No. 75,209

In The

Supreme Court of Florida

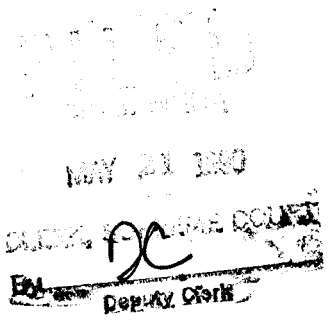
TED HERRING,

Appellant,

-vs.-

STATE OF FLORIDA,

Appellee.



ON APPEAL FROM DENIAL OF MOTION TO VACATE JUDGMENT AND SENTENCE BY THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR VOLUSIA COUNTY

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

In his Initial Brief, Herring demonstrated that this Court's decisions in Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 98 L. Ed.2d 681, 108 S. Ct. 733 (1988), and Herring v. Dugger, 528 So. 2d 1176 (Fla. 1988) ("Herring III"), confirmed that the application of Florida's heightened premeditation aggravating circumstance in Herring v. State, 446 So. 2d 1049 (Fla.), cert. denied, 469 U.S. 989, 83 L. Ed.2d 330, 105 S. Ct. 396 (1984) ("Herring I"), was erroneous, and that Herring is now entitled to relief on this claim. Herring further showed that the trial court's unprecedented use of collateral estoppel denied him the opportunity -- mandated by state law -- to present evidence in support of his individualized claims of ineffective assistance of counsel arising from

trial counsel's undisclosed status as a deputy sheriff at the time he represented Herring.

In its Answer Brief, the State makes two principal arguments: (i) Herring I was not overruled by Rogers v. State, and in any event, Herring is not entitled to relief because the heightened premeditation aggravating circumstance was correctly applied in this case; and (ii) Herring's claim of ineffective assistance of trial counsel was disposed of by the (very same) trial court's previous findings of fact and conclusions of law on remand of Harich v. State, 542 So. 2d 980 (Fla. 1989). Herring respectfully submits that the State is wrong on both counts.

As demonstrated in Herring's Initial Brief, and more fully below, Herring I was "expressly overruled" in Rogers, the heightened premeditation aggravating circumstance was applied erroneously to Herring, and the "fail[ure] to apply [this Court's] previously recognized limiting construction of [that] aggravating circumstance," Maynard v. Cartwright, 486 U.S. 356, 100 L. Ed.2d 372, 108 S. Ct. 1853, 1859 (1988) (citing Godfrey v. Georgia, 446 U.S. 420, 429, 64 L. Ed.2d 398, 100 S. Ct. 1759, 1765 (1980)), was an error of constitutional dimension requiring vacation of Herring's death sentence. In addition, the State's argument that the trial court was entitled to rely upon its factual findings in Harich confirms that Herring's Rule 3.850 Motion was denied on the basis of the improper use of collateral estoppel principles.

REPLY STATEMENT OF FACTS

Herring relies upon the statement of facts contained in his Initial Brief, and offers this reply statement in response to errors contained in the State's Answer Brief.

A. It Is Undisputed That Only Two Shots Were Fired

The State asserts that the victim in this case, a convenience store clerk, suffered three gunshot wounds, citing this Court's opinion in Herring I. Answer Brief ("AB") at 3. The assertion is incorrect. Neither the record of the trial proceedings nor any appellate record filed in connection with this case discloses the existence of a third gunshot or a resulting wound. Rather, the record on this appeal, as well as that in Herring I, establishes that the Medical Examiner concluded that the cause of death had been a bullet wound to the head, that the victim had been shot twice, and that both shots were fired within the same time frame. R.O.A. at 10; Supp. at 481-82.*

B. Herring Does Not Rely Upon The Same Facts And Arguments As Harich

With respect to Herring's ineffective assistance of counsel claim, the State also contends that "Herring's motion relied on the same factual assertions and legal arguments presented to and rejected by [the same trial court] after an

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* "R.O.A." refers to the Record on Appeal. "Supp." refers to the transcripts of Herring's trial, found in the first supplement to the record on appeal filed in Herring I.

evidentiary hearing in State v. Harich, Case No. 81-1894-BB." AB at 9 & n.6. This contention is inaccurate. Although Herring, like Harich, argues that he was ineffectively represented by virtue of Howard Pearl's undisclosed conflict of interest, Herring's claims of prejudice rest on a factual record entirely different from Harich's. A comparison of Herring's allegations and those made in Harich makes clear that the arguments are quite different. Compare R.O.A. at 114-20; Initial Brief ("IB") at 33-40 with AB at Appendix A.

ARGUMENT

I.

HERRING I HAS BEEN "EXPRESSLY OVERRULED," THUS REQUIRING, UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE, THE VACATION OF HERRING'S DEATH SENTENCE

A. The Heightened Premeditation Aggravating Circumstance Was Applied In Violation Of The Eighth And Fourteenth Amendments

The State devotes much of its Answer Brief to the remarkable proposition that Herring I has not been overruled, AB at 10-15, notwithstanding this Court's clear holdings to the contrary. In Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 98 L. Ed.2d 681, 108 S. Ct. 733 (1988), this Court held that "[s]ince we conclude that 'calculation' consists of a careful plan or prearranged design, we recede from our holding in Herring [I], to the extent it dealt with this question." Even if there were some doubt as to the meaning of this holding, the Court

unambiguously restated the result of Rogers in Herring III: "Since our decision in Herring [I], this Court, in Rogers v. State, adopted Justice Ehrlich's view and expressly overruled the application of this aggravating circumstance under the factual situation set forth in Herring [I]." Herring v. Dugger, 528 So. 2d 1176, 1178 (Fla. 1988) (citations omitted) (emphasis supplied). It cannot seriously be disputed that Herring I has now been overruled.

Indeed, the State did not dispute that fact in litigating Herring's Federal Petition for a Writ of Habeas Corpus. To the contrary, the State, in its response to Herring's Federal Petition, conceded that

> by virtue of the decision in Rogers, one of the aggravating factors upon which the trial court based its decision to [impose] the death penalty would seem to have been eliminated in this case.

R.O.A. at 41.

Under these circumstances, the State's further contention that the heightened premeditation aggravating circumstance was applied properly to the facts of this case is demonstrably false. All of the surrounding circumstances indicated that the shooting was an accident. At trial, the State offered no evidence to refute Herring's statement that he shot the clerk "by mistake." In his confession, Herring admitted to four other armed robberies in the same time period; he never fired his gun or harmed anyone during any of these incidents. Indeed, prior to his arrest, he had never been convicted, or even accused, of any violent crime. In

light of Rogers and Herring III, it is clear that the heightened premeditation aggravating circumstance could not be applied in any future case involving facts identical to those in Herring I; put another way, if the State presented precisely the same evidence at Herring's resentencing hearing, the trial court could not impose a sentence of death on the basis of this aggravating circumstance.

For these reasons, the State's reliance upon Eutzy v. State, 541 So. 2d 1143 (Fla. 1989), is misplaced. In Eutzy, this Court held that its decision in Rogers was not a fundamental change in the law which "should be given retroactive effect," but was a mere "evolutionary refinement" in the law of the heightened premeditation aggravating circumstance. 541 So. 2d at 1147; see also Harich v. State, 542 So. 2d 980, 982 (Fla. 1989). Here, Herring does not seek the retroactive benefit of Rogers. In essence, Herring claims the precise opposite: in holding that Rogers was not a "jurisprudential upheaval" requiring retroactive application, this Court recognized that the law of the heightened premeditation aggravating circumstance had not changed; Rogers was merely an "evolutionary refinement" in a body of law that had been applied consistently -- with the exception of this case -- since well before the decision in Herring I. See IB at 13-18 (citing cases). Thus, if anything, Eutzy supports Herring's position.

As Herring demonstrated in his Initial Brief, United States Supreme Court decisions such as Maynard v. Cartwright,

486 U.S. 356, 100 L. Ed.2d 372, 108 S. Ct. 1853 (1988), and Godfrey v. Georgia, 446 U.S. 420, 429, 64 L. Ed.2d 398, 100 S. Ct. 1759 (1980), are controlling here.* In overruling Herring I, this Court recognized that, like the Oklahoma courts in Cartwright, it "failed to apply its previously recognized limiting construction of [the heightened premeditation] aggravating circumstance." Cartwright, 486 U.S. at 363, 108 S. Ct. at 1859. However, the mere acknowledgement of error, without eliminating the heightened premeditation aggravating circumstance which formed a critical basis for Herring's death sentence, does not satisfy well-established constitutional standards. Under Cartwright and Godfrey, Herring's sentence violates the Eighth Amendment because this Court applied a statutory aggravating circumstance to the facts of this case "without some narrowing principle to apply to those facts," and thus, "there [is] 'no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in

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* In this regard, the State's reliance upon Brown v. State, 15 F.L.W. S165 (Fla. Mar. 22, 1990), is unavailing. In Brown, this Court concluded that the heightened premeditation aggravating circumstance was applied correctly and in accordance with Rogers, and rejected defendant's contention that that aggravating circumstance was unconstitutionally vague under Cartwright. Thus, Brown did not address the legality of a death sentence where, as here, the state courts failed to apply their "previously recognized limiting construction" of the heightened premeditation aggravating circumstance, nor may Brown reasonably be read as holding that the Cartwright/Godfrey principle is applicable only to this state's "heinous, atrocious, and cruel" aggravating factor.

which it was not.'" Id. (citations omitted).

B. Herring Is Entitled To A New Sentencing Hearing Because The Erroneous Application Of The Heightened Premeditation Aggravating Circumstance Was Not Harmless Beyond A Reasonable Doubt

The State argues alternatively that the erroneous application of that aggravating factor was harmless. In essence, the State contends that this Court's refusal to reach the question of retroactivity in Herring III should be read as an implicit finding that the error committed in Herring I was harmless. No fair reading of Herring III warrants this conclusion.

The State concedes, as it must, that this Court refused to reach the issue of the retroactive application of Rogers, or the merits of Herring's claim regarding the erroneous application of the heightened premeditation aggravating circumstance, in Herring III. AB at 14. Indeed, the State specifically made the point in opposing Herring's Federal Petition, arguing that Herring's Rogers claim had "yet to be presented to any state court." R.O.A. at 41. Thus, in Herring III, this Court did not address its acknowledgement in Rogers of its error in Herring I, and certainly did reach the question of whether that error was harmless, implicitly or otherwise.

Nor can the error at issue be considered harmless beyond a reasonable doubt. At trial, the jury recommended the death sentence by a vote of 8 to 4. Elimination of the heightened premeditation aggravating circumstance, which

formed a critical basis for both the State's case at sentencing and the trial court's ultimate sentencing determination, almost certainly would have affected, if not altered, the outcome of Herring's sentencing hearing. The presence of two substantial mitigating factors -- Herring's age at the time of the offense and his difficult life as a child and young adult -- reinforces the conclusion. Cf. Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988) (citing Herring I).

Herring is entitled to a new sentencing hearing as a matter of law. See Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977) ("Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial."); State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943, 40 L. Ed.2d 295, 94 S. Ct. 1950 (1974). Indeed, because "the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances," Elledge, 346 So. 2d at 1003, this Court has consistently ordered new sentencing hearings in similar cases. See, e.g., Peavy v. State, 442 So. 2d 200, 203 (Fla. 1983) (new sentencing hearing required where elimination of heightened premeditation aggravating circumstance left "three aggravating factors to be weighed

against two mitigating factors"); Dudley v. State, 545 So. 2d 857, 860 (Fla. 1989) (new sentencing hearing ordered where elimination of heightened premeditation aggravating circumstance left three aggravating factors and one mitigating factor). The result here should be no different. Cf. Clemons v. Mississippi, 58 U.S.L.W. 4395, 4399-4400 & n.5 (Mar. 28, 1990) (failure to remand to a sentencing jury violates the Constitution "if the decision is made arbitrarily").

C. Herring's Claim Relating To The Erroneous Application Of The Heightened Premeditation Aggravating Circumstance Is Neither Procedurally Barred Nor An Abuse Of Process

The State's final contention, that "[s]ince the validity of the [heightened premeditation aggravating circumstance] was raised in prior post-conviction motions, the reassertion of the claim is an abuse of process" and is procedurally barred, AB at 15, is also incorrect. In essence, the State argues that since Herring has diligently asserted this claim, only to be denied relief on the basis of error this Court has now acknowledged, Herring should be procedurally barred from seeking the relief to which he indisputably is entitled. Herring respectfully submits that procedural rules and defenses are inapplicable to the unique circumstances of this case: Herring cannot be faulted -- let alone penalized -- for failing to have convinced the courts of this state of an error this Court subsequently has acknowledged.

Herring raised the issue of the improper application of the heightened premeditation aggravating circumstance in his initial 3.850 Motion. At that time, the State argued, and this Court agreed, that the issue was procedurally barred because it was raised on direct appeal. Herring II, 501 So. 2d at 1280. The State's argument now, apparently, is that Herring is still barred even though on direct appeal the issue was decided wrongly. Such an argument is not only absurd; it makes a mockery of the principles of due process and fairness that must underlie any rational criminal justice system. Cf. Sanders v. United States, 373 U.S. 1, 8, 10 L. Ed.2d 148, 83 S. Ct. 1068, 1073 (1963) ("[c]onventional notions of finality of litigation have no place where life and liberty is at stake and infringement of constitutional rights is alleged").

Moreover, as Herring pointed out in his Initial Brief, the State's invocation of procedural bar flies directly in the face of the State's position in opposing Herring's Federal Petition; namely, that in light of Rogers, "the issue of whether the trial court would have, or could have, still imposed that same sentence has yet to be presented to any state court." R.O.A. at 41. Thus, even if procedural defenses could properly be invoked in this case -- which they cannot -- the State has waived such defenses. See Smith v. Zant, 887 F.2d 1407, 1438 (11th Cir. 1989) (en banc) (Kravitch, J., concurring in part and dissenting in part) ("The state selected its defenses and its arguments . . . it

must accept the ramifications of those choices. Waiver of claims is not a principle that works only to the detriment of petitioners.").

II.

TRIAL COUNSEL'S UNDISCLOSED CONFLICT OF INTEREST DENIED HERRING THE EFFECTIVE ASSISTANCE OF COUNSEL AND THE TRIAL COURT ERRED IN SUMMARILY DISMISSING THIS CLAIM BY INVOKING COLLATERAL ESTOPPEL PRINCIPLES

A. The State's Contention That Harich Is Dispositive Of This Case Mirrors The Trial Court's Erroneous Application Of Collateral Estoppel Principles In Summarily Denying Herring's Amended 3.850 Motion

In his Initial Brief, Herring demonstrated that he was entitled, at a minimum, to an evidentiary hearing on his ineffective assistance of counsel claim, and that the trial court denied him such a hearing on the basis of an unprecedented and erroneous use of collateral estoppel in a criminal proceeding and where mutuality of parties was lacking. In its Answer Brief, the State's offers no authority to support the use of factual findings made in a proceeding, criminal or civil, to which the estopped party did not participate. Rather, the State's response rests solely on the assertion that the trial court did not call such use of factual findings what it is -- collateral estoppel. By any other name, such a disposition rests on principles of collateral estoppel, and should be reversed because those principles were misapplied. Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843, 845 (Fla. 1984); Zeidwig v. Ward, 548 So. 2d 209 (Fla. 1989).

Moreover, the State does not deny that the use of collateral estoppel is inappropriate under any circumstances in a Rule 3.850 proceeding. Cf. Sanders v. United States, 373 U.S. at 8, 83 S. Ct. at 1073 (res judicata is inapplicable in habeas proceedings). Thus, in a response filed herewith, Herring has opposed the State's motion to hold this case in abeyance pending the outcome of the Harich appeal, and has not opposed the State's motion to rely upon and incorporate the Harich record (on the ground that anything thus incorporated is, in any event, irrelevant).

Indeed, even a cursory examination of Herring's allegations and those made in Harich, compare R.O.A. at 114-20; Initial Brief ("IB") at 33-40 with AB at Appendix A demonstrates that the trial court's -- and now the State's -- broad brush treatment obscures the record in this case. As demonstrated in Herring's Initial Brief, Howard Pearl's failure to cross-examine witnesses, his bolstering of the testimony of police officers and law enforcement personnel, his ineffective cross-examination of witnesses and his failure to properly prepare a defense, when viewed in light of the subsequently discovered fact that Pearl held a law enforcement position at the time of Herring's trial, establish that his representation of Herring was constitutionally defective. IB at 33-40. That conclusion remains unaltered regardless of the outcome in Harich, and requires that Herring be afforded an evidentiary hearing to present proof of his claim.

B. Herring's Claim Of Ineffective Assistance Of Counsel Is Not Procedurally Barred

The State's Answer Brief asserts that Herring's ineffective assistance of counsel claim is procedurally barred, relying upon the trial court's finding in Harich that Pearl's status as a Special Deputy Sheriff was well known in the community and, in any event, did not rise to the level of a per se conflict of interest. Even if the findings made in Harich were relevant here, the State's has not demonstrated that Pearl's status as a deputy sheriff was well-known and could have been discovered within the limitations period imposed by Rule 3.850. Indeed, the State's position is internally inconsistent and cuts against the result it urges here. In its Answer Brief in Harich, which it has moved to be made part of the record in this case, the State indicates that the Marion County Sheriff testified that ninety-nine percent of his personnel would not even know Howard Pearl by name or sight. AB Appendix A at 18. Presumably, those same personnel did not know that he was a deputy sheriff either. The State has offered no reason why an indigent capital defendant, incarcerated in a county jail, would have known more than Pearl's fellow law enforcement officers and personnel.

For these reasons, the State's contention that Herring's Amended 3.850 Motion was an improper successive petition is wrong as a matter of Florida law, and contrary to this Court's holding in Harich. It is axiomatic that a

subsequent ineffective assistance of counsel claim is not procedurally barred where the nature of the ineffectiveness claimed differs from the first. See Nova v. State, 439 So. 2d 255, 260, n.3 (Fla. Dist. Ct. App. 1983) (citing Sanders v. United States, 371 U.S. 1, 10 L. Ed.2d 148, 83 S. Ct. 1068 (1963); Lawson v. State, 231 So. 2d 205 (Fla. 1970) (other citations omitted)). This rule applies with particular force here, where Herring moved for relief immediately upon learning the facts that give rise to his ineffective assistance of counsel claim.

CONCLUSION

The trial court's Order should be reversed and Herring's conviction and sentence should be set aside; in the alternative, Herring's death sentence should be vacated with instruction to impose a life sentence; in the alternative, Herring's death sentence should be vacated and the case remanded for a new sentencing hearing; or, in the alternative, the case should be remanded for an evidentiary hearing and discovery.

Dated: May 21, 1990

Respectfully submitted,

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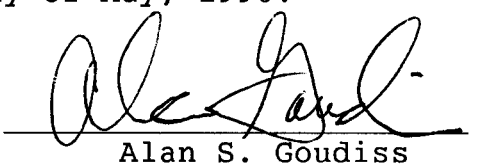
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the State of Florida by mailing the same Federal Express, next day delivery, prepaid to Barabara C. Davis, Esq., Assistant Attorney General of the State of Florida, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 21st day of May, 1990.



Alan S. Goudiss