight Circuit, in banc, affirmed. The Eight Circuit affirmed the findings of the District Court that:

1. Death qualification excludes a substantial number of jurors who could be fair and impartial in determining guilt, even though they could not vote to impose the death penalty; this group comprises somewhere between 11 and 17% of the jurors who are impartial in the guilt phase. 758 F.2d at 231-2.

2. Death qualification disproportionately excludes blacks and women. 569 F.Supp. at 1283, 1293-4.

3. Death qualified jurors differ from those who are excluded by death qualification in their appraisal of the criminal justice system and their approach to the evidence. Death qualified jurors are more likely to conclude that a defendant who does not testify in his own behalf is guilty. They are more distrustful of defense attorneys, more hostile to the insanity defense, and less concerned about the danger of erroneous convictions. 758 F.2d at 232-33.

4. The process of death qualification itself tends to make jurors believe the defendant is more likely to be guilty as charged. 758 F.2d at 234.

5. Death qualified juries are more likely to convict given the same evidence than juries which have not been death qualified. 758 F.2d at 233-36.

A. DEATH QUALIFIED JURIES ARE NOT IMPARTIAL

The Sixth Amendment to the United States Constitution guarantees that:"in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed..." In Duncan v. Louisiana, 391 U.S. 145 (1968), the Supreme Court held that this provision was applicable to the States:

> "The guarantees of jury trial in the Federal and State constitutions reflect a profound judgment about the way in which

law should be enforced and justice administered ... If the defendant preferred the common sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or a group of judges." (391 U.S. at 156)

Because, as Grigsby held, overwhelming evidence shows that death qualified juries are not impartial, death qualification necessarily violates the Constitution.

B. DEATH QUALIFICATION VIOLATES THE "FAIR CROSS-SECTION" REQUIREMENT

In addition to the fundamental requirement that a trial jury be fair and impartial, it must also be representative of the community. "The fair cross-section requirement [is] ... fundamental to the jury trial guaranteed by the Sixth Amendment ..." Taylor v. Louisiana, 419 U.S. 522, 530 (1975). In Duren v. Missouri, 439 U.S. 358, 364 (1979), the Court explained that:

> "In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in Venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to the systematic exclusion of this group in the jury selection process."

The Eight Circuit, applying this standard, found that the group of jurors who are excluded by death qualification is distinctive and sizeable; that the representation of such person on venires is not fair and reasonable; and that they are systematically excluded by the death qualification process. Grigsby, 758 F.2d at 229.

Claim II. The general principles governing claims of ineffective assistance of counsel on appeal are well established. The "petitioner must show (1) specific errors or ommissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionaly acceptable performance and (2) the defficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result". Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985).

Here, there was absolutely no reason for appellate counsel not to raise the Grigsby issue on appeal. It had been raised and preserved in the Trial Court. Under no circumstances would competent counsel in a capital case forego an argument which compels reversal of a first degree murder conviction. As this Court said recently in Wilson:

> "The basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law. Every attorney in Florida has taken an oath to do so and we will not likely forgive a breach of this professional duty in any case; in a case involving the death penalty it is the very foundation of justice." (474 So. 2d 1164).

Mr. Middleton need not demonstrate conclusively that his conviction must be reversed in order to show the prejudicial effects of his appellate attorney's error. In Wilson, this Court granted a new appeal, even though it could not "predict the outcome of a new appeal at which petitioner will receive adequate representation." 474 So. 2d at 1165. Under Grigsby, Mr. Middleton is entitled to a new trial. His appellate attorney should have raised the Grigsby issue. The denial of a meaningful appeal totally frustrates the ends of justice.

VI. CONCLUSION

Mr. Middleton requests that the Court: (1) Grant him a new trial and (2) grant a new direct appeal.

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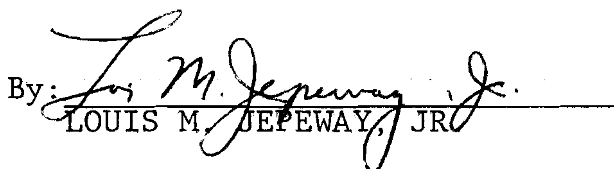
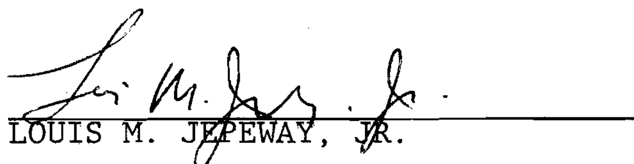


By: LOUIS M. JEPEWAY, JR.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to MICHAEL NEIMAND, 401 N.W. Second Avenue, Suite 820, Miami, Florida 33132, this 9 day of April, 1986.



LOUIS M. JEPEWAY, JR.