IN THE SUPREME COURT OF FLORIDA

DANIEL E. REMETA, Appellant, vs. STATE OF FLORIDA, Appellee.	CASE NO. 69,040

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant reasserts and relies on the argument and authority as to each point previously set forth in the Initial Brief of Appellant, and in reply to the state's answer brief respectfully submits the following in reference to Points I and VII:

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REPLY BRIEF OF APPELLANT

POINT I

THE TRIAL COURT ERRED IN FAILING TO SECURE FROM THE DEFENDANT PERSONALLY A KNOWING, VOLUNTARY AND INTENTIONAL WAIVER OF THE CONSTITUTIONAL RIGHT TO TESTIFY AT TRIAL.

There are two separate prongs to this issue. The first prong, addressed in the Answer Brief of Appellee, concerns the right of an accused to testify on his own behalf at trial. The second prong, not addressed in the Answer Brief of Appellee, concerns the right of the convicted defendant to address his sentencer.

"Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." Brooks v. Tennessee, 406 U.S. 605, 612 (1972). That right has been referred to by this Court as an "organic provision" giving the accused wider latitude than is accorded a "mere witness". Deeb v. State, 131 Fla. 362, 179 So 894, 902 (1938). It cannot

seriously be contended that there is no constitutional right of the defendant to testify at trial, and the state offers no argument to that effect. Rather, assuming that the right exists, the state argues ". . . the existence of such a right in no way implicates a trial court's duty to secure an affirmative waiver thereof when a defendant chooses not to take the stand." (Answer Brief at p.21, emphasis added). How are we to know, however, when a defendant "chooses" [1/] not to take the stand?

> . . . There is a presumption against the waiver of constitutional rights (citations omitted), and for a waiver to be effective it must clearly be established that there was "an intentional relinquishment or abandonment of a known right or privilege." (citation omitted).

Brookhart v. Janis, 384 U.S. 1, 4 (1966).

From a practical standpoint there is a great problem with determining in a post conviction proceeding the voluntariness and deliberateness of the waiver of a fundamental right; a convicted murderer facing the electric chair has no credibility. At a post conviction proceeding, in the face of a silent record, it is the word of a convicted murderer versus the word of an attorney as to what was said, what was implied, and what the defendant understood his options to be. The convicted murderer more often than not has some form of mental disorder. The post

1/ The Fourteenth Amendment secures against state invasion the right of a person to remain silent "unless he chooses to speak in the unfettered exercise of his own will." Malloy v. Hogan, 378 U.S. 1, 8 (1964).

conviction proceeding will occur at its earliest after the appeal has been decided which, as this Court well knows, can take anywhere from one to four years, the point being that time will diminish the accuracy of the recall of even the most scrupulous attorney as to what was actually said, what was implied, and what was understood.

Is the right to testify personal to the defendant, or does the election of the right to the assistance of counsel divest the defendant of his right to speak in the unfettered exercise of his own free will? It is respectfully submitted that the loss of the absolute right to testify in order to obtain the assistance of counsel is too high a price to place on the free exercise of fundamental constitutional rights. An accused cannot be so forced to choose between his right to speak and his right to the assistance of counsel. Rather, it is only through the assistance of counsel that the defendant can intelligently exercise his personal right to testify or remain silent. See Faretta v. California, 422 U.S. 806, 834 (1975) (footnote 45).

The state argues that "requir[ing] the trial court to inquire as to such waivers . . . ultimately thrust[s] the trial judge into the role of arbiter of defense strategy and not that of a neutral magistrate" (Answer brief at p. 26). The argument is untenable. An example is found in this very case where, at the instance of the state, an affirmative waiver of the defendant's right to be present during voir dire was obtained by the court (R10-12). The state points to that waiver as disposing of that issue in this appeal. A colloquy between the defendant and

the trial judge contemporaneous to the waiver would have totally eliminated that issue. For it to occur through counsel affirmatively and the defendant through acquiesence is the minimal standard. Acquiesence by counsel and the defendant, however, can never constitute a knowing waiver. See Carnley v. Cochran, 369 U.S. 506 (1962). A knowing and intentional waiver of a personal constitutional right cannot be presumed. An after-the-fact, post conviction relief proceeding to determine the presence of a valid waiver of such rights in a death case is simply inadequate.

These same concerns apply with equal force to the defendant's right to speak at the penalty phase of trial but, during that phase, the right of allocution is fully implicated. The jury that has convicted the defendant has the duty to recommend to the trial judge what sentence should be imposed. That recommendation is accorded great weight. McCampbell v. State, 421 So.2d 1072,1075 (Fla. 1982). Assuming, arguendo, that the failure of the trial judge to secure from the defendant personally a knowing, voluntary and intentional waiver of the right to testify during the guilt phase of trial can be harmless error, it is respectfully submitted that the error cannot be considered harmless as it pertains to the right of allocution.

> The design of Rule 32(a) [2/] did not begin with its promulgation; its legal provenance

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2/ Federal Rule of Criminal Procedure 32(a) in pertinent part provides: "Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

> was the common law right of allocution. As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal. (citation omitted). Taken in the context of its history, there can be little doubt that the drafters of Rule 32(a) intended that the defendant be personally afforded the opportunity to speak before imposition of sentence. We are not unmindful of the relevant major changes that have evolved in criminal procedure since the seventeenth century - the sharp decrease in the number of crimes which were punished by death, the right of the defendant to testify in his own behalf, and the right to counsel. But we see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remains. None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.

Green v. United States, 365 U.S. 301, 303-304 (1961).

It has long been the rule in Florida that, in a capital case before sentence is pronounced, the defendant must be personally asked if he has any reason why a sentence of death should not be passed upon him, and that procedure must appear in the record. Keech v. State, 15 Fla. 591, 609 (1876). That rule was not complied with in the instant case. The record instead shows only that Daniel Remeta was not affirmatively offered the opportunity to address the trial judge before sentence was pronounced, or the jury before the advisory recommendation was rendered, or the jury before the verdict was rendered. It is impossible to determine what effect a personal statement by Daniel Remeta would

have had on his jury and trial judge. For these reasons a new trial and/or penalty phase is required.

POINT VII

THE DEATH PENALTY WAS IMPOSED IN CONTRAVENTION OF THE RIGHTS TO DUE PROCESS AND A JURY TRIAL GUARANTEED BY THE CONSTITUTIONS OF FLORIDA AND THE UNITED STATES, IN THAT IN RENDERING ITS VERDICT THE JURY DID NOT CONSIDER THE ELEMENTS THAT STATUTORILY DEFINE THE CRIME FOR WHICH THE DEATH PENALTY MAY BE IMPOSED.

This Court has expressly stated "[T]he aggravating circumstances of Section 921.141(6), Florida Statutes actually define those crimes, when read in conjunction with Florida Statutes 782.04(2) . . . to which the death penalty is applicable in the absence of mitigating circumstances." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). This Court has further held "that the provisions of Section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty." Vaught v. State, 410 So.2d 147, 149 (Fla. 1982).

Thus, the Florida death penalty statutes necessarily and unequivocally establish a constitutional right to jury determination of the presence of statutory aggravating circumstances. The recognition by this Court that the statutory aggravating circumstances are substantive elements "that define those capital felonies which . . . deserve the death penalty", Vaught, supra, at 149, acknowledges that without proving these elements the state has not proved a crime that is punishable by death. See Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). The "beyond a reasonable doubt" standard of proof connotes the importance of aggravating

circumstances as substantive elements of the crime. See In re Winship, 397 U.S. 358 (1970).

A defendant convicted of first-degree murder in Florida has not had a jury determine facts comprising substantive elements that are required by statute to be proved beyond a reasonable doubt before imposition of the death penalty. When the verdict is rendered by the jury a defendant cannot receive the death penalty because he has not been convicted of a crime containing all the statutory elements defining an offense for which the death penalty may be imposed. He has been convicted of murder, but he has not been convicted of a crime that is necessarily punishable by death. Only after additional statutory elements are proved beyond a reasonable doubt may the state obtain the death penalty against the defendant.

The state argues that requiring the jury to render a verdict as to the presence of statutory aggravating circumstances would "bastardize" the enlightened concept of a bifurcated penalty phase because the jury would require instruction on aggravating circumstances during the guilt phase of trial, to the defendant's detriment. (Answer brief at p.64). The state misunderstands. The initial verdict need not deal in any manner with the statutory aggravating circumstances. It is acceptable if in the bifurcated sentencing phase the jury renders a unanimous verdict specifying what aggravating circumstances exist. See Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

The state of Oklahoma has a death penalty statute that contains substantially the same aggravating circumstances as those found in Florida's death penalty statute. Compare Section 921.141, Florida Statute to 21 Okla. Stat. Section 701.12. Significantly, however, the procedure in Oklahoma requires unanimous jury determination of aggravating circumstances.

> In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases, the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

21 Okla. Stat. Section 701.11. It is not herein submitted that a unanimous jury recommendation must exist in Florida prior to imposition of the death penalty by a judge in Florida. However, it is strongly submitted that the jury must unanimously determine the presence of at least one aggravating circumstance as a fundamental principle of due process before a death sentence can be imposed.

By way of analogy, this Court is respectfully asked to consider the following hypothetical procedure: A defendant is charged with theft. A jury is instructed that if the defendant knowingly takes or endeavors to take property belonging to another with the intent to deprive him thereof, he has committed theft. The jury returns a verdict of guilty. In a subsequent proceeding the jury is instructed that if a majority of them find that the stolen property was worth $100.00 or more, was a horse or cow, was a firearm, was a fire extinguisher, or was a will or codicil, etc. pursuant to Section 812.014(2)(b),1 - 8 Fla. Stat. (1985), it may recommend that the defendant be sentenced for a third-degree felony. A majority recommendation is made and the judge sentences the defendant to five years imprisonment. Another example applies in the context of robbery. A defendant is convicted of robbery after the jury is instructed that robbery means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault or putting in fear. In a subsequent proceeding the jury is instructed that, if a majority of the jury finds that in the course of committing the robbery the defendant carried a firearm or deadly weapon, they should recommend that he be punished for committing a first-degree felony. Following such a recommendation by a majority of the jury, the judge then imposes a sentence for a first-degree felony. Quite clearly this procedure violates the defendant's right to jury determination of substantive elements of the crimes. This is precisely what is happening in the death penalty context.

In State v. Overfelt, 457 So.2d 1385 (Fla. 1984) this Court stated the following:

> The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in such cases as this where the defendant was charged with but not convicted of a crime involving a firearm.

Overfelt at 1387 (emphasis added). There is no denying that certain statutory aggravating circumstances set forth in section 921.141 involve "matters concerning the criminal episode". Examples include whether the defendant knowingly created a great risk of death to many persons, whether the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody, or was committed for pecuniary gain, whether the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, whether the capital felony was especially heinous, atrocious or cruel, or whether the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In reference to the latter aggravating circumstance, which was found

by the trial judge in this case, this Court has expressly held that this aggravating circumstance requires more premeditation than is necessary to support a conviction for premeditated murder. It defies logic and common sense to say that the jury constitutionally must determine the presence of premeditation to support a conviction, but not determine the premeditation necessary to support the sentence. After all, it is not the stigma of the murder conviction that most affects the convicted murderer, but the death sentence.

The state argues that "in enacting section 921.141, the Florida Legislature was enumerating sentencing considerations which need not be considered by a jury during the trial on the issue of guilt. Therefore, the Appellant was not deprived of due process or of any right to a trial by jury." (Answer Brief at p.66). The assertion flies in the face of the above quoted language of this Court in State v. Overfelt. The state's citation to McMillan v. Pennsylvania, 477 U.S.__, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) is to no avail. In McMillan the United States Supreme Court held that the Due Process clause of the United States Constitution did not require the state to prove visible possession of a firearm beyond a reasonable doubt since the statute neither altered the maximum penalty for the crime committed nor created a separate offense calling for a separate penalty, but operated solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it. McMillan, 91 L.Ed.2d at 77. In the context of the death penalty, however, the sanction of the death penalty is not

available to the state upon conviction for a capital offense; it cannot be obtained unless an aggravating circumstance is found to exist beyond a reasonable doubt. Thus, determination of the presence of an aggravating circumstance "ups the ante" for the defendant by raising the available punishment from that of life imprisonment to that of the death penalty. Imposition of the death penalty is not a limitation on the trial court's discretion. Rather, it is an extension of its power. This fact effectively distinguishes McMillan. In Florida an offense can be labeled a "capital offense" even though the death penalty is wholly unattainable following conviction for the offense. See State v. Hogan, 451 So.2d 844 (Fla. 1984). A capital offense for which the death penalty may be imposed is an offense that is sui generis, with its own statutory elements.

It is respectfully submitted that because the jury did not determine the presence of the statutory aggravating circumstance that are substantive elements defining the capital offenses for which the death penalty may be imposed, the imposition of the death penalty violated the defendant's rights to due process and a jury trial guaranteed under the Florida and Federal Constitutions. Accordingly, the sentence of death must be reversed.

CONCLUSION

Based on the arguments and authorities cited herein and in the Initial Brief of Appellant, this Court is respectfully requested to reverse the conviction and remand for a new trial based on Points I and III; to vacate the death penalty and to remand for a new penalty proceeding based on Points II, V and VI; to vacate the death penalty and remand with directions to impose a sentence of life imprisonment based on Points IV and VII; and to strike the assessment of two-hundred dollars court costs based on Point VIII.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014 in his basket at the Fifth District Court of Appeal and mailed to Mr. Daniel Remeta, Sebastian County Detention Center, 315 Parker St., Ft. Smith, Arkansas, 72902 on this 26th day of March 1987.

Larry B. Henderson

LARRY B. HENDERSON
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