IN THE SUPREME COURT OF FLORIDA

MAY 3 1990

ERNEST CHARLES DOWNS,

Appellant,

v. CASE NO. 73,988

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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______________________________:

REPLY BRIEF OF APPELLANT

ISSUE I

THE COURT ERRED IN EITHER FAILING TO FIND ANY MITIGATION OR IN NOT STATING WITH UNMISTAKABLE CLARITY WHAT MITIGATION IT FOUND.

The State dismisses this argument by assuming that the resentencing was nothing more than a paper shuffling exercise, a technical formality. "On two prior occasions, direct appeal and appeal of the denial of a Rule 3.850 motion, this Court has stated in no uncertain terms that Ernest Downs' culpability made capital punishment the appropriate punishment for this case." (State's brief at p. 9) If that were the case, this court would not have remanded this case for a new resentencing hearing before a new sentencing jury.

But this is a new sentencing trial in which Downs presented new evidence and advanced new theories of defense. The court cannot incorporate by reference the findings made at the first trial because they were presumably based upon evidence admitted there. Huff v. State, 495 So.2d 145 (Fla.

1986). In Huff, the trial court "essentially adopted the sentencing phase findings of the trial court in Huff I,[1], and also filed a `supplement to finding of fact supporting death sentence.'" Id. at 151. This court disapproved that procedure, relying upon Rule 3.640 (a) Fla. R. Crim. P.:

> When a new trial is granted, the new trial shall proceed in all respects as if no former trial had been had...."

Here, the effect of this court's ruling in Downs v. Dugger, 514 So.2d 1069 (Fla. 1987) was to grant a new sentencing trial on all sentencing issues. Thus, contrary to what the state asserts on page 10 of its brief, the original sentencing order has been set aside.

Also, this court in no way limited the scope of the resentencing. Accordingly, as the state noted on page 10 of its brief, Downs presented mitigating evidence, and he offered evidence to soften the aggravating factors. He presented new evidence and argued new theories of why he should live. United States v. Shotwell Manufacturing Co., 355 U.S. 233, 243, 78 S.Ct. 245, 2 L.Ed.2d 234 (1957) (At a new trial, parties may present new evidence or argue different theories than presented at the first trial.) The evidence he presented so undermined the validity of the original sentencing order, that if the court had adopted it by reference, it would have been wrong to do **so** in light of the new evidence. Using the original

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[1] Huff v. State, 437 So.2d 1087 (Fla. 1983). (Huff I.)

sentencing order does not provide the unmistakable clarity this court requires.

The state on page 13 of its brief says that "It is of course appropriate for this Court to consider the trial court's oral pronouncement in connection with the written sentencing order Bryan v. State, 533 So.2d 744, 748 (Fla. 1988); Thompson v. State, 328 So.2d 1 (Fla. 1976)." In Thompson, the court had dictated his findings supporting the death sentence at the sentencing hearing, and this court held that satisfied the statutorily required written findings. This court implicitly questioned Thompson in Cave v. State, 445 So.2d 341 (Fla. 1984) where the trial court, like the one in Thompson, had dictated his findings into the record at sentencing. "Nevertheless, we find it prudent to require that written findings of fact be entered into the record on appeal and grant appellee's motion to relinquish jurisdiction and to supplement the record." Id. at 342. In Van Royal v. State, 497 So.2d 625 (Fla. 1986), this court explained why written reasons were required:

> A court's written finding of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it.... Without these findings this Court cannot assure itself that the trial judge based the oral sentence on a well-reasoned application of the [aggravating and mitigating factors]...Thus, the sentences are unsupported.

Id. at 628.

In this case, unlike Thompson, the court did more than simply dictate her reasons into the record. She expounded on

why she rejected Downs' arguments and why she accepted the States'. None of that is reflected in her sentencing order. The State is asking this court to rummage among what Judge Pate said and wrote and fashion a patchwork order, a sort of "Best hits of Judge Pate." That is not this court's function.

On page 13 of its brief the State refers to Rutherford v. State, 545 So.2d 853 (Fla. 1989) for the proposition that the trial court need not consider, as mitigating, everything the defendant presents. In that case, Rutherford offered as mitigating only that he had been a combat infantryman in Vietnam. As this court noted in a footnote, there was no evidence that because of that experience he had suffered any post-traumatic stress. Thus, what Rutherford offered was not relevant as mitigating evidence under this court's analysis in Rogers v. State, 511 So.2d 526 (Fla. 1987). Not so in this case, where Downs offered abundant, relevant mitigating evidence.

Finally, as it had done earlier, the State says this court can review the records of the Downs' prior litigation to correct any of the errors the court made in this case. (Appellee's brief at page 14.) But, as was said earlier, it is not this court's function to cull the record looking for the reasons the court did not articulate.

ISSUE II

UNDER A PROPORTIONALITY REVIEW OF THIS CASE, A DEATH SENTENCE IS NOT WARRANTED.

On page 15 of its brief, the state says that Downs ''urges the Court to abandon its supervisory role in favor of an activist fact-finding position." The state gives Downs too much credit. He is only asking this court to do what it said it would do in Menendez v. State, 419 So.2d 312, 315 (Fla. 1982), to "consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate.''

On pages 16 and 17 of its brief, the states cites several cases which it says have very similar circumstances to this case. Except for Antone v. State, 382 So.2d 1205 (Fla. 1980) and Koon v. State, 513 So.2d 1253 (Fla. 1987), the cases cited are the same ones Downs cited in his brief which he said were distinguishable. In Koon, the victim was killed as part of a witness elimination scheme. The murder was especially heinous, atrocious, and cruel because he endured hours of terror before his inevitable death. He was kidnapped, beaten (an ear was torn off), and marched at gunpoint into a swamp where he was killed. Those facts easily distinguish that case from this where there were no hours of terror, no kidnapping, no torture, and no prolonged suffering. Antone is likewise distinguishable because it was a witness elimination killing which Antone instigated and benefitted from.

The State also dwells on Thompson v. State, 553 So.2d 153 (Fla. 1989), but that case has very few similarities to this case. There, Thompson put out an "open contract" to kill a long time friend who had stolen $600,000 from him. Thompson found him and took him out to sea in a boat. There he tortured the victim, wrapped him in chains, shot him in the back of the head, and dumped him into the sea. This court characterized the killing and Thompson as "a contract killing conducted in a professional manner by an underworld crime boss." Id. at 158. It also approved the five aggravating factors, and it noted there were no statutory mitigating factors and "very little" nonstatutory mitigating evidence.

The state forces the comparison between Thompson and this case by noting that here the court found three of the same five aggravating factors the court found in Thompson, and the mitigation was treated the same. The distinctions are evident. Downs has never been and cannot be considered an "underworld crime boss." His violence had occurred years earlier when he was 16, tired, cold, and hungry. He robbed so he could eat. Moreover, he presented a wealth of non-statutory evidence which explains and mitigates the murder in this case. Unlike Thompson, Downs worked hard, tried to make a success of his life, helped others when and where he could, and has consistently made the best of his situation. Unlike Thompson, he did not kill for revenge. Thompson is clearly distinguishable from this case.

The State again mentions that this court has twice found that death was an appropriate penalty, (Appellee's brief at p. 18.) and it calls upon "considerations of stare decicis" to prevent this court from reviewing the new mitigation presented. The state misapplies that doctrine and this court's role in proportionality review. (Appellee's brief at page 18.) Stare decicis is the policy of courts to "stand by precedent and not to disturb settled point." Black's Law Dictionary. Downs is not asking this court to ignore any precedent; instead, he is asking this court to follow what it has said it will do: compare this case "in light of our other decisions and determine whether the death penalty is appropriate." Menendez v. State, **419 So.2d 312, 315** (Fla. **1982).** Downs also has not come before this court every time some other death row inmate has had his sentence reduced to life. (Appellee's brief at page 18). He simply is asking this court to examine his case in light of the significant new mitigating evidence and arguments. Stare decicis has nothing to **do** with this review, nor does this court's original opinions approving the death sentence for Downs. In those opinions, this court did not have the new evidence, nor did it have the benefit of Downs' arguments. Thus, even if death was appropriate under the facts this court had in the earlier Downs' cases, they are not the facts this court must deal with now. Those facts, as argued in Downs' initial brief, compel a life sentence.

ISSUE III

THE COURT COMMITTED A FUNDAMENTAL ERROR WHEN IT ADMITTED THE FORMER TESTIMONY OF LARRY JOHNSON AT THIS RESENTENCING.

The weakest aspect of Downs' argument is its preservation, and the State has understandably focussed upon it. It is the weakest point, but only in a relative sense. At trial, Downs said, regarding the admissibility of Johnson's 1977 testimony, "I'd like to argue, Your Honor, that there was restricted cross examination in regards to Larry Johnson back in 1977.'' (T 529). That objection adequately apprised the trial court of the problems presented with Johnsons' testimony. Nevertheless, the state presents the issue of whether Downs' failure to object with supreme precision to Larry Johnson's 1977 trial testimony could amount to fundamental error. In support of its argument, the state cites this court's opinion in Smith v. State, 521 So.2d 106, 108 (Fla. 1988) and quotes from it concerning the limited application of the fundamental error doctrine. In Smith, this court said that the defendant's failure to object to a technically incorrect instruction on insanity was not fundamental error. The instructions given to the jury were overall adequate, but they could have been clearer. The instructions were not so flawed that giving them denied Smith a fair trial. In short, the interests of justice did not demand Smith be given a new trial.

Here, the court committed a major error in admitting Johnson's testimony. That testimony was the states' case, and without it the court could not have justified a sentence of

death. The court should have been very leery of using testimony taken for different purposes at a hearing over eleven years earlier. As the trial court itself recognized at the 3.850 hearing, "[T]he manner of defending capital cases has markedly changed since December 1977 to this date.'' Downs v. State, 453 So.2d 1102 (Fla. 1984). If so, the court should have been especially attuned to the requirements of $90.802, that Downs have "had an opportunity and similar motive to develop the testimony by direct, cross, or re-direct examination.'' Because he did not have the same motive in the 1977 guilt phase portion of his trial to develop Larry Johnson's testimony for a 1988 penalty phase trial, the interests of justice require the court's omission to be treated as fundamental error.

As to Downs' similar motive, the state says on page 21 of its brief that Downs had similar motives because this court found the "[d]efendant's evidence at this proceeding was not restricted to statutory matters but he was allowed to present what he wanted in mitigation." (Appellee's brief at page 21. Footnote omitted.) The quote actually comes from the trial court's opinion denying Downs' Motion for Post-conviction relief which this court quoted in Downs v. State, supra. It was made in reference to trial counsel's effectiveness. Yet, in this court's later opinion in Downs v. Dugger, 514 So.2d 1069 (Fla. 1987), this court said that the court, the prosecutor, and probably the defense counsel believed only the statutory mitigating factors were applicable in the penalty

phase. **Id.** at 1072. If counsel presented non-statutory mitigating evidence, that is a hindsight determination. Clearly in 1977, everyone concerned with this trial thought only evidence relevant to statutory mitigation was admissible.

As to what Downs could have developed had he cross-examined Johnson in 1988, the states says he could not have gotten anything more than he already had. (Appellee's brief at page 22.) Yet if Barfield had changed his testimony, maybe Johnson would have also. He may have agreed he shot Harris. That would have been more than simply cumulative evidence. It would have radically changed the nature of this case. On pages 28-29 of his initial brief, Downs lists other matters he could have developed through cross-examining Johnson.

The court should have recognized Downs did not have the same motive in 1977 to cross-examine Johnson as he did in 1988, and it should have excluded Johnson's trial testimony at this sentencing hearing. That the court did not do so is reversible error.

ISSUE IV

THE COURT ERRED IN QUASHING DOWNS' SUBPOENAS OF THE STATE ATTORNEY SO DOWNS COULD QUESTION HIM REGARDING HIS GRANTING LARRY JOHNSON IMMUNITY FROM PROSECUTION, A VIOLATION OF DOWNS' SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The State's analysis of the issue assumes that the only relevant evidence Downs could have offered in mitigation was that which met the standards articulated in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). That is an unnecessarily restricted view of what Downs could have offered. Besides the type of mitigation contemplated in Lockett, and Eddings, this court has recognized that the treatment of defendants in other cases and co-defendants in the same case can mitigate a death sentence. That is, there are two types of proportionality review. In this case, Downs sought to establish that he should have been accorded the same treatment as Larry Johnson, the principle co-defendant in this case. At least since Slater v. State, 316 So.2d 539 (Fla. 1975) this court has said that defendants equally culpable should be treated equally. Thus, the state has missed the point Downs sought to make in his initial brief on this issue. The Rogers' analysis (Rogers v. State, 511 So.2d 526 (Fla. 1987)) is inappropriate because Downs sought to question Austin to develop his proportionality argument, which is mitigation of a different type than that which Rogers applies.

The State has also not fully appreciated why Downs wanted to question Austin. The state told the jury (or perhaps more accurately, testified) that it had granted Johnson immunity for the murder of Jerry Harris because he was not the triggerman and therefore was less culpable than Downs, the man Johnson said had killed Harris. (T 260-261). By refusing to prosecute Johnson, the state was saying it believed his version of the murder. It believed Larry Johnson.

During voir dire in Downs' original trial, Mr. Austin repeatedly told the jury it had granted Johnson immunity even though it believed him equally guilty.

> Would the fact that some people who are equally guilty with him are going free and he is not going free if you convict him, could you still convict him. . ." (T 68)[2]
>
> Even if the State has to parade up on that witness stand a murderer that's been let go. . . (T 284)
>
> And you won't turn against the State or not believe anything we have just because we put a murderer on the street, is that right.
>
> (T 285)
>
> [A]nd let me say that it pains no one more than it pains me to give it, but do you understand that -- will you follow the Court's instructions if the State has to use a witness that it has given immunity to even though he has committed a crime that is a bad as the person that's on trial here? (T 354)

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[2]A copy of the quoted portions of the trial transcript from Downs v. State, 386 So.2d 788 (Fla. 1980) is included as an appendix to this brief.9

The State will have to rely in this case on certain people who are guilty of crimes, one in particular who is also guilty of, in my judgment, murder. (T 384)

All Downs wanted to develop was why Mr. Austin believed Johnson. Since Mr. Austin had extensively justified his position in Downs' original trial, he should have been willing at Downs' resentencing to tell the jury why he believed Larry Johnson.

In Issue 11, Downs has argued Johnson was as culpable as Downs as a matter of law. Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). Now he wants to show Johnson was as culpable or more so than Downs as a matter of fact. To do this, Downs wanted to test the validity of the State's voucher of Johnson by calling the man who had made the decision to believe Johnsons' story.

The state on pages 27-30 of its brief goes to great length to justify the court's order quashing the subpoena of the State Attorney. It distinguishes Messer v. State, 403 So.2d 341 (Fla. 1981) which admittedly is factually distinguishable from this case, but it is the closest case discussing this problem in Florida. It then looks beyond our borders and law to bring in other cases to support its argument. Montez v. State of Wyoming, 573 P.2d 34 (Wyo 1977). In Montez, the Wyoming Supreme Court said the trial court had not abused its discretion in refusing to let Montez call the prosecutor in that case to testify. The prosecutor's testimony was not vital to his defense, nor would it establish a new defense or provide

the missing link in his theory. The purpose of the testimony was to rehabilitate Montez's alibi defense, and besides what the prosecutor would have said supporting this was speculative.

Other courts have generally refused to let the prosecutor testify when the evidence sought could have been developed through other sources, State v. Williams, **656 P.2d 450** (Utah **1982),** the evidence was not needed, or it was cumulative. U.S. v. Troutman, 814 F.2d **1428** (10th Cir. **1987).**

Whatever those courts may have ruled is not persuasive here. In Florida, relevancy is the test for admissibility. Ruffin v. State, **397 So.2d 277** (Fla. **1981).** Necessity, or the lack of it is not a consideration in determining if proposed evidence should be admitted.

Moreover, the cases and the rule of law the State argues are not applicable. In the cases dealing with the defense calling the prosecutor as a witness, the defendant usually wants to call the prosecutor handling his case. He did not want to call the State Attorney or his equivalent. In this case, Downs wanted to call Ed Austin, the State Attorney. Austin was not prosecuting the case personally, and had he been called there would have been no need to recuse his entire staff. State v. Doran, **731** P.2d **1344** (NM Court **of** Appeals **1986).**

Also, what Downs sought from Austin was vital to his attack on Larry Johnson. In the reported cases dealing with this issue, the purpose of the prosecutor's testimony was to establish some tangential or cumulative bit. It was not

particularly important to the defendant's case. Here, that is not so. The state, for reasons unknown to the jury, granted Johnson immunity, thereby accepting and vouching for his version of the facts. By showing the jury that Austin had granted immunity for reasons of expediency[3] and he relied upon a very questionable basis for verification, the judge and the jury may not have accepted Johnson's version of what happened.

Finally, the state repeatedly mentions that Downs suffered no harm because the jury knew Austin had granted immunity to Johnson. (Appellee's brief at pp 27, 30). That misses the point. It was not the fact Johnson had received immunity that was important, it was the reasons the state had used in granting it that was important. The court prevented Downs from developing those reasons, and it erred in denying Downs the right to develop his defense.

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[3]The state had worked on this case for months without any breakthroughs. It was a troubling case, and it was one Austin wanted to solve. By examining Austin Downs could have developed that Austin latched onto the first explanation for the murder and refused to acknowledge that what Johnson may have told him was what he he wanted to hear regardless of the truth. Why else would he have refused Downs' offer to take a polygraph test?

ISSUE V

THE COURT ERRED IN EXCLUDING THE PERPETUATED DEPOSITION TESTIMONY OF BOBBIE JO MICHAEL, WHICH WOULD HAVE SHOWN THAT DOWNS WAS NOT THE TRIGGERMAN.

Throughout its brief the state has said that this court has found, as a matter of fact, that Downs was the triggerman. It begins and ends its argument on this issue with the same conclusion:

> Appellee must again stress the obvious in order to respond to one of Appellant's arguments concerning his culpability. This court has on two prior occasions found that Ernest Charles Downs was the triggerman in the murder of Mr. Harris. 486 So.2d 788 and 453 So.2d 1102.

(Appellee's brief at 32.)[4]

What the State has not told this court is that in its latest opinion in this case, it recognized that the original jury had some doubt that Downs was the triggerman. Thus, even though this court may have earlier said Downs killed Harris, it has since reconsidered that opinion. Downs v. Dugger, 514 So.2d 1069 (Fla. 1987).

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[4]The State, in its footnote 8 refers to the examination of Downs' trial counsel during the 1983 3.850 hearing, and it provides a portion of that transcript as its appendix B. Distilling this testimony, the point made is that trial counsel believed Downs was at the scene of the crime. So what? That should not have affected the admissibility of Ms. Michael's testimony. It obviously could have been used to rebut what she had said, but it is no reason to exclude it. The jury is the proper forum to weigh, accept, and reject evidence, not the court.

But even if this court had not said this, Downs would question whether what this court had said earlier was now the law of the case. In this court's resentencing order in Downs v. Dugger, there was no limitation of what evidence Downs could present. This court did not say Downs was precluded from presenting any evidence to show he was not the triggerman. Instead, this court simply remanded for resentencing. The legal effect of that order was as if Downs had never been sentenced. United States v. Shotwell Manufacturing Co., 355 U.S., 233, 243, 78 S.Ct. 245, 2 L.Ed.2d 234 (1957). All sentencing issues were new, and Downs could present any evidence and argue any theory allowed by law. What had happened earlier would have no effect on the new sentencing phase of Downs' trial.

Moreover, the state has now given this court the responsibility of determining matters of fact, a task normally reserved for the jury. Even if this court is willing to assume that task, surely it would want to consider all the relevant evidence on the issue of who shot Jerry Harris. Downs argument is that without the testimony of B.J. Michaels it does not have all the evidence, and what it said earlier about Downs having shot Harris was based upon incomplete evidence.

The State on page 33 of its brief then says that the state agreed to the deposition procedure only for purposes of the 3.850 hearing. That is not entirely correct. What the state said was:

> Mr. Guidi [the prosecutor]: The State

> would make a general statement that we would reserve the right to object to questions propounded depending upon the nature of the proceeding that this would be used at, including the purpose for which you have just set out, and we would at the appropriate time move to strike for the purposes of consideration by any judicial entity that would be reviewing that particular testimony at the appropriate time and with an appropriate objection. (R 7-8)

Thus, all the state said was that it had reserved the right to object to questions asked of Michaels. It never said it objected to the use of the deposition "for any reason other than the 3.850 hearing.'' And even if this was true, counsel for Downs also told the state he was not limiting her testimony for use just at the 3.850 hearing (R 7).

On page 33, the state also says "Thus, Appellant's current premise that 'who shot Jerry Harris was major issue at the resentencing hearing' is a false one." Not so, but to perhaps clarify what was meant, the major issue at the resentencing was who shot Jerry Harris, Ernest Downs or Larry Johnson. In either case Downs was guilty of murder, but only if he also shot Harris would he be eligible for a death sentence. If Johnson shot Harris, then Downs was not present when he was killed, but had walked to B.J. Michael's house. Thus the "lingering doubt" is not whether Downs is guilty of murder, but whether he or Johnson was the triggerman. That is a completely different issue than presented to this court in King v. State, 514 So.2d 354 (Fla. 1987) and Burr v. State, 466 So.2d 1051 (Fla. 1985).

The State distinguishes Zequera v. State, 549 So.2d 189 (Fla. 1989) by saying "Because the question was obviously one involving culpability for the crime of first degree murder, this court felt compelled to reverse as there was no other evidence involved in Zequera." (Appellee's brief at p. 34.) Obviously, the state had introduced other evidence, but who had the .22 caliber bullets was the crucial evidence negating Zequera's culpability. This case is like Zequera in that Downs had other evidence to support his theory, but on the crucial question of where he was on the night of the murder, Ms. Michaels gave the clearest and most unbiased answer to it. Like the testimony in Zequera, the little details assumed big importance. It was not harmless error for the court to have excluded Michael's testimony.

Finally, the state says that "most of the information would have been excluded on hearsay grounds even if the document itself had been admitted for jury consideration. (TR 916-917)" (Appellee's brief at 34) Why? Ms. Michaels did not say, "I heard someone say Downs had come to my house that night." She said Downs "was right here at this house with me." (R 9) That is not hearsay, but a direct observation. It is clear from the original jury's question during its deliberations, that it did not believe Johnson, a fact this court noted in Downs v. Dugger, 514 So.2d 1069 (Fla. 1987). What Michaels said may have tipped the jury's recommendation in favor of life.

ISSUE VI

THE COURT ERRED IN NOT INSTRUCTING THE JURY THAT THEY COULD CONSIDER ANY DOUBT THEY HAD THAT DOWNS WAS THE TRIGGERMAN AS A MITIGATING FACTOR, IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

In his initial brief, Downs pointed out that he had presented extensive evidence and made as extensive an argument that Johnson was the triggerman. That argument should be bolstered with the fact that the original jury did not believe he shot Harris, and this court made a special point of emphasizing it in its opinion in Downs v. Dugger, 514 So.2d 1069 (Fla 1988).

ISSUE VII

THE COURT ERRED IN EXCLUDING SEVERAL MITIGATING FACTS FROM THE JURY'S CONSIDERATION WHICH DENIED DOWNS A FAIR RESENTENCING AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In his initial brief, Downs argued that the court should have allowed him to present evidence that Barfield had tried to have him killed. The State makes two answers on this issue: 1. the "specific objection argument presented in the Appellant's brief were not presented to the trial court and are therefore waived." 2. Even if presented to the court, "[t]his is nothing more than a further attempt to relitigate that which is clearly known, that Earnest Downs was the triggerman in this murder. (Appellee's brief at 40).

As to the preservation argument, Downs raised this issue at trial.

> MR. DOWNS: The reason I called this witness, I asked Mr. Barfield if he ever conspired to have me killed, and the record reflects that prior to my trial he did conspire to have me killed...

(T 833). Earlier, Barfield had also said he blamed Downs for disclosing the murder, and the evidence that he had tried or wanted to kill Downs supported his argument that Barfield lied in 1977 in an effort to get back at Downs. The state realized this was the gist of Downs' proffer because it introduced on rebuttal, evidence that Barfield implicated Downs in the murder in 1977 when the police questioned him (T 1000-1001). The court also must have reasonably understood Downs was trying to

attack Barfield's 1977 statements by showing if he hated Downs enough to want him murdered, he certainly would have lied to hurt Downs. Downs is raising here no argument the court was unaware of.

As to whether it is clearly known Downs was the triggerman, it would not have been so clear if the court had let Downs present the evidence Barfield had tried to kill him in a fit of revenge.

Downs also argued that the court should have allowed his lawyer at his original trial to testify about his peaceable nature. The state responds by comparing Downs with Theodore Bundy and it was relevant only to rebut an unmade allegation that Downs was violent. (Appellee's brief at pp. 41-42.) The comparison to Bundy is not valid because there is no record support that Bundy was "always polite and courteous." With equal authority as that cited by the State, Downs asserts that Bundy abused his lawyers, had tantrums, and refused on occasions to come to court.

Mitigating evidence need not necessarily rebut a State assertion. Here, the lawyer's testimony of Downs' civilized behavior, was admissible because it reflected his character. Contrary to what the State claims on page 42 of its brief, that everyone "accepted the fact that Earnest Downs was an otherwise everyday person who just happened to commit violent crimes does not mitigate against the death penalty" an isolated act of total criminality can mitigate a sentence of death. State v. Dixon, 283 So.2d 1 (Fla. 1973). That was the purpose of this

testimony, to show Downs acted grossly out of character in killing Harris. It also showed that Downs was rehabilitating himself, and true to his innate positive character, he is seeking to make the best of his situation. Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

ISSUE VIII

THE COURT ERRED IN IMPROPERLY INSTRUCTING THE JURY THAT DOWNS WOULD BE GIVEN CREDIT FOR THE TIME HE HAS ALREADY SERVED IN PRISON.

The State relies upon this court's opinion in Harvey v. State, 529 So.2d 1083, 1086-87 (Fla. 1988) to answer Downs' argument on this issue. In particular it quotes from the opinion:

> Any suggestion that Harvey would never become eligible for parole if sentenced to life imprisonment would have been sheer speculation.

If it would have been "sheer speculation" to believe Harvey would never become eligible for parole, it is equally sheer speculation for the jury to believe that Downs will be paroled in 13 or 14 years. The jury had no evidence Downs, although eligible for parole, will ever be granted it. Thus, the court erred by encouraging the unfounded belief that Downs might someday be released from prison.

ISSUE X

THE COURT ERRED IN RETROACTIVELY APPLYING THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR TO THIS CASE.

On page 48 of is brief this case says the United States Supreme Court has "reviewed this claim and found it lacking. Justus v. Florida, 465 U.S. 1052, 104 S.Ct. 1332, 79 L.Ed.2d 726 (1984). Not *so*. The United States Supreme Court refused to accept jurisdiction in the case, which is not a decision on the merits.

The State also says on the same page that Downs in effect has waived any objection to the application of the aggravating factor because he filed a petition for a writ of Habeus corpus which was ultimately successful. That argument cannot withstand scrutiny because if the trial court had not made the errors which prompted the petition, the court could not have used the cold, calculated, and premeditated aggravating factor. It did not exist when Downs was originally sentenced. Why should Downs now be punished for errors the trial court made.

CONCLUSION

Based upon the arguments presented here, Ernest Downs respectfully asks this honorable court to:

1. remand for resentencing.

2. remand for resentencing before a new jury.

3. remand for imposition of a life sentence without the possibility of parole for twenty-five years.

Respectfully submitted,

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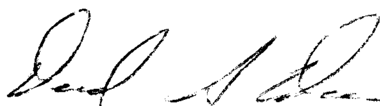
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Richard Doran, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, ERNEST CHARLES DOWNS, **#063143,** Florida State Prison, Post Office Box **747,** Starke, Florida, **32091,** on this 2nd day of May, 1990.



DAVID A. DAVIS