


**FILED**

SID J. WHITE

**APR 15 1991**

CLERK, SUPREME COURT

By   
Chief Deputy Clerk

THE SUPREME COURT OF FLORIDA

HORACE WILLIAMS,

Appellant,

vs.

CASE NO. 77, 702

STATE OF FLORIDA,

Appellee.

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PETITIONER'S BRIEF ON JURISDICTION

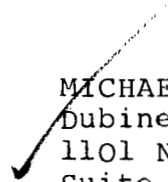
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STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of First Degree Murder and Armed Robbery With a Weapon on June 7, 1988 in Palm Beach County, Florida. He raised seven (7) points on his Appeal to the Fourth District Court of Appeal. The State of Florida cross-appealed the Waiver of Jury Trial for the Second Phase of the proceeding through a one (1) paragraph argument in its Answer Brief.

On December 5, 1990, the Court Per Curiam Affirmed the main appeal, but reversed the decision of the Trial Court on the cross-appeal (appendex). Petitioner moved for a rehearing, which was denied by an Order filed March 6, 1991. Petitioner then filed to Notice to Invoke Discretionary Jurisdiction on April 4, 1991 (appendex).

The facts as found in the Fourth District Opinion indicate that Petitioner was found guilty of First Degree Murder, but the Trial Judge stated for the record that he would not impose the death penalty. Although, Petitioner argued and cited evidence of the waiver of Phase Two by the State in its Reply/Cross-Appeal Answer Brief, the Fourth District, citing an excerpt from the record in its opinion found no valid waiver.

As the Fourth District indicated, Florida Rule of Criminal Procedure 3.260 requiring waiver with "the consent of the State" was not shown. Therefore, "...we must reverse the Trial Judge's ruling in this regard and remand for further proceedings on the penalty phase of this trial pursuant to Section 921.141(1), Florida Statutes (1989)."

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal in the instant case conflicts with prior decisions of this Court: which indicates that a Defendant convicted of First Degree Murder and sentenced to life imprisonment by the Trial Court cannot be subject to sentencing to death after reopening the sentencing phase by Order of the Appellate Court without violating the double jeopardy clause. This is an important issue, which this Court must address.

ARGUMENT

POINT ONE

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE CONFLICTS WITH PRIOR DECISIONS OF THIS COURT HOLDING THAT REOPENING THE SENTENCING PHASE TO ATTEMPT TO IMPOSE THE DEATH PENALTY WOULD BE A VIOLATION OF DOUBLE JEOPARDY.

Petitioner seeks to establish this Court's "conflict" jurisdiction. Article V, Section 3(b)(3), Florida Constitution; Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellant Procedure. The decision of the Fourth District Court of Appeal on the issue in this point conflicts with prior decisions from this Court: Brown v. State, 521 So.2d 110 (Fla. 1988); Fasenmyer v. State, 457 So.2d 1361 (Fla. 1984); Troupe v. Rowe, 283 So.2d 857 (Fla. 1973). The conflict is express and direct and appears in the written opinion of the Fourth District. See, Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

In the case sub judice, the State is seeking to reopen the sentencing phase of the underlying proceeding to secure a jury recommendation of death. The State's waiver of the hearing is established in the record proper. There is some ambiguity as the Fourth District noted in its Opinion. However, reopening the sentencing phase of this first degree murder trial subjects Petitioner to double jeopardy as prohibited by the Florida and United States Constitutions and as interpreted by this Court.

In Brown v. State, 521 So.2d 110 (Fla. 1988), this Court reversed the decision of the Third District Court of Appeal as found in Brown v. State, 501 So.2d 1343 (Fla. 3rd DCA, 1987). The Third District reversed the imposition of a life sentence, for

resentencing, finding that the Trial Court erred in determining that the death penalty could not be imposed pursuant to the Trial Court's erroneous interpretation of case law at the time of Brown's sentencing. This Court reversed the decision of the Third District in Brown, and ruled as in Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.ed. 2d 164 (1984), that the erroneous Trial Court ruling acquitted the Defendant on the death penalty and terminated jeopardy. Accordingly, it was a violation of double jeopardy to reopen the sentencing phase and impose the death penalty.

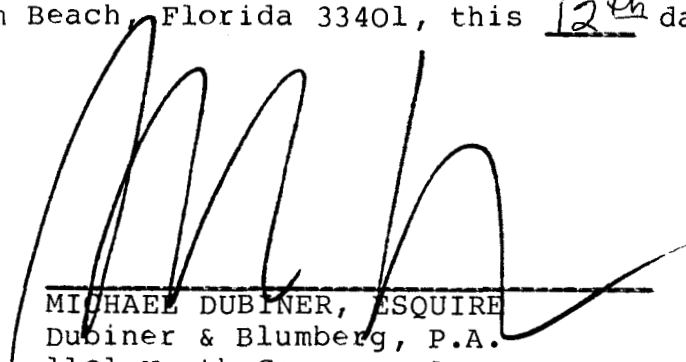
Petitioner was sentenced to life imprisonment. Regardless of the issue of waiver of jury consideration for Phase Two, the Fourth District's reversal and remand "...for further proceedings on the penalty phase of this trial ....", clearly conflicts with this Court's decision in Brown v. State, 521 So.2d 110 (Fla. 1988). Petitioner is now subject to double jeopardy. This Court, therefore, has jurisdiction, which it should exercise in order to resolve a conflict of its previous decision in Brown with the decision of the Fourth District in the instant case.

CONCLUSION

This Court's "conflict" on jurisdiction is established. This Court should exercise its jurisdiction and accept this case for review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent by U. S. Mail to the Office of the Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 12<sup>th</sup> day of April, 1991.



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