NO. 70074

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

WILLIE MITCHELL JR.,

Petitioner

vs.

STATE OF FLORIDA,

Respondent

FILED
SID J. WHITE
SEP 19 1988
CLERK, SUPREME COURT
By _____ Deputy Clerk

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Mitchell v. State, 527 So.2d 179 (Fla. 1988), is set forth in Appendix A. The motion for rehearing and denial thereof are set forth in Appendix B and C.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered on May 19, 1988, and petitioner's timely motion for rehearing was denied on July 20, 1988.[1/]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1973), and involves the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner, WILLIE MITCHELL JR., was charged by indictment returned May 19, 1986 with first degree murder in the death of Walter Shonyo, and with armed robbery. Petitioner's trial took place on November 3-7, 1986, before Circuit Judge Harry Lee Coe, III and a jury. The evidence at trial, as to both the murder and robbery counts, was entirely circumstantial [2/]. The state's theory of the case was that petitioner killed Shonyo in the course of a robbery, possibly when he met with more resistance than he anticipated. According to the state's hypothesis, petitioner bit Shonyo on the

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[1/] The "revised opinion" referred to in the order denying rehearing refers only to the correction of the name of the defense forensic odontologist from "Dr. Lennie" to Dr. Levine. See App. B-1.

[2/] A detailed summary of the evidence, from petitioner's initial brief in the Florida Supreme Court, is set forth in Appendix G.

upper arm during the struggle. Petitioner, testifying in his own behalf, denied robbing or killing anyone, but admitted that he burglarized Shonyo's abandoned truck. The defense theory of the case was that Shonyo was murdered by someone else, under circumstances (among them the bite mark) indicating a homosexual rage killing.

The state's forensic odontologist, Dr. Briggle, expressed the opinion that the bite mark on Walter Shonyo's left arm was made by petitioner's teeth. The defense forensic odontologist, Dr. Levine, found that the bite mark did not contain sufficient characteristics to permit an identification to be made, by himself or by anyone. While he could not absolutely exclude petitioner, there were a number of discrepancies and inconsistencies he could not account for. Dr. Levine summarized the situation as follows "[There] are other people you can exclude, and there are a lot of people you can rule in. There is just not enough there [in the bite mark] to work with". Levine further testified that bite marks are commonly found in two categories of homicides: (1) those involving sexual activity around the time of death, "both heterosexual and homosexual, forcible and voluntary", and (2) cases involving children as victims. However, he acknowledged that a bite mark resulting from a struggle between two men in the course of a robbery is something which "could occur".

Dr. Diggs, the associate medical examiner for Hillsborough County, testified for the state that the cause of death was multiple stab wounds of the chest. There were approcimately 110 wounds, mostly on the left side of the body. Dr. Diggs, was of the opinion that the victim was alive (although not necessarily conscious) throughout all 110 stab wounds. Diggs testified that this type of attack was consistent with "homosexual-type killings" and was also consistent with "a vicious attack occurring during a robbery". Because the large number of stab wounds suggested "anger-type

overtones" found in many homosexual cases, Dr. Diggs took oral swabs of the mouth and rectum, to have them examined for acid phosphatase. The results indicated an oral level of 2.8 units per liter and a rectal level of 17.6 units per liter, which, according to Diggs, indicated insignificant or no sexual activity.

Dr. Baden, a forensic pathologist called by the defense, expressed the opinion that the victim was already dead, or at least unconscious, during the infliction of most of the 110 stab wounds. Further, it was his opinion that this death was typical of a "homosexual rage killing", and was inconsistent with a casual stranger robbery. Baden based his conclusion on (1) the extremely high number of stab wounds, suggestive of a rage reaction; (2) the presence of the bite mark; (3) the fact that the victim's pants were somewhat lowered and his zipper was down; and (4) the relatively high level of acid phosphatase in the victim's anal region [3/].

Aside from the bite mark testimony of Dr. Briggle, the most damaging evidence against petitioner was the testimony of his cousin Annie Hardin, and Annie's daughter Gloria, to the effect that petitioner had blood on his shirt when he arrived at their home, and that he made statements about having been in a fight with two men at a bar [4/]. [See App. A2, App. G 4-6, 10-11, 23-24]. However, according to Annie, both she and Gloria were present when petitioner came in covered with blood and made the remarks; while, according to Gloria, Annie was upstairs asleep when this happened. Various state and defense witness testified that Annie Harden

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[3/] Dr. Baden testified, contrary to Dr. Diggs, that an acid phosphatase level of 17.6 units per liter was high enough to "concern me about representing anal sex."

[4/] Much of the remaining evidence, concerning petitioner's bringing various articles from Shonyo's truck into the Harden apartment, and his selling the tools the following day, was consistent with his testimony that he came upon the abandoned truck and looted it.

harbors a strong dislike for petitioner (which she acknowledged).

The jury returned a verdict finding petitioner guilty of felony murder in the first degree and armed robbery. Following a jury recommendation of death, by a 7-5 vote, the trial judge imposed the death penalty. The conviction and death sentence were affirmed by the Florida Supreme Court on May 19, 1988, and rehearing was denied on July 20, 1988.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

(1) Four prospective jurors and alternate jurors were excused for cause based on their opposition to the death penalty, without any inquiry into their ability to follow the law. In each instance, the trial court granted the state's challenge for cause, and noted an objection on behalf of the defense. On appeal, the defense contended that the excusals violated the constitutional standard set forth in such decisions as Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed2d 581 (1980); Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed2d 841 (1985); and Gray v. Mississippi, 481 U.S. __, 107 S.Ct. 2045, 95 L.Ed2d 622 (1987) [see App. F 1-12]. The Florida Supreme Court rejected petitioner's contention [see App. A 2-3].

(2) During voir dire, the prosecutor told the prospective jurors that they "must realize that the ultimate decision as to whether or not the man lives or dies is made by Judge Coe". Petitioner coutended on appeal that this statement, by diminishing the importance of the jury's penalty verdict, violated the constitutional principles of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed2d 231 (1985) and Adams v. Wainwright, 804 F.2d 1526, amended on rehearing, 816 F.2d 1493, rev. granted sub nom Dugger v. Adams, U.S. Supreme Court Case No. 87-121 (41 Cr.L. 4181) [see App.F 13-17]. The Florida Supreme Court

rejected this argument, holding that the issue was waived by defense counsel's failure to object [5/], and that in any event "the jury was not misled about its role in the capital sentencing process" [see App. A3].

(3) One of the aggravating circumstances found by the trial court in imposing the death penalty was that the homicide was "especially heinous, atrocious, or cruel". On appeal, petitioner argued that this finding did not meet the constitutional standard of proof beyond a reasonable doubt [App. F18], because it was based on speculation and possiblity. The defense pathologist testified that the victim would have become unconscious very quickly, and died soon after the stabbing began, while the state's pathologist was able to say only that the victim "could have been conscious" and "could have struggled with his attacker". [App. F18-19]. The state's pathologist admitted that he did not know when the victim became incapacitated or when he lost consciouness [App. F19]. Neverthless, the Florida Supreme Court, without discussion, affirmed the finding of "especially heinous, atrocious, or cruel".

REASONS FOR GRANTING THE WRIT

QUESTION I

WHETHER THE FLORIDA SUPREME COURT, IN ITS DECISION IN THIS CASE, HAS UNCONSTITUTIONALLY RELIEVED THE STATE (AS THE PARTY SEEKING EXCLUSION) OF ITS BURDEN OF SHOWING THAT THE CHALLENGED JURORS, BECAUSE OF THEIR OPPOSITION TO THE DEATH PENALTY, WOULD BE IMPAIRED IN THEIR ABILITY TO ABIDE BY THEIR OATHS AND TO FOLLOW THE LAW AS INSTRUCTED BY THE COURT.

[5/] Petitioner recognized in his brief that there had been no objection below, but contended that the comments impaired the reliability of the sentencing decision and the fundamental fairness of the penalty trial itself. He further contended that, given the state of the law on November 3, 1986, when the jury was selected, defense counsel could reasonably have believed that no legal basis for an objection existed. See App. F15-16.

The very first words spoken in the voir dire of prospective jurors for this trial were these:

> THE COURT: Mr. Benito, don't even ask them their name. Just ask them the ultimate question first about whether they will render the death penalty. You know what I am talking about, the Witherspoon problem first. Don't fool around with anything else when, in fact, they may be excused for cause. Go right to that, "Any of you, blah-blah-blah." Don't even ask them their name. Then when they raise their hand, then you can ask them their name. Bring in the jury. Seat 12.

The law is clear that a juror may not be excluded for cause merely because he is personally opposed to the death penalty, whether for religious, philosophical, political, or other reasons. In its recent decision in Gray v. Mississippi, 481 U.S. ___, 107 S.Ct. 2045, 95 L.Ed2d 622 (1987), this Court reaffirmed the principle that "the relevant inquiry is whether the juror's views would 'prevent or substantially impair the performance of his duties as ajuror in accordance with his instructions and his oath'". This strict standard has been established in such decisions as Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed2d 581 (1980) and Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed2d 841 (1985). The constitutional basis of that standard was emphasized in Gray (95 L.Ed2d at 633).

> It is necessary, however, to keep in mind the significance of a capital defendant's right to a fair and impartial jury under the Sixth and Fourteenth Amendments.
>
> Justice Rehnquist, in writing for the Court, recently explained:
>
> > "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law". Lockhart v. McCree, 476 U.S. ___, ___ (1986)(slip op.12).
>
> The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths". Wainwright v. Witt, 469 U.S., at 423. To permit the exclusion for cause of other prospective jurors based on their views on the death penalty unnecessarily narrows the cross-section of venire members. It "stack[s] the deck

> against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law". Witherspoon v. Illinois, 391 U.S. at 523.

It is important to note, as this Court expressly recognized in Wainwright v. Witt, supra (105 S.Ct. at 852), that the burden of demonstrating that the challenged juror will not follow the law in accordance with his oath and the instructions of the court is on the party seeking exclusion of the juror; i.e., the state.

> As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality. See Reynolds v. United States, 98 U.S. 145, 157, 25 L.Ed.244 (1879). It is then the trial judge's duty to determine whether the challenge is proper. This is, of course, the standard and procedure outlined in Adams, but is equally true of any situation where a party seeks to exclude a biased juror.

In the present case, in accordance with the trial court's directions, the prosecutor opened his questioning of the first group of twelve jurors, and his questioning of each replacement group of jurors, by asking each individual a close variation of the following question: "Under the proper circumstances, could you recommend the death penalty?" All but five answered yes. The only juror of the original twelve who said she could not vote for a death recommendation was Mrs. Jarboe:

> MR. BENITO [prosecutor] [to Ms. Morrison] Under the proper circumstances, could you recommend the death penalty?
>
> A. Yes.
>
> Q. Mrs. Jarboe?
>
> A. I am afraid not.
>
> Q. As you sit here today, you are against Capital punishment?
>
> A. I am not against it, it's just that I couldn't vote for that.
>
> Q. Under no circumstances could you vote for a recommendation of death?
>
> A. It's just that I would rather not.

BY THE COURT:

Q. I am sorry. I can't hear you ma'am.

A. It's just that I would rather not.

[App.E4-5]

At this point, the prosecutor, quite properly, sought to ascertain whether Mrs. Jarboe's personal views or feelings on the death penalty would prevent or substantially impair the performance of her duties as a juror:

BY MR. BENITO:

Q. If the law in Florida says that you can recommend the death penalty if you find the proper circumstances, would you have trouble following that law because of you feelings?

A. No.

Q. Ma'am?

A. No.

Q. So, you would be able to follow the law?

A. [Juror nods head].

Q. You would be able to impose the death penalty u er the proper circumstances?

A. I am a law-abiding citizen. If it came to that, I would.

Q. I am trying to determine whether or not you would be able to give this matter a fair and impartial consideration. If you have misgivings about the death penalty, you may not be able to follow the law because of your personal feelings.

There is no problem with that. I am not trying to chastise you. Don't get me wrong. I am not trying to chastise you about that, but the law allows you to recommend the death penalty under the proper circumstances.

You may have some personal misgivings about that and you may have trouble following the law with your personal feelings about the death penalty, which is acceptable.

A. I would repeat that I would rather not.

[App. E5-6]

Even the prosecutor must have recognized that Mrs. Jarboe's responses did not meet the Adams-Witt test, because he did not even move to exclude her for cause, but rather exercised a peremptory challenge. [App. E7].

The four venirepersons (two prospective jurors and two prospective alternates) who came up later, and who answered the prosecutor's lead question in the negative, were handled quite differently. The sum total of the inquiry was as follows:

> MR. BENITO: And is it Mr. Dewrell? Under the proper circumstances, could you recommend the death penalty?
>
> A. No.
>
> Q. You are opposed to capital punishment as you sit here today?
>
> A. Yes, sir.
>
> Q. You can think of no circumstances where you would be able to recommend the death penalty, is that a fair statement?
>
> A. That is a fair statement.
>
> THE COURT: Motion?
>
> MR. BENITO: Motion to challenge the juror for cause.
>
> THE COURT: I will note the defense objection You may step down, please.

[App. E8]

* * * * * *

> Q. As to the death penalty, ma'am, under the proper circumstances, could you vote to recommend to a court of law that a man be sentenced to death? .... And Mrs. Richardson, how about you?
>
> A. I am sorry but I do not believe in the death penalty.
>
> Q. No need to apologize.
>
> A. I feel very strongly about it.
>
> Q. You have strong feelings against the death penalty?
>
> A. Yes. I do. I don't believe we have a right to ever take someone's life.
>
> MR. BENITO: State would note a challenge for cause.
>
> THE COURT: I will note the defense objection. You may step down.

[App. E9-10]

* * * * * *

Q. All right. As to the death penalty, Mrs. St. Charles, could you under the proper circumstances render a death penalty?

A. I can't take someone else's life that is what I am saying.

MR. BENITO: I challenge the alternate for cause.

THE COURT: I will note the defense objection. You may step down. Thank you ma'am.

[App. E11-12]

* * * * * *

MR. BENITO: As to the death penalty ma'am, under the proper circumstances, could you recommend that a man be sentenced to death?

A. [juror Vilmure]: No.

Q. You are against capital punishment?

A. Yes, I am.

MR. BENITO: At this time I challenge the juror for cause, judge.

THE COURT: I will note the defense objection. You may step down, ma'am.

[App. E13-14]

None of the latter four jurors was ever asked whether they could set aside their personal feelings and render a decision based on the law, in accordance with the instructions of the court. Contrast Herring v. State, 446 So.2d 1049, 1055-1056 (Fla. 1984), and Lara v. State, 464 So.2d 1173, 1178-1179 (Fla. 1985), in which the Florida Supreme Court said:

> It would make a mockery of the jury selection process to ... allow persons with fixed opinions to sit on juries. To permit a person to sit as a juror after he has honestly advised the court that he does not believe he can set aside his opinion is unfair to the other jurors who are willing to maintain open minds and make their decision based solely upon the testimony, the evidence, and the law presented to them.[6]

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[6] The Florida Supreme Court, citing Herring and Lara, said the same thing in its opinion in the instant case [App. A2]. However, jurors Dewrell, Richardson, St. Charles, and Vilmure never advised the trial court that they could not set aside their opinions.

As Gray v. Mississippi, supra, makes clear, Wainwright v. Witt does not represent a retreat from the constitutional principle of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed2d 776 (1968). Rather, Witt readjusts the focus of the inquiry away from an (occasionally hairsplitting) analysis of the wording of the questions and answers, and places the emphasis instead on whether, in their totality, the juror's responses demonstrate an inability to obey his oath or follow the court's instructions on the law. Since this determination depends in part on an assessment of the juror's demeanor and credibility, the trial court is accorded broad (but not unlimited) discretion in making it. See Wainwright v. Witt, supra (105 S.Ct. at 852-56). This Court recognized that, concomitant with this privilege, is a responsibility:

> In so holding, we in no way denigrate the importance of an impartial jury. We reiterate what this Court stressed in Dennis v. United States, 339 U.S. 162, 168, 70 S.Ct. 519, 521, 94 L.Ed. 734 (1950): "[T]he trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefor.... In exercising its discretion, the trial court must be zealous to protect the rights of an accused".

Wainwright v. Witt, supra, 105 S.Ct. at 855.

Of the five "death-scrupled" jurors in this case, only the first, Mrs. Jarboe, was given an opportunity to consider whether she could set aside her personal views in deference to the rule of law. That, and not "whether they will render the death penalty" (see App E1], is the ultimate question. If the juror straightforwardly announces that he cannot or will not set aside his personal opinion, he is gone. Herring v. State, supra; Lara v. State, supra. If the juror equivocates, then it is up to the trial court to determine, from the totality of his responses, whether the juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath". See Adams; Witt; Gray; Herring; Lara. If the juror

advises the court (as Mrs. Jarboe did, for example) that he believes he can set aside his personal views and follow the law, then the juror is clearly qualified to serve and cannot constitutionally be excluded for cause, unless the trial court determines, based on the juror's credibility and demeanor, that his "protestations of impartiality" should not be believed. See Wainwright v. Witt, supra (105 S.Ct. at 852); Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed2d 847 (1984).

In the present case, prospective jurors Dewrell, Richardson, St.Charles, and Vilmure were ushered out through the express lane, with only perfunctory inquiry into their views on the death penalty, and without any inquiry into whether they would be willing or able to set aside those views in deference to the law - the dispositive question according to Adams, Witt, and Gray.

It is of some importance to note that neither the trial court nor the prosecutor explained to the prospective jurors that they would be instructed on the aggravating circumstances and mitigating circumstances as defined by statute, and that their role was to determine which of these circumstances were supported by the evidence, and to weigh them to determine the appropriate sentence. Rather, the prosecutor simply informed the jurors that, in the event of a conviction of first degree murder, there would be a second phase, in which they would be called upon to make an advisory recommendation (by majority vote) to the trial court as to whether the death penalty or life imprisonment should be imposed. As far as the jurors had any reason to know, it might be solely up to them to define what kinds of circumstances might warrant a death sentence. The prosecutor also told the prospective jurors:

> It becomes important at this time to determine each juror's opinion as to capital punishment, as to the death penalty. I know this is the first time many of you have been asked as to your feelings on capital punishment, but it's a very important part of this case, and we ask that you try to be as honest as you possibly can with regards to your feelings as to the death penalty.

[App. E3]

The prosecutor then asked each juror - in all but a few instances it was the first question the juror was asked - a question closely resembling "Under the proper circumstances, could you recommend the death penalty"? The juror, in all likelihood being unfamiliar with the operation of Florida's post-Furman capital sentencing statute, and having heard the prosecutor say he wanted to know the juror's feelings on the death penalty, could reasonably have answered "No" if, in his personal opinion, there are no circumstances in which a death sentence is proper. That, in fact, would be the position of virtually anyone who, for religious, philosophical, or political reasons, is opposed to capital punishment. Yet even firm opponents of the death penalty "may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law". Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed2d 137 (1986); Gray v. Mississippi, supra, 95 L.Ed2d at 633. Mrs. Jarboe, in fact, did so. Mr. Dewrell, Mrs. Richardson, Mrs. St.Charles, and Ms. Vilmure never got the chance.

Since the burden of demonstrating, through questioning, that a juror is unqualified due to bias is on the party seeking to exclude the juror [Wainwright v. Witt, supra], and since "the State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional sentencing schemes by not following their oaths' Wainwright v. Witt, 469 U.S. at 423" [Gray v. Mississippi, supra, 95 L.Ed2d at 633], then it is apparent that the state failed to establish a constitutionally acceptible basis for removal of these four jurors.

The erroneous exclusion of even one juror in violation of the Adams - Witt - Gray standard is constitutional error which goes to the very integrity of the legal system [Gray v. Mississippi,

supra, 95 L.Ed2d at 639] and which can never be written off as "harmless error". Gray v. Mississippi, supra; Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, So L.Ed2d 339 (1976). The decision of the Florida Supreme Court in this case unconstitutionally relieved the state of its burden, as the party seeking exclusion, of demonstrating that the challenged jurors were unqualified to serve. This Court should grant review.

QUESTION II

WHETHER THE PROSECUTOR'S STATEMENT DURING VOIR DIRE, IN WHICH HE DIMINISHED THE IMPORTANCE OF THE JURY'S PENALTY RECOMMENDATION, VIOLATED THE EIGHTH AMENDMENT STANDARDS OF RELIABILITY IN CAPITAL SENTENCING.

At the beginning of the voir dire, the prosecutor told the prospective jurors that, in the event of a first degree murder conviction, there would be a second phase in which the jury would be called upon to make an advisory recommendation to the court as to what penalty appellant should receive [App. E2]. The prosecutor continued, "So, it becomes important in this case [to determine each juror's opinion as to capital punishment] and you must realize that the ultimate decision as to whether or not the man lives or dies is made by Judge Coe" [App. E2-3].

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed2d 231 (1985), this Court held that the Eighth Amendment requirement of heightened reliability in capital sentencing is impermissibly compromised where the jury has been led to believe that the responsibility for determining the propriety of a death sentence rested elsewhere. Noting that its capital punishment decisions were premised on the assumption that a capital sentencing jury is aware of its "truly awesome responsibility", the Court wrote:

> ...the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell v. Mississippi, supra, 105 S.Ct. at 2641-2642.

In Adams v. Wainwright, 804 F2d 1526, amended on rehearing 816 F2d 1493, rev. granted sub nom Dugger v. Adams, U.S. Supreme Court case no. 87-121 (41 CrL 4181), the Eleventh Circuit determined that the Caldwell principle is applicable to the Florida capital sentencing scheme, notwithstanding the potential availability of the "override" provision of the statute, which, under certain carefully limited circumstances, permits (but never requires) the trial court

to reject the jury's recommended sentence. See Tedder v. State, 322 So.2d 908 (Fla. 1975), and its numerous progeny. Under Florida law, the jury's recommendation "is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion". Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983); see e.g. McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Tedder v. State, supra. A Florida capital defendant is entitled by law to a meaningful jury recommendation [see Richardson v. State, supra, at 1095], and in cases where a death sentence was predicated on a tainted jury death recommendation, the Florida Supreme Court has not hesitated to reverse for a completely new penalty proceeding.[7/] Recognizing the importance of the jury's penalty recommendation, the Eleventh Circuit in Adams v. Wainwright, supra, concluded that the jury's role in Florida capital sentencing is "so crucial that dilution of its sense of responsibility for its recommended sentence constitutes a violation of Caldwell".

The statement that "the ultimate decision as to whether or not the man lives or dies is made by Judge Coe" not only encourages the jury to abdicate its own sense of responsibility, it is actually somewhat misleading. Unlike several western states under whose death penalty statutes the trial court is solely responsible (subject to appellate review) for the capital sentencing decision, Florida has a "trifurcated" sentencing procedure in which the jury, the trial court, and appellate Court each plays a critical role. See State v. Dixon, 283 So.2d 1 (Fla. 1973); Tedder v. State, supra. For that matter

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7/ See e.g. Patten v. State, 467 So.2d 975 (Fla. 1985) (improper "Allen charge" given to deadlocked penalty jury); Robinson v. State, 487 So.2d 1040 (Fla. 1986); Toole v. State, 479 So.2d 731 (Fla. 1985) (inadequate jury instructions in penalty phase); Dragovich v. State, 492 So.2d 350 (Fla. 1986) (improper cross-examination in penalty phase); Teffeteller v. State, 439 So.2d 840 (Fla. 1983) (prosecutorial misconduct in penalty phase closing argument); Trawick v. State, 473 So.2d 1235 (Fla. 1985); Dougan v. State, 470 So.2d 697 (Fla. 1985) (improper evidence and argument); Valle v. State, ___So.2d ____ (Fla. 1987) (12 F.L.W. 51) (improper exclusion of evidence offered in mitigation).

the Governor (who decides clemency petitions and signs warrants), the Cabinet, and the federal courts also have significant impact on whether a particular capital defendant lives or dies, but that certainly doesn't mean the prosecutor is free to make a point of this to the jury. Caldwell v. Mississippi. The Eighth Amendment requires reliability in capital sentencing [Caldwell], and the recognized purpose of Florida's trifurcated procedure is to provide safeguards - safeguards which were missing under the prior statutory scheme - against unwarranted imposition of the death penalty. State v. Dixon, supra, at 7-8. Every participant in the process - each juror, the trial judge, and each member of this Court - must consider the question of penalty as if a man's life depends on it; that is the essence of the Caldwell rule.

Petitioner recognizes that defense counsel at trial failed to object to the prosecutor's comment. However, remarks which minimize the jury's sense of responsibility for its penalty verdict diminish both the reliability of the sentencing decision and the fundamental fairness of the penalty proceeding itself, in violation of the Eighth Amendment. A sentence of death imposed pursuant to such a proceeding violates due process. Contrast Caldwell v. Mississippi, supra, with Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed2d 431 (1974). Moreover, at the time of the trial in the instant case, Adams had not yet been decided, and the Florida Supreme Court had held (as it has continued to hold) that the Caldwell principle is inapplicable to Florida's capital sentencing scheme. See Darden v. State, 475 So.2d 217, 221 (Fla. 1985); Pope v. Wainwright, 496 So.2d 798, 805 (Fla. 1986). Thus, defense counsel could reasonably have determined that an objection would be futile.

As previously noted, this Court has accepted Adams for review. This Court should, therefore, either grant certiorari in the instant case, or defer its disposition until Adams has been decided.

QUESTION III

WHETHER THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE HAS BEEN APPLIED BY THE FLORIDA SUPREME COURT IN AN UNCONSTITUTIONALLY OVERBROAD MANNER.

In Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. ___, 100 L.Ed2d 372 (1978), this Court held that Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague and overbroad, and noted that the Oklahoma Court of Criminal Appeals had not adopted a limiting construction of the aggravating factor which could cure its overbreadth. This Court cited its previous decision in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed2d 398 (1980). In that case, the Georgia Supreme Court had previously adopted a limiting construction of its "outrageously or wantonly vile, horrible or inhuman" aggravating factor, but had failed to apply it. In Godfrey, this Court concluded that "as a result of the vague construction applied, there was 'no way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not'". Godfrey v. Georgia, supra, 446 U.S. at 433; Maynard v. Cartwright, supra, 100 L.Ed2d at 381.

The Cartwright opinion also refers, by way of comparison to Proffitt v. Florida, 428 U.S. 242, 254-56, 96 S.Ct. 2960, 49 L.Ed2d 913 (1976), in which this Court observed that the Florida Supreme Court had adopted a limiting construction of its "especially heinous, atrocious, or cruel" circumstance:

> That court has recognized that while it is arguable "that all killings are atrocious,...[s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder". Tedder v. State, 332 So.2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim". State v. Dixon, 283 So.2d, at 9. See also Alford v. State, 307 So.2d 433, 445 (1975); Halliwell v. State, supra, at 561 [footnote omitted]. We

> cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See Gregg v. Georgia, ante, at 200-203, 49 L.Ed2d 859, 96 S.Ct. 2909.

Proffitt v. Florida, supra, 428 U.S. at 255-56.

However, as discussed in depth by Michael Mello in "Florida's 'Heinous, Atrocious, or Cruel' Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller", 13 Stetson L.Rev. 523-554 (1984), the Florida Supreme Court has in fact applied the "h.a.c." aggravating factor in such a way that it has become the rule rather that the exception. As stated by Mello in his conclusion (The Universal Aggravating Circumstance):

> The (5)(h) circumstance is so pervasively used that its ambit comes close to being all-inclusive. Every first degree murder by strangulation of a conscious victim meets (5)(h). Stabbing deaths meet (5)(h), unless death occurs almost instantly. The Florida cases clearly demonstrate that normally, stabbing murders do not result in instantaneous death. Deaths by shooting will not meet section (5)(h), but only if death was instantaneous, the killing was not "execution style", and the victim was not aware that death was imminent. What remains is a very narrow category of cases which do not meet the circumstance, and the remainder of homicides which do fall within the (5)(h) category. All first degree murders meet the (5)(h) circumstance except those resulting in instantaneous death not preceded by awareness by the victim and not committed "execution style". This turns on its head the concept of section (5)(h) being device to limit the class of capital murders to those especially deserving of death.

[13 Stetson L.Rev. at 551] [emphasis in article].

In the present case, there was no evidence that unconsciousness and death did not occur relatively quickly, or that the crime was torturous to the victim to any greater extent than is inherent in any homicide. The defense's pathologist, Dr. Baden, testified that the victim would have become unconscious very quickly, and that he died soon after the stabbing began. Moreover, from the pattern of the stab wounds, Dr. Baden concluded that the victim was

completely motionless, and probably unconscious or already dead, during the time that most of the wounds were inflicted. [See App. G19]. The state's pathologist, Dr. Diggs, was able to say only that it was possible that the victim may have struggled with his attacker during all or part of the stabbing, and that it was possible that he remained conscious during the entire attack. [See App. G12, F19]. Dr. Diggs acknowledged that he did not know when the victim became incapacitated or when he lost consciouness. [See App. G12]. Petitioner contended that the finding of the "heinous, atrocious, or cruel" circumstance failed to meet the constitutional standard of proof beyond a reasonable doubt [App. F18], since it was based on nothing more than speculation that the crime was especially torturous to the victim, beyond the norm of capital felonies. Nevertheless, the Florida Supreme Court affirmed the finding without comment [App. A4]. In so doing, the state Court violated the Eighth Amendment principles established in Godfrey v. Georgia, and Maynard v. Cartwright, and failed to apply the limiting construction which it purported to adopt in State v. Dixon.[8/] This Court should grant review.

8/ An additional infirmity lies in the fact that the Florida standard jury instructions used in the penalty phase of capital trials (and which were used in the present case) do not apprise the jury of the definitions which supposedly narrow the applicability of the "heinous, atrocious, or cruel" circumstance. See Maynard v. Cartwright, supra. Petitioner's jury recommended death by a bare majority of 7-5.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, petitioner, WILLIE MITCHELL JR., respectfully requests that this Court issue a writ of certiorari to the Supreme Court of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. Mail to the Honorable Joseph E. Spaniol, Jr., Clerk of the Supreme Court of the United States, First and Maryland Avenue, Northeast, Washington, D.C., 20543; Willi Mitchell Jr., Inmate No. #030018, Florida State Prison, P.O. Box 747, Starke, Florida 32091; The Honorable Sid J. White, Clerk of the Supreme Court, State of Florida, Tallahassee, Florida 32301; and to the Attorney General's Office, Park Trammell Bldg., 1313 Tampa Street, 8th Floor, Tampa, Florida 33602, this 16 day of September, 1988.

Steven L Bolotin

STEVEN L. BOLOTIN