IN THE SUPREME COURT OF FLORIDA

MICHAEL GEORGE BRUNO, SR.	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 71,419
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	

BRIEF OF AMICUS CURIAE THE FLORIDA 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)

SONNETT SALE & KUEHNE, P.A.

Counsel for Florida Association of Criminal Defense Lawyers, Amicus Curiae
One Biscayne Tower, #2600
Two South Biscayne Blvd.
Miami, Florida 33131-1802
Telephone: 305/358-2000

STATEMENT OF INTEREST OF AMICUS CURIAE

The Florida Association of Criminal Defense Lawyers (FACDL) is a non-profit corporation with a state-wide membership of over 4,000 lawyers. Its members include private attorneys 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.

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

SUMMARY OF ARGUMENT

Counsel for a capital appellant 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. It is also a denial of the apellant's state constitutional rights pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

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]

This Honorable Court and other courts have recognized the unique nature of capital litigation. "What separates the unlawful killing by men and the lawful killing by the state are the legal barriers that exist to preserve the individual's consitutional rights and protect against the unlawful execution of a death sentence." Mercer v. Armontrout, 864 F.2d 1429, 1431 (8th Cir. 1988) (discussing standards for stays). This Court has undertaken the monumental task of carefully reviewing the many capital cases that come before it. But the Court cannot go it alone. "[w]e will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate." Wilson v. Wainwright, 474 So.2d 1162, 1165 (Fla. 1985). This Court relies on attorneys appearing in each capital case to carefully read the record, identifying and briefing meritorious claims. Without such briefing, this Court cannot adequately perform its hefty obligations.

Appellant representation in a capital proceeding imposes legal and ethical obligations on counsel too, which are far beyond those presented by a non-capital appeal. These obligations are more profound because a person's life is at stake.

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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).

There are other, related reasons. As this Court knows, death penalty law constantly changes, sometimes unexpectedly and radically. See Brown, et al v. Wainwright, 392 So.2d 1327, 1333 at n. 17 (Fla. 1981) ("we cannot help but observe that the operation of capital punishment laws has been dependent upon a changing set of procedural principles...which have imposed shifting, supervisory standards on state high courts."). What is a borderline issue today may be a sure "winner" tomorrow. Counsel is obliged to raise those issues which are now percolating through this and other courts throughout the country, though there may be no clear basis for legal relief today. Also, issues which this Court has previously rejected may today be ripe for reconsideration, because of the intervening decisions of other courts throughout the land. While this Court may accept such arguments in the future, there is no guarantee it will hear them in a post-conviction proceeding. See Witt v. State, 387 So.2d 922 (Fla. 1980) and Teague v. Lane, 57 USLW 4233, 4239 (U.S. Feb. 22, 1989) (plurality opinion) ("unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to these cases which have become final before the new rules are announced."). Counsel cannot ethically fail to raise these issues simply because there is page limit on briefs.

The page limit restriction raises an issue of continuing concern to the FACDL, 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 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).

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.

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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.

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 people 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 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.

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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.