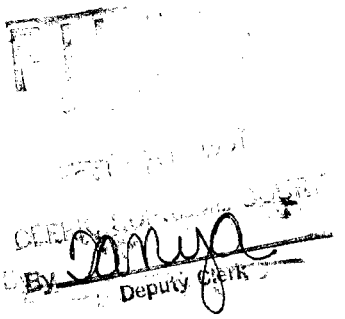

IN THE SUPREME COURT OF FLORIDA

JOHNNY WILLIAMSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. CF-130

68800

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR DIXIE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

MICHAEL E. ALLEN
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ISSUE I

WHETHER THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AS TO THE STATE'S CLOSING ARGUMENT CONCERNING CO-DEFENDANT OMER WILLIAMSON'S PLEA OF GUILTY TO FIRST-DEGREE MURDER.

The state's answer to Williamson's argument on this issue is that the trial court did not abuse its discretion denying Williamson's motion for mistrial. (See Appellee's Brief p.15) The state in this case seems to believe that by merely canning "abuse of discretion" that judicial review of any purported error is thereby foreclosed. The extent of review by of review of discretionary rulings, however, is far broader than the state acknowledges.

Any particular legal issue will have two components: facts and law. As to the law, the court has no discretion; it must apply the correct principles or rules of law to a particular factual situation. See Canakaris v. Canakaris, 382 So.2d 1197 (Fla.1981). As to the facts, if there is no dispute as to what the facts are, the court has no discretion to accept those facts. Holland v. Gross, 89 So.2d 255, 258 (Fla.1956). Only when the facts are conflicting, does the court have discretion as to what facts it can believe and what weight to accord those facts.

Thus, in analyzing questions of law or fact or mixed questions of law and fact, the analysis is more involved than simply looking for some sort of nebulous "abuse of discretion."

> Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.

Brown v. Allen, 344 U.S. 443, 97 L.Ed. 469, 73 S.Ct. 397 (1952).

In this case neither the law or the facts are disputed. As to the facts, the prosecutor clearly intended to infer Williamson's guilt of First Degree Murder from Omer Williamson's plea of guilt to First Degree Murder (T.808-09).

Moreover, the law is equally clear. The state errs when it introduces evidence of a co-defendant's plea of guilt. Parker v. State, 458 So.2d 750, 753 (Fla.1984). In Parker, the state told the jury that Parker's ex-wife had pled guilty to Second Degree Murder pursuant to a plea bargain. This court agreed with Parker that this was error:

> Appellant cites Thomas v. State, 202 So.2d 883 (Fla. 3d DCA 1967), and Moore v. State, 186 So.2d 56 (Fla. 3d DCA 1966), as holding that revealing a co-felon's conviction or entry of a guilty plea was impermissibly prejudiciaal to the fairness of the trial. We agree in principle with Judge Pearson's analysis in Thomas:
>
> > As a general rule, it is improper for a prosecuting attorney to disclose during trial that another defendant had been convicted or has pleaded guilty. This is because competent and satisfactory evidence against one person charged with an offense is not necessarily so against another person charged with the same offense. Each person charged with the commission of an offense must be tried upon evidence legally tending to show his guilt or innocence.

202 So.2d at 884, Id. at 753.

This court, however, found this error harmless upon the "unique facts of [that] case." Specifically, revelation of Parker's ex-wife's plea in no way foreclosed or rebutted any of Parker's defenses.

Such is not the case here as the state claimed it mentioned Omer Williamson's plea to First Degree Murder specifically to rebut Williamson's manslaughter argument.

> MR. PHELPS: No, that's not it at all. This is an argument in direct rebuttal to Mr. Slaughter's argument that they didn't know, that Omer's own statement was they didn't know there was going to be a killing. And both he and Mr. McKeever talked about manslaughter. Now, what we're talking about here--all I'm saying is that it doesn't make sense for him to plead guilty to first-degree murder if all it was was manslaughter that he did. That's what I'm saying, and that's not a mistrial.

T.808-09.

Consequently, with the facts and law undisputed, and the prejudice Williamson suffered clear, whatever discretion the trial court had in this case, was clearly abused.

ISSUE II

THE COURT DID NOT ERR IN SENTENCING WILLIAMSON TO DEATH WHEN HIS CO-DEFENDANT, OMER WILLIAMSON, RECEIVED A LIFE SENTENCE.

The state's argument is that Williamson was the dominant force in this murder, and as such he merits death rather than a life sentence similar to that imposed upon Omer Williamson. In support of this argument it cites several facts and cases.

It says for example that ". . . [Appellant] initiated the acts towards acquiring the weapon." Appellee's Brief at p. 18. What it does not say is that Williamson never found a weapon. Instead, Omer Williamson, who also was looking for a weapon (R.518), retrieved the one he had hidden in his cell (R.518).

The state says "Appellant repeatedly told other inmates that they were going to kill the victim." Appellee's Brief at p. 18. Omer Williamson made similar threats (R.614). The state says ". . . [Appellant] recruited Robertson to act as the lookout." Appellee's Brief at p.18. Actually Robertson volunteered (R.500-02). The state says Williamson was the leader and Omer Williamson and Robertson were mere followers. Appellee's Brief at p.18. Omer Williamson, however, started the fight with Drew (R.527), kicked him (R.527), tried to stop Drew from screaming (R.572), and also stabbed him (R.614).

Most of the testimony inculpating Williamson came from his co-defendant, Omer Williamosn, yet Omer Williamson had a motive (a life sentence) and an expressed willingness to lie to save himself and "fix [Williamson's] ass" (R.725). Omer Williamson's testimony, as a matter of fact and as a matter of law, is inherently suspect.

> ". . . the post-arrest statements of a co-defendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a co-defendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence."

Lee v. Illinois, __U.S.__ 90 L.Ed.2d 514, 526 __S.Ct.__ (1986), quoting from Bruton v. U.S., 391 U.S.__ 20 L.Ed.2d 476 88 S.Ct. 1620 (White dissenting).[1]

There is, however, no evidence the trial court, in sentencing Williamson to death, acknowledged the inherent problems of Omer Williamson's testimony or in any way analyzed the facts of this case in light of Omer Williamson's inherent unreliability.

In capital cases, such an analysis is especially compelling not only because of the finality of the sentence, but because this court has said that sentencing orders must be of unmistakable clarity. Mann v. State, 420 So.2d 578 (Fla.1982).

Here the trial court's order lacked that clarity as it made no mention that it considered the inherent weakness of Omer Williamson's testimony or his life sentence when it sentenced Williamson to death. Considerally, the court was aware of Omer Williamson's life sentence, but there is no evidence in the record before this court that it considered it in sentencing Williamson to death. Alford v. State, 355 So.2d 108, 109 (Fla.1978); Brown v. Wainwright, 392 So.2d 1327 (Fla.1981).

In Pope v. State, 441 So.2d 1073, 1076 (Fla.1983), the trial court met this exacting standard:

> The transcript of court proceedings and the trial court's discussion of the evidence in the sentencing order show the serious consideration the court gave to the issue. So long as all the evidence is considerd, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion. (cites omitted)

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[1] Lee v. Illinois, involves a sixth amendment confrontation issue, but what it says concerning the inherent suspicion surrounding co-defendant's post-arrest statements applies to this case.

Here there is no evidence of a similar, serious consideration of Omer Williamson's testimony or sentence.

The cases cited by the state also do not support the trial court's imposition of death. In four of these cases, Bolender v. State, 422 So.2d 833 (Fla.1982); Brown v. State, 473 So.2d 1260 (Fla.1985); Marek v. State, 492 So.2d 1055 (Fla. 1986), and Downs v. State, 386 So.2d 788 (Fla.1980), the co-defendants were passive observers to the murders and did not actively participate in the killings. In this case, that can not be said of Omer Williamson.

In Palmes v. Wainwright, 460 So.2d 362 (Fla.1984), the co-defendant was neither present at the murder nor used a weapon. That case obviously is inapplicable here.

Only Smith v. State, 365 So.2d 704 (Fla.1978), supports the state's position, and the court in that case summarily affirmed Smith's sentence without any analysis of why his death sentence should be affirmed over his equally culpable co-defendant. It therefore has little precedential value beyond the facts of that case.[2]

Thus, it is not clear beyond a reasonable doubt that Williamson was the dominant force in this murder. Moreover, if he was, this court can not use that fact to justify his death sentence as it amounts to an unenumerated aggravating factor and is violative of this court's limitation of aggravating factors to those specifically statutorily listed. Purdy v. State, 343 So.2d 4, 6 (Fla.1977).

[2]The facts in Jackson v. State, 366 So.2d 752 (Fla.1978), and Hoffman v. State, 474 So.2d 1178 (Fla.1985), are either vague or to abbreviated to properly analyze this court's holding regarding the defendant's dominance in either case.

ISSUE III

THE COURT DID NOT ERR IN FINDING THAT APPELLANT COMMITTED THIS MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The state's response to Williamson's argument on this issue is contained in the second to the last paragraph of its answer. Appellee's Brief p.25. Essentially, the state claims that there is no evidence to support Williamson's argument.

Initially, because Section 921.141(5)(i), Florida Statutes (1985), requires only a pretense of moral or legal justification. Williamson does not have to present much evidence of such justification to prevent its application of this factor. That necessary modicium of evidence is present in this case. That is, given Drew's violent proclivities if debts owed him were not paid (i.e. he was a country boy (R.511)) and Williamson's knowledge of the realities of prison life, the attack on Drew certainly had a pretense of justification as self-defense. As such, the aggravating factor defined by Section 921.141(5)(i), Florida Statutes (1985), is inapplicable to this murder.

VI CONCLUSION

Based upon the arguments presented here, Williamson respectfully asks this Court to either reverse the trial court's judgment and sentencing remand for a new trial or reverse the trial court's sentence or remand for an imposition of a life sentence without the possibility of parole for 25 years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Assistant Attorney General Andrea S. Hillyer, The Capitol, Tallahassee, FL, 32301, this 10th day of February, 1987.

David A. Davis
Assistant Public Defender