IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,248

THE STATE OF FLORIDA,

Petitioner,

vs.

JOSE RAMON ENRIQUEZ,

Respondent.

FILED
SID J. WHITE
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Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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BRIEF OF RESPONDENT ON THE MERITS

INTRODUCT

Petitioner, the [illegible] of Florida, was the appellee in the district [illegible]urt of appea[illegible] and [illegible]he prosecution in [illegible] [illegible]cui[illegible] Court[illegible] Respondent, Jose Ramon [illegible] was t[illegible] [illegible]llant in the d[illegible]stri[illegible] [illegible] of appeal and the def[illegible] in [illegible]he [illegible]t Court. In this [illegible]ief of respondent on the merits, all emphasis is [illegible]p[illegible] unless the contrary i[illegible]nd[illegible]

STATEMENT OF THE CASE AND FACTS

Respondent accepts the petitioner's Statement of the Case and Facts as a substantially accurate account of the proceedings below.

SUMMARY OF ARGUMENT

Defendant, who was charged with first-degree murder, a capital felony punishable by death under statutory and constitutional law, was entitled to a twelve-person jury. The state's "waiver" of the death penalty, which was not conditioned upon a relinquishment by the defendant of his right to a twelve-person jury, did not work to vitiate that right.

First-degree murder remains a capital crime regardless of whether the state "waives" the death penalty or not. A "waiver" of the death penalty by the state is simply an announcement that the state will not ask the court to impose a death sentence. While "capital" crimes which cannot, as a matter of law, be punished by death do not carry with them the rights incidental to a capital trial, an announcement by the state that in a particular case it does not wish to seek a death sentence does not rise to the level of a constitutional or statutory bar to death as a punishment.

ARGUMENT

A TWELVE-PERSON JURY IS REQUIRED IN A FIRST-DEGREE MURDER CASE IN WHICH THE PROSECUTION "WAIVES" THE DEATH PENALTY.

The question certified to this Court by the district court of appeal is whether a twelve-person jury is required in a first-degree murder case in which the prosecution "waives" the death penalty. The same issue is currently pending before this Court in Griffith v. State, 548 So.2d 244 (Fla. 3d DCA 1989), review pending, No. 73,997 (Fla. 1989).[1]

In seeking a negative response to this question, the state's central thesis is that its purported "waiver" of a death sentence prior to trial somehow transforms the capital crime of first-degree murder into a non-capital crime because death is no longer a possible punishment after that "waiver" by the state. The fundamental flaw in the state's argument is that it seeks to elevate an exercise of prosecutorial discretion to the level of a legislative abolition of capital punishment or a judicial declaration that death as punishment is per se unconstitutional for a certain crime.

The Florida Legislature has defined first-degree murder as a capital crime and established death as a possible punishment for

[1] Griffith was argued before this Court on December 7, 1989. Also pending before this Court on the same certified question are Poole v. State, 550 So.2d 1144 (Fla. 3d DCA 1989), review pending, No. 74,657 (Fla. 1989), Joseph v. State, 550 So.2d 1134 (Fla. 3d DCA 1989), review pending, No. 74,428 (Fla. 1989), Mustelier v. State, 550 So.2d 1124 (Fla. 3d DCA 1989), review pending, No. 74,069 (Fla. 1989), Rodriguez-Acosta v. State, 548 So.2d 248 (Fla. 3d DCA 1989), review pending, No. 73,997 (Fla. 1989), and Jones v. State, 548 So.2d 244 (Fla. 3d DCA 1989), review pending, No. 73,998 (Fla. 1989).

the commission of that crime. Section 782.04(1)(a), Florida Statutes (1985) provides:

> The unlawful killing of a human being ... [when committed in any of the circumstances described herein] ... is murder in the first degree and constitutes a capital felony punishable as provided in s. 775.082.

Section 775.082(1) provides:

> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

It is well settled that the power to define crimes and prescribe the punishment therefor is solely within the legislative branch. Rusaw v. State, 451 So.2d 469, 470 (Fla. 1984); Watson v. State, 190 So.2d 161 (Fla.), cert. denied 389 U.S. 960, 88 S.Ct. 339, 19 L.Ed.2d 369 (1966); Brown v. State, 152 Fla. 853, 13 So.2d 458 (1943). The legislature having defined first-degree murder as a "capital" crime and having prescribed death as a possible penalty for the commission of that offense, a prosecutor cannot transform a capital crime to a non-capital crime by "waiving" the death penalty. Rather, such a "waiver" is nothing more than a declaration by the prosecutor that he or she will not ask the court to impose a death sentence.

As the court below thoughtfully concluded in Griffith, it is the legal categorization of first-degree murder as a "capital" offense that is at the very heart of the twelve-person jury guarantee:

The state . . . contends that . . . -- by virtue of its foregoing the death penalty and the practical, if not legal impossibility of its being imposed in this case, Brown v. State, 521 So.2d 110 (Fla. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 270, 102 L.Ed.2d 258 (1988) -- the case was no longer a "capital" one which required a twelve-person jury at all. After extensive and careful consideration of this argument, we are compelled to reject it. It can hardly be denied that first-degree murder is, and was at the time of the commission of the offense charged in the grand jury indictment, a crime which was alternatively punishable by the death penalty. Since that is the case, we conclude, in common with every case on the pertinent issue, that capital procedural safeguards, specifically including the twelve-person jury, are applicable notwithstanding that a subsequent event, in the form of a state waiver or a life sentence after a jury verdict, has meant that no death sentence is or may be imposed. E.g., State v. Hogan, 451 So.2d 844, 845 (Fla. 1984)("a capital case is one where death is a possible penalty"); Lowe v. Stack, 326 So.2d 1 (Fla. 1974)(first degree murder requires indictment rather than information); Bradley v. State, 374 So.2d 1154 (Fla. 3d DCA 1979)(same); State ex rel. Manucy v. Wadsworth. 293 So.2d 345 (Fla. 1974)(same); Ulloa v. State, 486 So.2d 1373, 1375 n.4 (Fla. 3d DCA 1986)("In cases where death as a punishment was unavailable at the time the defendant was charged, the courts have held that the procedural requirements accorded capital defendants are not applicable"); Nova v. State, 439 So.2d 255 (Fla. 3d DCA 1983) (twelve-person jury in a first degree murder case is fundamental right and validity of waiver may be considered pursuant to Fla.R.Crim.P. 3.850 even if not raised on appeal); see Alfonso v. State, 528 So.2d 383, 384 (Fla. 3d DCA 1988)("[T]he trial court's pretr'ial decision not to impose a death penalty did not transform first-degree murder into a non-capital crime"). As Ulloa makes clear, the rule is different only in those instances -- in which the death penalty is or was unavailable as a matter of law -- that is, capital sexual battery, § 794.011(2), Fla.Stat. (1985), and first degree murder during the period between Furman v. Georgia, [408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346

> (1972)], and the revalidation of the death penalty in Proffitt v. Florida, [428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)]. . . . .

Griffith v. State, 548 So.2d at 246-247 (original emphasis).

A similar result was reached in Ortagus v. State, 500 So.2d 1367 (Fla. 1st DCA 1987). In that case, the defendant was charged with first-degree murder. Prior to trial, the state filed a "notice to waive request for the death penalty." 500 So.2d at 1369. Over the defendant's objection, the trial court advised the jury of the possible penalties in the case. On appeal, the court rejected the defendant's claim of error in the giving of such an instruction to the jury:

> . . . Fla.R.Crim.P. 3.390(a) provides that a trial judge shall not instruct the jury on the sentence which may be imposed in a cause, unless it is a capital case. Ortagus contends that he was not charged with a capital crime because per the parties' stipulation, the death sentence was not a possible punishment for the crime. Rusaw v. State, 451 So.2d 469 (Fla. 1984)(a capital crime is one in which the death sentence is possible). This argument, however, ignores the fact that the legislature has the power to define crimes and set punishments. Id. According to Section 782.04, Florida Statutes (1983), murder in the first degree is a capital offense. Accordingly, we find no error here.

500 So.2d at 1371. Compare Coleman v. State, 484 So.2d 624 (Fla. 1st DCA 1984)(instruction on penalties properly refused where defendant charged with sexual battery upon a person eleven years of age or younger because death sentence constitutionally prohibited); Dailey v. State, 501 So.2d 15 (Fla. 2d DCA 1986)(same); Croney v. State, 495 So.2d 926 (Fla. 4th DCA 1986), rev. denied, 506 So.2d 1040 (1987)(same).

The analysis of the Third District in Griffith and the analysis of the First District in Ortagus are in complete accord with this Court's precedent, which, on two previous occasions, has addressed the consequences of the abolition of capital punishment: in 1972, following Furman v. Georgia, and in this decade, following this Court's holding in Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982), that death as punishment may not be applied to capital sexual battery under Section 794.011(2), Florida Statutes (1987). In the first set of cases, this Court held that the judicial invalidation of capital punishment in Furman eliminated the class of "capital offenses" in Florida, Donaldson v. Sack, 265 So.2d 499, 502 (Fla. 1972), and with that, no cases were to be tried by a twelve-person jury, jurors should not be "death-qualified," formerly-capital offenses need not be charged by indictment, id. at 503-04, and the unlimited statute of limitations governing capital crimes was of no application to such offenses, State ex rel. Manucy v. Wadsworth, 293 So.2d 345, 346 (Fla. 1974); accord, Reino v. State, 352 So.2d 853, 858 (Fla. 1977). The rationale for this line of cases was that Furman, by declaring the death penalty unconstitutional, had led to "the abolition of the procedure for imposition of the death penalty." State ex rel. Manucy v. Wadsworth, 293 So.2d at 346 n. 4. Similarly, the abolition of the death penalty for capital sexual battery in Buford led this Court to hold that the right to be charged by indictment and to a 12-person jury became inapplicable to prosecutions for that offense. Heuring v. State,

513 So.2d 122 (Fla. 1987); State v. Hogan, 451 So.2d 844 (Fla. 1984); Rusaw v. State, 451 So.2d 469 (Fla. 1984).[2] Again, the underlying rationale was that sexual battery "is not a capital offense" because that offense "is not punishable by death" as a matter of law. Heuring v. State, 513 So.2d at 123; accord, Batie v. State, 534 So.2d 694 (Fla. 1988).

A discretionary decision by a prosecutor not to ask a judge to impose a death sentence simply does not stand on the same

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Interestingly, however, not all capital incidents have fallen away from prosecutions under Section 794.011(2) with the abolition of death as punishment. In Batie v. State, this Court held that the prohibition against release pending appeal for persons convicted of "capital" offenses, Fla.R.Crim.P. 3.691, applied to defendants convicted of capital rape, upon concluding that the legislature and the court had intended to deny such release to persons convicted of such offenses, regardless of the potential penalty. 534 So.2d at 694-95. More recently -- and more significantly -- this Court held in Perez v. State, 545 So.2d 1357 (Fla. 1989), a case involving a 1986 prosecution for capital sexual battery allegedly committed between June, 1975, and June, 1976, that the provisions of former Section 932.465(1), Florida Statutes (1973) ("[a] prosecution for an offense punishable by death may be commenced at any time"), governed the prosecution because "the limitations period in effect at the time of the incident . . . controls the time within which prosecution must be begun," and the crimes in that case "occurred at a point in time when the death penalty was in effect." Id. at 1357-58 (citation omitted). Thus, this Court held that "no statute of limitations controlled the prosecution of the crimes at issue because death was a possible penalty at the time of the commission of the offenses." Id. at 1358.

Perez is of weight in the present case because the absolute unavailability in that case, as a matter of constitutional law, of the death penalty, which is noted in this Court's decision, id. at 1358, did not dictate the result of the case; rather, what controlled is the possible penalty at the time of commission of the offenses. Ibid. If the same logical thread is followed in this case, the same result must be reached: the offense of first-degree murder was punishable by death at the time that defendant allegedly committed it, and the state's subsequent declination to proceed with a request for a death sentence cannot be given more legal significance than an absolute legal bar to imposition of death as punishment.

legal footing as the abolition of capital punishment for some or all criminal offenses:

> Whether [a] . . . case should be deemed a capital case depends . . . on the possibility of capital punishment when the act complained of occurred. The cases involving crimes labeled "capital" but not punishable by death are in two categories. In cases where death as a punishment was unavailable at the time the defendant was charged, the courts have held that the procedural requirements accorded capital crime defendants are not applicable. In contrast, in cases where death could have been imposed on the defendant, but was not, the failure to provide procedural requirements has been held to have voided the trial.

Ulloa v. State, 486 So.2d at 1375 n.4 (original emphasis).

A first-degree murder case in which a prosecutor declines to ask for a death sentence which is authorized under statutory and constitutional law is nothing more or less than a case in which death was available as a punishment at the time of the crime, and one in which "death could have been imposed on the defendant, but was not." The state's pretrial decision to forego a death sentence in this case "did not transform first-degree murder into a non-capital crime," Alfonso v State, 528 So.2d at 384, and the court below properly held that the trial judge had committed error in denying defendant his right to a twelve-person jury.[3]

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[3] The state's attempt to have this Court decide the instant case on "narrower grounds" (Brief of Petitioner at 21) merits little attention. Contrary to the state's claim, nowhere in the record in this particular case can there be found "defense counsel's stipulation to a six person jury in exchange for the State's waiver of the death penalty" (Brief of Petitioner at 21). The prosecution in this case independently decided not to seek the death penalty, and there is no indication that this decision was conditioned on defense counsel's waiver of the defendant's right to a twelve-person jury (SR. 55-57). Indeed, the prosecutor "waived" the death penalty before jury selection began, and defense counsel did not stipulate to a six-person jury (Cont'd)

CONCLUSION

Based on the foregoing facts, authorities and arguments, respondent respectfully submits that the question certified by the district court should be answered in the affirmative, and that the decision of the district court be affirmed.

Respectfully submitted,

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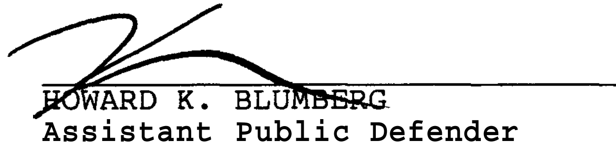
until near the completion of the selection process (SR. 171).

Furthermore, the state's reliance on Dumas v. State, 439 So.2d 246 (Fla. 3d DCA 1983), rev. denied, 462 So.2d 1105 (Fla. 1985), is misplaced. In Dumas, the court held that where a defendant personally executes a written waiver of his right to a jury trial, a presumption arises that the waiver was knowingly and voluntarily made. The seemingly obvious and dispositive distinction between Dumas and the case at bar is that no written waiver of a twelve-person jury was executed by the defendant. Accordingly, there can be no finding of a valid waiver in this case. See State v. Singletary, 549 So.2d 996 (Fla. 1989)(on-the-record waiver by the defendant required to establish valid waiver of right to jury trial).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 14th day of February, 1990.



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