IN THE SUPREME COURT OF FLORIDA

MARK ANDREW BURCH,

Appellant,

vs. CASE NO. 68,881

STATE OF FLORIDA,

Appellee.

_____/

APPELLANT'S REPLY BRIEF

A Death Penalty Appeal from the Circuit Court of the Seventeenth Judicial Circuit, Honorable Mark A. Speiser

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POINT 2

THE TRIAL COURT'S OVERRIDE OF THE JURY'S EIGHT TO FOUR VOTE RECOMMENDING A LIFE SENTENCE AND ITS IMPOSITION OF THE DEATH PENALTY WAS ERROR.

The Appellee challenges that the record is void of proof that the Appellant's substantial drug usage impaired his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law. The Appellee states, "...there was no proof produced at trial that Defendant had ingested PCP immediately prior to the murder or that he was "high" at the time of the crime." The Appellee asserts that the Appellant was not under the influence of intoxicants at the time of the offense.

To the contrary, Barbara Cooper, the Appellant's roommate, attested to the Appellant's daily snorting of PCP. Sandra Marini, an acquaintance, testified that the Appellant's "normal" state of being was a drug induced PCP stupor. During the three month time period prior to the shooting, she had only seen the Appellant "straight" two times. The Appellant testified he ingested PCP and alcohol daily. The last thing he remembered before the shooting incident was being at the location where Carr and Folsom picked him up. He was snorting PCP. Joanne Gill, the Appellant's sister, testified that she was with the Appellant in the afternoon before the shooting. She became angry when she observed the Appellant and his girlfriend snorting PCP. The Appellant was "high" on PCP when she dropped him off at his trailer late that afternoon.

The State's witnesses attested to the Appellant's state of intoxication. Betty Robson, who the Appellant encountered shortly after the shooting, testified that the Appellant was acting irrational, strange, and appeared to be two-thirds drunk. Her husband, Benjamin, testified that the Appellant appeared to be "high", or two-thirds drunk. Carr, who drove the Appellant to and from the locale of the shooting, noticed that the Appellant's reactions were unusual, that there was something mentally wrong with him, and that he appeared to be disturbed. Her boyfriend, Roy Folsom, testified that the Appellant was acting very hyper like he was under the influence of drugs. Contrary to the Appellee's position, there was substantial competent evidence that the Appellant was under the influence of PCP at the time of the shooting, such that his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law was substantially impaired.

The Appellee argues that, "... the jury may have been improperly influenced by the weeping of Defendant's mother and wife, and the obvious lack of presence of the victims family in the courtroom." This argument of the Appellee is based upon a statement made by the prosecutor at the sentencing hearing held a month after the jury's advisory sentence. (Vol. 8, p. 1352) The record of the proceedings before the jury contains no reference that the Appellant's mother or wife were crying. The Appellee asserts that the jury was swayed by the obvious lack of presence of the deceased family. The jury was never apprised of whether, or not, the deceased family was, or was not, present at the

trial. Who is to conclude whether the jurors opined that one or more of the spectators at the trial were related to the deceased. The Appellee's argument is not supported by the record of the proceedings held in the jury's presence.

In conclusion, there were valid mitigating factors upon which a reasonable jury could have recommended a sentence of death. The trial court's imposition of the death sentence was a abuse of discretion.

POINT 3

THE TRIAL COURT ERRED IN NOT CONSIDERING AS A NON-STATUTORY MITIGATING CIRCUMSTANCE THE APPELLANT'S BEHAVIOR IN JAIL AND ADJUSTMENT TO INCARCERATION.

The jury, by an 8 to 4 vote, recommended a sentence of life imprisonment. The trial court set sentencing for a month later. At no time prior to the trial court's actual rendition of the sentence, was the Appellant apprised that the trial court might override the jury's recommendation.

Rule 3.800 provides that the sentencing court retains jurisdiction to reduce, or moditify any sentence within sixty (60) days of imposition provided that no notice of appeal has been filed. State v. English, 400 So.2d 570 (Fla. 2 DCA 1981); Smith v. State, 407 So.2d 399 (Fla. 4 DCA 1981). In accord with the aforementioned rule and case law, the Appellant the day after his sentencing, and before filing a notice of appeal, filed a motion to mitigate. The motion moved the trial court to order that the Appellant's behavioral reports while incarcerated be brought before the trial court for consideration. The Appellant moved the

trial court to have brought before it the correction's personnel who had dealt with the Appellant on a daily basis. After a review of the aforegoing, the Appellant wanted the trial court to reduce or mitigate his sentence.

Contrary to the Appellee's assertion, this error was preserved for appellate review. Pursuant to Rule 3.800, the Appellant brought a timely motion to mitigate. The Appellant was not asking the trial court to merely "reopen" the case for more testimony. Rather, the Appellant was asking the court to act on a properly filed motion to mitigate predicated upon mitigating circumstances that the United States Supreme Court has declared that the sentencing court must consider.

The Appellee faults the Appellant for failing to proffer the contents of the reports. The Appellant could not proffer something he did not have. The reports are not public records. The Appellant, as part of his motion to mitigate, moved the trial court to order the Department of Corrections and the Broward County Sheriff's Office to produce the reports for the trial court's review.

Notwithstanding the fact that the records were never produced or reviewed, the Appellee has opined that the Appellant could not prove himself to be a well behaved prisoner. This conclusion is predicated upon comments made by the trial judge at the hearing on the motion to migitate. The comments by the trial judge were blatant hearsay. The trial judge related an incident that had been related to him by the administrator of the jail who had in turn had received information through the chain of command in the jail. At best, the information was "double" hearsay, and

more probably "quadruple" hearsay. The only proof of the Appellant's "recent outrageous behavior in prison," as asserted by the Appellee, was the trial court's sua sponte version of an incident predicated upon double or quadruple hearsay.

Accordingly, the Appellant's cause should be remanded to the trial court with directions that the trial court consider the Appellant's behavioral reports dealing with his conduct while incarcerated from the date of his arrest to the present.

POINT 4

THE TRIAL COURT ERRED IN NOT REVIEWING THE APPELLANT'S 1974 PRESENTENCE INVESTIGATION REPORT BEFORE IMPOSING THE DEATH PENALTY

The Appellant recognizes that in a capital case, the trial court is not required to have prepared a presentence investigation report. Nor, is the trial court required to update a pre-existing presentence investigation report before referring to it. The Appellant challenges that before the trial court overrides a jury recommendation of life imprisonment and imposes a death sentence, the trial court has an obligation to the defendant and to society to review all competent material bearing on the sentencing process which is readily available. In the case sub judice, the prior trial judge, before sentencing the Appellant to death, did review the 1974 presentence investigation report. The 1974 presentence investigation report, if not already a part of the court file, was readily available through the same probation and parole authorities who provided the court with the 1984 presentence investigation report, which the trial

court did review. Before taking a life, the trial court should review the official reports of the statutory arm of the court (ie. Department of Corrections) responsible for providing the trial court with pertinent information relative to sentencing. readily available.

Accordingly, the Appellant's case should be remanded for resentencing with directions that the trial court review and consider the 1974 presentence investigation report.

CONCLUSION

As to the Points addressed herein, as to Point 2, the Appellant prays that his cause be remanded with directions that a life of sentence be imposed. If Point 2 is rejected, the Appellant in Points 3 and 4, prays that his cause be remanded for resentencing with directions that the trial court consider the mitigating evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Diane E. Leeds, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401 this 21 day of April, 1987.

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