IN THE SUPREME COURT OF FLORIDA

MELVIN TROTTER, :

Appellant, :

vs. : Case No. 82,142

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

Appellant will rely upon the Statement of the Case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his initial brief.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO ADDUCE EVIDENCE OF TROTTER'S STATUS ON COMMUNITY CONTROL AS AN AGGRAVATING CIRCUMSTANCE IN VIOLATION OF A) LAW OF THE CASE; AND B) EX POST FACTO PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS.

A) Law of the Case

The State first argues that this Court should not reach the merits of Appellant's argument that the law of the case precludes use of Trotter's status on community control as an aggravating circumstance because no sufficiently specific objection was made in the trial court. Brief of Appellee, p.12. While it is true that defense counsel never specifically mentioned the doctrine of "law of the case", he did inform the trial judge that applying the amended statute would "negate entirely the relief gained in his appeal" and deprive him of "Due Process" (R374, T121, 129). This objection was sufficient to apprise the trial judge of the error which would stem from ignoring the law of the case established by this Court's decision in Trotter v. State, 576 So. 2d 691 (Fla. 1990).

Even if this Court believes that Appellant's objection was borderline, law of the case is not something that can be waived by failure to object. Certainly the parties could not agree to substitute their own stipulation for a decision that had been mandated by this Court. Like jurisdiction, law of the case is a

fundamental concept which cannot be waived or conferred by agreement of the parties. Cf., Bowers v. State, 452 So. 2d 146 (Fla. 2d DCA 1984); Lane v. State, 388 So. 2d 1022 (Fla. 1980).

Turning to the merits, since Appellant's initial brief this Court has decided Henry v. State, Case No. 80,941 (Fla. December 15,1994) [19 FLW S651]. In Henry, this Court rejected the defendant's attempt to re-litigate an issue which had divided the Court in Henry's earlier appeal [Henry v. State, 574 So. 2d 66 (Fla. 1991)]. This Court discussed the "law of the case" doctrine:

> Under this doctrine, all points of law which have been previously adjudicated by a majority of this Court may be reconsidered only where a subsequent hearing or trial develops material changes in the evidence, or where exceptional circumstances exist whereby reliance upon the previous decision would result in manifest injustice.

19 FLW at S651.

At bar, there was no change in the evidence and the subsequent legislative enactment does not constitute "exceptional circumstances". Consequently, this Court should hold that "law of the case" precluded use of Trotter's status on community control as an aggravating circumstance in his resentencing proceeding.

B) Ex Post Facto

Appellee essentially argues that Chapter 91-270, section 1, Laws of Florida (1991), did not create a new aggravating circumstance but simply clarified legislative intent that community control be considered as a sentence of imprisonment for purposes

of section 921.141 (5) (a), Fla. Stat. (1991). Even if this view is correct, it does not follow that the amended aggravating circumstance may be applied retroactively.

The case authorities cited in Appellee's brief do not truly support the State's contention. For instance, State v. Lanier, 464 So. 2d 1192 (Fla. 1985), gave effect to an amendment which clarified that legislative intent was contrary to a decision of the Third District interpreting the criminal statute in question. A key factor in Lanier is that the case was certified to this Court when there was no prior controlling authority on the question. Thus, this Court was free to either affirm the opinion of the Third District or quash it.

A careful reading of Justice Adkins analysis in Lanier shows that the statute must be applied "as it existed at the time the ... acts occurred, prior to the enactment of the amendment". 464 So. 2d at 1193. (e.s.) Further, Justice Adkins explained that this Court was not "bound by statements of legislative intent uttered subsequent to either the enactment of a statute or the actions which allegedly violate the statute". Id. Therefore, the Lanier court had to hold that the statute had been violated by the defendant's conduct both prior to the amendment and subsequent to it in order for the State to prevail. In essence, the Lanier court quashed the Third District's interpretation of the statute as it existed prior to the legislative amendment.

By contrast in the case at bar, a majority of this Court has already held in Trotter's prior appeal that the statute [(section

921.141 (5) (a)] did not cover status on community control when this offense occurred. Accordingly, chapter 91-270, section 1, Laws of Florida (1991) not only clarifies legislative intent; it also overrides this Court's prior declaration of the law.

There is no reason for this Court to treat the legislative amendment in issue here any differently on the ex post facto question than the legislation considered in Booker v. State, 514 So. 2d 1079 (Fla. 1987) and State v. Smith, 547 So. 2d 613 (Fla. 1989). In Booker, a legislative enactment overrode this Court's decision in Albritton v. State, 476 So. 2d 158 (Fla. 1985)(allowing appellate review of the extent of a guidelines departure sentence). One of the issues raised was whether defendants whose crimes were committed prior to the effective date of the new statute were still entitled to have their guidelines departure sentences reviewed for abuse of discretion in length of sentence imposed. The Booker court held that restriction of appellate review acted as a detriment to those who committed crimes prior to the statute's effective date. Consequently, it would violate constitutional ex post facto provisions unless they were still allowed the same review existing prior to the new statute.

State v. Smith, 547 So. 2d 613 (Fla. 1989) concerned retroactive application of an enactment expressing legislative intent contrary to this Court's holding in Carawan v. State, 515 So. 2d 161 (Fla. 1987). The Smith court quoted with approval from Heath v. State, 532 So. 2d 9-10 (Fla 1st DCA 1988):

> Although legislative amendment of a statute may change the law so that prior judicial

> decisions are no longer controlling, it does not follow that court decisions interpreting a statute are rendered inapplicable by a subsequent amendment to the statute.

547 So. 2d at 616. The majority in Smith concluded that Carawan would still be applied to offenses committed prior to the effective date of the new statute.

C) Harmless Error Analysis

When this Court vacated Trotter's death sentence in his prior appeal, the majority wrote:

> Because the trial judge erroneously treated violation of community control as an aggravating factor in sentencing, and because there were four aggravating and four mitigating circumstances, we remand to a jury for resentencing.

Trotter v. State, 576 So. 2d 691 at 694 (Fla. 1991). In the case at bar, there is even less reason to find the error harmless. While the aggravating circumstances remained identical in the two proceedings, Appellant produced additional mitigating evidence at resentencing with regard to the existence of a frontal lobe brain disorder. Indeed, the resentencing judge found either five or six mitigating circumstances (depending upon how the sixth factor is interpreted) including frontal lobe brain disorder this time as opposed to the four mitigating factors in the prior case (R545-6).

Appellee points to comments made by the sentencing judge to the effect that he would have imposed a death sentence even had he not weighed status on community control as an aggravating fac-

tor. Brief of Appellee, p.17. However, this contention ignores the likely prejudicial effect that the invalid aggravating circumstance had on the penalty jury's recommendation. After Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), it is clear that a death sentence violates the Eighth Amendment when the penalty jury weighs an invalid aggravating factor; even if the judge disregards the invalid factor.

In conclusion, this Court did not find evidence of an invalid aggravating circumstance to be harmless error in Trotter's prior appeal; there is even less justification for finding the error harmless now.

ISSUE II

SECTION 921.141(7), FLORIDA STATUTES (1993) IS UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AMENDMENT, UNITED STATES CONSTITUTION.

Appellee maintains in his brief that Trotter did not argue below that the new victim impact legislation violated the cruel or unusual punishment clause. Brief of Appellee, p.25. This is not accurate. Appellant's pretrial "Motion to Exclude Evidence or Argument Designed to Create Sympathy for the Deceased" (R225-43) relies heavily on the Florida Constitution, Article I, section 17 (R228, 233-8). This is the written motion which was before the judge during defense counsel's argument (T132-48). Admittedly, Appellant's oral presentation of the motion made only

passing reference to the "state constitutional" issue (T135). However, the trial court's ruling encompassed the constitutionality of section 921.141 (7), Fla. Stat. (1993) (T147-8); thus the issue is preserved for appellate review.

Appellee maintains throughout his argument on this issue that the victim impact evidence "plays no role in the weighing process". Brief of Appellee, p.31; 35. It is absurd to propose that a jury in a capital case merely engages in an abstract philosophical exercise of "considering" the victim impact evidence, without giving it any weight in their recommendation. The prosecutor would not even present victim impact evidence unless he thought it would tilt the jury towards a death recommendation.

When Appellee analogizes victim impact evidence to the jury finding required in felony murder cases where the defendant is not the triggerman, or to evidence of a co-defendant's culpability (Brief of Appellee, p.33-5); he is eminently correct. But he is wrong to assert that a non-triggerman's mental intent is not mitigation; in fact, a jury finding of insufficient culpability is such overwhelming mitigation that it outweighs any combination of aggravating circumstances and bars imposition of a death sentence. Similarly, Scott v. Dugger, 604 So. 2d 465 (Fla. 1992) stands for the proposition that receipt of a life sentence by an equally guilty codefendant is such compelling mitigation that a death sentence must be reduced to life imprisonment.

Continuing the analogy, bringing victim impact evidence into a capital sentencing proceeding establishes such compelling aggra-

vation that the jury may recommend death regardless of the mitigating evidence when a particularly exemplary citizen is murdered. At bar, this is in fact what happened. Virgie Langford was portrayed as a defenseless elderly person who had been so generous to the community that anyone who killed her deserved a death sentence.

ISSUE III

ALLOWING VICTIM IMPACT EVIDENCE WAS ERROR BECAUSE APPLICATION OF SECTION 921.141(7), FLORIDA STATUTES (1993) TO APPELLANT IS AN IMPERMISSIBLE EX POST FACTO VIOLATION.

Appellant will rely upon the argument presented in his initial brief supplemented with the argument and authorities cited in the ex post facto section of Issue I, supra.

ISSUE IV

THE TRIAL COURT ERRED BY RULING THAT RULE 3.850'S TWO YEAR LIMITATION BARRED HIM FROM CONSIDERING THE CONSTITUTIONAL VALIDITY OF APPELLANT'S PRIOR CONVICTION FOR ROBBERY.

Out of the numerous authorities cited in Appellee's argument, only this Court's decision in Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993), deals with a challenge to prior invalid convictions used as an aggravating circumstance. While the Henderson court found the defendant's claim procedurally barred, it alternatively found that consideration of the challenged con-

victions was harmless error.

The case at bar should be distinguished from Henderson because Trotter challenged the validity of his prior conviction for a violent felony before the resentencing proceeding at which his current death sentence was imposed. Henderson, by comparison, did not complain until many years into post-conviction collateral proceedings.

A recent decision of the 7th Circuit provides a thorough discussion of collateral attacks against prior state convictions used to enhance a current sentence. In Smith v. Farley, 25 F. 3d 1363 (7th Cir. 1994), the court wrote:

> Because such a challenge is against the new use of a prior conviction - i.e. a challenge to the state's enhancement procedures - a defendant's failure to use an initial opportunity to obtain review of a state conviction - in a direct appeal or collaterally, while still serving the sentence - should not bar him from obtaining later indirect review of the conviction now being used in a wholly new manner.

25 F. 3d at 1367. The defendant Smith actually got no relief because he had been afforded a full and fair post-conviction state review of the merits of his claim. However, the 7th Circuit warned that if a state failed to afford a defendant adequate opportunity to litigate his claim, the federal court should "independently inquire into the merits of matters such as the constitutionality of prior convictions used to enhance a present sentence". 25 F. 3d at 1370.

ISSUE V

THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN EVIDENTIARY HEARING ON APPELLANT'S MOTION ALLEGING THAT RACIAL BIAS PLAYED A ROLE IN THE STATE ATTORNEY'S DECISION TO SEEK A DEATH PENALTY IN THIS CASE.

Appellee's citation of statistics in his brief at page 49, footnote 5, actually lends support to the argument that racial bias plays a role in capital prosecution in Manatee County. When this Court vacated death sentences on white defendants Koenig and Nowitzke, both were allowed to plead in return for life sentences. On the other hand, the black defendants Trotter and Burns were ultimately resentenced to death.

Appellee's brief also seems to ignore the fact that the only relief Appellant asks is an evidentiary hearing where he can properly present his claim for a ruling on the merits. As detailed in his initial brief, Trotter has alleged enough specific facts of racial bias infecting his case to entitle him to this evidentiary hearing.

ISSUE VI

THE TRIAL COURT ERRED BY DENYING APPELLANT'S CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS WHO ADMITTED THAT THEY WOULD VOTE TO IMPOSE A DEATH SENTENCE REGARDLESS OF MITIGATING EVIDENCE.

Appellant apologizes for having inadvertently attributed a response made by prospective juror Fletcher to prospective juror

Flanders. See Brief of Appellee, p.56. Otherwise, Appellant relies upon his argument as presented in his initial brief.

ISSUE VII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S CHALLENGE FOR CAUSE TO A PROSPECTIVE JUROR WHO DOUBTED HER ABILITY TO BE FAIR AND IMPARTIAL BASED UPON HER EXPOSURE TO PRETRIAL PUBLICITY AND THE GRAPHIC NATURE OF EVIDENCE TO BE PRESENTED.

The recent decision of Williams v. State, 638 So. 2d 976 (Fla. 4th DCA 1994), presented a comparable situation where the prospective juror expressed "unprompted doubts about his own ability to be unbiased in judging this case". 638 So. 2d at 979. Like Williams, Appellant should now be granted a new trial as to penalty because of the trial court's failure to grant his challenge for cause to prospective juror Panico, who doubted her ability to be impartial.

ISSUE VIII

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES WHICH TAINTED THE JURY'S PENALTY RECOMMENDATION.

A) Evidence that Trotter Lied to the Police During Interrogation.

In Derrick v. State, 581 So. 2d 31 (Fla. 1991), this Court reversed a penalty proceeding where the State was permitted to

introduce testimony of a witness to whom the defendant had confessed. The Derrick court reasoned:

> The statement was not relevant to show Derrick's guilt because guilt is not at issue in the penalty phase of a trial. (e.s.)

581 So. 2d at 36. The content of the statement was highly prejudicial and did not relate to any "issue properly considered in the penalty phase". Id.

The case at bar is indistinguishable from Derrick. The State could certainly cross-examine the defense expert witnesses without having Trotter's contradictory statements to the police in evidence. The State's argument that since Trotter lied to the police, he must have lied to the mental health experts as well was severely prejudicial to a reasoned consideration of the mitigating evidence Appellant presented. Resentencing before a new jury should now be ordered.

B) Evidence of a Violent Act Which Never Resulted in Criminal Charges.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE IX

THE TRIAL COURT ERRED BY FAILING TO DECLARE A MISTRIAL OR EVEN GIVE A CURATIVE INSTRUCTION WITH REGARD TO THE PROSECUTOR'S CLOSING ARGUMENT WHICH WAS LACED WITH IMPROPER REMARKS IN VIOLATION OF TROTTER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

ISSUE X

THE SENTENCING JUDGE ERRED BY A) IMPROPERLY DOUBLING THE AGGRAVATING CIRCUMSTANCES OF ROBBERY AND PECUNIARY GAIN, AND B) RECITING THAT HE "CONSIDERED THE OTHER NONSTATUTORY FACTORS" (MITIGATING) WITHOUT CLARIFYING WHETHER HE FOUND ANY OR GAVE THEM ANY WEIGHT.

Appellant will rely upon his arguments as presented in his initial brief.

CONCLUSION

Appellant respectfully requests relief as specified in his initial brief.

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 10th day of March, 1995.

Respectfully submitted,

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