IN THE SUPREME COURT OF FLORIDA

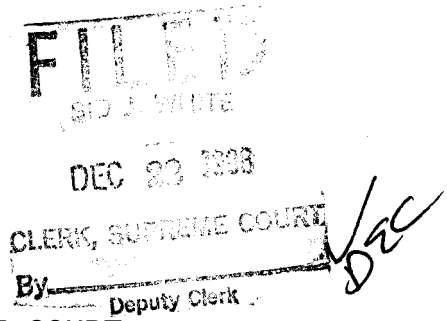
CHARLIE THOMPSON, :

Appellant,

vs. : Case No. 70,401

STATE OF FLORIDA, :

Appel1ee. :



APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. **0143265**

STEPHEN KROSSCHELL
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL **33830**
(813) 534-4200

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

Appellant relies on his initial brief with regard to issues VI, VII, X, XII, XIII, XIV, and XVI.

ISSUE I

DESPITE HIS REPEATED "TEMPORARY" APPOINTMENTS TO THE CIRCUIT BENCH, COUNTY JUDGE BONANNO LACKED JURISDICTION TO PRESIDE OVER THIS CAPITAL CASE.

Appellee claims that the assignment of County Judge Bonanno was limited in type and duration. Brief of Appellee at 39. Appellee fails, however, to point to any substantive way in which this assignment actually was limited, and, in fact, there was no such substantive limitation. Appellee also observes that Judge Graybill, a circuit judge, adopted all of Judge Bonanno's rulings as his own. Id. This observation is irrelevant because Graybill merely rubber stamped these rulings without seriously reconsidering them.

ISSUE II

THE TRIAL JUDGE POISONED THE RELATIONSHIP BETWEEN THOMPSON AND HIS PUBLIC DEFENDER AND THEN REFUSED TO APPOINT NEW COUNSEL.

According to appellee, Judge Bonanno may have been impatient but did not attack the competence of Thompson's attorney. Id. at 39-40. Appellant disagrees with appellee and stands by his initial brief in this respect. Judge Bonanno did tell Thompson that his counsel's request for a continuance would unfairly leave him in jail until March, 1987 without a trial, (R1383-85) did say that defense counsel was not representing Thompson "speedily and

adequately," (R1386) did say that counsel had "messed up" the record, (R1386) did say that counsel had been too slow in investigating the case, (R1394-95) did suggest that counsel was a prima donna who thought he was "above everybody else," (R1398-99) and did say that he could not close his eyes when he saw that a defendant was not being represented properly and was being denied his right to a speedy trial. (R1089-90) These were attacks on defense counsel's competence, and appellee is wrong to say they were not.

ISSUE III

THE TRIAL COURT ERRED BY NOT HOLDING AN EVIDENTIARY HEARING ON WHETHER THE TELEVISION CAMERA IN THE COURTROOM WOULD INHIBIT THE CANDOROF PROSPECTIVE JURORS ABOUT THEIR RACIAL BIAS AND ON WHETHER THE CAMERA WOULD INCREASE THE CHANCE OF A GUILTY VERDICT.

Appellee argues that defense counsel will usually know whether the media intend to cover a trial because reporters usually hang around the pretrial proceedings. Brief of Appellee at 41. This argument misses the point. In this particular case, defense counsel said he in fact did not know about the media's plans to cover the trial. (R7) Nothing in the record shows that he should have known or that reporters were hanging around the pretrial proceedings. Consequently, whether defense counsel usually know about the media's plans is an irrelevant consideration in this case.

ISSUE IV

THE PROSECUTOR DID NOT PROPERLY EXPLAIN WHY HE PEREMPTORILY CHALLENGED FOUR BLACK JURORS, EECAUSE (1) HE GAVE NO REASONS AT ALL FOR EXCLUDING ONE BLACK JUROR, (2) THE REASONS HE GAVE FOR CHALLENGING SOME BLACK JURORS ALSO APPLIED TO WHITE JURORS WHOM HE DID NOT CHALLENGE, AND (3) "WEAKNESS ON THE DEATH PENALTY IS AN ILLEGAL REASON FOR EXCLUSION.

Appellee claims that the defendant was not black and therefore lacked standing to challenge the exclusion of black jurors. Id. at 6. Appellee claims further that only two of the excluded jurors were black and that both of these jurors had relatives charged with drug offenses. Id. at 6-7. These claims are factually false. (R6, 317, 322, 329, 332, 342, 536, 547, 553) Appellee claims that juror King did not say she had a brother-in-law convicted of drug smuggling. Id. at 27. Juror King's exact words were as follows: "He was drug smuggling." (R453)

According to appellee, appellant's claim based on Witherspoon v. Illinois, 391 U.S. 510 (1968) was procedurally defaulted by a lack of a contemporaneous objection. Brief of Appellee at 42. Defense counsel, however, did say that the prosecutor's reasons for excluding Juanita Jackson were flimsy. (R549) Furthermore, a Witherspoon error is a due process error, and, in Florida, denials of due process are fundamental errors. Castor v. State, 365 So.2d 701 (Fla. 1978) A jury selected in violation of Witherspoon is by definition a hanging jury organized to kill the defendant. 391 U.S. at 521-23. Allowing a hanging jury to convict and sentence a defendant to death is by any standard fundamental error.

ISSUE V

THE COURT SHOULD HAVE EXCUSED THREE JURORS FOR CAUSE RATHER THAN FORCED THE DEFENSE TO USE PEREMPTORY CHALLENGES; ONE PROSPECTIVE JUROR HAD BUSINESS CONNECTIONSWITH THEVICTIMSWHICH WOULD HAVE INFLUENCED HER JUDGMENT, A SECOND JUROR WOULD AUTOMATICALLY HAVE BEEN IN FAVOR OF DEATH FOR ALL PERSONS CONVICTED OF PREMEDITATED MURDER, AND A THIRD JUROR WOULD HAVE BEEN IMPROPERLY INFLUENCED BY GORY PHOTOGRAPHS.

As appellee points out, Brief of Appellee at 28, the court said that jurors Olson and Ratka did not say they could not follow the court's instructions on the law and could not be fair and impartial. (R301, 306) This statement by the court missed the point since the jurors also did not say they could follow the law and be fair and impartial. In any event, even if the jurors had claimed they could follow the law and be fair, such claims are viewed with suspicion when their other statements show otherwise. Hill v. State, 477 So.2d 553, 555-556 (Fla. 1985). Contrary to the views of appellee, Brief of Appellee at 43, the issue was not whether the jurors would automatically be biased against the defendant. The issue was rather whether a reasonable doubt existed that they could not be fair or follow the law. Hill. The statements of jurors Constantino, Olson, and Ratka did provide a reasonable doubt of their fairness, and therefore the court should have excluded them for cause.

ISSUE VIII

THE TRIAL COURT PREDICATED THE ORIGINAL COMPETENCY DECISION ON INVALID EVIDENCE; MOREOVER, THE COURT SHOULD HAVE HELD A SECOND COMPETENCY HEARING BECAUSE EVENTS AT TRIAL GAVE REASONABLE GROUNDS FOR BELIEVING THAT THOMPSON HAD BECOME INCOMPETENT DURING THE COURSE OF THE TRIAL.

Appellee's only argument about the failure of Judge Graybill to hold a second competency hearing was that "Judge Graybill was sensitive to the issue and watched for signs of incompetency." Brief of Appellee at 45. This argument is wrong because the record shows that Judge Graybill was completely insensitive to this issue. Graybill generally adopted a high-handed and abrupt approach to the defendant. Graybill made no effort to use simple language when he talked to the defendant, who was mentally retarded. Graybill refused to hear any expert testimony that the defendant was incompetent. (R914-16, 957, 1027) Graybill's attitude was that Judge Bonanno had already decided the question and that Graybill would not reconsider it. These were not the actions of a judge who was "sensitive" to the possibility that the defendant might have become incompetent during the course of the trial. Appellant stands by the twelve indicia of incompetence which were listed in his initial brief and which appellee's brief ignored.

ISSUE IX

TKE TRIAL COURT IMPROPERLYADMITTED AS EVIDENCE THOMPSON'S TAPED STATEMENT TO THE POLICE, BECAUSE THE POLICE (1) DID NOT INSURE THAT THOMPSON UNDERSTOOD HIS RIGHTS AND INTELLIGENTLY WAIVED THEM, (2) COERCED HIS CONFESSION BY USING A LASER ON HIM, AND (3) DID NOT SCRUPULOUSLY HONOR HIS DESIRE FOR THE ASSISTANCE OF COUNSEL.

Appellee was not able to distinguish Fields v. State, 402 So.2d 46 (Fla. 1st DCA 1981), Henry v. Dees, 658 F.2d 406 (5th Cir. Unit A Oct. 1981), and Commonwealth v. Waqqoner, 540 A.2d 280 (Pa. Super. Ct. 1988) and therefore ignored them. Appellant continues to rely on these cases and asserts that they are indistinguishable from his own.

ISSUE XI

THOMPSON WANTED TO BE ABSENT FROM THE COURTROOM ONLY DURING CLOSING ARGUMENTS; HE DID NOT WAIVE HIS RIGHT TO BE PRESENT WHEN THE JURY RETURNED ITS VERDICT AND WAS POLLED.

Appellee claims that appellant apparently acquiesced in the actions of his counsel. Brief of Appellee at 47. Appellee claims further that appellant made no effort to reclaim his right of presence. Id. Nothing in the record supports either of these claims. In fact, appellant attempted to reclaim his right of presence at the first opportunity he was given to do so. (R904-06)

ISSUE XV

THE KILLINGS WERE NOT HEINOUS, ATROCIOUS, OR CRUEL, BECAUSE THE EVIDENCE DID NOT SATISFY A CORRECT UNDERSTANDING OF THIS VAGUELY DEFINED AGGRAVATING CIRCUMSTANCE.

Appellee claims that the finding of this aggravating circumstance was proper because the victims were put in fear at the time of their removal from the cemetery office. Id. at **49**. This element of fear, however, was inherent in the crime of kidnapping to commit murder for which Thompson was convicted. According to the principles of Florida's sentencing guidelines, this fear was therefore not a valid reason to aggravate the sentence. See Fla. R. Crim. P. 3.701(d)(11).

In general, this court should use the insights it has gained from the sentencing guidelines and apply them to capital cases. If this case were judged by the sentencing guidelines, the facts of the case would not be *so* extreme and beyond the usual kidnapping/murder case that they would warrant departure from the recommended sentence, which in this case would be life in prison.

ISSUE XVII

EXECUTING THE MENTALLY RETARDED IS CRUEL AND UNUSUAL PUNISHMENT.

Appellee claims that the judge and jury had conflicting information about the appellant's intelligence and emotional development before them. Brief of Appellee at **49**. This claim is false because the state did not present any evidence on this point to Judge Graybill and the sentencing jury. Appellee may be thinking of the

testimony from Doctor Gonzalez and Doctor Sprehe at the pretrial competency hearing. These doctors did not testify during trial or at the sentencing hearing. Consequently, the testimony at the sentencing hearing was entirely unrebutted and not in conflict at all.

ISSUE XVIII

THE SENTENCES OF DEATH IN THIS CASE ARE DISPROPORTIONATE BECAUSE THOMPSON SUFFERED FROM MENTAL RETARDATION, BRAIN DAMAGE, MENTAL ILLNESS, A LOW EMOTIONAL CAPACITY, AND AN IMPOVERISHED UPBRINGING; IN ADDITION, THE KILLINGS PROBABLY OCCURRED UPON REFLECTION OF ONLY A SHORT DURATION.

Appellee argues that a correct proportionality argument compares the sentence to the offense and the offender, not to other reported cases. Brief of Appellee at 50. Both types of proportionality arguments, however, are correct. The first type is necessary for analysis under the eighth amendment cruel and unusual punishment clause. Enmund v. Florida, 458 U.S. 782 (1982). The second type is necessary under Florida law to insure that similarly situated defendants in capital cases receive similar sentences. Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988). Contrary to the view of appellee, not performing this second type of proportionality analysis would make this state a "target of mockery," Brief of Appellee at 50, because some defendants would receive life while others with similar cases would arbitrarily receive death.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
FLORIDA BAR NUMBER 0143265

ST KROSSCHELL

Assistant Public Defender

Public Defender's Office
Tenth Judicial Circuit
Polk County Courthouse
P. O. Box 9000
Drawer PD
Bartow, FL 33830
(813) 534-4200

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida, 33602, by mail on this _____ day of December, 1988.

STEPHEN KROSSCHELL

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