IN THE SUPREME COURT OF FLORIDA

DONALD DAVID DILBECK,

Appellant,

v. CASE NO. 77,752

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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STATE OF FLORIDA, :

Appellee. :

_____ :

REPLY BRIEF OF APPELLANT

ARGUMENT

ISSUE I

THE COURT ERRED IN RULING THAT SEVERAL PROSPECTIVE JURORS WERE EITHER QUALIFIED OR NOT TO SIT IN THIS CASE, IN VIOLATION OF DILBECK'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

As to the merits of Dilbeck's claim that the court improperly ruled on his motions to excuse various prospective jurors, the state says that the record reflects the three jurors pinpointed by Dilbeck were not excusable for cause. (Appellee's Brief at p. 42) Instead of making any argument on the merits, the state primarily relies on this court's recent opinion in Trotter v. State, 576 So.2d 691 (Fla. 1990). In that case, this court required a defendant who seeks a reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges to identify who he intended to excuse if the court would have granted him additional challenges. Id. at 693.

After Dilbeck's lawyer had exhausted his peremptory challenges, the court "out of an abundance of caution" gave him an additional two challenges that he immediately used on a Ms. Kundrat and Ms. Ferguson (T 1575). Further voir dire was conducted after which defense counsel identified five people it had challenged for cause. He also said, "I think I know what your answer to this is, but, at any rate, I would at this time ask for additional challenges. It would be my intention to at this point to strike Mr. Ussery." (T 1588) The court denied that request and moved to selecting the alternates, which were soon chosen (T 1593, 1597).

Contrary to the state's assertion (Appellee's Brief at p. 42), there is no evidence defense counsel ever peremptorily challenged Mr. Ussery, and from what the record reveals, he served on the jury. Counsel certainly wanted this prospective juror excused, but because he had exhausted his challenges, even the extra ones the court had given him, Mr. Ussery remained on the jury (T 1588). Dilbeck has done all this court has required to preserve this issue for review. Moreover, because he has met the exacting requirements articulated in Trotter, the state should have to provide especially strong reasons why the jurors identified in the Initial Brief should not have been excused. Its mere conclusion, without any argument to support it, that they were not excusable for cause cannot sustain the trial court's rulings. As this court has done with harmless error, the burden of showing the correctness of the trial court's ruling should be on the state, and unless

it carries that load, this court should not shoulder it for the Appellee. In this case, the state rested its entire argument on a procedural hurdle, which Dilbeck has jumped. It said nothing on the merits of his claim, and this court should consider this issue as it would any other where a party has not made or waived an argument it could have or should have made. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN REFUSING TO LET DILBECK ELICIT EVIDENCE OF HIS LACK OF SPECIFIC INTENT TO COMMIT A MURDER IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONT HIS ACCUSERS, PRESENT EVIDENCE IN HIS OWN BEHALF, AND HAVE A FAIR TRIAL.

The state has two responses to this argument. First, there was conflicting evidence about the extent of Dilbeck's brain damage. Second, there is no reason to recede from this court's opinion in Chestnut v. State, 538 So.2d 820 (Fla. 1989).

As to the first complaint, the state's thrust goes to the weight of the evidence of the defendant's mental defects, not to their admissibility. Its argument on this point is without merit since Dilbeck was completely precluded from presenting, at the guilt portion of his trial, any evidence of his debilitation. That is, the court ruled any evidence going to show his mental condition which was not connected to a defense of insanity inadmissible.

As to the correctness of this court's ruling in Chestnut, Dilbeck relies on the argument he made in his Initial Brief. By way of emphasis, he points out that he challenged the constitutionality of the trial court's ruling. This court in Chestnut summarily dismissed any constitutional problems by holding that a "state is not constitutionally compelled to recognize the doctrine of diminished capacity." Id. at 823. The Initial Brief explains not only why the constitution requires the admission of such evidence, it also goes to some

length to explain how the court erred in characterizing the defense Chestnut and Dilbeck sought to present as one of "diminished capacity."

ISSUE III

THE COURT ERRED IN REQUIRING DILBECK TO SUBMIT TO A PSYCHOLOGICAL EXAMINATION BY THE STATE'S MENTAL HEALTH EXPERT.

Some preliminary matters need to be clarified before Dilbeck can discuss the state's primary contention on this issue. On page 46 of its brief the state says, "In fact, the record reflects that when Dr. McClaren testified all evidence pertaining to information he derived solely from his interview with Dilbeck was disallowed pursuant to defense counsel's objection (TR 2610-2614)."

To the contrary, the court allowed the state's expert to give his opinion to all but three of the points he had identified to show the defendant had a goal oriented behavior (T 2610). Specifically, the court said:

> THE COURT: Mr. Murrell[defense counsel], this is this witness' opinion. That's what he is on the stand to testify for. He's been accepted as an expert.
>
> * * *
>
> THE COURT: Well, I think that's a matter for cross examination, Mr. Murrell.
>
> MR. MURRELL: Well I've made my objection.
>
> THE COURT: You have. It will be overruled.

(T 2613-2614).

At the hearing on the motion to allow Dr. McClaren to examine Dilbeck, the state argued that Rule 3.220(f) Fla. R. Crim. P. authorized the examination (T 2821). The state has abandoned that justification on appeal, and it has instead relied solely on the trial court's rationale that it would be

"fundamentally" unfair to refuse the examination. (Appellee's brief at pp. 47, 51.) Dilbeck's response, therefore, will address only the "fundamental fairness" of the court's ruling.

The state's primary argument appears on page 47 of its brief:

> Rather the trial court determined it would not be fundamentally fair to not permit an examination where there was no rule that prevented it and more importantly, the prosecution had given a justifiable reason for requesting said examination. In that regard, the question then becomes did the trial court abuse his discretion in allowing Dr. harry McClaren to examine Dilbeck. The answer, of course, is no.

The state, in short, has said that the trial court's ruling permitting the examination of Dilbeck by the state was subject to an abuse of discretion. That was wrong. The court failed to apply the correct legal rule for which it had no discretion in applying since it was a matter of law. This court is correcting an erroneous application of a rule of law, and the error, thus, is not subject to an abuse of discretion standard. Canakaris v. Canakaris, 392 So.2d 1197 (Fla. 1980).

That the court failed to apply the correct legal rule flows from the law concerning discovery. The Common Law generally did not recognize discovery, State v. Smith, 260 So.2d 487 (Fla. 1972), and unless a rule of criminal procedure specifically permitted it, such was prohibited. See, State v. Lamb, 155 So.2d 10 (Fla. 2d DCA 1963). Thus, the state has a general right to non-disclosure unless the law has specifically given the defendant a right to a particular piece of

information. State v. Johnson, 285 So.2d 53 (Fla. 2d DCA 1973). Such a right arises when the rules of discovery specifically list what evidence in the state's possession a defendant is entitled to receive.[1] "Fundamental fairness," therefore cannot justify what the court did here because this court has provided no general "catch-all" provision to permit whatever discovery the court thinks is necessary. Thus, in this case, unless a rule of discovery allows the examination (which the state has has admitted have no application), the court cannot create one it believes is required.

Moreover, assuming that the trial court's ruling was discretionary does not mean that a mere abuse of discretion standard applies. As Justice Richard Wallach of the Supreme Court, State of New York has noted there is a range of discretion available to the trial judge. "[T]he less the judicial discretion which the trial judge may have, the greater will be the need for articulation by him of the reasons for `his discretionary' decision."[2] In this case, where the court's discretionary ruling directly infringes on Dilbeck's Fifth Amendment right to remain silent, the court should have little discretion, and it should be closely monitored by this

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[1]The purpose of discovery is also to help the defendant, not the state, prepare his case. See, Ivester v. State, 398 So.2d 926 (Fla. 1st DCA 1981).

[2]Richard W. Wallach, "Judicial Discretion: How Much" Judicial Discretion, ed. J. Eric Smithburn (Reno, Nevada: National Judicial College, 1980), pp. 7-11.

court. Thus, an intrusion into this defendant's constitutional rights should require a greater articulation than presented here. This is especially true because as Dilbeck presented in his Initial Brief, there is no constitutional right to examine the defendant; alternative, effective means of getting essentially the desired information exist; and the state's expert had access to as much information about Dilbeck (less the personal exam) as did his experts. While it may have been nice and even desirable to have the state's expert question Dilbeck, the same could have been said if he had testified at the guilt phase portion of his trial. In that situation, the state could argue with compelling logic that if the defendant intends to testify, the state should be able to depose him before he takes the stand. Afterall, should not the state be able to prepare to rebut whatever the defendant may say? Yet no one has claimed that fundamental fairness requires state access to the defendant even though it may be fundamentally unfair to allow the defendant to hide his testimony until he takes the stand.

On page 47 of its brief, the state also says that Rule 3.780 Fla. R. Crim. P. does not prevent the court from ordering discovery. The state argues that unless a rule specifically prohibits discovery, the trial court can permit it. That, as just explained, is directly contrary to what the law is. Unless specifically authorized by law, there is no right of discovery. Lamb, supra.

On pages 48-50, the state complains that unless it can have its expert personally examine the defendant it cannot fully and fairly explore or rebut inaccurate, incorrect, or misleading mitigation that has been presented as this court's decisions in Campbell v. State, 571 So.2d 415 (Fla. 1990) and Nibert v. State, 574 So.2d 1059 (Fla. 1990) implicitly require. As pointed out in Dilbeck's Initial Brief (pages 64-65), except for the limit on interviewing the defendant, there is nothing preventing the state from satisfying this court's demands regarding rebutting a defendant's mitigating evidence. The state has an abundance of techniques and resources available to it to minimize the defendant's mitigation, and limiting access to the defendant in no way restricts its use of them. It can still cross-examine his experts, present its own mental health experts to challenge the defense witness' testimony and his evidence, and cross-examine the defendant (if he testifies). Its experts can propose their own evaluation of the defendant by means of the hypothetical question. The state, in short, has no significant limit on its ability to rebut the defense mitigation.

On page 50 of its brief, the state says, "To suggest as Dilbeck has, that in some way, he was compelled to confess is simply in error." Dilbeck never made such a suggestion.

On page 51, the state says Dilbeck's argument has no merit because Dr. McClaren learned nothing from Dilbeck that the jury did not already know. The defendant refuted that claim on page 63 of his Initial Brief, footnote 2:

> Dilbeck told Dr. McClaren that he had used the money he had to buy a knife rather than alcohol, he had traveled through the woods to avoid detection, and he bought the knife to use for robbery and kidnapping (T 2611-12).[3]

Dilbeck agrees that the state should have a full and fair opportunity to "explore, and present, evidence to rebut the defense's expert testimony." (Appellee's brief at p. 51). Such agreement stops short of allowing it's experts to examine the defendant. Moreover, contrary to the state's final words on this issue, even if the trial court has discretion to order the defendant to submit to the state's expert, the prosecution must make far more than a "colorable showing of need." Instead, because one of the defendant's most valuable privileges is involved, his right to remain silent, and because there is a distinct possibility that what the state witness may learn may significantly contribute to the defendant's execution, the state should have to show a manifest necessity for such an examination.

This court should reverse the trial court's sentence and remand for a new sentencing hearing before a new jury.

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[3]Defense counsel had also told the court earlier that it was hard to tell what Dr. McClaren was relying on. "I don't know whether he is relying on what the defendant told him or what he read it someplace else." (T 2609)

ISSUE IV

THE COURT ERRED IN INSTRUCTING THE JURY THAT THEY COULD CONSIDER, AS EVIDENCE OF GUILTY, THE DEFENDANT'S FLIGHT.

The state argues that Dilbeck did not precisely raise the proper objection so as to merit application of this court's decision in Fenelon v. State, Case No. 77,765 (Fla. February 13, 1992) 17 FLW S113 to this case. In that case, this court noted that flight instructions amounted to a judicial comment on the evidence, and in reaching this decision, it acknowledged that much of the confusion arising from the law in this area originated in defining what was flight. Rather than trying to resolve the conflicting cases on that issue, this court recognized that the fundamental problem was more than semantics but one of fairness. "[W]e can think of no valid policy reason why a trial judge should be permitted to comment on evidence of flight as opposed to any other evidence adduced at trial." Id. at S113.

That finding has significant bearing on this case beyond clearly indicating the trial court erred in giving the flight instruction. Apparently, Fenelon did not object to the propriety of a trial court giving such an instruction in general. His complaint was that "under Florida law the evidence was insufficient for such an instruction." Thus, Fenelon, like Dilbeck, did not raise, at the trial level, the precise issue this court considered. Yet, as in Fenelon's case, such an omission should not preclude review by this court.

Here Dilbeck conceded sufficient evidence of flight existed to give an instruction on that bit of circumstantial evidence (T 2030-31). He merely sought to minimize the unfairness of the instruction by changing its egregious language, yet by asking for such a change, it is obvious that he was trying, in a limited way, to anticipate this court's ruling in Fenelon. That is, if existing law said such instructions were permissible, counsel nevertheless tried to reduce its deleterious effects by modifying the instruction offered by the state. Dilbeck did as much as the law required to preserve this issue by putting the court on notice of the objectionable aspect of the proposed instruction.

The state seems to argue that whatever error occurred was harmless because it presented plenty of evidence justifying such an instruction. As Fenelon notes, however, an abundance of flight evidence does not justify such an instruction. It amounts to judicial comments on the evidence.

Finally, the Third District Court of Appeal in Bryant v. State, Case No. 91-1727 (Fla. 3rd DCA June 16, 1992) 17 FLW D1503 had no difficulty in applying Fenelon retroactively. See, Smith v. State, Case No. 76,235 (Fla. April 2, 1992) 17 FLW S213, 214.

This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE V

THE COURT ERRED IN PERMITTING DR. HARRY McCLAREN, A PSYCHOLOGIST TESTIFYING FOR THE STATE, TO TESTIFY ABOUT THE REASONS HE BELIEVED DILBECK ENGAGED IN "PURPOSEFUL RATIONAL BEHAVIOR" AS WHAT HE OBSERVED WAS NOT THE SUBJECT OF EXPERT TESTIMONY AND INVADED THE PROVINCE OF THE JURY, IN VIOLATION OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

Dilbeck has no dispute with the state's assertion that it needs to be able to rebut whatever mitigation he presented. (Appellee's brief at pp. 58-59) He merely disagrees that Dr. McClaren in this case could help it do so the way he did.

That is, the trial court should have admitted the psychologist's testimony only if it assisted the jury in reaching the appropriate sentencing recommendation. §90.702 Fla. Stats. (1990). In this case, ostensibly the state offered his testimony to show that Dilbeck had "goal oriented" behavior.[4] Yet how did Dr. McClaren's listing of the factors he believed show such action help the jury? The prosecutor could, during its closing argument, have presented the same evidence and argued the same conclusion as this expert without ever having had called him to testify. In short, Dr. McClaren's testimony did nothing to assist the jury resolve the issues present in the penalty phase of the trial.

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[4]Contrary to the state's claim on page 58 of its brief, it was not also admitted to show that the defendant could also "control his behavior."

Moreover, as mentioned in the Initial Brief (pp. 75-76), only a very few of the "facts" the witness enumerated had anything to do with Dilbeck's goal oriented behavior at the time of the murder. For example, merely because the defendant had planned to escape for years does not mean he had also planned to kill to do so. The doctor's response encompassed far too much time, and it likewise included "facts" which had no bearing on Dilbeck's intent when he committed the murder. Such a broad time frame, distinguishes this case from Gore v. State, Case No. 75,955 (Fla. April 16, 1992) 17 FLW S247, which the state cites on page 59 of its brief. In that case, the state asked Gore's psychiatrist (on cross-examination) about the defendant's mental state at the time of the offense. The prosecution asked nothing about what the defendant had been doing for the prior two years as the state here impliedly did.

Moreover, the questions asked of the expert in Gore were peculiarly those which he could answer because of his expertise. For example, without the assistance of an expert, the jury would have probably had a very difficult time determining whether Gore "knew the difference between right and wrong, was capable of understanding the nature and quality of his acts, and was capable of conforming his conduct to the requirements of the law." Id. at 17 FLW S250. The expert's testimony in that case assisted the jury. Dr. McClaren's testimony, on the other hand, did not because all he did was list facts without any explanation. The jury, with the help of

the prosecutor in closing, could have as easily reached the same conclusion without his testimony.

Thus, while Dilbeck agrees with the language cited in Gore it has no relevance here because the jury did not need Dr. McClaren's assistance. C.f. Johnson v. State, 393 So.2d 1069 (Fla. 1980).

This court should reverse the trial court's sentence and remand for a new sentencing hearing before a new jury.

ISSUE VI

THE COURT ERRED IN INSTRUCTING THE JURY ON THE ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL AGGRAVATING FACTOR BECAUSE THAT INSTRUCTION FAILED TO ADEQUATELY LIMIT AND GUIDE THEIR DELIBERATIONS.

The state argues, rather weakly, that Dilbeck's lawyer did not renew his objection to the instruction on the heinous, atrocious, and cruel aggravating factor after the court had read the instructions to the jury. (Appellee's brief at p. 60) Of some significance, the trial court never asked counsel, as is customary, if he had any objections to the instructions, so counsel should not be faulted for not renewing his objection.

More significant, however, Dilbeck's lawyer did object to this particular instruction, and an extended, specific discussion was had over the appropriate instruction (T 2655-2659). The court was very much aware of the defendant's problems with the instruction actually given (T 2656). The issue was adequately preserved for this court to review.

As to the merits, the state relies on this court's opinions in Martin v. Singletary, Case No. 79,779 (Fla. May 5, 1992) 17 FLW S282 and Smalley v. State, 546 So.2d 720 (Fla. 1989).

The recent United States Supreme Court decision in Espinosa v. Florida, Case No. 91-7390 (1992) 6 FLW Fed S 662 casts doubt on the continuing viability of the holdings in those cases regarding the heinous, atrocious, and cruel instruction. In that decision, the court rejected this court's

finding that the instruction on this aggravating circumstance withstood constitutional scrutiny. In doing so, it quoted from a crucial portion of this court's opinion: "We reject Espinosa's complaint with respect to the text of the jury instruction on the heinous, atrocious, or cruel aggravating factor upon the rationale of Smalley v. State, 546 So.2d 720 (Fla. 1989)." The court refused to approve the instruction given in Espinosa's case by noting "We have held instructions more specific and elaborate than the one given in the instant case unconstitutionally vague. See, Shell v. Mississippi, 498 U.S. ___ (1990); Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980)."

A fair reading of this case thus indicates that the United States Supreme Court has repudiated this court's efforts to narrow the construction of the heinous, atrocious, or cruel aggravator in Smalley. Significantly, what this court said in that case almost exactly tracked the court's instruction here. Id. at 722. Espinosa, therefore, controls this case, and the court's instruction on this aggravating factor failed to meet constitutional muster.

ISSUE VII

THE COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD CONSIDER WHETHER THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, AND IN FINDING THIS AGGRAVATING FACTOR APPLIED.

Appellate counsel has no argument with the state's argument on this issue except that it is irrelevant. Dilbeck freely concedes that that facts of the murder, i.e. that it was a murder involving multiple stabbings, which most often is without more especially heinous, atrocious, or cruel. Dilbeck's argument, however, is that there is more. Specifically, as argued in his Initial Brief, the defendant had major physical and emotional debilitations that prevented him from "enjoying" the suffering of Faye Vann as this court has required. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). As to that claim, the state says nothing.

ISSUE VIII

THE COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD FIND THAT DILBECK COMMITTED THE MURDER WHILE TRYING TO EFFECTUATE AN ESCAPE.

The state has missed the point of this issue. In his Initial Brief, Dilbeck argued that the trial court erred in viewing his continued flight from the Quincy Vocational Center as part of an escape. It was not, and once he had left that facility, he had escaped as various courts have construed that term.

As to when an escape is accomplished, the state says nothing, apparently hoping that merely repeating certain facts of the case will substitute for reason and argument. It also cites three cases which it admits have factual scenarios "slightly different" than in this case. (Appellee's brief at p. 64) "Slightly" is a gross understatement. It would have been more accurate if the state had said the factual scenarios were "slightly similar."

In Bryan v. State, 533 So.2d 744 (Fla. 1988) the defendant and his girlfriend somehow got a truck in Mississippi and drove it to Florida where they obtained a motor boat. They used it to return to Mississippi, and the couple stopped at a small town in that state to repair it. Bryan borrowed some tools from a nightwatchman at a seafood wholesaler, and when he was unable to fix the craft, the defendant robbed the guard using a sawed off shotgun. He put the victim in his car, drove him to Florida, and later took him to an isolated area, and despite

his pleas for mercy, killed the guard. Some time later, the defendant was arrested, and about a year after the murder he escaped and lived peacefully in Arizona before being found and returned to custody.

This court agreed with the trial court that Bryan murdered the victim to eliminate him as a witness. Id. at 748-49. There is no hint that Bryan had escaped from custody of some sort and killed the guard as part of his escape. Dilbeck cannot imagine the state is arguing that Bryan's escape a year after the murder in some way aggravates that crime. Indeed, the trial court in Bryan found what the defendant did after he had left Florida was mitigation. Dilbeck, in short, is baffled about what relevancy Bryan has to his case either factually or legally.

Similarly in Swafford v. State, 533 So.2d 270 (Fla. 1988) neither the defendant or his four buddies had escaped from some form of legal constraint at the time Swafford murdered a convenience store clerk. They had come from Nasheville to Daytona Beach and had set up camp at a local state park. A short time later, Swafford robbed, kidnapped, and murdered a clerk at a gas station. That case has no similarities with this one.

Tafero v. State, 403 So.2d 355 (Fla. 1981) comes closest to the facts of this case. The evidence showed that the defendant had killed two police officers, one of whom had seen a gun in Tafero's car. The defendant committed the murders, not because he was escaping from prison, but because he had

been there, did not like it, was now on parole, and did not want to return. Although the trial court said Tafero had committed the murder to avoid lawful arrest or effectuate an escape, Id. at 362, it clearly had in mind that the defendant committed the murders to avoid being sent back to prison. There was nothing for Tafero to escape from because at the time of the murders he was not in legal custody. He had not left some prison days earlier and miles away and then shot a traveler to steal his car. Instead, he killed two men, at least one of whom could have arrested him for possession of a firearm by a convicted felon. The strong evidence in that case was that Tafero's sole or dominant motive was to kill the officer to avoid being arrested.

Finally, in passing, the state claims that whatever error occurred was harmless, but it provides no facts or reasons to support this claim. In light of the United States Supreme Court's questioning of state courts' harmless error analysis in death penalty sentencing, Stringer v. Black, 112 S.Ct. 1130 (1992) and Justice Kogan's similarly well founded concern, Kennedy v. Singletary, 79,736 (Fla. April 30, 1992)(Kogan, concurring) 17 FLW S271, such a cursory statement without more can neither carry its burden of showing harmlessness beyond a reasonable doubt, nor can it assist this court in discharging its obligation in particularly explaining how neither the jury's recommendation nor the judge's sentence were affected by their consideration of this aggravating factor.

This court should reverse the trial court's sentence and remand for a new sentencing hearing before a jury.

ISSUE IX

UNDER A PROPORTIONALITY ANALYSIS, DILBECK DOES NOT DESERVE A DEATH SENTENCE.

The state's response on this issue raises the question concerning the nature of this court's proportionality review. Is it, as the state brief impliedly suggests, nothing more than a reexamination of the trial court's sentencing order? Or is it, as Dilbeck argued, a comparison of his case with other, similarly cases?

This court has repeatedly said that its function is far greater than merely regurgitating what the trial court found to aggravate and mitigate a death sentence. In State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), it declared that it could "review that case in light of the other decisions and determine whether or not the punishment is too great."[5] More recently it articulated this proportionality review process with greater precision:

> Our function in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974). Menendez v. State, 419 So.2d 312, 315 (Fla. 1982).

Thus, this court will compare the facts of the case under consideration with those in other, similar cases to decide if a

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[5]Arguably, the legislature mandated proportionality review when it provided that this court shall review "the entire record." §921.141 (4) Fla. Stats. (1990).

death sentence is warranted. Profitt v. State, 510 So.2d 896 (Fla. 1987). This court, therefore, has rejected the narrow approach advocated by the state of merely re-examining the sentencing order and in an analytical vacuum deciding whether death is appropriate. Instead, it will not only compare a defendant's case with other opinions of this court, it will go beyond the trial court's sentencing order and compare the facts of the case with those in other cases. This court's proportionality review is, in short, in the nature of a "totality of the circumstances" examination. Dilbeck's Initial Brief responds to this approach by discussing the pertinent influences in the defendant's life and then comparing what occurred in his case with the facts in other, similar cases. Such an approach follows this court's analytical approach, and as argued in the Initial Brief, Dilbeck's death sentence should be reduced to life in prison.

CONCLUSION

Based on the arguments presented in this brief, Donald Dilbeck respectfully asks this court to grant the following relief: 1) reverse the trial court's judgment and sentence and remand for a new trial, 2) reverse the trial court's sentence and remand for a new sentencing hearing before a jury, or 3) reverse the trial court's sentence and remand for imposition of a sentence of life in prison without the possibility of parole for twenty-five years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by hand-delivery to Ms. Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, DONALD DAVID DILBECK, #068610, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 22nd day of July, 1992.

DAVID A. DAVIS