IN THE

SUPREME COURT OF FLORIDA

CASE NO. 74,172

LARRY DONNELL BROWN,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Generally, Mr. Brown will rely upon his Statement of the Case which was set forth in his Initial Brief. However, in response to Appellee's Statement and Argument Concerning Procedural Bars, several points must be made. Mr. Brown timely filed his Motion to Vacate Judgment and Sentence. At that time, Mr. Brown was represented by volunteer attorneys from Massachusetts. Later, these attorneys withdrew from the case citing, among other reasons, their unfamiliarity with Florida law. The Office of the Capital Collateral Representative (CCR) was ordered into the case and given time to file an amendment to the 3.850 motion. Once the Amended Motion to Vacate Judgment and Sentence was filed, the amended motion was accepted, and the allegations contained in it as to constitutional deprivations were heard.

As to the procedural bars relied upon by the State, the State conveniently overlooks this Court's ruling in Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), and Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). In those cases, this Court specifically held that decisions by the United States Supreme Court are cognizable in 3.850 motions if they either directly or indirectly reverse and/or overturn this Court's prior precedent. If so, the United States Supreme Court decisions constitute a change in law. In order for this Court to find a procedural bar, this Court must consider whether the authority relied upon by Mr. Brown has reversed or overruled this Court's prior precedent.

ARGUMENT I

MR. BROWN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State's position is "Where a life recommendation was obtained from the jury, certainly defense counsel cannot be found deficient." Answer Brief at 16. However, this Court specifically rejected the State's argument in Stevens v. State, 552 So. 2d 1082 (Fla. 1989). There, this Court found trial counsel

provided ineffective assistance even though a life recommendation had been obtained. ("We find that trial counsel's inaction in the penalty phase of the trial amounted to a substantial and serious deficiency measurably below the standard for competent counsel." 552 So. 2d at 1087.) This Court also rejected this State's position in Heiney v. Dugger, ___ So. 2d ___, 15 F.L.W. 47 (Fla. 1990). There, an evidentiary hearing was ordered on the question of counsel's effective assistance at sentencing when he "fail[ed] to presented [sic] other nonstatutory mitigating evidence." 15 F.L.W. at 48. The State's argument was also rejected in Mills v. Dugger, ___ So. 2d ___, 15 F.L.W. 114 (Fla. 1990). There this Court ordered an evidentiary hearing on whether counsel was ineffective in not presenting evidence of statutory and nonstatutory mental health mitigation. The fact that the jury had returned a life recommendation was not dispositive. Perhaps it is no accident that the State does not cite or refer to this Court's decisions in Stevens, Heiney, and Mills.

Here, Mr. Brown has alleged that his trial counsel failed to adequately investigate and present the mitigating factors present in Mr. Brown's background. Further, Mr. Brown has alleged that his counsel did nothing to prepare for the judge sentencing. In fact the record bears this out. No evidence was presented by defense counsel despite the trial judge's request for more information. Counsel's argument barely fills one page of transcript (R. 277-78). Under Stevens, Heiney, and Mills, an evidentiary hearing is required as to whether counsel's performance was deficient.

The State also questions whether sufficient prejudice has been pled. "Nothing in Dr. Krop's report [] supports any mental health mitigating circumstance." Answer Brief at 14. However, a brief excerpt from Dr. Krop's report, submitted as an appendix in support of the 3.850 motion, belies the State's contention:

> Intellectual testing reveals that Mr. Brown is functioning overall in the low Borderline range (WAIS-R I.Q.=72), this classifying him in the

lowest 3% of the total population. All cognitive processes are low, but his judgment is particularly impaired and abstract thinking is certainly limited. Personality testing reveals a long-standing depression secondary to his mother's death. this depression may also reflect his continued failures related to his limited cognitive ability, his size and feeling of rejection and loneliness throughout his formative years. This individual derives from an obviously deprived environment, culturally, economically and emotionally (except for his mother's love) and Mr. Brown continued to exist in similar environments throughout his adolescent and young adult years with the cycle being perpetuated by his involvement in the criminal justice system.

Summary and Conclusion

This is a thirty-four year old separated male who was evaluated to determine his mental status and possible mitigating factors at the time of the alleged offense. Although Mr. Brown still denies his involvement in the killing, he describes his mental state around that time in a manner consistent with a clinical depression. Based on the current evaluation, it is this examiner's opinion that Mr. Brown was suffering from an Adjustment Disorder with Depression Mood (DSM III - 309.00) and was also exhibiting acute psychotic symptoms in the form of visual hallucinations. There is also evidence from history of an Organic Brain syndrome (i.e. Epilepsy) and the current testing indicates that Mr. Brown is functioning intellectually in the lowest 3% of the total population.

In conclusion, it is this examiner's opinion that Mr. Brown was suffering from both an organic process and a major mental disorder at the time of the killing. Although this examiner cannot provide definitive evidence of his susceptibility to being influenced by his codefendant, individuals with similar diagnostic patterns and limited intellectual ability generally have difficulty planning and organizing in any complex manner.

(T. 46-47).

Certainly evidence of a 72 I.Q. alone would constitute mitigation and shed new light on the relative culpability of Mr. Brown vis-a-vis his co-defendant George Dudley. However Dr. Krop's report is chock full of additional mitigation essential to an individualized sentencing. Dr. Krop found evidence of organicity, a major mental disorder (Adjustment Disorder with Depression Mood), a deprived and abusive background, family strife and poverty; all of which constitute mitigation upon which a life recommendation can reasonably be based.

In addition to Dr. Krop's report, Mr. Brown has submitted numerous affidavits of family and friends describing Mr. Brown and the circumstances of

his life, as well as the conditions of the environment in which he was raised and in which he resided at the time of the offense. This information did not get presented at the time Mr. Brown was sentenced to death. The newspaper article published the day after the death sentence was handed down contained information about "Methodist town" which was not presented in court by Mr. Brown's attorney. Certainly the conditions of "Methodist Town," the slum that Mr. Brown was raised in and lived in, could have afforded a reasonable basis for a life recommendation.

Mr. Brown's lawyers knew nothing of their client's background and history. They did nothing with the overwhelming mitigation available from his client's mental health background. They ignored all of that evidence -- evidence which would have made a difference, as it would have precluded an override of the jury's recommendation of life. They therefore failed to present the tribunal charged with deciding whether their client should live or die with the incredibly tragic story of Larry Donnell Brown's life and of his mental deficits. They thus deprived their client not only of a meaningful and individualized sentencing determination, but also of a life sentence. Moreover counsel failed to know eighth amendment jurisprudence and actively oppose the presentation of inadmissible evidence and improper argument. Mr. Brown is entitled to an evidentiary hearing, and thereafter to the relief he seeks. See Mills v. Dugger, supra; Heiney v. Dugger, supra; Stevens v. State, supra. This case must, at a minimum, be remanded for an evidentiary hearing.

ARGUMENT II

MR. BROWN WAS DENIED HIS RIGHT TO CONFLICT FREE REPRESENTATION IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State argues that Mr. Brown is not entitled to an evidentiary hearing on this claim. For this proposition, the State relies upon Smith v. White, 815 F.2d 930, 939 (11th Cir. 1986), wherein the Eleventh Circuit on the basis of an

evidentiary hearing concluded that the petitioner was not entitled to relief. Since an evidentiary hearing had been ordered in Smith v. White, it is hardly persuasive authority that one should not be held here.

In Porter v. Wainwright, 805 F.2d 930, 939 (11th Cir. 1986), it was explained that:

> To demonstrate that he should have been afforded an evidentiary hearing in the district court on this issue, Porter must first allege facts which, if proved, would entitle him to relief under the Constitution. Townsend v. Sain, 372 U.S. 293, 312, 83 S. Ct. 745, 756, 9 L.Ed. 770 (1963); Guice v. Fortenberry, 661 F.2d 496, 503 (5th Cir. 1981)(former Fifth Circuit en banc). In order for Porter to prevail on this claim, he must demonstrate that Widmeyer actively represented conflicting interests and that an actual conflict of interest adversely affected Widmeyer's performance. Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719, 64 L.Ed.2d 333 (1980); Stevenson v. Newsome, 774 F.2d 1558, 1562 (11th Cir. 1985). cert. denied, ___ U.S. ___, 106 S. Ct.1476, 89 L.Ed.2d 731 (1986). "An actual conflict exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing." Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1981)(Unit B), cert. denied, 456 U.S. 1011, 102 S. Ct. 2307, 73 L.Ed.2d 1308 (1982). In order to show an actual conflict, Porter must demonstrate that Widmeyer chose between possible alternative courses of action such as eliciting or failing to elicit evidence helpful to Porter but harmful to Thomas. See Stevenson, 774 F.2d at 1562.
>
> In the instant case, Porter claims that Widmeyer owed a continuing duty to Thomas which prevented vigorous cross-examination without violating the attorney/client privilege. Porter asserts that Widmeyer was forced to choose between discrediting his former client through information learned in confidence, or foregoing vigorous cross-examination in an attempt to preserve Thomas' attorney/client privilege. If true, these assertions would suffice to demonstrate an actual conflict of interest.

Here, Mr. Brown's counsel, Michael McMillan, had previously represented George Dudley, the State's star witness. Mr. McMillan represented Mr. Dudley on a prior aggravated battery charge. At Mr. Brown's trial, Mr. Dudley testified that he agreed to plead guilty to murder and testify against Mr. Brown the day that his capital murder trial was set to begin (R. 969). He stated that his change of plea was not motivated by fear of the death penalty (R. 967-68). He certainly should have been asked if he knew that his prior conviction of

aggravated battery would have established an aggravating circumstance, i.e., prior crime of violence. He should have also been asked if his three year probationary period had expired when Ms. Jordan was murdered one year and one month after his sentencing; because if it had not, he had a second aggravating factor against him, i.e., under sentence of imprisonment. Counsel without a conflict certainly could have pursued this line of questioning to show that Mr. Dudley entered his plea and claimed that Mr. Brown committed the murder in order to save himself. As it was, no questioning concerning this prior conviction on which Mr. McMillan represented Mr. Dudley was pursued at Mr. Brown's trial. This failure on trial counsel's part was as a result of his conflict of interest.

This situation is identical to Porter v. Wainwright. Trial counsel's judgment and representation was adversely affected by a conflict of interest. Prejudice, therefore, must be presumed. An evidentiary hearing is required.

ARGUMENT IV

MR. BROWN WAS ILLEGALLY SENTENCED IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS SINCE THE SENTENCING JUDGE HAD BEEN SUSPENDED FROM THE PRACTICE OF LAW PRIOR TO THE COMMENCEMENT OF MR. BROWN'S TRIAL.

The State argues that this issue is barred because it could have been brought on direct appeal. However the State conveniently overlooks the fact that Judge Farnell's suspension from the practice of law was not of record and therefore not cognizable on direct appeal.[1] This issue was not cognizable on

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[1]The State also asserts "Brown's appellate counsel made written inquiry to the Florida Bar concerning the matters now complained of." Answer Brief at 23. No record cite is given for this factual representation. However, in Mr. Brown's appendix to his amended 3.850 motion, Appendix AA was a letter from the Florida Bar to Mr. Brown's appellate counsel, Robert Moeller. In this letter the Florida Bar confirmed Judge Farnell's suspension for the period October 1, 1982 to November 15, 1982. The letter is dated June 27, 1985, which is the very same date that this Court issued its opinion on direct appeal. Assuming this document is the correspondence that the State is referring to, it hardly provided appellate counsel with a basis for raising the issue when he briefed Mr. Brown's case, two years earlier. Moreover, the letter to appellate counsel

(continued...)

direct appeal because it required consideration of non-record evidence. It, therefore, is cognizable and was properly included in the Rule 3.850 motion.

As to the merits, the State argues that the standard to which a judge held is no higher or different than the standards by which defense counsel is measured. However, the United States Supreme Court disagrees with that analysis. That Court has recognized a "distinction between judicial and nonjudicial officers." Marshall v. Jerrico, Inc., 466 U.S. 238, 249 (1980). Judicial officers, i.e., judges, are held to a higher standard. Young v. U.S. ex rel. Vuitton Et Fils S.A., 107 S. Ct. 2124 (1987). What may be acceptable for a prosecuting attorney or a defense lawyer is not necessarily acceptable for a judge. The standard that the State proposes, which is, in essence, was the judge ineffective because of his suspension, is not the correct standard. The issue here is jurisdictional. If the judge was not a judge at the time of trial, the conviction is void. According to the Florida Bar and even Judge Farnell himself, at the time of trial he was suspended from the practice of law. Rule 3.850 relief is mandated for the reasons set forth in Mr. Brown's initial brief.

ARGUMENT V

THE OVERRIDE OF THE JURY'S RECOMMENDATION THAT A LIFE SENTENCE BE IMPOSED MUST BE DECLARED UNCONSTITUTIONAL BECAUSE THE RECOGNIZED STANDARDS FOR A JURY OVERRIDE WERE NOT FOLLOWED IN THIS CASE AND THUS THE IMPOSITION OF THE DEATH SENTENCE WAS ARBITRARY AND CAPRICIOUS, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The State asserts as to this issue "appellant is merely rearguing a matter which was raised and determined on direct appeal." Answer Brief at 26. The State ignores the fact that this claim is premised upon a newspaper article not part of the record on appeal and thus not presented to this Court on direct

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[1](...continued)
was still not part of the record in this case until a timely Rule 3.850 motion was filed.

appeal. Claims or issues not based on record material are not cognizable on direct appeal. In fact, the purpose behind Rule 3.850 is to permit presentation of non-record material which gives rise to a claim for relief not previously cognizable.

On November 16, 1982, the St. Petersburg Times published an article regarding Mr. Brown's death sentence. This article, not part of the record on direct appeal, quoted Judge Farnell:

> Monday, Farnell sentenced his first man to death. "It is really frustrating. There is a substandard element of society down there that is following that same level of conduct. It's a tragedy," said Farnell, when it was over. "They are like rabid rats running around in a hamster cage, running 'round and 'round and every once in a while they run out of that sphere of influence and bite somebody to death."

The justification of the override not part of the record on direct appeal established that the override occurred because Mr. Brown left his black neighborhood and killed a white woman. The override in light of this new evidence, cognizable in a Rule 3.850 motion, was improper.

ARGUMENT VI

PRESENTATION OF IMPERMISSIBLE "VICTIM IMPACT" STATEMENT TO THE COURT, THE PROSECUTION'S RELIANCE UPON THIS VICTIM IMPACT EVIDENCE, AND THE JUDGE'S USE OF VICTIM IMPACT AS THE BASIS FOR THE OVERRIDE CONSTITUTED FUNDAMENTAL EIGHTH AMENDMENT ERROR WHICH RENDERED MR. BROWN'S CAPITAL SENTENCING PROCEEDINGS FUNDAMENTALLY UNRELIABLE AND UNFAIR AND WHICH ABROGATED MR. BROWN'S EIGHTH AMENDMENT RIGHTS TO A RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION.

The State claims that this issue is barred because it was not raised on direct appeal and thus Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), does not apply. The State is simply wrong; this issue was presented to this Court on direct appeal.

In Mr. Brown's brief on direct appeal, two of the claims were premised upon an improper override of the jury's life recommendation. (See Arguments VII and X in Brief of the Appellant, Brown v. State, No. 62,922). In that brief and in those issues, Mr. Brown claimed that the decision to override the life

recommendation was premised upon non-statutory aggravating circumstances not related "to the aggravating circumstances enumerated in Section 921.141(5), Florida Statutes. Only those circumstances enumerated in this subsection may be considered by the sentencer." Brief of the Appellant, supra at 45. "[T]he only additional factor before the judge that was not before the jury was the presentence investigation report, containing a subjective evaluation and opinion." Brief of the Appellant, supra, at 56. Mr. Brown asserted that for these and other reasons the override was improper. Under Jackson v. Dugger, supra, this Court must revisit the override issue and determine whether error occurred under Booth v. Maryland, 107 S. Ct. 2529 (1987), i.e., did the judge improperly consider non-statutory aggravation arising from the subjective opinion of the daughter of the victim that she believed death was appropriate.

Furthermore, Mr. Brown has presented in support of his 3.850 motion new evidence not of record on direct appeal, which is cognizable in 3.850 proceedings, which establish Booth error occurred. Judge Farnell told a newspaper reporter that he imposed death because Mr. Brown was "like [a] rabid rat [] running around in a hamster cage, running 'round and 'round and every once in a while [] run[ning] out of the sphere of influence [the black neighborhood] and bit[ing] somebody to death." Obviously the judge imposed death because Mr. Brown left his neighborhood and killed a white woman not in his sphere of influence. This is consideration of victim impact evidence. This is an impermissible basis for a death sentence under Booth. Rule 3.850 relief is required.

ARGUMENT VII

THE PROSECUTOR IMPROPERLY INJECTED RACIAL PREJUDICE INTO MR. BROWN'S TRIAL BY REPEATEDLY NOTING THE FACT THAT THE VICTIM WAS WHITE AND FOCUSING THE SENTENCER'S ATTENTION ON THE RACIAL ASPECT OF THE CASE.

The State argues that this claim is barred because it should have been raised on direct appeal. The State ignores the fact that the claim is premised

upon non-record material which was not available to be considered on direct appeal. An element of any claim for relief is prejudice (unless of course prejudice is presumed). Here proof of prejudice is contained in the judge's explanation of the death sentence which he shared with a newspaper reporter. According to the newspaper report Judge Farnell gave a death sentence because Mr. Brown was "like [a] rabid rat [] running around in a hamster cage, running 'round and 'round and every once in a while [] run[ning] out of the sphere of influence [the black neighborhood] and bit[ing] somebody to death." This is new evidence, cognizible in 3.850 proceedings, establishing that Mr. Brown's death sentence is premised upon the State's efforts to inflame racial bias. This establishes that Mr. Brown was in fact prejudiced by the prosecutor's improper use of race. The judge's comments to the press overcomes the presumption that a judge follows the law and is not influenced by improper considerations. Mr. Brown's claim is dependent upon consideration of the newspaper article. It is only cognizable in a Rule 3.850 motion in which the non-record newspaper article can be considered. Accordingly, 3.850 relief is mandated.

ARGUMENT VIII

THE CIRCUIT COURT JUDGE WAS IN ERROR IN REFUSING TO DISQUALIFY HIMSELF FROM PRESIDING OVER THE 3.850 PROCEEDINGS.

The State in opposing this Argument takes the novel position that Rule 3.230 only applies where a judge is faced with a factual determination. The State argues that where the issue for resolution is a legal one, disqualification under Rule 3.230 is improper. ("The argument concerning the motion to disqualify reveals that the only questions to be resolved were those of law, and not of fact (R. 453-454). There was no reason, therefore, for Judge Farnell to recuse himself when the question was purely one of law." Answer Brief at 33).

Disqualification is proper whether the issues are legal or factual. The rule is concerned with whether a judge with a bias or inside information should be deciding who wins the case. There is absolutely no basis for the State's claim that disqualification is improper where the issues are "purely one[s] of law." Under Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988), new 3.850 proceedings before a new judge must be ordered.

ARGUMENT X

THE INTRODUCTION AND CONSIDERATION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. BROWN'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

As to this Argument, the State asserts "A trial judge is presumed to follow the law." However, here Mr. Brown has offered new evidence cognizable in a 3.850 motion that rebuts that presumption. The statements by Judge Farnell contained in the November 16, 1982 article, establish that he did not follow the law and limit his consideration to those allowed by this Court's precedent. If the statements contained in the November 16, 1982, article are correct, Mr. Brown is entitled to relief. An evidentiary hearing on this claim is required to determine whether the statements in the newspaper article are true.

CONCLUSION

For the reasons stated herein and those reasons stated in Mr. Brown's initial brief, Mr. Brown respectfully requests that this Court vacate his unconstitutional capital conviction and sentence of death.

Respectfully submitted
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by first class, U.S. Mail, postage prepaid, to Robert Krauss, Assistant Attorney General, Office of the Attorney General, Park Trammel Building, 1313 Tampa Street, Tampa, Florida 33602, this 21st day of May, 1990.

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