IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAY 24 1989
CLERK, SUPREME COURT
By ________
Deputy Clerk

MICHAEL GEORGE BRUNO, SR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 71,419

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS 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 OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a nation-wide membership of over 5,000 laywers. Its members include private attroneys and public defenders. Its membership includes trial and appellate practitioners. It is concerned with the protection of individual rights, the improvement of criminal law practice and procedure, and the preservation of the professional independence of the criminal defense bar. The NACDL frequently files amicus curiae briefs on criminal law issues in both state and federal courts.

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 Association of Criminal Defense Lawyers, files this brief in support of the motion for rehearing.

SUMMARY OF ARGUMENT

Counsel for a capital defendant must consider the post-conviction effects on his client's case when deciding whether and how to brief issues. The current system of justice generally requires legal issues to be raised as soon as possible in the process to gain consideration by other courts at a later date.

Limits on sizes of briefs implicate the eighth amendment need for heightened reliability in capital cases, the fourteenth amendment right to due process, and the sixth amendment right to the effective assistance of counsel. Counsel must have a fair opportunity to present the client's case in an adversary system. The arbitrary imposition of a one hundred (100) page limit is a violation of the federal constitutional rights in this capital case.

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. Duties of Appellate Counsel.

The Commentary to Guideline 11.9.2.D. 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 further 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]

The page limit restriction raises an issue of continuing concern to the NACDL, government interference with the professional independence of defense counsel.

> "It is the constitutional obligation of the State to respect the professional independence of...public defenders."

Polk County v. Dodson, 454 U.S. 312, 322 (1981). This statement applies equally to all defense counsel. The United States Supreme Court in Polk County, supra added:

> This Court's decision in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), established the right of state criminal defendants to the "'guiding hand of counsel at every step in the proceedings against [them].'" Id., at 345, 83 S.Ct., at 797, quoting Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932). Implicit in the concept of a "guiding hand" is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate. See, e.g., Gideon v. Wainwright, supra; Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

Id. at 323. These principles apply at the appellate level.

In the present case, counsel has submitted his brief in good faith. Counsel has raised numerous issues regarding the trial and sentencing proceedings. Counsel is ethically obligated to pursue every potentially meritorious issue, both to obtain relief

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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).

on direct appeal and to preserve issues for possible federal review. The arbitrary imposition of a one hundred page limit will force counsel to abandon issues which he feels are meritorious and thus waive these issues forever. This is direct state interference with counsel's professional independence and his ability to provide effective assistance of counsel. This sort of interference is improper, especially in a capital case involving unique eighth amendment concerns.

There are cases in which issues found by this Court to be so meritless as to give them 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. 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).

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 fully raise 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.

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.

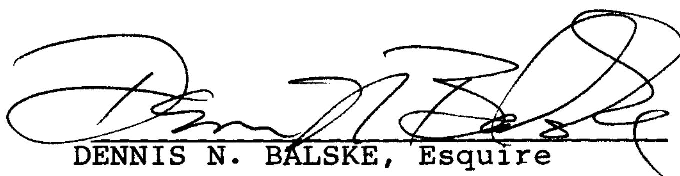
Each issue in the rejected brief, in the present case, raises significant claims. The statements of the case and fact are not argumentative and their length is appropriate for a case of such importance in which the sufficiency of the evidence is at issue. The argument as to the guilt phase creates doubts 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 justifiable 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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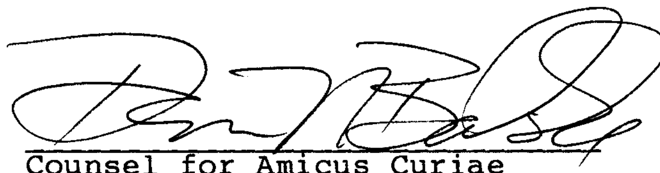
CERTIFICATE OF SERVICE

I here certify that a copy hereof has been furnished by courier to Deborah Guller, 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 23rd day of May, 1989.



Counsel for Amicus Curiae