

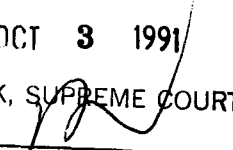
OA 12-291

**FILED**

SID J. WHITE

OCT 3 1991

CLERK, SUPREME COURT

By   
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

HORACE WILLIAMS,

Petitioner,

vs.

CASE NO. 77,702

STATE OF FLORIDA,

Respondent.

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PETITIONER'S INITIAL BRIEF ON THE MERITS


  
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PRELIMINARY STATEMENT

Petitioner, HORACE WILLIAMS, the criminal defendant below will be referred to as "Petitioner-defendant."

Respondent, the State of Florida, the prosecuting authority below will be referred to as "Respondent" or the "State".

Reference to the record on appeal will be designated "R".

STATEMENT OF THE CASE

Petitioner-Defendant was charged by way of an Indictment with First Degree Murder and Armed Robbery. (R2901-2902)

A jury trial was held and the Defendant was convicted of both charges. (R3016-3017)

The Trial Court ruled that as a matter of law it could not sentence the Defendant to the death penalty. (R2834)

Petitioner-Defendant was sentenced as to Count One to life imprisonment with a mandatory minimum twenty-five (25) year sentence. (R3019) As to Count Two, Petitioner-Defendant was sentenced to a thirty (30) year term to run consecutive to the sentence imposed in Count One. (R3020)

The Petitioner filed a Notice of Appeal. (R3036) The Respondent cross-appealed the Petitioner's sentence.

The Fourth District Court of Appeals Per Curiam affirmed without comment the Petitioner's appeal. (See Appendix) On the Respondent's cross-appeal, the Fourth District Court of Appeals in a written Opinion ruled that the Petitioner-Defendant could not waive a jury trial on Phase Two without the "consent of the State". The Fourth District Court of Appeals reversed the Trial Court's imposition of a life sentence and remanded "for further proceedings on the penalty phase of this trial pursuant to section 921.141(1), Florida Statutes, (1989)."

A timely Notice of Appeal was filed by Petitioner-Defendant with the Fourth District Court of Appeals.

STATEMENT OF THE FACTS

After the Petitioner-Defendant was convicted of first degree murder and armed robbery, the Trial Court and counsel discussed the possibility of the imposition of the death penalty.

The Respondent-State indicated it was waiving its right to go before the jury for a Phase Two evidentiary hearing. (R2822-2854) The State did not object to the Trial Court proceeding without a Phase Two advisory jury recommendation. (R2822-2855)

In a two sentence Cross-Appeal, the Respondent urged before the Fourth District Court of Appeals that it was error for the Trial Court to waive a Phase Two evidentiary hearing.

The Fourth District Court of Appeals determined that the Petitioner's waiver was not effective without the "consent of the State". The Fourth District Court of Appeals reversed the Trial Court's sentence and remanded for further proceedings "on the penalty phase of this trial pursuant to section 921.141(1), Florida Statutes, (1989). (See Appendix)

A timely Notice of Appeal was filed by Petitioner with the Fourth District Court of Appeals.

#### SUMMARY OF ARGUMENT

The Trial Court ruled that Petitioner-Defendant was not subject to the death penalty and, accordingly, sentenced him to life imprisonment with a mandatory minimum of twenty-five (25) years.

The facts to this case are virtually identical to Brown v. State, 521 So.2d 110 (Fla. 1988), wherein this Honorable Court determined that it would be a violation of the Double Jeopardy Clause to reverse and remand for a sentencing phase and subject the Petitioner to the possible imposition of the death penalty after the Petitioner-Defendant had been sentenced to life.

Article 1, Section 9, of the Florida Constitution, prohibits the State from putting an individual in jeopardy twice for the same offense. Remand, as ordered by the Fourth District Court of Appeals, would put violate the double jeopardy clause of the Florida Constitution and the United States Constitution and would violate the dictates of Brown v. State, supra. Any remand of the Defendant's case for a Phase Two hearing would violate the double jeopardy clause of the Florida and the United States Constitutions.

### ARGUMENT

Article 1, Section 9, of the Florida Constitution, states that:

"no person shall ....be twice put in jeopardy for the same offense....".

The Fifth Amendment of the United States Constitution also contains a double jeopardy clause.

This Court in Brown v. State, 521 So.2d 110 (Fla. 1988), applied the protections of the Double Jeopardy Clause in a factual scenario remarkably similar to the one before this Court. In Brown v. State, supra, the Defendant was convicted of first degree murder. The Trial Court ruled as a matter of law that it was barred from imposing of the death penalty. The Trial Court accordingly sentenced that Defendant to life imprisonment. The Defendant appealed and the State cross-appealed. The District Court of Appeals affirmed the conviction, but reversed the life sentence. The District Court ruled that the Trial Court erred as a matter of law in determining that it was barred from imposing the death penalty. The District Court remanded for resentencing in accordance with Section 921.141.

This Court determined that the Third District Court of Appeals was correct in ruled that the Trial Judge was in error in ruling that it was barred from the imposition of the death penalty. In spite of the Trial Court's error, this Court determined that as the imposed sentence was a lawful one, the Trial Court was prohibited from reopening the sentencing phase to expose the Defendant to the possibility of imposition of the death penalty. See also, Arizona



v. Rumsey, 467 U. S. 203 (1984) and Bullington v. Missouri, 451 U.S. 430 (1981).

The facts in this case are virtually indistinguishable from Brown. The Petitioner-Defendant was convicted of first degree murder and armed robbery. (R3016-3017) The Trial Court discussed with counsel the possibility of imposition of the death penalty. The State concurred in the waiver of a Phase Two advisory jury recommendation. (R2822-2854) The State did not object to proceeding without a Phase Two advisory jury recommendation. (R2822-2825). The Trial Court ruled:

I believe, and I believe this sincerely, and I have looked at the law in depth that the mitigating circumstances would be such that were I to impose a death penalty on Mr. Williams, it would be reversed. I believe that. (R2834)

After the Court made its ruling as a matter of law that it could not impose the death penalty on the Petitioner-Defendant, it sentenced the Petitioner-Defendant to a life sentence with a mandatory minimum sentence of twenty-five (25) years. (R3019)

The Petitioner-Defendant does not argue here whether or not the Trial Court was correct in determining that it could not as a matter of law impose the death penalty. This determination is irrelevant. As this Court stated in Brown v. State, supra, even if the ruling was in error, as long as the Defendant was sentenced to a lawful sentence, a remand to reopen the sentencing phase to expose the Petitioner-Defendant to the possibility of a death penalty would be a violation of the double jeopardy clause of the Florida Constitution and the United States Constitution. See also, Arizona v. Rumsey, supra and Bullington v. Missouri, supra.

The Respondent has previously argued before the Fourth District Court of Appeals that Petitioner waived the double jeopardy claim. Petitioner-Defendant is before this Court in the same position as the Petitioner in Brown v. State, supra. The Third District Court of Appeals in Brown v. State, 501 So.2d 1343 (Fla. 3rd DCA 1987), never addressed the issue of whether or not a remand after a life sentence for a Phase Two hearing would implicate the double jeopardy clause of the Florida and United States Constitutions. It was only before this Court that the Petitioner in Brown v. State, supra, had a determination made that such a remand would violate the dictates of the United States and Florida Constitution.

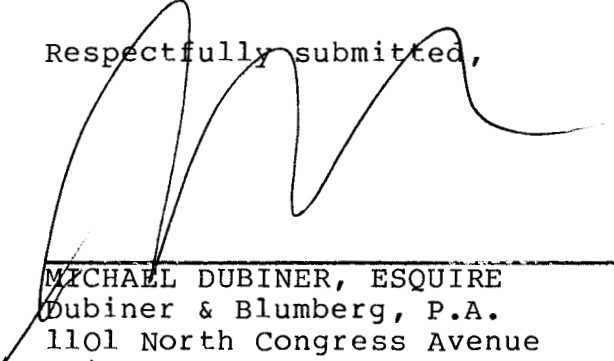
Additionally, this Court in State v. Johnson, 483 So.2d 420 (Fla. 1986), has determined that the right not to be placed twice in jeopardy is "fundamental". See also, Benton v. Maryland, 395 U.S. 784 (1989), Singleton v. State, 561 So.2d 1296 (Fla. 2nd DCA 1990), Johnson v. State, 535 So.2d 651 (Fla. 3rd DCA 1988). See also, Nova v. State, 439 So.2d 255 (3rd DCA 1983) and Meak v. State, 566 So.2d 1318 (4th DCA 1990).

Whether or not the Trial Court was correct in ruling that the Petitioner-Defendant could not receive the death penalty, the Petitioner-Defendant received a lawful sentence. Any resentencing of the Defendant or remand for a resentencing hearing would violate the double jeopardy clause of the Florida Constitution, Article 1, Section 9 and the Fifth Amendment of the United States Constitution.

CONCLUSION

Based on the foregoing Argument and authorities cited herein, Petitioner-Defendant respectfully requests that this Honorable Court reverse the decision of the Fourth District Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to the Attorney General's Office, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by U. S. Mail, this 2nd day of October, 1991.



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MICHAEL DUBINER, ESQUIRE