IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA	)	
	)	
vs.	)	No. 69,557
	)	
ROBERT BRIAN WATERHOUSE	)	

APPELLANT'S REPLY BRIEF

STEPHEN B. BRIGHT
CLIVE A. STAFFORD SMITH
185 Walton Street, N.W.
Atlanta, Ga. 30303.
(404) 688-1202

Attorneys for Robert
Brian Waterhouse

TABLE OF CASES

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APPELLANT'S REPLY BRIEF

Comes now, Robert Brian Waterhouse, and files this brief in response to the Brief of Appellee filed in his case.

The contentions raised by Appellee's brief concerning the suppression of favorable evidence in Mr. Waterhouse's case have all been adequately dealtwith in Mr. Waterhouse's initial brief. Similarly, Appellee's post hoc rationalization of the woefully inadequate manner in which counsel dealt with the prosecution's expert witnesses merits no further discussion. Mr. Waterhouse will therefore respond, first, to Appellee's treatment of his claim of ineffective assistance of counsel at the penalty phase, and, second, to Appellee's allegation that this Court should turn a blind eye to any unconstitutionality which taints a prior conviction obtained in another state.

I. MR. WATERHOUSE WAS DEPRIVED OF HIS RIGHT TO CONSTITUTIONALLY EFFECTIVE COUNSEL AT THE PENALTY PHASE OF HIS TRIAL.

Appellee devotes one paragraph to Mr. Waterhouse's extensive and compelling claim that counsel's performance at the penalty phase rendered the sentence of death unconstitutionally unreliable. No mention is to be found therein concerning the many witnesses who might have been called at the penalty phase, had counsel merely investigated. No mention is made of counsel's failure to recognize the unconstitutionality of the prior conviction introduced against Mr. Waterhouse, the basis for two aggravating circumstances. No mention is made of trial counsel's clearly unconstitutional closing argument, which minimized the jury's responsibility for its decision.

Appellee's sole recourse is to invite this Court to differ with the Fifth and Eleventh Circuit Courts of Appeal concerning one incidental issue, the mitigating effect of "whimsical doubt". Brief of Appellee, at 29-30. Cf. Johnson v. Wainwright, 806 F.2d 1479 (11th Cir. 1986)(again, the Court holds that "whimsical doubt" is a mitigating circumstance).

Since the filing of Mr. Waterhouse's opening brief, the United States Court for the Eastern District of New York vacated Mr. Waterhouse's prior conviction for a violation of his fundamental Sixth Amendment right to counsel. The Court's opinion appears as Appendix A to this brief.

It is undisputed that trial counsel entered the penalty

phase of Mr. Waterhouse's Florida case believing that this prior murder conviction was the "monumental problem" standing between Mr. Waterhouse and a life sentence. (Tr. 947) It is undisputed that trial counsel knew that Mr. Waterhouse's lawyer was disbarred during the pre-trial hearings in his New York prosecution. (Tr. 920) All counsel had to do was raise this issue, and the conviction would necessarily have fallen, along with two aggravating circumstances.

This Court has already called into question the applicability of another aggravating circumstance found in this case. Waterhouse v. State, 429 So.2d 301, 307 (Fla. 1983). Add this to the evidence in mitigation, and there is more than a substantial probability that the outcome of the penalty proceeding would have been different.

II. FLORIDA COURTS CANNOT PERMIT THE INTRODUCTION OF UNCONSTITUTIONALLY OBTAINED CONVICTIONS AT THE SENTENCING PHASE OF A CAPITAL TRIAL.

Appellee argues that this Court has "no jurisdiction to decide constitutional issues . . . as raised by [Mr. Waterhouse]." Brief of Appellee, at 31. The State asserts that this Court has a constitutional duty to ignore fundamental violations of Mr. Waterhouse's most cherished rights:

> The New York court has the jurisdiction to rule correctly as well as to make a mistake and the only remedy is to appeal to courts having New York jurisdiction.

Id.

The issue is mooted by the fact that a New York court now has noted the error in the conviction, and vacated it for a fundamental violation of Mr. Waterhouse's right to counsel. This requires the reversal of the trial court's order. See, e.g., Oats v. State, 446 So.2d 90, 94-95 (Fla. 1984)(reversal required where conviction used in penalty phase later reversed on appeal, even though subsequently reconvicted).

However, even absent the recent development in New York, Appellee's position is untenable. The authorities cited by Appellee deal with civil obligations arising in another state which must be enforced in accordance with the Full Faith & Credit Clause of the United States Constitution. See, U.S. Const. Art. IV, § 1. In arging that the same analysis applies to criminal prosecutions, Appellee misconstrues the nature of the Clause.

Certainly where there is a civil proceeding arising in another state, this State must accord it respect. Edgar v. Edgar, 126 So.2d 585, 587 (Fla. DCA3, 1961); Hunter v. Hunter, 359 So.2d 500 (Fla. DCA4, 1978). However, it is elemental that "the Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment. . . ." Nelson v. George, 399 U.S. 224, 229 (1970)(emphasis supplied), citing, Huntington v. Attrill, 146 U.S. 657 (1892).

Indeed, where Mr. Waterhouse's prior conviction violated his right to counsel, the United States Supreme Court has already

held specifically that this State cannot accord the judgment Full Faith & Credit, consistent with the Sixth Amendment. The Court held that Texas had a constitutional duty to note the infirmity of an invalid prior conviction from Tennessee, noting in Burgett v. Texas, 389 U.S. 109, 19 L.Ed.2d 319, 88 S.Ct. 258 (1967), that:

> To permit a conviction obtained in violation of [the right to counsel] to be used against a[] person either to support guilt or to enhance punishment for another offense . . . is to erode the principle of [Gideon v. Wainwright, 372 U.S. 335 (1963)].

Id. at 115 (emphasis supplied). In accord, United States v. Tucker, 404 U.S. 443, 30 L.Ed.2d 592, 92 S.Ct. 589 (1972)(California court must note infirmity of Florida and Louisiana convictions).

In Zant v. Stephens, 462 U.S. 862 (1983), the Supreme Court applied this law to capital sentencing proceedings, holding that it must be applied with at least equal force:

> [E]ven in a non-capital sentencing proceeding, the sentence must be set aside if the trial court relied at least in part upon . . . prior . . . convictions that were unconstitutionally obtained.

Id. at 887 n.23 (emphasis supplied).*

Most recently, this direct issue was confronted by the

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*. Therefore there can be no harmless error analysis. Cf. Elledge v. State, 346 So.2d 998 (Fla. 1977)(harmless error analysis under state law, where error made is not of constitutional dimension).

Eleventh Circuit in Mann v. Wainwright, ___ F.2d ___, No. 86-3182 (11th Cir. May 14, 1987). The Court held that, if the Florida courts refuse to review a prior conviction for constitutional infirmity, this simply abdicates the responsibility to the United States District Court on federal habeas corpus. Id., Slip Op. at 26-27.

However, it is not necessary to resort to federal constitutional law to reach the conclusion that Mr. Waterhouse's death sentence must be reversed. As Appellee argues in response to Mr. Waterhouse's Petition for a Writ of Habeas Corpus, the prosecution has often been permitted to introduce "testimony concerning the specifics [of] a prior conviction." Id. at 5. See, e.g., Brown v. State, 473 So.2d 1260, 1266 (Fla. 1985); Johnson v. State, 465 So.2d 499, 505 (Fla. 1985); Mann v. State, 453 So.2d 784, 786 (Fla. 1984). Surely it cannot be that the prosecution can conduct mini-trials on prior convictions and then argue that the defense should be denied the right to show those prior convictions are invalid. Cf. Brown v. State, 473 So.2d 1260, 1266 (Fla. 1985)(defense must be allowed to rebut evidence of prior conviction).*

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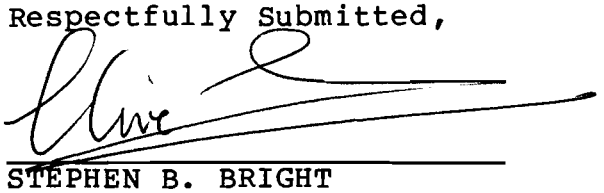
*. Of course, the right to rebut the effects of the prosecution's "mini-trial", both before the jury and as a matter of law, must also be viewed in its federal constitutional context. See, e.g., Skipper v. South Carolina, 476 U.S. ___, 90 L.Ed.2d 1, 7 n.1 (1986); Id. at 9 (Powell & Rehnquist, JJ., & Burger, C.J., concurring).

Conclusion

For the aforegoing reasons, in addition to those already set forth in Mr. Waterhouse's initial brief, this Court should grant Mr. Waterhouse relief from his unconstitutional conviction and sentence of death.

Respectfully Submitted,



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