IN THE SUPREME COURT OF FLORIDA

PAUL ALFRED BROWN,

Appellant,

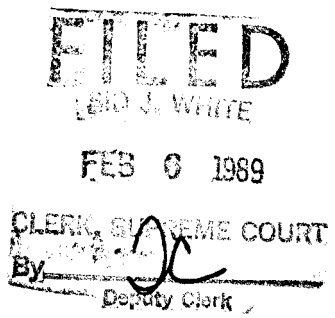
vs.

Case No. 70,483

STATE OF FLORIDA,

Appellee. :

_____:



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

DOUGLAS S. CONNOR
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

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

STATEMENT OF THE CASE

Appellant, Paul Alfred Brown, will rely upon the Statement of the Case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his initial brief.

SUMMARY OF ARGUMENT

Appellee has located hearsay testimony by Detective Davis in the suppression hearing which he now urges this Court to accept as a basis for the death sentence. Neither the jury nor the sentencing judge heard any evidence that Appellant had committed a sexual battery on the victim. This Court should similarly reject such speculations. A sentence of death is disproportionate.

A recent decision by the Ninth Circuit Court of Appeals is persuasive authority that Appellant's proposed modification to language in the standard jury instructions should have been given.

Contrary to Appellee's assertion, this Court cannot disregard Appellant's argument that the jury instruction on the cold, calculated and premeditated aggravating circumstance violates the Eighth Amendment merely by finding that the facts support a CCP finding. The United States Supreme Court has specifically rejected such an approach.

The Eighth Amendment is violated when a reviewing court treats a tie penalty vote of 6-6 as a jury recommendation for life

entitled to great deference but fails to give any consideration when five jurors recommend life. This is an arbitrary distinction which should be corrected by requiring the sentencing court to give clear and convincing reasons why death rather than life is the appropriate sentence when the jury is sharply divided on the appropriate penalty.

ARGUMENTS

ISSUE I

BROWN'S CONFESSION SHOULD HAVE BEEN SUPPRESSED BECAUSE DETECTIVE DAVIS DID NOT ADEQUATELY ADVISE HIM OF HIS CONSTITUTIONAL RIGHTS AS REQUIRED BY MIRANDA V. ARIZONA.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S CHALLENGE FOR CAUSE ON PROSPECTIVE JUROR SCALFARI WHO SHOWED A PREDISPOSITION IN FAVOR OF DEATH AS THE PROPER PENALTY.

ISSUE III

THE TRIAL COURT'S INSTRUCTION TO THE JURY ON "REASONABLE DOUBT" (STANDARD JURY INSTRUCTION) UNCONSTITUTIONALLY DILUTED THE DUE PROCESS REQUIREMENT OF PROOF BEYONDA REASONABLE DOUBT.

Appellant will rely upon his arguments as presented in his initial brief.

ISSUE IV

A SENTENCE OF DEATH IS DISPROPORTIONATE IN THIS CASE WHEN COMPARED TO OTHER CAPITAL CASES WHERE THIS COURT REDUCED THE PENALTY TO LIFE IMPRISONMENT.

Appellee asserts in his brief that a death sentence is proportional because the trial judge was "made aware of a number of factors the jury did not have an opportunity to consider". Brief of Appellee, p. 25. Specifically, Appellee points to testimony in the suppression hearing from Detective Paul Davis

which was never placed before the jury. Detective Davis testified that he had hearsay information that Pauline Cowell had charged Appellant with sexual battery and that another detective, George Hill, had not yet investigated the complaint (R764). There is no further mention of this alleged complaint anywhere in the record.

Apparently, Detective Davis's assertion was not supported by any admissible evidence. Judge Spicola never alluded to this allegation against Brown in any manner, neither during the sentencing hearing nor in his written order. Indeed, the suppression hearing was held before Judge Bucklew (R738), so the record does not even reflect that Judge Spicola was aware of an alleged sexual battery complaint.

In short, there is no reason for the State to suggest that Judge Spicola considered this alleged motivation when imposing a sentence of death on Brown. Likewise, this Court should not consider such unsupported speculation on review of the sentence despite Appellee's urging. See Brief of Appellee, pages 25-8.

This cases cited by Appellee in his brief for proportionality review are clearly distinguishable from the case at bar. In Remeta v. State, 522 So.2d 825 (Fla. 1988), the defendant planned a convenience store robbery with the prior intention of killing all witnesses. Unlike Brown, who had never committed a violent crime previously, Remeta had prior convictions for nine violent felonies including three first-degree murders. 522 So.2d at 828.

Dufour v. State, 495 So.2d 154 (Fla. 1986) is also

inapposite. Dufour announced his intention to pick up a homosexual in a bar, to rob him and kill him. He accomplished his plan. Dufour had previously murdered another person. There were no mitigating circumstances in Dufour in contrast to the three statutory mitigating circumstances and several non-statutory mitigating factors found and weighed in the case at bar (R914-5).

ISSUE V

THE TRIAL COURT ERRED BY DENYING APPELLANT'S SPECIALLY REQUESTED MODIFICATIONS TO THE STANDARD PENALTY PHASE JURY INSTRUCTIONS.

Recently the Ninth Circuit, sitting en banc, struck down the Arizona death penalty statute in Adamson v. Ricketts, Case No. 84-2069 (9th Cir. December 22, 1988) [44 Crim.L.Rptr. 22651. Among the constitutional flaws found by the court was the requirement that a defendant establish mitigating circumstances by a preponderance of the evidence before they could be weighed against the aggravating circumstances. The Ninth Circuit, citing Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), stated that it is "well established" that the Eighth Amendment requires the capital sentencer to weigh **all** relevant mitigating evidence against the aggravating circumstances.

A similar Eighth Amendment flaw exists in the Florida standard jury instructions where a threshold standard of "reasonably convinced" is set up before the jury is permitted to consider a mitigating circumstance established. Appellant's requested modification should have been granted. Appellee's

citation of Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (Brief of Appellee, p. 32) is not on point because a different aspect of the Florida standard instructions was challenged there.

ISSUE VI

THE TRIAL COURT'S INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY VAGUE BECAUSE IT DID NOT INFORM THE PENALTY JURY OF THE LIMITING CONSTRUCTION GIVEN TO THIS AGGRAVATING CIRCUMSTANCE.

The thrust of Appellee's argument is that if the cold, calculated and premeditated aggravating circumstance is applicable to the facts of this case, then it doesn't matter whether the jury instruction sufficiently advises the jury of the limiting construction given to this aggravating circumstance. The United States Supreme Court in Maynard v. Cartwriaht, 486 U.S. ____, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) specifically rejected such an approach. "Its [Oklahoma Court of Appeals] conclusion that on these facts" wrote the Cartwrisht court," the jury's verdict that the murder was especially heinous, atrocious, or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance". 100 L.Ed.2d at 382.

Similarly at bar, the jury instruction on the cold, calculated and premeditated aggravating circumstance violates the Eighth Amendment because the jury was not adequately informed as to what they must find in order to consider this aggravating circumstance. Because there is a reasonable probability that the jury did not limit their consideration of the CCP aggravating

factor in accordance with this Court's construction of it, the weighing process might well have been distorted. The jury's recommendation of death is therefore constitutionally infirm.

ISSUE VII

BROWN'S SENTENCE OF DEATH VIOLATES THE EIGHTH AMENDMENT, UNITED STATES CONSTITUTION BECAUSE A BARE MAJORITY JURY DEATH RECOMMENDATION IS NOT RELIABLY DIFFERENT FROM A TIE VOTE JURY LIFE RECOMMENDATION.

Appellee's brief misconstrues Appellant's argument. Certainly a valid death sentence can be imposed where a simple majority recommends death; a valid death sentence can be imposed also where a majority or even a unanimity of the jury recommends life. See e.g. State v. White, 470 So.2d 1377, 1381 (Fla. 1985). The statutory mandate is clear that "[n]otwithstanding the recommendation of a majority of the jury", the court shall conduct an independent weighing and impose sentence. Section 921.141(3), Florida Statutes (1985). The United States Supreme Court in Spaziano v. Florida, 468 U.S. 447 (1984) held a sentence of death may be constitutional despite a jury recommendation of life.

The issue in the case at bar concerns the nature of this Court's review of death sentences. When the jury vote on sentence recommendation is 6-6 or 7-5 in either direction, it is clear that the jury is sharply divided as to the appropriate penalty. It is misleading to consider such divided jury recommendations as reflecting the conscience of the community that life is appropriate when six jurors vote life, but that when only five jurors vote

life, death is the presumed penalty.

This Court treats jury votes of 7-5 for life and 6-6 as life recommendations "entitled to great deference". Craig V. State, 510 So.2d 857 at 867 (Fla. 1987). On the other hand, a jury vote of 7-5 for death has not required any special consideration of the five jury votes for life. This drawing of a line between "life recommendations" and "death recommendations" is arbitrary and unconstitutional under the Eighth and Fourteenth Amendments if it results in totally different standards of appellate review.

Appellant suggests that when a sharply divided jury recommends death by a bare 7-5 margin, the sentencing judge should have to demonstrate clear and convincing reasons why death rather than life is the appropriate penalty. The court's findings at bar do not meet this standard because they show that the court merely gave "great weight" to the separate aggravating factors §921.141(5)(b) and **(d)** while giving little weight to the mitigating factors §921.141(6)(b), (f) and (g) as well as the non-statutory mitigating evidence (R912-5).

ISSUE VIII

THE FINDING BY THE SENTENCING JUDGE THAT THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR APPLIED WAS ERRONEOUS.

As in Issue IV supra, Appellee urges this Court to consider a motive for the homicide which was not considered by the jury or sentencing court. His brief states, "[t]he motive and/or reason why this homicide was committed was to silence a rape

victim's accusations against appellant". Brief of Appellee, p. 41.

If this was the State's theory of the case, the prosecutor should have produced some admissible evidence to support this theory in the trial court where it would be subject to rebuttal by Appellant. This Court should emphatically refuse to consider any allegations of a sexual battery committed by Appellant against the victim.

CONCLUSION

Appellant will rely upon his conclusion as presented in his initial brief.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
FLORIDA BAR NUMBER **0143265**

Douglas S. Connor

DOUGLAS S. CONNOR
Assistant Public Defender
Bar No. **0350141**

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 2d day of February, 1989.

Douglas S. Connor

DOUGLAS S. CONNOR

DSC/an