IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Cross-Appellee,

CASE NO. 75,797

v.

OSCAR MASON,

Appellee/Cross-Appellant.

OSCAR MASON,

Appellant,

CASE NO. 72,918

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE THIRTEENTH
JUDICIAL CIRCUIT COURT, IN AND FOR
HILLSBOROUGH COUNTY, STATE OF FLORIDA

REPLY BRIEF OF CROSS-APPELLANT MASON AND REPLY BRIEF OF APPELLANT-MASON

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

JUDITH J. DOUGHERTY
Assistant CCR
Florida Bar No. 0187786

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

PRELIMINARY STATEMENT

This brief is the reply brief of cross-appellant, Oscar Mason, in Case No. 75,797, and of appellant, Oscar Mason, in Case No. 72,918. As a reply brief it will only address those issues on which Mr. Mason did not prevail in circuit court. This brief will not further address the Hitchcock claim on which the circuit court granted relief and which was previously briefed by Mr. Mason.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

The State has not contested Mr. Mason's Statement of the Case set forth in his previous brief. Accordingly, Mr. Mason continues to rely upon that Statement of the Case.

SUMMARY OF ARGUMENT

I. Judge Hinson's resolution of the competency claim rested upon an erroneous legal standard. The State repeated this erroneous standard in its brief. It asserted that Mr. Mason bore the burden of proving his incompetency. Because Judge Hinson and the State did impose a burden of proof on Mr. Mason and thus entertained a presumption of competency, the circuit court must be reversed.

II. In Hitchcock, the United States Supreme Court held that a Florida penalty phase jury must receive accurate jury instructions which conform to the eighth amendment. Subsequently, this Court held Hitchcock was a change in law which was cognizable in 3.850 motions. Mr. Mason challenges the jury instruction regarding the aggravating circumstances heinous, atrocious or cruel. Under Hitchcock and its progeny this claim is cognizable in 3.850 proceedings.

III. In Hitchcock, the United States Supreme Court held that a Florida penalty phase jury must receive accurate jury instructions which conform to the eighth amendment. Subsequently, this Court held Hitchcock was a change in law which was cognizable in 3.850 motions. Mr. Mason challenges the jury instruction regarding the aggravating circumstances cold, calculated and premeditated. Under Hitchcock and its progeny this claim is cognizable in 3.850 proceedings.

ARGUMENT I

JUDGE HINSON APPLIED AN ERRONEOUS LEGAL STANDARD IN EVALUATING MR. MASON'S COMPETENCY; AS A RESULT HIS RULING MUST BE REVERSED.

This Court held in Mason v. State, 489 So. 2d 734 (Fla. 1986), that, in light of bona fide doubt as to Mr. Mason's competency to stand trial, the case had to be remanded for reconsideration. The circuit court was directed to consider whether a nunc pro tunc "evaluation of Mason's competency at the time

of the original trial [could] be conducted in such a manner as to assure Mason due process of law." 489 So. 2d at 737. The State has argued in its brief that, despite this Court's clear language, Mr. Mason bore the burden of proving his incompetency (Answer Brief of State at 4). It was Judge Hinson's acceptance of the State's error of law that caused him to ignore the testimony of Drs. Gardner and Gonzalez that they had no opinion as to Mr. Mason's competency at the time of trial.

Dr. Gardner testified:

> Q. He could have been incompetent in the murder trial?
> A. Yes, he could have, but I didn't see him so I had no opinion.
> Q. No opinion whatsoever?
> A. I have no idea whether he was competent or not or whether he was competent at the time that he was to be tried for murder since I did not see him then. And whether he remained competent to stand trial during the course of the trial, again, I have no opinion because I wasn't there . . . .

(PC-R. 300)(emphasis added).

Dr. Gonzalez testified:

> Q. And things that people observed afterward didn't matter?
> A. Of course. I saw him on a slice in time. I saw him in a window, and in that window he was what I describe him as being.
> Q. Could he have been psychotic an hour after you saw him?
> A. Yes, he could have.
> Q. Could he have been incompetent and (sic) hour after you saw him?
> A. Yes, he could have been incompetent an hour after I saw him.
> Q. Could he have been incompetent an hour before you saw him?
> A. Yes, he could have been incompetent an hour before I saw him.
> Q. How about five minutes?
> A. Perhaps.
> Q. Did you ever talk to Mr. Edwards about his relationship with Mr. Mason?
> A. No, sir, I didn't.
> Q. Do you have any opinion that you can provide to us with regard to his competency at the time of his trial?
> A. No, sir, I don't have any opinion that I can provide to you.

(PC-R 93-94, emphasis added).

Though both Drs. Gardner and Gonzalez believed Mr. Mason was competent at the time of their interviews with Mr. Mason (Dr. Gardner saw Mr. Mason in

March of 1980 and Dr. Gonzalez in October of 1980), Mr. Mason's trial was in April of 1981. Both Drs. Gardner and Gonzalez testified they had no opinion as to whether Mr. Mason was competent in April of 1981. In Pridgen v. State, this Court held that competency is dynamic and may change in the course of a trial. Drs. Gardner and Gonzalez agreed with this Court's holding and concluded that they could not form an opinion as to Mr. Mason's competency at trial in April of 1981. Jail records reflected intervening factors including suicide attempts and psychotropic medication which raise a question about a schizophrenic Mr. Mason's competency in April of 1981.

Despite absolutely no evidence that Mr. Mason was competent at the time of trial, Judge Hinson found Mr. Mason competent by imposing a burden of proof on Mr. Mason and entertaining a presumption of competency. Judge Hinson applied an erroneous legal standard.

Due process "prohibits a person accused of a crime from being proceeded against while incompetent." Nowitzke v. State, 572 So. 2d 1346, 2349 (Fla. 1990).

> In the absence of any indications to the contrary, a defendant charged with criminal behavior is presumed to be mentally competent to stand trial. However, once a defendant's competency has been called into question, either by the defendant or the prosecution expressly raising the issue, or through the presence of "warning signals" which cause the court to raise the question sua sponte, the burden is placed on the prosecution to prove that the defendant is mentally competent to stand trial.

Brown v. Warden, 682 F.2d 348, 349 (2nd Cir. 1982) cert. denied 459 U.S. 991. See United States ex rel. Bilyew v. Franzen, 686 F.2d 1238, 1244 (7th Cir. 1982)("There is little question that the Fourteenth Amendment requires the state or federal prosecution to shoulder the burden of proving that the defendant is fit to stand trial once the issue of unfitness has been properly raised"); Griffin v. Lockhart, 935 F.2d 926 (8th Cir. 1991)(no presumption of competency can be entertained once bona fide competency claim raised).

In fact this Court in Scott v. State, 420 So. 2d 595 (Fla. 1982), refused to apply a presumption of competency. Similarly in Pridgen v. State, 531 So. 2d 951 (Fla. 1988), this Court refused to place the burden upon the defendant to prove his incompetency.

In this case, Mr. Mason presented experts who believed Mr. Mason was incompetent at the time of trial. These experts based their opinions on Mr. Mason's mental retardation, on his schizophrenia, and on the documentation surrounding the trial reflecting Mr. Mason's incompetence.

The two mental health experts relied on by the State could not reach an opinion as to Mr. Mason's competency at the time of trial. These experts did not believe a nunc pro tunc determination could be made. These experts' testimony is consistent with the holding in Griffin v. Lockhart that a three year gap between the trial and a nunc pro tunc competency evaluation is too long to permit a reliable determination. Accordingly, as in Griffin, this Court must hold that a nunc pro tunc determination cannot be made; Rule 3.850 relief is therefore mandated.

ARGUMENT II

MR. MASON'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE, AND THE AGGRAVATOR WAS IMPROPERLY ARGUED AND IMPOSED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A Florida capital jury must be correctly instructed at the penalty phase proceedings. Hitchcock v. Dugger, 481 U.S. 393 (1987). Mr. Mason's jury was not advised of the limitations on the "heinous, atrocious or cruel" aggravating factor adopted by this Court. See Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Cochran v. State, 547 So. 2d 528 (Fla. 1989); Hamilton v. State, 547 So. 2d 630 (Fla. 1989). Unconstitutional constructions of heinous, atrocious or cruel were argued to the jury. As a result, the instructions failed to limit the jury's discretion and violated Hitchcock v. Dugger, 481 U.S. 369 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988). In addition, the judge employed the same erroneous standard when sentencing Mr. Mason to death.

At the time of Mr. Mason's appeal, Hitchcock was not yet the law in Florida, and jury instructional error was not reversible so long as this Court was satisfied that the sentencing judge's findings were supportable. Hitchcock changed that. Hitchcock held that the jury must receive instructions conforming to the eighth amendment. This Court held Hitchcock

was a change in law. On the basis of Hitchcock this claim is cognizable in Rule 3.850 proceedings. The State's argument to the contrary is in error.

ARGUMENT III

MR. MASON'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING CIRCUMSTANCE, AND THE AGGRAVATOR WAS IMPROPERLY ARGUED AND IMPOSED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A Florida capital jury must be correctly instructed at the penalty phase proceedings. Hitchcock v. Dugger, 481 U.S. 393 (1987). Mr. Mason's jury was not advised of the limitations on the "cold, calculated and premeditated" aggravating factor adopted by this Court. See Rogers v. State, 511 So. 2d 526 (Fla. 1987). Mr. Mason's jury was not advised of the elements of this aggravating circumstance which had to be proven beyond a reasonable doubt. Hamilton v. State, 547 So. 2d 630 (Fla. 1989). Unconstitutional constructions of cold, calculated and premeditated were argued to the jury. As a result, the instructions failed to limit the jury's discretion and violated Hitchcock v. Dugger, 481 U.S. 369 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988). In addition, the judge employed the same erroneous standard when sentencing Mr. Mason to death. Neither the judge nor the jury knew "heightened" premeditation was required.

At the time of Mr. Mason's appeal, Hitchcock was not yet the law in Florida, and jury instructional error was not reversible so long as this Court was satisfied that the sentencing judge's findings were supportable. Hitchcock changed that. Hitchcock held that the jury must receive instructions conforming to the eighth amendment. This Court held Hitchcock was a change in law. On the basis of Hitchcock this claim is cognizable in Rule 3.850 proceedings. The State's argument to the contrary is in error.

CONCLUSION

Based upon the foregoing and upon the discussion presented in Mr. Mason's previous brief, this Court should grant a new trial because the State cannot establish that Mr. Mason was competent in April of 1981 in light of his mental retardation, suicide attempts, active schizophrenia, and his receipt of

psychotropic medication which was documented by jail records after the psychological evaluations.

Further this Court should affirm the resentencing ordered by the circuit court, not only on the basis of the Hitchcock error found, but also because of the failure to adequately instruct regarding the necessary elements of the aggravating factors.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 21, 1991.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

JUDITH J. DOUGHERTY
Assistant CCR
Florida Bar No. 0187786

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: _____
Counsel for Defendant

Copies furnished to:

Candance Sunderland
Assistant Attorney General
Westwood Building, 7th Floor
2002 North Lois Avenue
Tampa, Florida 33607