SUPREME COURT OF FLORIDA

JOHNNY COPELAND,

Petitioner,

v. Case No. 69,428

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of Florida,

Respondent.

* * * * * * * * * * * * * * * * * * *

JOHNNY COPELAND,

Appellant,

v. Case No. 69,482

STATE OF FLORIDA,

Appellee.

* * * * * * * * * * * * * * * * * * *

REPLY BRIEF FOR PETITIONER-APPELLANT JOHNNY COPELAND

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REPLY BRIEF FOR PETITIONER-APPELLANT
JOHNNY COPELAND

Preliminary Statement

In its answering brief, the State has elected to forego any discussion of the merits of Copeland's appeal. It has restricted itself instead to urging that each of the issues raised by Copeland is barred under existing Florida procedural rules or doctrines. Putting aside the shrill tone of the State's brief, there is no merit to the State's monotonous invocation of procedural default. This Court may -- and should -- reach the substance of each claim.

This is not a successor 3.850 case; it represents a death row inmate's first opportunity to obtain collateral relief. For this reason, precedents like Bundy v. State, 11 F.L.W. 592 (Fla. 1986) and others relied upon by the State are largely inapplicable.

Adoption of the State's extreme approach would lead to the absurd result that post-conviction review would never be available in the Florida courts. According to the State, this Court lacks the power to hear (a) all issues previously raised and (b) all issues not previously raised. No question, however appropriate for post-conviction review by the Florida courts, could survive that procedural hammerlock. The State's position would eviscerate the authority of the Florida courts to decide questions that are uniquely within their province, and would entirely undermine their ability to provide meaningful review of significant questions of law which this Court, by adopting Fla. R. Crim. P. ("Rule 3.850"), and the people, by giving this Court the constitutional power to conduct habeas corpus review, intended the Florida courts to consider in post-conviction proceedings.

The practical effect of adopting the State's approach, moreover, would merely be to relinquish this State's control over the development of its criminal jurisprudence to the federal courts.

In raising here the issues that he intends to pursue on any later appeals, Copeland is utilizing the system

of post-conviction review for precisely the purposes for which it was designed. As the Court considers those issues, we urge it to be flexible and realistic in implementing those purposes.

Araument

THIS COURT SHOULD ADDRESS THE MERITS OF EACH OF COPELAND'S CLAIMS

I. This Court Applied an Excessively Rigid Legal Standard In Affirming the Denial of Copeland's Chanae of Venue Motion on Direct Appeal

Notwithstanding that a very high proportion of the potential jurors admitted a disqualifying prejudice, that three separate community surveys revealed intense and pervasive racial prejudice against Copeland, and that his identically-situated co-defendant was granted a change of venue, Copeland was denied one. The State contends that this issue was raised and decided on direct appeal and thus is now unavailable.

The issue was indeed raised and decided previously. However, in rendering its decision on direct appeal, this Court applied a change of venue standard which represented an unexplained departure from its own precedents in Manning v. State, 378 So. 2d 274 (Fla. 1979), and Singer v. State, 109 So. 2d 7 (Fla. 1959), and was impermissible under the federal constitution. Indeed, after deciding Copeland v. State, 457 So.2d 1012 (Fla. 1984), cert. denied, 471 U.S. 1030 (1985), this Court recognized as much in its subsequent

decisions in Davis v. State, 461 So. 2d 67 (Fla. 1984), and Mills v. State, 462 So. 2d 1075 (Fla. 1985), each of which returned to the Manning standard. Had the Manning standard been applied to Copeland, a change of venue would certainly have been required, and the conviction reversed.

In addition to prejudicing Copeland, this unwarranted and unexpected shift has created palpable uncertainty in Florida as to the proper change of venue standard. This Court is the sole judicial forum with the power to clarify and correct inconsistencies in state law, and thus to ensure uniform application of law in capital cases -- a principle which this Court has repeatedly endorsed. See, e.g., Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980). It is perfectly appropriate for this Court to exercise its habeas corpus powers to consider this issue in order to harmonize state law and to avoid the otherwise inevitable federal constitutional attack upon its ruling on direct appeal of this case.

11. Copeland Was Incompetent at Trial and Sentencing

We demonstrated in our opening brief ("Brief") that Copeland was incompetent to stand trial on account of his mental retardation, psychosis and organic brain damage. (Brief, Point 11) In response, the State says only that Copeland is procedurally barred from asserting this claim now. The State is wrong. Even though this claim was first

explicitly raised in Copeland's opening brief here, it should be addressed on the merits.

It is beyond dispute that the issue of Copeland's competency could have been raised by a Rule 3.850 motion even though it was not raised at trial or on direct appeal. See, e.g., Mason v. State, 489 So. 2d 734 (Fla. 1986); Hill v. State, 473 So. 2d 1253 (Fla. 1985). See also Pate v. Robinson, 383 U.S. 375, 384 (1965) ("it is contradictory to argue that a defendant may be incompetent, and yet knowingly and intelligently waive his right to have the court determine his capacity to stand trial"); Lane v. State, 388 So. 2d 1022, 1025 (Fla. 1980) ("the issue of competency to stand trial clearly can be raised at any time"); State ex rel. Deeb v. Fabisinski, 111 Fla. 454, 456, 152 So. 207, 211 (1933) (issue may be raised at any time during pendency of criminal proceedings, "whether before or during or after the trial").

Yet the State is now asking this Court to ignore a claim that is fundamental to the very concept of a fair trial -- based only on a brief delay during which the State was in no way prejudiced. The State's position is particularly unjust since Copeland's right to amend his Rule 3.850 motion was thwarted by the trial court's erroneous summary denial of that motion.

Facing an execution date of October 21, 1986, counsel for Copeland (who had been retained only on October 8) filed a Rule 3.850 motion in the Circuit Court on

October 14, 1986, and, on October 15, an application for a stay of execution. That same day, the trial judge, after brief oral argument, signed the State's order denying Copeland's motion and the stay. Copeland immediately appealed to this Court and filed applications for a writ of habeas corpus and a stay of execution. On October 16, 1986, this Court granted a stay of execution and requested that both sides brief all the issues.

This Court's action indicates that sufficient questions had been raised in Copeland's Rule 3.850 motion to warrant further consideration and possibly a hearing, and that the Circuit Court's ruling to the contrary was erroneous. Had the Circuit Court granted the requested stay of execution, as this Court's subsequent action indicates it should have, Copeland would have had the right, under Fla. R. Civ. P. 1.190,[1/] to amend his Rule 3.850 motion to include his incompetency claim.

1/ Fla. R. Civ. P. 1.190 provides, in relevant part:

> (a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of

(Continued)

Copeland should not now be penalized for the Circuit Court's erroneous summary denial of his Rule **3.850** motion. But for the exigencies of the procedure forced upon Copeland by his impending execution date, the Rule **3.850** petition would have been routinely amended to assert the competency claim. Thus Copeland merely asserts here the right that he was effectively denied by the Circuit Court -- the right to amend his pleading.2/

In any event, the State's effort to avoid consideration of the merits of this claim is foreclosed by State v. Sireci, Nos. **69-386, 69-380,** slip op. (Fla. Jan. **5, 1987).** There as here, persuasive evidence of defendant's incom-

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(Continued)
court shall be given freely when justice so requires.

The State recognizes that Fla. R. Civ. Pro. **1.190** is applicable to post-conviction proceedings when it asserts that the rule would preclude the amendment of pleadings while on appeal. (State's Brief at **18)**

2/ Had the evidence now before this Court relating to Copeland's incompetence been proffered to the Circuit Court in support of an amended **3.850** motion, the Circuit Court would have been obliged to order an evidentiary hearing. See Jones v. State, **478** So. 2d **346** (Fla. **1985)** (courts should grant evidentiary hearings on **3.850** motions unless the motion, files, and records conclusively show that the prisoner is entitled to no relief; affidavits from lawyers opining that defendant was incompetent to stand trial and from various doctors opining that he suffers from organic brain damage and was and is incompetent to stand trial preclude conclusive finding that the prisoner is entitled to no relief).

petency came to light in a psychiatric evaluation during the pendency of the appeal from a **3.850** motion. Unlike the evaluation of his original two psychiatrists, Sireci's third evaluation took into account his past medical history. In addition to faulting the procedures used by the original two psychiatrists, the third psychiatrist reached the vastly different conclusion that Sireci suffered from organic brain damage and paranoid psychosis.

When Sireci presented these facts in a successive Rule **3.850** motion, the Circuit Court stayed the execution and ordered that an evidentiary hearing be held. The State appealed that ruling and this Court affirmed, noting:

> The diligence of counsel in attempting to present the instant claim in the initial **3.850** proceeding as soon as the factual basis became available militates against our disturbing the trial court's order finding that the instant motion is not abusive.

Sireci, supra, slip op. at **4.** Copeland seeks a similar opportunity to present his psychiatric evidence at a hearing before the Circuit Court. That such a hearing is mandated is clear from Sireci:

> We must warn that a subsequent finding of organic brain damage does not necessarily warrant a new sentencing hearing. James v. State, **489** So. 2d **737** (Fla. **1986).** However, a new sentencing hearing is mandated in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage. Mason v. State, **489** So. 2d **734** (Fla. **1986).**

Id.

This is just such a case. Dr. Dorothy Lewis, Copeland's expert psychiatric witness, takes into consideration Copeland's previously overlooked history of severe mental illness and refutes the methodology and findings of the original medical experts. (Brief, Ex. B) Dr. Lewis concludes that Copeland was suffering from organic brain damage, psychosis and mental retardation. (Brief, Ex. B, ¶¶ 6-10)

Indeed, this case is even more compelling than Sireci, because the profferred psychiatric evidence makes out a strong claim not only that Copeland is entitled to a new sentencing hearing, but also that he was incompetent to stand trial in the first place. (Brief, Point 11)

Since, under Sireci, the Circuit Court will thus be required to address the merits of Copeland's claims, this Court should remand for that purpose.

There is simply no reason to apply the principles of procedural bar to Copeland's incompetency claim. In light of the promptness with which the claim was asserted, the State will not be prejudiced or in any way disadvantaged in defending against the claim by being required to respond to it on the merits. Nor is there the slightest validity to the State's assertion that Copeland has engaged in "chicanery." (State's Brief at 18) It would be ludicrous to believe that a condemned inmate would deliberately omit a meritorious claim -- thus risking a fatal procedural bar -- in the hope

of somehow gaining some undefined advantage over the State, only to assert the claim immediately thereafter.

Under the circumstances, and because the requirement that a defendant be competent at the time of his trial is fundamental to due process, see Pate v. Robinson, 383 U.S. 375 (1966); Bishop v. United States, 350 U.S. 961 (1956), this Court should address the merits of Copeland's incompetency claim.

111. Copeland Was Denied a Reliable Individualized Sentencing Determination When the Jury Was Not Permitted to Consider Non-Statutory Mitigating Circumstances

Copeland's death sentence is unconstitutional under Lockett v. Ohio, 438 U.S. 586 (1978), because the jury in his 1979 sentencing proceeding was limited to considering only those mitigating circumstances specifically enumerated in the Florida death penalty statute. § 921.141(6), Fla. Stat. (1975). (See Brief, Point 111) This was particularly damaging to Copeland because it meant that he was denied the opportunity to present such potentially persuasive mitigating evidence as a background of mental illness and a history of victimization as a child by beatings and sexual assaults. (See Brief, Point 111, at 43)

In July 1979, the Florida Legislature amended Florida's death penalty statute to permit the consideration of all non-statutory mitigating circumstances as required by Lockett. 1979 Fla. Laws, Ch. 79-353. Only after this

amendment were Florida lawyers and judges on notice of the unconstitutionality of such restrictive instructions as those given in this case.

Because his trial took place in May 1979, Copeland did not benefit from the clarification of the law brought about by the change in Florida's death penalty statute. Copeland's jury was instructed pursuant to the old, restrictive Florida statute and restricted its consideration of mitigating circumstances accordingly. (ROA 480, 2136, 2199)

This was an injustice to Copeland, and one which this Court has ample power to correct, since the unconstitutional application of the pre-amendment Florida statute was fundamental error. See Southwestern Insurance Co. v. Stanton, 390 So. 2d 417 (Fla. 3d DCA 1980) (civil case; instruction which tends to confuse rather than enlighten a jury is fundamental error if it may have misled the jury into arriving at a conclusion it otherwise would not have reached). See also Butler v. State, 343 So. 2d 93 (Fla. 3d DCA 1977) (fundamental error to impose sentence exceeding that allowed for a particular crime).

This Court and the Eleventh Circuit have each recognized the pervasive confusion in Florida law regarding consideration of non-statutory mitigating circumstances. See Harvard v. State, 486 So. 2d 537, 539 (Fla. 1986) (granting relief because Florida's death penalty statute "could have

been reasonably understood to preclude the introduction of non-statutory mitigating evidence"); Sonser v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc) (per curiam) (granting relief because trial court "misconstrued" statute and restricted jury's consideration of mitigating evidence). Sonser v. State, 365 So.2d 696 (Fla. 1978) (per curiam), cert. denied, 441 U.S. 956 (1979), decided by this Court prior to Copeland's trial, purported to clarify the law, but in fact only added to the earlier confusion by upholding instructions which restricted a jury's consideration of mitigating circumstances to a narrow list. See § 921.141, Fla. Stat. (1975).

It was only after July 1979, when the wording of Florida's death penalty statute was amended, that Florida capital juries were told that they were free to consider non-statutory mitigating circumstances. Jurors in prior cases such as this one, who were not so instructed, could not return a constitutionally valid death sentence. See Sonser v. Wainwrisht, supra, 798 F.2d 1488.

In short, this Court not only can but should take the opportunity to put a sensible close to this chapter in its judicial history by extending the rule of Harvard to cover the few cases that went to judgment during the 6-month period between the decision in Songer and the Florida statutory amendment.

IV. The Trial Judge and the Prosecutor Impermissibly Minimized the Jury's Sense of Responsibility for Determining the Appropriateness of the Death Sentence, In Violation of Caldwell v. Mississippi

At Copeland's trial, both the judge and the prosecutor repeatedly misled the jurors as to their role at sentencing, diminishing their importance with remarks such as "the jury has absolutely nothing to do with whatever sentence I might impose." (ROA 1360) Such remarks are clearly impermissible under Caldwell v. Mississippi, 472 U.S. 320 (1985), but the State argues that Copeland is barred from making this claim by his failure to assert it at trial and on direct appeal.

We recognize the holding in Sireci, supra, slip op. at 3, that the failure to object at trial to similar comments amounted to a waiver. However, that ruling should be reconsidered in light of Adams v. Wainwright, 804 F.2d 1256 (11th Cir. 1986), in which the Eleventh Circuit found cause for Adams' failure to object at trial to comments virtually identical to those made in Copeland's case:

> [A]s the legal basis for Adams' claim was not reasonably available to Adams until the Caldwell decision, the district court erred in finding that Adams had failed to establish cause for any procedural default in the state courts.

804 F.2d at — (footnotes omitted) (See Brief, Ex. C at 8).

As in Adams, the legal basis for Copeland's claim was not reasonably available until Caldwell was decided in 1985. Copeland's trial took place in 1979. His direct

appeal was decided on September 13, 1984. Certiorari was not even granted in Caldwell until October 9, 1984. Thus, Copeland is in precisely the same procedural posture with regard to his Caldwell claim as was Adams.

Because it is clear from Adams that the federal courts will eventually hold that Copeland did not waive his Caldwell claim at trial, it would not advance the jurisprudence of this Court to avoid the Adams/Caldwell issue in this case on the basis of waiver. Instead, this Court should address the issue squarely.

Indeed, the State appears to recognize implicitly that the merits of the issues are properly before the Court. Straying from its theme of procedural default, the State suggests that Adams was wrongly decided in that it failed to acknowledge the implications of Spaziano v. Florida, 468 U.S. 447 (1984), which the State interprets as "affirming indirectly the correctness" of the comments to the jury here. The State's reliance on Spaziano is misplaced.

Spaziano directly reaffirmed and readopted the standard of Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), that a jury's recommendation may be rejected by the trial judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." 447 U.S. at 465. Since the Spaziano court specifically applauded the fact that "the Florida Supreme Court takes [the Tedder] standard seriously and has not hesitated to reverse a trial

court if it derogates the jury's role," id., the Adams decision is plainly compatible with Spaziano. Indeed, the strong rule of Tedder -- a rule indispensable to the constitutionality of the Florida death penalty scheme, Dobbert v. Florida, 432 U.S. 282, 295 (1977) -- points up the prejudice to Copeland in the trial court making such statements as: "Now, the jury has absolutely nothing to do with whatever sentence I might impose." (ROA 1360) (See Brief, Point IV, at 47-50)

V. Copeland's Death Sentence Violates Enmund v. Florida

Because Copeland's liability for first degree murder rests solely on a felony murder theory, his death sentence is unconstitutional under Enmund v. Florida, 458 U.S. 782 (1982), which prohibits imposition of the death penalty absent a showing that the defendant killed, attempted to kill, or intended to kill.

It is undisputed that Copeland's Enmund claim was raised and disposed of on direct appeal, and would thus, under normal circumstances, be precluded from consideration under Rule 3.850 and available only on federal habeas corpus review.

However, subsequent to the disposition of Copeland's direct appeal, the United States Supreme Court granted certiorari in Tison v. Arizona, 106 S. Ct. 1182 (1986), granting cert. to 690 P.2d 747 (Ariz. 1984). The relevant facts in Tison are remarkably similar to those in

Copeland, and a reversal in that case would indicate that Copeland's Enmund claim was wrongly decided. Since this Court would then certainly have the power to reconsider this issue under the principles of Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), the sensible course would be to accept the issue for review pending the outcome in Tison.

VI. Copeland's Statements Should Have Been Suppressed

Copeland has presented in his Rule 3.850 motion numerous reasons why his pre-trial statements were unconstitutionally obtained and therefore should have been excluded at trial. As the State points out, this claim was previously raised at trial and on direct appeal, and decided against Copeland.

However, the affidavits of Drs. Krop (3.850, Ex. H) and Lewis (Brief, Ex. B) present new evidence that Copeland suffered from significant mental and neurological impairments at the time he made his statements to the police. Since, for the reasons described at Point II above, this evidence may in any event be considered at a hearing, and since the federal courts will consider the evidence in the context of Copeland's suppression claim, the Florida courts should do the same.

The State in its brief notes that People v. Connelly, 702 P.2d 722 (Colo.), cert. granted, 106 S. Ct. 785 (1985), which was pending before the United States Supreme

Court at the time Copeland's brief was filed on November 15, 1986, was subsequently reversed by the United States Supreme Court. Colorado V. Connelly, 107 S. Ct. 515 (Dec. 10, 1986). Of course, the United States Supreme Court's reversal of the Colorado Supreme Court on federal constitutional grounds does not bar this Court from adopting as a matter of Florida law the principle that incriminating statements that are produced by mental illness are involuntary and inadmissible. Indeed, such a just and enlightened result would be expected, given this State's and this Court's laudable concern for the rights of the mentally ill. See, e.g., In re Beverly, 342 So. 2d 481 (Fla. 1977); §§ 394.467, 27.51, Fla. Stat. (1985).

VII. Copeland's Death Sentence Was the Result of a Racially Biased System

In accordance with the procedure sanctioned by Sireci, supra, slip op. at 4, Copeland raised the issue of the racially biased application of the death penalty in his Rule 3.850 motion.

Although raised and rejected on direct appeal, the Court should take the opportunity to reconsider this issue. Since Copeland's direct appeal, the decisional law governing this claim has developed so significantly that the United States Supreme Court has heard arguments in two cases, one presenting the claim identical to that asserted by Copeland, and one involving closely related claims under Georgia law. Hitchcock V. Wainwright, 106 S. Ct. 2888 (1986); McClesky v.

Kemp, 106 S. Ct. 1331 (1986). No purpose would be served by foregoing the imminent guidance of the United States Supreme Court.

Moreover, although Copeland raised this claim under both the Florida and federal constitutions, this Court's opinion analyzed the claim only under federal constitutional law. Copeland, 457 So. 2d at 1016. The Court should take the opportunity presented here to make clear that the racially biased application of the death penalty is offensive to the Florida constitution. See State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974); Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981).

VIII. Electrocution is Cruel and Unusual Punishment

In his direct appeal, Copeland explicitly challenged the constitutionality of the death penalty as cruel and unusual punishment. (See Brief for Appellant on direct appeal, Point 111, at 9) True to its crabbed approach to post-conviction review, the State now argues that this did not embrace a claim that imposing the death penalty by electrocutioq is cruel and unusual punishment. In order to preserve this claim for further review, the State's unduly rigid position should be rejected. (Brief, Point VII, at 57-58)

IX. The "Pecuniary Gain" Aggravating Circumstance Was Irrationally Applied to Copeland's Case

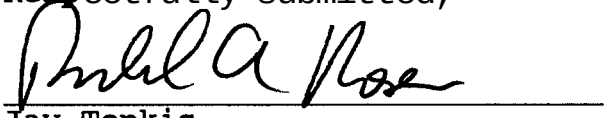
We contend here, as we did on direct appeal, that the "pecuniary gain" aggravating circumstance was irrationally applied to this case. Because the claim was raised on direct appeal, we would ordinarily concede that it is fully exhausted and ripe for federal review. However, the argument on direct appeal did not rely on the same constitutional underpinnings in presenting this claim as does the 3.850 motion. Therefore, we present this claim anew in order to allow the Florida courts the opportunity to consider this issue in the form in which it will be presented to the federal courts.

Conclusion

Because, as we have demonstrated here, this Court can and should reach the merits of Copeland's claims, we urge it to do so. And because, as we have demonstrated in our opening brief, the merits of Copeland's claims amply warrant relief, we urge this Court to vacate Copeland's conviction

and sentence of death, or, at least, remand this matter to the Circuit Court for a hearing.

Respectfully submitted,



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* Awaiting admission to the Bar

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon Mark Menser, Assistant Attorney General, c/o the Office of the Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32301, by mailing a copy of the same first-class, postage prepaid, this 15th day of January, 1987.

ATTORNEY