IN THE SUPREME COURT OF FLORIDA

MICHAEL GEORGE BRUNO, SR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 71,419

BRIEF OF AMICUS CURIAE THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF APPELLANT'S MOTION FOR REHEARING AS TO ORDER OF MAY 9, 1989

(On Appeal from the 17th Judicial Circuit
In and For Broward County, Florida)

STATEMENT OF INTEREST

The National Legal Aid and Defender Association is a private non-profit organization which combines the efforts of members of the private bar and other concerned persons with those of professional legal aid and defender attorneys. The Association has worked since 1911 to expand and improve the quality of legal services for poor people in this country. It has helped establish and improve systems to provide effective legal representation to indigent criminal defendants in the most cost-efficient manner possible. It has authored the Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases adopted by the American Bar Association in February 1989.

STATEMENT OF THE CASE

Michael George Bruno, Sr., has appealed to this Court from his conviction and death sentence in the Circuit Court of the Seventeenth Judicial Circuit of Florida. Counsel for Mr. Bruno has filed with this Court a 230-page initial brief with a motion asking this Court to waive the 50 page limit imposed by rule 9.210(a)(5), Florida Rules of Appellate Procedure. On May 9, 1989, the Court summarily denied the motion without awaiting a response from appellee, and gave Mr. Bruno leave to file a brief not to exceed 100 pages. Mr. Bruno now moves for rehearing as to the May 9 order. Amicus curiae, the National Legal Aid and Defender Association, files this brief in support of the motion for rehearing.

SUMMARY OF ARGUMENT

The standards applicable to appellate counsel in capital cases require that counsel raise every available issue on direct appeal. The nature of capital litigation requires such an approach. Case law teaches that issues which a state court of last resort considers frivolous have been held so important on federal habeas corpus review as to require a new trial for the defendant. The competence of Mr. Bruno's counsel is nationally recognized and the brief filed on his behalf is ably written. Its rejection out of hand denies Mr. Bruno his rights to effective representation and full appellate review of his conviction and death sentence.

ARGUMENT

Section 921.141(4), Florida Statutes, requires appellate review of the conviction and sentence in all death penalty cases. In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the Court, in upholding the constitutionality of the Florida death penalty statute, specifically relied on Florida's appellate review system as a safeguard against arbitrary or capricious application of the death penalty. 428 U.S. at 253-54. A criminal defendant is entitled to effective representation of counsel on appeal. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The right to counsel includes the requirement that the presentation of the defendant's case be made with the benefit of "the guiding hand of counsel" unfettered by arbitrary state court rules. See Brooks v. Tennessee, 406 U.S. 605, 612, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972). Otherwise valid procedural rules may be unconstitutional in a capital setting. See Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). The order disallowing the initial brief served by Mr. Bruno and arbitrarily ordering its reduction by 130 pages violates these rights.

The American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases state with respect to appellate counsel:

> Appellate counsel should seek, when perfecting the appeal, to present all arguably meritorious issues, including challenges to any overly restrictive appellate rules.

Id., Guideline 11.9.2.D.

The Commentary to this Guideline states:

> Traditional theories of appellate practice notwithstanding, appellate counsel in a capital case should not raise only the best of several potential issues. Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later. When a client will be killed if the case is lost, counsel (and the courts) should not let any possible ground for relief go unexplored or unexploited.

(Emphasis in original; footnote omitted).

This standard is dictated by the peculiar nature of capital litigation. In a non-capital criminal case or in a civil case, the direct appeal is normally the last stage of the litigation. In such a case, the competent lawyer will raise only issues likely to appeal to this court of last resort. The situation in a capital case is quite different. There, the direct appeal is but one step of a long course of litigation whose end result is frequently the execution of one of the parties.[1] The appellant seeks both to advance the issues most likely to persuade the appellate court, and to present other issues which may persuade another tribunal farther down the line. Hence the usual standards of appellate advocacy do not apply. The short brief which

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[1] The Florida Legislature has recognized the importance of collateral proceedings in capital cases by establishing the Office of the Capital Collateral Representative. Similarly, the federal government has established resource centers to assist death row inmates in collateral review cases.

raises only one or two issues -- the hallmark of the competent appellate attorney -- has no place in a capital direct appeal.[2]

There are cases in which issues found by this Court to be so meritless as to receive only cursory consideration or even no consideration at all, have been found on collateral review in federal court to be so substantial as to require reversal of the defendant's conviction and death sentence.[3] Thus in Christopher v. State, 407 So.2d 198 (Fla. 1981), this Court mentioned in passing that Mr. Christopher contended that his confession was improperly obtained when the police failed to honor his request to cut off questioning. Id. 200. The Court considered this issue so trivial that it did not discuss it in its disposition of the case. Was counsel contumacious in filing a brief containing such an apparently meritless issue? Scarcely. The Eleventh Circuit Court of Appeals found the issue so meritorious as to require that Mr. Christopher's conviction and death sentence be set aside in Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987).

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2 In California, for instance, the opening brief in a capital appeal is typically between 150 and 350 pages long. California Appellate Project, Representation in Capital Appeals, J-1 (1987).

3 Amicus curiae does not make this point as a vehicle of attack on this Court. It is a commonplace of human nature that an argument that appeals to one person will leave another cold. The point is that this Court is not, and cannot be, the final arbiter of what issues have merit and which do not, of how many issues should be raised, and at what length.

In Jent v. State, 408 So.2d 1024 (Fla. 1981), Mr. Jent contended that he was entitled to inspection of grand jury testimony. This Court rejected the claim in two brief paragraphs with no mention of the constitutional issues at play. Counsel pressed on in federal court with this claim that was scarcely worthy of mention. In Jent v. Dugger, 820 F.2d. 1135 (11th Cir. 1987), the court agreed with Mr. Jent and ordered review of the grand jury testimony, and a new trial was eventually ordered.

Amicus curiae will not belabor the point with further citations. It simply wishes to indicate that what may seem like a frivolous issue today in one court may be a substantial issue in another court tomorrow. Hence counsel's duty to raise fully all available issues in capital cases.[4]

It is safe to say that more prisoners have been executed because their lawyers said too little than those whose lawyers said too much. The most recent example is among the most striking. Aubrey Dennis Adams is dead now instead of awaiting resentencing because his attorney failed to object at trial to the court's improper characterization of the jury's role in sentencing in capital cases. The Eleventh Circuit ordered that he receive a new sentencing hearing because of the trial court's improper instruction. Adams v. Wainwright, 804 F.2d 1526 (11th

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[4] The exhaustion doctrine requires that the federal habeas petitioner first present his claims to the state court "face-up and squarely." Martens v. Shannon, 836 F.2d 715 (1st Cir. 1988). A cursory presentation of the issues (or worse yet, simply listing them without argument) will not satisfy this requirement. Appellate counsel must afford the state court the opportunity to address the issues on their merits.

Cir. 1986), reh. den. sub nom. Adams v. Dugger, 816 F.2d 1493 (1987). The Supreme Court reversed not because the decision on the merits was incorrect, but because of trial counsel's procedural default. Dugger v. Adams, 109 S.Ct. 1211 (1989) Mr. Adams was executed a few months later. It is not surprising that counsel for Mr. Bruno would not want such a result on his conscience.[5]

Amicus curiae submits that the appellate court must rely on counsel's good faith determination as to the number of issues to be raised and the manner and length of their presentation. It may be appropriate to require that counsel file a certificate of good faith when filing a brief over the page limit. Beyond that, there should be no page limitation in capital cases. Where a brief contains excessively repetitive, scandalous, or otherwise grossly inappropriate matters, this Court may strike the offending portions. Nevertheless, this Court must have confidence in counsel's ability to make reasonable professional judgments about the presentation of a capital appeal.

It is not likely that Mr. Bruno's counsel is engaging in contumacious or disruptive tactics. The Office of the Public Defender of the Fifteenth Judicial Circuit is nationally recog-

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5 In Cave v. State, 476 So.2d 180 (Fla. 1985), this Court complained of appellate attorneys who raise "weaker arguments." (How lucky Mr. Christopher and Mr. Jent are that their attorneys did not bow to such complaints, how unlucky Mr. Adams that his attorney did!) This Court saw only two reasons for such behavior: "client pressure," and "counsel's fears" of ineffective assistance of counsel claims. Id. 183, n.1. The more logical reason is counsel's desire to have all issues fairly litigated.

nized as being at the forefront of capital litigation. It has been declared one of the three top public defender offices in the nation. A federal judge recently ruled that its representation of clients in capital cases was of such high caliber that court appointed counsel could not be expected to meet its standards. Its attorneys have obtained decisions of the United Supreme Court on issues determined by state courts to be "nebulous" or meritless. See Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), and Miller v. Florida, 107 S.Ct. 2446 (1987). History suggests that its attorneys are likely to argue issues of substantial merit. A review of the brief summarily rejected by this Court bears this out.

Each issue in the rejected brief raises significant claims. The statements of the case and fact are not argumentative and their length is appropriate for a case of such importance in which the sufficiency of the evidence is at issue. The argument as to the guilt phase creates doubts as to the fairness of the trial. A sampling of the argument shows: the police obtained Mr. Bruno's confession by promising to release his son if he made a statement exculpating him; although the state's principal witness was suffering from a serious mental disorder involving memory impairment and dissociative states, the trial court refused to order a psychiatric evaluation of him; the cause was submitted to the jury without the presentation of a defense case over the defendant's assertion of his desire to call witnesses; and the trial court's instruction to the jury on excusable and justi-

fiable homicide was contrary to Florida law. The argument regarding sentencing sets out equally significant issues. As the brief points out, the trial court's findings in the sentencing order are contrary to the evidence, the testimony of the defense mental health expert raises serious questions as to the fairness of the penalty phase of the trial, and there are substantial doubts about the validity of Florida's death penalty statute in light of Maynard v. Cartwright, 108 S.Ct. 1853 (1988) and Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988). The argument throughout the brief is professionally presented. It is succinct and straightforward. To require reduction of the brief to 100 pages would nullify Mr. Bruno's constitutional rights of effective representation of counsel and full appellate review of his conviction and death sentence.

CONCLUSION

This Court should grant the motion for rehearing and accept Mr. Bruno's initial brief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to the Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401 and to Steven H. Malone, Assistant Public Defender, 15th Judicial Circuit, Governmental Center/9th Floor, 301 N. Olive Avenue, West Palm Beach, Florida 33401 this 23 day of May, 1989.

Mary Broderick

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