IN THE SUPREME COURT OF FLORIDA

CHARLIE THOMPSON, :

Appellant, :

vs. : Case No. 76,147

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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* Delivered 4 days late

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PRELIMINARY STATEMENT

Appellant relies on his initial brief with regard to Issues II, III, IV, VII, and IX.

STATEMENT OF THE CASE AND FACTS

Appellant objects to appellee's lengthy recitation of the facts. This is plainly contrary to the appellate rules. Fla. R. App. P. 9.210(c)

ARGUMENT

ISSUE I

THE TRIAL COURT IMPROPERLY ADMITTED AS EVIDENCE THOMPSON'S STATEMENT TO THE POLICE, BECAUSE THE POLICE DID NOT TELL HIM HE HAD A RIGHT TO A LAWYER AT NO COST AND DID NOT INSURE THAT HE UNDERSTOOD HIS RIGHTS AND INTELLIGENTLY WAIVED THEM.

Appellant objects to Appellee's quotation from the appellate record in Caso v. State, 524 So.2d 422 (Fla. 1988). Brief of Appellee at 17-19. The Caso record is not part of the appellate record in this case, and relying on evidentiary material outside the appellate record and not presented to the trial court below is improper, absent permission from the appellate court to do so. Russell v. State, 521 So.2d 379 (Fla. 1st DCA 1988); State v. Montalvo, 428 So.2d 695 (Fla. 2d DCA 1983). Appellant does not know the context of this quotation or whether other matters in the Caso record might cast the quotation in a different light.

In any event, the quoted material from Caso supports the appellant's position rather than the State's. Like the bungled warnings in the present case, the quoted warnings in Caso told the defendant everything except that he had a right to a lawyer at no charge. As in the present case, the defendant in Caso was told that he had a right to remain silent, that he had a right to an attorney, that he could talk to his lawyer before or during questioning, and that he could stop questioning at any time. This court in Caso, however, found that these warnings were not enough, absent the additional statement that the defendant had the right to a lawyer at no cost. The same is true here. The irreducible fact of both the present case and Caso was that neither defendant was told he had this right.

Appellee in effect concedes that Thompson was not told that he had this right to a lawyer at no cost. "[T]he gist of Miranda warnings were provided and it is not essential that the accused be told that the ultimate cost will be borne by the state or the county." Brief of Appellee at 19. Appellee had to concede this much because detective Childers had conceded it at the suppression hearing below.

> Q: So, when you say you told him words similar to that effect, that he had a right to a free lawyer, that is inaccurate, is it not, sir? You did not tell him any such thing?
>
> A: That's correct.

(R9)

By conceding this much, however, detective Childers and counsel for appellee effectively conceded that Thompson's statement

to the police should have been suppressed, because Miranda holds that suspects must expressly be told that counsel will be appointed for them if they so desire, even though they cannot afford one.

> In order fully to apprise a person interrogated of the extent of his rights under this system, then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. . . . [O]nly by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

Miranda v. Arizona, 384 U.S. 436, 473 (1966). In this case, Thompson was not expressly told that counsel could be appointed for him at his request even if he could not afford one. Accordingly, the trial court erred by not suppressing his statement to the police.

Appellee twice refers to Dr. Sprehe's report and to Thompson's prior experience with the law. Brief of Appellee at 23-24, 26. Appellee, however, misleadingly fails to mention that the prosecutor did not submit Sprehe's report as evidence until after the trial and suppression hearings were over. The prosecutor also made no argument at the suppression hearing or at trial with respect to this issue concerning Thompson's prior experience with the law. Consequently, neither of these matters are relevant to the issue whether the trial judge erred at the hearing or at trial by not suppressing Thompson's statement to the police.

Appellant agrees that the Eleventh Circuit vacated Smith v. Zant, 855 F.2d 712 (11th Cir. 1988), but -- as appellee points out -- only because the en banc panel eventually split evenly on

whether to uphold the district court's order.[1] Thus, half of the Eleventh Circuit judges believed that Smith's confession should have been suppressed. Unlike appellee, appellant continues to believe that the facts in Smith are similar to the present case, and finds appellee's attempts to distinguish Smith entirely unconvincing.

Finally, appellant renews for the record all arguments raised in the first trial and appeal and in the second trial that Thompson's waiver of his rights was unknowing and involuntary (although undersigned counsel believes he has already renewed these arguments in his initial brief).

ISSUE V

THE KILLINGS WERE NOT COLD AND CALCULATED BECAUSE A REASONABLE HYPOTHESIS WAS THAT THEY WERE COMMITTED IN A RAGE WITH A PRETENSE OF LEGAL JUSTIFICATION AND BECAUSE THE INTENT NECESSARY TO PROVE KIDNAPPING COULD NOT JUSTIFY A FINDING OF THIS AGGRAVATING CIRCUMSTANCE.

Appellee argues that undersigned counsel unethically advanced an argument which he knew to be contrary to the admissions of his client. Brief of Appellee at 37 n.6. This argument is wrong for several reasons.

First, as appellee concedes, the admission in question was on a portion of the tape that this court suppressed. By appellee's

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[1]After filing the initial brief in this case but before the answer brief was filed, undersigned counsel learned of the Eleventh Circuit's later decisions in Smith and called counsel for appellee by phone to tell him about them.

reasoning, defense lawyers should stand mute in front of the jury every time confessions of their clients are suppressed. Defense counsel in these case should not argue the defendants' innocence to the jury because the defendants had already confessed their guilt. Appellee's argument is absurd. The whole point of suppressing confessions is that these statements are deemed to be unknowing and/or involuntary and therefore unreliable. Consequently, defense counsel may ethically disregard these untrustworthy suppressed statements, to the extent that they are contrary to the interests of their clients.

Second, the admission was merely Thompson's assent to the detective's leading suggestion that he shot Walker because she could identify him as having just shot Swack. The detective leadingly put words in Thompson's mouth, and Thompson obligingly said, "Yes." (R781) This assent was not strong evidence because, as the experts testified, Thompson was retarded, and retarded persons often will assent to whatever is said to them, even if they do not understand it and it is not in fact true. (R760, 796-97)

Third, appellee does not explain why Thompson's agreement that he shot Walker because she could identify him as having <u>just</u> shot Swack would be evidence of a prearranged design. If anything, just the opposite is true. If Thompson did not think of killing Walker until <u>after</u> he shot Swack, then this would be evidence that he did <u>not</u> have a prearranged design, because a prearranged design would necessarily include the plan that he would kill them both. The prosecutor's argument on this issue is effective only if Thompson

had the calculated plan to kill when he left the cemetery on a death ride with Swack and Walker. By contrast, the attorney general's argument disproves the prosecutor's argument and proves the appellant's point, because the murder could not have been cold and calculated if Thompson did not think to kill Walker until after he in a rage killed Swack when Swack hit him with a tree branch.

Finally, Thompson repeatedly said on the tape that he never intended to kill. (R345) If this Court considers the taped statement as a whole, it will find that Thompson never admitted to a prearranged design, that he in fact denied having a prearranged design, and that the evidence generally supports this denial. Appellee is wrong to say otherwise.

The basic problem with appellee's argument is its assumption that a rational, healthy, and intelligent mind was at work here. The defense, however, presented persuasive and entirely unrebutted evidence that Thompson was mentally retarded and at the time of these events was suffering from a paranoid psychotic episode in which he could not distinguish the real from the unreal. (R524-27) As Dr. Maher and Dr. Berland said, allowing Swack and Walker to record the check to Thompson in the journal, killing them in broad daylight, fencing the distinctive watch and ring, and cashing the Myrtle Hill check signed by Swack, showed how psychosis and paranoia had reduced Thompson's already impaired ability to make rational judgments. (R539-40, 595-99) Under these circumstances, the state's speculations and assumptions about the supposedly clear-

headed, cool, and calculated inner workings of Thompson's mind are entirely unfounded.

ISSUE VI

THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE AND COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE ARE UNCONSTITUTIONALLY APPLIED IN FLORIDA AND THE JURY INSTRUCTIONS ON THESE AGGRAVATORS ARE UNCONSTITUTIONALLY VAGUE.

Appellee argues that this issue is procedurally barred because counsel did not request a clarifying instruction. Brief of appellee at 41. Appellee, however, does not explain why appellant should nonsensically have to submit a clarifying instruction on these aggravating circumstances when he did not want the jury to be instructed on these circumstances at all. He had the burden only of objecting to vague instructions. In this case, appellant satisfied this burden; he argued specifically that the jury instructions on these two aggravators should not be given because their language was unconstitutionally vague. (R606, 915-25) Accordingly, this issue was preserved.

Appellee's reliance on Walton v. Arizona, 111 L. Ed. 2d 511 (1990), is unpersuasive. Walton upheld Arizona's heinous, cruel, or depraved aggravating circumstance, even though there was "no serious argument" that it was not facially vague, because judges rather than juries sentence Arizona defendants to death. 111 L. Ed. 2d at 528-29. Appellee urges that Walton controls and Shell v. Mississippi, 112 L. Ed. 2d 1 (1990) is inapplicable, because, in Florida, judges also are the sentencers in capital cases.

Appellee, however, misreads Walton in two ways. First, although, in Florida, judges are the final sentencers in capital cases, juries incontestably play an extremely important role. A jury's recommendation of life can be overridden only if virtually no reasonable person could differ on the appropriateness of imposing death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Tedder was a "crucial protection" that helped to correct the deficiencies of Florida's first capital sentencing scheme. Dobbert v. Florida, 432 U.S. 282, 295-96 (1977). This court has long recognized that a capital jury is "an integral part of the death sentencing process." Riley v. Wainwright, 517 So.2d 656, 657 (Fla. 1987). The jury's recommendation can be a "critical factor" in determining whether the defendant will be sentenced to die. Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974). This court is much more likely to reverse for a life sentence when the jury recommends life rather than death. Cochran v. State, 547 So.2d 928 (Fla. 1989). Even in cases in which this court has held that the jury is an "advisor" to the judge, this court has still "emphasize[d] the importance of the jury's role." Combs v. State, 525 So.2d 853, 857 (Fla. 1988).

Because jurors have this important role in the sentencing process, clear instructions on the law relevant to their decision are essential. The contrary conclusion evidently espoused by appellee -- that penalty phase juries in Florida may be given unconstitutionally vague instructions -- is absurd. The precepts of Shell therefore apply to this case, and Walton does not control. Shell patently teaches that the trial judge's bare instruction to

the jury below was unconstitutionally vague. The judge merely instructed the jury that it could consider whether the crime was "especially wicked, evil, atrocious, or cruel," (R638) an instruction even more vague than the instruction condemned in Shell. The trial judge's instruction did not inform the jurors "what they must find to impose the death penalty and as a result [left] them with the open-ended discretion condemned in Furman v. Georgia, 408 U.S. 238 (1972)." Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988).

Second, Walton distinguishes judge from jury sentencing only when the state's supreme court has applied a narrowing definition to the aggravating circumstance in question. Trial judges are presumed to follow the law and apply the narrower definition. 111 L. Ed. 2d at 528. The Arizona Supreme Court had given substance to its narrowing definition, and accordingly the trial judge's reliance in Walton on the circumstance as a reason to impose death was constitutional.

In Florida, however, this court's narrowing definition uses language from State v. Dixon, 283 So.2d 1 (Fla. 1973), and this was precisely the language that the Court found unconstitutionally vague in Shell. This court has not given a definition that passes constitutional muster, and appellee therefore cannot rely on Walton. Appellant recognizes that Walton reaffirmed the holding in Proffitt v. Florida, 428 U.S. 242 (1976), that Florida's heinous, atrocious, or cruel aggravating circumstance was constitutional. However, because Proffitt relied on Dixon and because we now know from Shell that the Dixon language is unconstitutional, Walton's

reaffirmance of Proffitt is mystifying. Shell implicitly overruled Proffitt, and appellee cannot use it to justify Florida's capital sentencing scheme.

ISSUE VIII

THE TRIAL JUDGE FAILED TO FILE A PROPER WRITTEN ORDER AND THE ORDER HE DID FILE VIOLATED THE DOUBLE JEOPARDY DOCTRINE.

Appellee cites cases such as Zachary v. State, 559 So.2d 105 (Fla. 2d DCA 1990), and Rowland v. State, 548 So.2d 812 (Fla. 1st DCA 1989), to the effect that a written sentence must comport with the judge's oral pronouncement at sentencing. Brief of Appellee at 47. These cases apply when the written sentence is entered at the same time as the oral statements. In this case, the written sentence was entered on a different day before the oral statements. It was a legal sentence, and the defendant started serving it. Increasing it the next day was therefore a violation of the double jeopardy doctrine.

The judge's intent when he entered this sentence was irrelevant. For example, a judge might intentionally enter a lenient written sentence before the sentencing hearing for various improper reasons. This improper intent and failure to announce the sentence orally would be irrelevant to the defendant's double jeopardy claim. By the same reasoning, the trial judge's mistaken intent in this case and failure to announce the sentence orally was also irrelevant. The judge's second sentencing order imposing death and his statements when this court relinquished jurisdiction are in

effect his effort to amend the first order imposing life nunc pro tunc. The nunc pro tunc doctrine, however, cannot be used as a means of violating a person's double jeopardy rights by increasing the legal sentence he had previously received. Bickowski v. State, 530 So.2d 470 (Fla. 5th DCA 1988).

Appellee finds comfort in Judge Bonanno's extensive borrowing from Judge Graybill's order imposed in the first trial. Brief of appellee at 49. Contrary to appellee's views, however, this fact affirmatively showed that Judge Bonanno did not independently reach his own decision and instead just borrowed somebody else's work. This was not the independent weighing of the relevant circumstances required by Patterson v. State, 513 So.2d 1257 (Fla. 1987).

ISSUE X

EXECUTING THE RETARDED IS CRUEL AND UNUSUAL PUNISHMENT.

Appellee argues that appellant failed to preserve this issue because he argued only the federal and not Florida's cruel and unusual punishment clause. Brief of appellee at 54-55. Appellee cites no case that specifically adopts this claimed procedural default, and appellant knows of none. Constitutional claims regarding involuntary confessions, the illegal exclusions of black jurors, and the like, have always been understood to preserve both the federal and state claims, if the federal and state constitutional language is the same. An argument that executing the retarded is cruel and unusual punishment preserves both the federal and the state issue because the constitutional provisions are

identical and the argument informs the judge of the basic nature of the objection. In any event, if executing the retarded is cruel and unusual punishment, then it is surely fundamental error.

Appellee argues from a footnote in Davis, David, "Executing the Mentally Retarded," Florida Bar Journal, February, 1991, p. 12, 17 n.20, that a bill to prevent the execution of the retarded did not leave a Florida legislative committee. A failure to report a bill out of committee, however, does not mean that the legislature approves of the execution of the retarded, since numerous political reasons unrelated to a bill's content can explain a failure to report a bill. The bill might have been attached to some other, politically unfavored bill, or the committee may not have had time to consider it.

Appellee neglects to mention that, according to the same footnote, Tennessee, Kentucky, and Maryland have agreed with Georgia to prohibit executing the retarded. The article also discusses at length the many protections which the legislature has enacted for the retarded.

> [O]ver the past decades Florida has increasingly sought to treat [the retarded] with dignity and compassion rather than with vengeance or as a pariah. The trend is two-fold. First, the mentally retarded increasingly have been viewed as distinctly different than those who are mentally ill or have other mental disabilities. . . . Second, the legislature has dramatically increased the protections for and rights of the mentally retarded. . . . This person . . . is provided greater legal protections than he has ever enjoyed.

Id. at 15.

The article reviewed this court's decisions regarding mentally retarded defendants on death row and found that it

> "has not yet come to grips with the reality that this learning disorder defines the person. In virtually every aspect of his thought processes, the mentally retarded person has significant and substantial limitations. . . . Thus, as a class, mentally retarded killers commit murders which are the least aggravated and the most mitigated, which means they are not the ones for whom the death penalty was intended.

Id. at 14.

ISSUE XI

THE DEATH SENTENCES WERE DISPROPORTIONATE BECAUSE THOMPSON SUFFERED FROM MENTAL RETARDATION, BRAIN DAMAGE, MENTAL ILLNESS, AND AN IMPOVERISHED UPBRINGING; IN ADDITION, THE KILLINGS PROBABLY OCCURRED UPON REFLECTION OF ONLY A SHORT DURATION.

To the cases cited in appellant's initial brief that death is a disproportionate penalty, he adds Cochran v. State, 547 So.2d 928 (Fla. 1989). Although Cochran is a jury override case, it is otherwise like this case. Expert testimony accepted by the judge showed that Cochran was likely to become emotionally disturbed under stress, was substantially impaired in his ability to conform his conduct to the law, and had an IQ of 70. Notwithstanding Cochran's conviction for a prior capital felony, this court found that the death sentence was improper.

Appellant objects to appellee's citation of facts not in the appellate record on how often Dr. Berland testifies for first degree murder defendants represented by the Hillsborough County

Public Defender's Office. Brief of appellee at 60 n.15. On appeal, the parties must restrict themselves to the facts in the record, and facts about witnesses from other unrelated cases such as Henry v. State, 574 So.2d 66, 71 (Fla. 1991) are irrelevant and should not be cited.

ISSUE XII

FLORIDA'S STANDARD JURY INSTRUCTIONS IMPROPERLY MINIMIZE THE CAPITAL SENTENCING JURY'S ROLE DURING THE PENALTY PHASE.

In his written motion, defense counsel said that the "U.S. Eleventh Circuit Court of Appeals has held that Florida's Standard Jury Instructions violate Caldwell." (R913) He added that "the jury is badly misled by all this language about 'advisory sentence,' 'recommendation,' etc." (R912) Although the motion is characterized as a motion to declare Florida's death penalty statute unconstitutional, it is also obviously an attack on Florida's jury instructions. The trial judge said he had read the motion and was denying it. (R606) The trial judge understood the nature of the objection, and the issue is therefore preserved.

ISSUE XIII

THE REASON FOR DEPARTURE FROM THE GUIDELINES WAS INVALID.

In appellant's initial brief, he said that if "the sole reason for departure is an unscored conviction or victim injury, then the resulting sentence should not be greater than the sentence would be if the conviction or injury were scored." Initial Brief of Appel-

lant at 77. In Puffinberger v. State, 16 F.L.W. S424 (Fla. June 6, 1991), this court agreed with this contention. "Accordingly, we hold that a nonscoreable juvenile record may be considered as a reason for departure . . . only if . . . the resulting departure sentence is no greater than that which the defendant would have received if the record had been scored." Puffinberger thus implicitly overrules Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), at least for cases in which the sole reason for imposing consecutive life sentences is an unscored capital conviction.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 17th day of June, 1991.

Respectfully submitted,

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