IN THE SUPREME COURT OF FLORIDA

LEONARD SPENCER	
Appellant	**Supreme** Court **Case No. 77430**
-VS-	Cir. No. 86-5921 **CF A02**
STATE OF FLORIDA	
Appellee	

REPLY BRIEF OF APPELLANT Leonard Spencer

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The Trial Court **erred** in denying Spencer's motion for new trial on grounds **a** substitute judge could not sentence him. When, before sentence is imposed, the judge who already has tried **a** capital **case** is disqualified for bias or misconduct, a substitute judge who presided over neither the guilt-vs-innocence nor sentencing stage of jury trial may not determine sentence of life or death. Specifically because it is a capital case, and because the basis for removal of the previous judge is judicial misconduct, the accused has **a** fundamental right to more than just another judge for purposes of sentencing, but to **a** whole new trial before a new judge.

The Florida Attorney General tenders the legal proposition that a new trial is not required by "a trial judge's consultation with the prosecutor regarding the formalities of a written sentencing order." (Answer Brief of Appellee, at page 25.) Leonard Spencer agrees with that legal proposition, but asks: Is the Attorney General suggesting what occurred here was merely a consultation regarding the "formalities" of a written sentencing order?

What Judge Carlisle did here went far beyond any mere consultation regarding "formalities." At best, the judge's initial ex *parte* conversation with the prosecutor, in which they discussed the impact of the Grossman decision on the process for the upcoming sentencing, was a consultation concerning "formalities." But nothing that happened after that can possibly be construed to have been a consultation regarding formalities. After that initial conversation, as the record reflects, the judge sought and obtained

ex parte oral and written communications from the prosecutor regarding the "grounds" or "arguments" the State intended to use at the upcoming hearing in support of imposing sentence of death. The judge received from the prosecutor ex *parte,* and then worked with the prosecutor ex *parte* in revising, a completed draft of a written sentencing order, and that order sentenced Spencer as advocated by the prosecutor, to death.

If the Attorney General truly contends such communications between judge and prosecutor are permissible *ex parte* communications, then Appellant Spencer would ask the Attorney General this question: What could Assistant State Attorney Duggan and Judge Carlisle have discussed *ex parte* during Phase III that the Attorney General agrees would have been improper? What in the world does constitute an impermissible *ex parte* communication between prosecutor and trial judge?

The Attorney General also argues that any bias reflected by what did occur at time of Phase III only relates to that final stage of the case, not to any earlier stages of trial. According to the Attorney General the proof of this is in the fact the defendant never moved, anytime prior to trial or sentencing, to recuse the judge. There are at least three reasons why this argument of the Attorney General's is unpersuasive and downright wrong.

First, the Attorney General makes no effort to demonstrate by reference to the record itself an actual absence of judicial bias at Phase I of trial, even though the presence of such judicial bias

was argued by Spencer and Amos at time of trial, and was argued in Spencer's motion for new trial, and was argued in his appellate brief.

Second, the Attorney General's argument is illogical because, until defense counsel unexpectedly discovered the judge and prosecutor engaging in their ex *parte* communications at outset of Phase III, the defense had no basis for moving to recuse the judge. Secret communications between judge and prosecutor which are unknown to defense counsel are no **basis** for defense counsel to move for recusal of the trial judge.

Third, and in any event, the record does affirmatively reflect judicial bias at the earlier stages of trial. During trial itself the attorneys for both defendants expressed objections to the judge showing bias in favor of this prosecutor. (TR **3962-5)** Not only that, but the record of proceedings at trial reflects that Judge Carlisle did display bias against the defense. (TR **2245, 2375-6, 2421-3, 2445-6, 2454, 2474, 2536-7, 2579-80, 2588, 2596, 2598, 2607-10, 2715, 2723-4, 2753-4, 2977, 2988, 2899, 3075, 3077,** 3081-**3084, 3086-7, 3136-7, 3175, 3177, 3179, 3193-6, 3251-2, 3222-3, 3712, 3718, 3823-4)** In addition to that, prior to the sentencing hearing itself this defendant had already filed his motion for new trial in which the primary issue raised was the judge's bias at trial against the defendant and his attorney. (TR **5174-95)** Contrary to what the Attorney General now argues, the record of judicial bias was already laid, and the issue of judicial bias was already raised, prior to the final sentencing hearing at which

defense counsel discovered ex parte communications going on between this judge and prosecutor.

The Attorney General also argues that even if the incident which happened at what was supposed to have been the final sentencing hearing before Judge Carlisle might be construed as showing bias, it only shows his bias at that stage, which in no way taints any earlier stage of trial, therefore the use of a substitute judge for the final sentencing cured the error. But that argument of the Attorney General avoids addressing Appellant Spencer's primary contention, which is that the nature, depth, and extent of the judge's ex *parte* communications with the prosecutor during Phase III reflect an established and ongoing working relationship between them, thereby casting doubt over all the proceedings. Not only that, but the nature, depth, and extent of their *ex parte* communications acknowledged by the judge as having occurred, and the judge's initial belief there was nothing wrong with those communications, perhaps raise legitimate concerns about this judge's ability to even comply with fundamental rules of fair play. Aside from all that, though, this whole line of argument by the Attorney General is sufficiently answered by what the record does reflect concerning actual bias at time of trial on the merits, as presented in the preceding paragraph.

It is perhaps worth noting that the Attorney General never addresses one central argument of Spencer's, concerning the obvious impropriety of Judge Carlisle having ruled on Spencer's motion for

new trial (in which the judge's own bias at trial was a primary issue) after Spencer already had moved to recuse him from the case.

The integrity of the criminal trial process is what the constitutional provisions relating to due process and fair trial are all about, Every criminally accused citizen has an absolute right to integrity in the system: to a fundamentally fair trial process not biased in favor of the state. All Leonard Spencer asks for is integrity in the system.

In its brief the state goes to some lengths to present the facts of record that, as the state views it, clearly show Leonard Spencer's guilt. The argument the state seems to suggest is that, by reference to the evidence presented at trial, the end result was clearly right -- the right result being more important than the integrity of the process. Without saying it outright, the state seems to be suggesting "harmless error," a concept much in vogue with the Federal courts nowadays -- and that suggestion of harmless error requires a response.

At the Federal level the new rules of the game appear to be these: (1) if the evidence independent of the constitutional deprivation overwhelmingly points to guilt rather than innocence, you have no constitutional rights which can be enforced; and (2) only if the independent evidence leaves a residual question as to guilt or innocence, do you have constitutional rights which will be enforced by the courts. Harmless error as applied in the Federal courts means due process can be enforced only by an accused citizen who first demonstrates the verdict might have been "not guilty" if

he or she had been given a fair trial. Simply stated, possibly innocent people have constitutional rights that will be enforced; clearly guilty people do not. The current United States Supreme Court is using "harmless error" as a tool for taking away many individual rights, by having appellate courts impose their own views of the evidence over that of juries. [Why such an imposition is not of itself a violation of an accused's Sixth Amendment right of trial by jury is another question for another day.]

COMMENTARY

JOHN CHANCELLOR

NBC Nightly **News**

Tuesday, July 23, 1991

I have finally figured out what's been bothering me in all the talk about the Supreme Court. Defenders of Chief Justice Rehnquist and **the** Court say all they want is a Court that will faithfully interpret the Constitution. Well here's my problem with that. There is one central idea in the American Constitution -- that the rights of the individual are more important than the rights of the State. The Constitution and Bill of Rights says government can't tell you where to pray or when to speak. The Constitution makes you safe at home against government searches. It protects you from secret government trials and from cruel government punishment. The genius of the Constitution is that it sides with the citizen against the state. That's why it's such a world wide success. But today's Supreme Court tends to favor the state over the citizen. This term it has ruled that confessions coerced by government are not necessarily unjust. That some government searches can be made without warrants. That the government can put you in jail for two days without charging you with a crime. That government can tell some doctors not to speak certain words about abortion. The Chief Justice even wonders if the government really has to tell an arrested person of the right to have **a** lawyer. In this Supreme Court the state wins more often than the citizens. Something to keep in mind when they give you the old malarkey about the Court being true to the spirit of the Constitution. This Court isn't.

Perhaps John Chancellor should move to Florida. At least here there is still hope, for here there is the Florida Constitution and the Florida Supreme Court.

For years prior to **Chapman v. California, 386 U.S. 18 (1967),** criminal defendants relied on their constitutional protections and every deprivation of such basic protections resulted in a new trial. With **Chapman** the rules changed. **Chapman** told appellate courts to tolerate constitutional violations if they were **"harmless" -- save** three exceptions: (1) use of a coerced confession; (2) deprivation of the right to an attorney; and (3) trial before a biased tribunal. The last two exceptions recognized in **Chapman,** please note, go to precisely the issues in the present case, concerning the exclusion of Spencer's lawyer from the most critical moment in the sentencing process, and concerning the bias of the trial judge.

After **Chapman** the U.S. Supreme Court decided Arizona **v. Fulminante, 499 U.S. ___,** 113 L.E.2d 302 **(1991),** changing the rules again. **Fulminante** applies the harmless error analysis to a coerced confession. Id., at 331-332. But even in Fulminante two exceptions still remain in tact when it comes to "harmless error" analysis. Even after **Fulminante,** deprivation of the right to counsel or of the right to an unbiased tribunal still results in an automatic new trial, no matter the prejudice. Id., at **331.** The point is that since these are the very constitutional deprivations complained of by Leonard Spencer, even in the Federal courts "harmless error" analysis does not apply in this case.

But even if "harmless error" analysis did apply in this case, the record here refutes the basis for any finding of "harmless error beyond a reasonable doubt." Among other reasons because two weeks before this trial another jury considered the same case, heard the same witnesses, viewed the same evidence, and that jury was unable to find Spencer guilty of any offense at all. Two weeks before this trial the jury that tried the same case against Spencer was hung. This refutes the basis for any finding that no reasonable jurors could disagree about Spencer's guilt, because just two weeks before, reasonable jurors did disagree.

* * * *

Aside from the constitutional deprivations argued above, there were statutory violations that invalidate the sentencing process ultimately used in this case.

Florida's statutory scheme for determining sentence of life or death in capital cases requires more than a mere counting of aggravating and mitigating factors: it requires that a reasoned judgment be made by the trial judge in weighing those factors. Floyd v. State, 569 So.2d 1225, 1233 (Fla. 1990). And when a trial judge does sentence to death, the judge's written order must reflect, in addition to the jury's recommendation, that the trial judge independently weighed those factors. Bouie v. State, 559 So.2d 1113, 1116 (Fla. 1990). A substitute judge can not do that "independent weighing" -- cannot act as a "thirteenth juror" as contemplated by Florida's capital sentencing statutes -- unless that judge heard, saw, and felt what the jurors heard, saw, and

felt when the witnesses testified at trial. A judge who was not there has no basis for exercising the nature of independent judgment required by Florida's sentencing laws in capital cases.

The Attorney General makes much of the fact that Spencer presented no evidence other than "paper" at the sentencing-recommendation phase of his trial, arguing that this therefore moots Spencer's complaint about sentencing by a substitute judge who only knows the case on paper. Actually, what occurred in Spencer's case makes it all the more important that the judge who heard the original trial on its merits be the judge who imposed sentence. At time of sentencing before the substitute judge the heart of Spencer's argument for why he should not receive the death sentence was that he was not the trigger-man in either of the two fatal shootings, that co-defendant Vernon *Amos* was the trigger-man. (TR 4574 *et seq.*, at 4629-48, 4652-4) This necessarily entailed the sentencing judge passing judgment on the credibility of Vernon Amos's testimony at trial. It also rendered of importance the courtroom reenactments performed in front of the jury by experts and eye-witnesses -- something that a cold transcript of trial cannot re-create. Yet the judge who in the end imposed sentence never saw or heard Vernon Amos testify, or watched his and the other witnesses' physical reenactments of events. (TR 4630-4646)

* * *

Aside from the statutory requirements argued above, it is a basic principle of law and procedure that one judge cannot impose sentence when another judge has tried the case.

Recently, in reversing a dependency adjudication on other grounds, the Fifth District wrote,

> Additionally, we note that the judge who conducted the dependency hearing was not the judge who entered the final **order** of dependency which set forth the findings of fact and conclusions of law. Because we reverse this order on another ground, it is not necessary for us to pass on the validity of this order. However, an order or judgment which is dependent upon findings of fact and conclusions to be drawn from those facts should be signed by the judge before whom the facts are adduced and by whom the findings are made.
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> **Avery V. Department of Health & Rehabilitative Services (Fla.** 5th **DCA** 1991) 16 FLW D2684, at pages **2684-2685.**

In making that observation in **Avery** the Fifth District cites and relies on the Fourth District's decision in **Callaghan** v. **Callaghan 337** So.2d **986,** 989 (Fla. 4th DCA 1976). In **Callaghan** a part (not all, only part) of the basis for an order signed by a visiting judge was facts adduced in testimony presented earlier before the regularly presiding judge. Again, the appeals court reversed on other grounds, but said,

> It is not necessary for us to pass upon the validity of the purported order in view of the other grounds upon which we reverse, but it is appropriate to point out that an order or judgment whose effect is dependent upon findings of fact and conclusions to be drawn from these facts should be signed by the judge before whom the facts are adduced and by whom the findings are made.
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> **Callaghan v. Callaghan,** id., at page 989.

The only lawful way **a** successor judge may enter any judgment or order that is dependent on findings of fact and conclusions based on earlier proceedings handled by another judge, is by

stipulation of the parties. Short of that, a new trial must be granted.

> A successor judge may complete acts left uncompleted by a predecessor but may not weigh and compare testimony heard before the other judge. A successor judge that does not hear all the evidence may only enter a verdict or judgment upon a retrial, or if the parties so stipulate on the basis of the record of the prior proceedings.
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> **Tompkins** Land & Housing Inc. v. White, 431 So.2d 259 (Fla. 2d DCA 1983), at page 260.

Point II
On Appeal

The Trial Court erred fundamentally by admitting in evidence the tape-recorded statement of Allen Sedenka, after he had been excused from the witness stand without having discussed his taped statement on direct- or cross-examination, The Court further erred by denying Spencer's request to re-call Sedenka for further cross-examination when the tape-recording was admitted in evidence. Later the Court erred in denying motion for new trial on grounds admission **of** the tape-recorded statement effectively deprived Spencer of his fundamental right to confront and cross-examine the only State witness to make a "positive" identification **of** him at trial, concerning the contents of his tape-recorded statement.

The Attorney General makes the curious argument that Spencer opened the door to admission of Sedenka's prior consistent statement -- and therefore has no basis to complain. Of course Spencer opened the door to its admissibility. Spencer acknowledges so in his brief. This is precisely what Section **90.801** speaks to, which says if the defense does open the door in any of the was enumerated, a prior consistent statement of the witness becomes admissible. What that rule also says, however, is that once the door is open and the state seeks to walk through it by introducing the prior consistent statement, the witness whose statement the **state** seeks to introduce must **be "subject** to cross-examination concerning the statement." **Section 90.801, Florida Evidence Code.** Neither when the state introduced this witness's prior inconsistent statement into evidence, nor anytime after the state did so, was Sedenka ever **subject** to or even available for cross-examination

concerning the content of the statement. (3828-30, 3847-50, 3870-1) This violated not only the provisions of section 90.801, but also the Confrontation Clauses of the state and federal constitutions, and in this case it violated that rule and the Confrontation Clause as to the most important witness on the most important issue at trial -- identity.

Point III
On Appeal

> Fundamental error occurred, violating Spencer's right to confront and cross-examine, when co-defendant **Amos** testified in his own defense that he was there when the crimes occurred, but only **because** forced to ***go*** along at gun point, **and** it **was** the taller man with him who forced him to ***go*** along, and it was that taller **man** who did all the killings and robberies that night, and that taller man was Leonard Spencer; but later, when Spencer's lawyer cross-examined Amos, he refused to answer any questions about the identity of the taller man.

The Attorney General's argument is that, first, Vernon Amos never identified Leonard Spencer as the other man in the first place; and, second, Spencer was afforded the opportunity to cross-**examine** Amos. Spencer has an answer for both arguments.

First, Amos did identify Spencer -- while on **cross-examination by** the prosecutor. (3937-8) Furthermore, the trial judge acknowledged on the record that ***Amos*** had identified Spencer to the jury. (3992) The Attorney General is stuck with the fact it occurred.

Second, ***Amos*** **was** cross-examined by Spencer after he was cross-examined by the state. When cross-examined by Spencer, ***Amos*** flatly refused to discuss the question of identity any more. (3997-4038, at 3997, **4006)** Just as the Attorney General says in his brief with the quote from the Owens decision, **"The** Confrontation Clause guarantees only an 'opportunity for effective cross-examination, not cross-examination that is effective . . ." (Brief of Appellee, at page 36) On cross-examination by Spencer, Amos flatly

refused to discuss the subject of Spencer's identity, refused to stand for cross-examination on the subject, completely denying Spencer any opportunity to cross-examine him either effectively or at all on the subject.

The Attorney General is right about one thing. It was not the state's fault that this happened. But that makes no difference, because it did happen, and it did deny Spencer his right of confrontation. It was not the state's but the Court's fault, for failing to sever the trials of these two defendants, for failing to force Amos to answer the questions, and for failing to grant mistrial to Spencer once this denial of opportunity to cross-examine as to the most essential issue in Spencer's trial did occur.

CONCLUSION

Each point on appeal presents grounds requiring reversal and remand for new trial. The first point involves the greater number of constitutional issues, and is the only one involving the administration of this state's trial courts, so it is the issue this Court has the greatest obligation to address on its merits. As to each point on appeal but especially as to the first one, this Court should reverse and remand for a new trial.

WHEREFORE, Leonard Spencer, through his court-appointed appellate lawyer, respectfully so moves This Honorable Court.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this REPLY BRIEF OF APPELLANT was served by Mail delivery upon SYLVIA H. ALONSO, Assistant Attorney General, Department of Legal Affairs, Room 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401, on this date, the 26th day of December, 1991.

Respectfully submitted,

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