IN THE SUPREME COURT OF FLORIDA

NO. 71,192

GARY ELDON ALVORD,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida, ROBERT MARTINEZ, Governor, State of Florida

Respondent.

SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner, Gary Eldon Alvord, Jr., will be referred to herein as "Petitioner" and "Mr. Alvord." The Respondent, State of Florida, will be referred to as "The State" and "Respondent." References to the record on direct appeal will be designated "R", followed by the appropriate page number(s). Example: [R.1].

I.

THIS COURT IS OBLIGED TO DECIDE THE MIRANDA ISSUE TO CORRECT THE PREVIOUS MISAPPLICATION OF CONSTITUTIONAL LAW.

In Caso v. State, 524 So.2d 422 (Fla. 1988), this Court specifically overturned its erroneous reading of Miranda v. Arizona, 384 U.S. 436, 479 (1966), rendered on direct appeal in the instant case, Alvord v. State, 322 So.2d 533 (Fla. 1975). The Caso ruling brought Florida law into complete adherence with Miranda principles, which were binding United States Supreme Court precedent for over twenty years prior to Caso. Since the sources of these fundamental constitutional principles predated Alvord, that decision was a mistaken reading of the law in existence when that opinion was rendered.

The State characterizes this Court's decision in Alvord v. State, 322 So.2d 533 (Fla. 1975) as a "misapplication or misapprehension" of law not rising to the level of a major constitutional change requiring retroactive application. (Respondent's brief pps. 10-11). It asserts that no such misapplication may receive the benefit of retroactive correction of the misapplication. Significantly, it cites no authority for its assertion that "if a new case represents a misapplication or misapprehension of existing law, such cases should not be applied retroactively to other cases which are on collateral review." (Respondent's Brief, p.10).

Respondent's argument is faulty in that it confuses misapplication issues with change of law and retroactivity

issues. Petitioner's primary argument is that the instant case does not impinge retroactivity concerns due to the Petitioner's reliance on well-grounded fundamental rights embodied in the Miranda decision, which have never been significantly altered since the decision was first handed down in 1966. The Caso decision therefore re-links Florida with the main body of federal precedent, which has previously been cited in Petitioner's initial brief. No retroactivity concerns are thus presented, since no change of law has occurred.

In support of Petitioner's argument, by analogy, are cases where this Court has agreed to rehear a previously decided matter where the prior decision centered on a mistake which materially affected the result. In Christy v. Burch, 6 So. 857 (Fla. 1889), this Court acknowledged a mistake of fact in assessing the type of deed involved in the underlying suit and held:

> A rehearing was granted, because in the petition therefor attention was called to the fact that the court was mistaken as to the character of the warranty here spoken of. Instead of being a full warranty of title, it was only a warranty against any claim by [Respondent] or his heirs, and we are now to reconsider the case so far as it is affected by this mistake. ...points decided will not be reopened on a rehearing unless there is basis for this in mistake or omission of the court, or other like cause, for which the rehearing was granted; that is, unless the subject-matter of the mistake, omission, or other cause enters into and materially affects such points.

Id. at 857 (emphasis added).

This Court reaffirmed its willingness to rehear matters mistakenly decided in Town of Boca Raton v. Moore, 165 So. 279 (Fla. 1936) In that case, this Court extended the Christy v. Burch review standard to mistakes of law, where a question of a chancellor's jurisdiction in equity cases was raised on rehearing. Moore at 282. Therefore, Respondent's assertion that this Court will not reconsider matters wherein a mistake of law is alleged in error, since Respondent misjudges this Court's willingness to correct a mistake of law in the context of rehearing, analogous to the current disposition.

This Court has acknowledged a mistake of law was made in the instant case. Caso v. State, 524 So.2d 422 (Fla. 1988). Since the mistake was not identified until the Caso holding, the Petitioner was foreclosed from a rehearing petition which would have amounted to a re-argument on the merits. See, Fla.R.App.P. 9.320. Once the mistake of law was acknowledged by the Caso holding, Petitioner amended his Hitchcock claim petition for habeas corpus to include the Miranda claim so that this Court could expeditiously resolve both issues. Relief through this method of review is appropriate under analogy to the Moore holding, since it provides a method of review of the mistake of law.

Even if the Caso decision is viewed as a change in law, however, Respondent's assertion that no retroactive relief is available is erroneous. This Court has discarded the doctrine of

finality in cases where an aberrant, unfair result would be worked in an individual's case. In Witt v. State, 387 So.2d 922 (Fla. 1980), this Court stated:

> ...[S]ociety recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.

Id. at 925. This Court acknowledged that the doctrine of finality would give way when the more compelling objective of ensuing fairness and uniformity in individual adjudications was implicated. Id.

The Witt decision outlined the test for determining when a change of law should be retroactively applied. This Court identified three relevant areas of inquiry: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." Id. at 926.

Application of these three "essential considerations" to the instant case requires application of the Caso decision. First, the purpose to be served by the new rule is none other than to effectuate the policy concerns in Miranda v. Arizona, 384 U.S. 436 (1966). The Miranda Court sought to afford an accused every

reasonable presumption against waiver of fundamental constitutional rights. Miranda, 384 U.S. at 479. The Court placed a "heavy burden" of proof on the prosecution as a bar to admission of statements obtained in the absence of warnings. Thus, a retroactive application of the Caso holding to to the instant case would do nothing more than reaffirm the Miranda decision.

The second Witt inquiry focuses upon the extent of reliance on the old rule. The instant case clearly relied on the old rule, since the Alvord ruling was expressly overturned in the Caso decision. 524 So.2d 422, 533 (Fla. 1988). Therefore, reliance on the old rule is clear.

Finally, the "effect on the administration of justice of a retroactive application of the new rule" would also be a positive finding in favor of application of the Caso holding. Since the instant issue arises in a death penalty case, this Court's decision in accord with Caso would profoundly implicate concerns favoring the fair administration of justice. A failure to conform this case to the applicable law would work an irreparable individual injustice. In addition, an imposition of the death penalty upheld on an erroneous interpretation of constitutional law would be fundamentally unfair. See, Gardner v. Florida, 430 U.S. 349, 357-358 (1977). Such a result was avoided by this Court in Thompson v. Dugger, 515 So.2d 173 (Fla. 1987), where a capital conviction was overturned to give retroactive effect to

the Hitchcock holding. Id. at 175, citing, Hitchcock v. Dugger, _____ U.S. _____, 95 L.Ed.2d 347 (April 22, 1987).

The aggregation of these three interests rebuts Respondent's contention that the Caso decision should not apply to Petitioner's benefit. The cited case law stands in sharp contrast to Respondent's assertion that misapplications of law cannot be corrected by this Court.

Respondent also argues that the Miranda issue was not properly preserved. Respondent implies that this Court has no jurisdiction over the Miranda issue due to the failure to timely object to the statements' admission. (Respondent's Brief p.3). This assertion is simply untrue as evidenced by the trial transcript itself:

> THE COURT: I will rule it to be freely and voluntarily made and admit it into evidence.
>
> MR. PLOWMAN: Thank you, Judge.
>
> THE COURT: You want to go --
>
> MR. MEYERS: I want to interpose the objection --
>
> THE COURT: The jury --
>
> MR. MEYERS: -- as to the admissibility of this evidence, Judge.
>
> THE COURT: Right. I will overrule the objection.

[R. 926-27]. Mr. Meyers, Petitioner's counsel, thus made timely objection to the admissibility of the evidence, incorporating as grounds the previously entered Motion to Suppress A Confession or

Admissions Illegally Obtained, filed on February 4, 1974, some four months before the trial. The issue was properly preserved for appeal, both by oral objection and by written motion. German v. State, 379 So.2d 1013 (Fla. 4th DCA 1980).

Respondent's assertion is also mooted by this Court's previous acceptance of the issue for review in Alvord v. State, supra. Florida appellate courts have long held great discretion in acceptance of issues where the interests of justice are served or as a matter of grace. Bennett v. State, 173 So. 817 (Fla. 1937). This discretion is particularly great where the alleged error is fundamental in nature, as in the instant case. Everett v. State, 97 So.2d 241 (Fla. 1957). Moreover, the question of whether Petitioner's claim was properly preserved has been mooted by this Court's previous determination of the Miranda issue on direct appeal. For these reasons, review of this Court's opinion on direct appeal is appropriate under the facts of this case.

II.

PETITIONERS' UNWARNED STATEMENTS WERE INADMISSIBLE.

Respondent has conceded this issue.

III.

THE ERROR COMPLAINED OF IS NOT HARMLESS.

Contrary to the State's assertion, the error in admitting the unwarned statements challenged herein is not rendered harmless by the trial testimony of Zelma Hurley concerning statements allegedly made to her by Mr. Alvord. Respondent misapplies this Court's formulation of the harmless error test to conclude that the Petitioner's statements did not represent a reasonable possibility of influencing the jury's verdict. Cicarelli v. State, _____ So.2d _____, 13 FLW 536 (Fla., Sept. 9, 1988). In doing so, it ignores the fact that jurors typically attribute a much higher level of credibility to statements reported by law enforcement officers over similar statements reported by a civilian. This is particularly so in the present case because Ms. Hurley's credibility was suspect in light of her admitted prior false statements and her challenged motives in reporting Petitioner's statements. Without the Petitioner's statements to Detective Dufour, the prosecution lacked an unbiased and impartial witness to the statements allegedly made by Petitioner and the jury was free to reject Ms. Hurley's testimony. With the admission of the detective's testimony, however, Ms. Hurley's testimony became credible.

Additionally, the Petitioner's statements were to Detective Dufour emphasized by the State in the presentation of its case.

The State ended its closing argument with the Petitioner's statement, "They will have to prove it." It thus forcefully used this statement as a challenge to the jury, implying the Petitioner had dared the jury to convict him. The State also repeated the unwarned exchange to the jury:

> 'They want me for three murders in Florida.'
> 'I thought there was only two?'
> 'They must have forgot one.'
> 'Did you do it?'
> 'They will have to prove it.'
> And that's what we have done. This is what we have done.
> 'They will have to to prove it.' And that's what we have done. And now it's up to you as jurors in this county, jurors in this case, to go back and to do your duty. Make sure that this verdict is a true verdict.
> Thank you.

[R. 1073]. Since the prosecutor ended his closing with the defendant's unwarned statements still ringing in the jurors' ears, the State cannot credibly advance the argument that the statements could not have "possibly influenced" the jury's decision.

Furthermore, the State's representation that the case was primarily built around the testimony of Zelma Hurley, and not of the Petitioner's unwarned statements to law enforcement, is undercut by: 1) Ms. Hurley's admission that she previously lied under oath and; 2) Ms. Hurley's allegations of her self-exculpatory motives in testifying, which were noted by defense counsel during his closing argument [R.1019, 1075]. Thus, the statements attributed to the Petitioner by Ms. Hurley

were undermined by Ms. Hurley's lies about the circumstances under which the statements were made, as well as her motives for testifying about them.

Further, Respondent's contention that Ms. Hurley's testimony about the Petitioner's alleged possession of items stolen from the victims is erroneous when the record is examined. The stolen items were never recovered, and Ms. Hurley's descriptions of these items did not match descriptions of items possessed by the victims. Therefore, this testimony cannot be given the persuasive impact accorded it by Respondent.

Each of these factors discredit Ms. Hurley's testimony and erode Respondent's contention that Ms. Hurley's testimony was adequate, independent of Petitioner's statements, to sustain a jury verdict of guilt. To the contrary, the emphasis on the Petitioner's unwarned statements in closing, the higher credibility attached to the officer testifying to these statements, as well as Ms. Hurley's lowered credibility due to her deliberate falsehoods, each contributed in subordinating the impact of Ms. Hurley's testimony to Petitioner's unwarned statements made to Detective Dufour.

Accordingly, the error in the admission of Petitioner's unwarned statements cannot be dismissed on the grounds that the statements were relatively unimportant. Such an assertion requires an interjection of judgment that takes Ms. Hurley's statements as fact, while at the same time rejecting the

well-founded defense attacks on her credibility. This artificial after-the-fact inquiry is improper under Florida law and has been expressly rejected by this Court. Instead, as noted in Ciccarelli v. State, supra, in determining harmless error, this Court must closely evaluate the impact of the erroneously admitted evidence to determine whether such evidence might have possibly influence the jury verdict. Id. at FLW 536. Applying this standard, admission of the unwarned statements clearly warrants reversal.

Further, Florida appellate courts have not grounded their analysis of this issue on the mere weight of the evidence. In Abram v. State, 216 So.2d 498 (Fla. 1st DCA 1968), decided prior to Alvord, the Court held that the admission of an unwarned statement warrants reversal, despite "overwhelming eyewitness testimony establishing defendant's guilt of the crime charged." Abram. at 500. Thus, the analysis is not centered on the relative weight of the evidence, but on the reasonable possibility of impermissible effect on the jury verdict.

In sum, the admission of the Petitioner's unwarned statements was prejudicial error requiring reversal, since the statements were used to directly influence the jury's verdict. This influence was not dissipated by the prosecution's use of Zelma Hurley's testimony, given the substantial attacks on her credibility. The error complained of therefore was not harmless beyond a reasonable doubt.

CONCLUSION

Under the reasoning of Caso v. State, supra, there can be no dispute that an error of constitutional proportions occurred when the testimony of Detective Dufour was admitted at Petitioner's trial. The Caso decision does not reflect a departure from existing law, making the question of retroactivity irrelevant. Inasmuch as there is a reasonable possibility that this testimony influenced the jury's verdict in this cause, Petitioner's convictions must be reversed.

Respectfully submitted,

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