IN THE SUPREME COURT OF FLORIDA

KRISTOPBER SANDERS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 87,231

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This reply brief is directed to Issues One, Two, Three, and Four. As to Issues Five, Six, Seven and Eight, appellant will rely on his initial brief.

ARGUMENT

ISSUE I

THE TRIAL COURT VIOLATED FLORIDA RULE OF CRIMINAL PROCEDURE 3.300(b) AND DUE PROCESS OF LAW WHEN, IN EXCUSING PROSPECTIVE JUROR CLAIRE PAYEUR FOR CAUSE, HE DENIED DEFENSE COUNSEL'S REQUESTS FOR AN OPPORTUNITY TO EXAMINE THE JUROR ON VOIR DIRE.

The controlling law was established in O'Connell, Hernandez, and Willacv, and it should be followed.[1] The state's argument that juror Payeur's answers to the judge's questions were unequivocal, and therefore defense counsel would have been unsuccessful in any attempt to rehabilitate her, is the same argument which this Court rejected in O'Connell. Ms. Payeur's responses were no more and no less unequivocal that the jurors' responses in O'Connell and Willacy. The issue is not whether Ms. Payeur was excludable for cause, but whether appellant's right to examine her was wholly denied. See Willacv, 640 So. 2d at 1082 ("The trial judge properly sustained the State's challenge for cause, but committed error in not affording defense counsel an opportunity to rehabilitate the juror pursuant to Rule 3.300(b). We find [O'Connell] and most recently [Hernandez] dispositive." Note also that it was the state which successfully objected when defense counsel sought to exercise his right to examine Ms. Payeur (5/40-41,44). The state must live with the consequence of the error, reversal for a new penalty

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[1] O'Connell v. State, 490 So. 2d 1284, 1286-87 (Fla. 1985); Hernandez v. State, 621 So. 2d 1353, 1355-56 (Fla. 1993); Willacy v. State, 640 So. 2d 1079, 1081-82 (Fla. 1994).

trial, as clearly established by the caselaw. O'Connell; Hernandez; Willacy.

The state's reliance on Fleckinser v. State, 642 So. 2d 35 (Fla. 4th DCA 1994), rev. den., 650 So. 2d 989 (Fla. 1994) is misplaced. Fleckinger involved a prospective juror in a non-capital case who repeatedly insisted that she did not feel qualified to sit on any jury because she was not "evolved" to the point where she could judge another human being. The Fourth DCA distinguished Green v. State, 575 So. 2d 796 (Fla. 4th DCA 1991): "Here, in contrast, the issue is not one of the juror's doubt about her ability to be fair, but rather the juror's inability, or absolute refusal, to sit in judgment." Fleckinser, 642 So. 2d at 37. The district court also expressly distinguished O'Connell, noting that that "was a capital case and the questions involved a unique body of law applicable particularly to 'death qualifying' the jury". Fleckinser, 642 So. 2d at 37.

In the instant case, as in O'Connell and Green, the trial court's refusal to allow the defense any opportunity to examine the challenged juror cannot be justified as "control of unreasonably repetitious and argumentative voir dire questioning",[2] since defense counsel never got to ask her a single question. In Green -- like Fleckinser a non-capital case -- the majority of the Fourth DCA panel agreed with the defendant that O'Connell was applicable, and reversed. Judge Stone, dissenting, would have distinguished

[2] See Jones v. State, 378 So. 2d 797 (Fla. 1st DCA 1979), cert.den., 388 So. 2d 1114 (1980).

O'Connell on the same basis later used in Fleckinser: "This is not a capital case and does not involve, as did O'Connell v. State, the prejudice that accrues to a defendant facing a death sentence who is not afforded an opportunity to rehabilitate a potential juror expressing concerns about the imposition of capital punishment."

O'Connell and Rhodes v. State, 638 So. 2d 920, 924 (Fla. 1994) recognize that, in addition to depriving a defendant of the important procedural right guaranteed by Rule 3.300(b), the excusal of a death-scrupled juror coupled with the absolute denial of any opportunity for counsel to examine the juror violates due process. This Court should follow its own clearly established precedent and reverse for a new penalty trial.

ISSUE II

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO CROSS-EXAMINE A KEY PROSECUTION WITNESS, GEORGE NASHEF, ABOUT HIS DRUG RUNNING ACTIVITIES FOR JOEY DUCKETT AND OTHER INDIVIDUALS INVOLVED IN PLANNING THE HOMICIDE, WHERE THE CROSS-EXAMINATION WAS (1) CRITICAL TO THE JURY'S ASSESSMENT OF NASHEF'S CREDIBILITY AND (2) GERMANE TO MATTERS OPENED UP ON DIRECT.

Throughout, the state misconstrues the nature and purpose of the proffered cross-examination. The Sixth Amendment guaranteed appellant's right to show the jury, on cross-examination of the state's key witness, that the witness was not -- as he claimed to be -- merely a scared bystander in over his head, but a drug supplier who had made at least four or five "runs" for the people who were involved in planning the murder.[3] Since (according to the state's theory that this was a contract murder rather than a sudden overreaction) the drug business activities of the various participants -- including Nashef, Duckett, and the victim Clark -- provided the likely motive for the killing, and since this witness Nashef provided the most damaging testimony against appellant on the issues of premeditation and "cold calculation", the jury needed full and accurate information about Nashef's involvement with these individuals, and appellant had the right to present it to them.

[3] Nashef admitted (in the proffer outside the presence of the jury) to three or four runs for Ole Anderson, who he said was together with Wayne Sargent, and one run for Joey Duckett and his group (8/494). Anderson, Sargent, and Duckett, according to the state's own evidence, were all heavily involved in planning the murder of Hank Clark,

The Sixth Amendment's guarantee of full and fair cross-examination was denied, and appellant must be afforded a new trial.

ISSUE III

APPELLANT'S DEATH SENTENCE FALLS SHORT OF EIGHTH AMENDMENT STANDARDS OF RELIABILITY DUE TO THE TRIAL COURT'S FAILURE TO PROPERLY CONSIDER THE VASTLY DISPARATE TREATMENT ACCORDED TO JOEY DUCKETT, AN EQUALLY CULPABLE IF NOT MORE CULPABLE COPARTICIPANT IN THE HOMICIDE.

The state relies on Melendez v. State, 612 So, 2d 1366, 1368-69 (Fla. 1992) to argue that the disparate treatment of a coparticipant is irrelevant to both mitigation and proportionality "'when the prosecutor has not charged the alleged accomplice with a capital offense." First of all, Joey Duckett is far more than an "alleged accomplice"; according to the state's own theory and evidence it was Joey Duckett who was the feared leader of the group; Duckett who ordered and paid for the killing; Duckett who "instigated and was the mastermind of and was the dominant force behind the planning and execution of this murder." See Larzalere v. State, 676 So. 2d 394, 407 (Fla. 1996). Thus, according to the prosecution's own case, Duckett was shown to be at least an equally culpable, if not more culpable, participant in the homicide, and that fact is exceedingly relevant to both mitigation and proportionality. See O'Callaghan v. State, 542 So. 2d 1325, 1326 (Fla. 1989) (disparate treatment of individuals involved in the same offense is nonstatutory mitigating evidence; jury should have been apprised that it could consider that one coparticipant would be sentenced for second-degree murder, another had been granted immunity, and a third had not been charged with a crime); Fuente v.

State, 549 So. 2d 652, 658-59 (Fla. 1989) (judge's override improper where jury "could reasonably have based its [life] recommendation on the fact that Salerno and the victim's wife would likely not be prosecuted for their participation in the murder"); Brookings v. State, 495 So. 2d 135, 143 (Fla. 1986) ("although appellant pulled the trigger, Murray and Lowery were also principals in this contract murder, helping to plan and carry out this crime. That Murray would escape any chance of the death penalty and that Lowery would walk away totally free while the ultimate penalty was sought against appellant, are facts that could reasonably be considered by the jury").

The comment in Melendez should logically apply only in situations where there is no proof of the unprosecuted "alleged accomplice's" involvement in the homicide, or where the evidence fails to demonstrate his equal culpability. To apply Melendez as broadly as the state suggests (1) would be inconsistent with O'Callaghan, Fuente, and Brookings, and (2) would violate the constitutional principle of Lockett v. Ohio, 438 U.S. 586, 604 (1978), that the sentencer in a capital case must "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." In the instant case, it was the prosecution which proved -- in order to support its theory that this was a premeditated contract killing -- that Joey Duckett ordered and paid for it, that he was the mastermind and dominant force. Indeed, had the state not presented the

evidence of Duckett's primary role, it could not have proven "CCP"; the only aggravating factor upon which appellant's death sentence rests. That being the case, the choice -- also made by the state -- not to prosecute Duckett for the homicide cannot be used to deprive appellant of meaningful consideration by the trial court of the gross disparity in treatment between himself and the person who ordered the killing.

Due to the trial court's inexplicable denigration of the evidence relating to Joey Duckett -- his mischaracterizations of fact and law -- this mitigating factor was not fairly weighed, and the reliability of the death sentence was compromised. See Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990) (Supreme Court need not accept trial court's findings "when . . . they are based on misconstruction of undisputed facts and misapprehension of law"). As this is a single aggravator case with substantial mitigation, and as the reliability of the death sentence is further diminished by the absence of any competent, substantial evidence to support the trial court's outright rejection of the age mitigator [Issue V], and by his failure to give any meaningful consideration to the equal, if not greater, culpability of Duckett, this Court should find appellant's death sentence disproportionate, and reverse for imposition of life imprisonment. [See Issue VI]. In the alternative and at the very least, the death sentence should be vacated and the case remanded for resentencing with due consideration of all mitigating factors.

ISSUE IV

DR. SIDNEY MERIN, WHO WAS INITIALLY AUTHORIZED TO SERVE AS THE DEFENSE'S CONFIDENTIAL PSYCHOLOGICAL EXPERT, AND WHO RECEIVED PRIVILEGED MATERIALS SUPPLIED BY THE DEFENSE, SHOULD NOT HAVE BEEN ALLOWED TO BE CALLED AS A WITNESS FOR THE PROSECUTION IN VIOLATION OF THE ATTORNEY-CLIENT PRIVILEGE AS GUARANTEED BY FLORIDA RULE OF CRIMINAL PROCEDURE 3.216(a).

The state's argument is written as if what occurred here were no different than if defense counsel had asked Dr. Merin to serve as the defense's expert and Dr. Merin had said "No, thanks." Appellant agrees that if that were all that happened, the attorney-client privilege under Rule 3.216(a) would never have kicked in, and there would be no error. That, however, is not even close to the scenario here. Dr. Merin never indicated to defense counsel that he did not wish to accept the appointment. Instead, over a period of months, during which defense counsel and his client were operating under the reasonable belief that Dr. Merin was the defense's Rule 3.216 confidential expert,[4] defense counsel sent Merin voluminous records including appellant's personal medical files [contrast Rose]; authorized him (and sent him a court order authorizing him) to visit and examine appellant at the jail; informed him of appellant's history of mental illness and hospitalization during adolescence; relayed to Merin appellant's statements

[4] See Rose v. State, 591 So. 2d 195 (Fla. 4th DCA 1991), which expressly recognizes that -- unlike the pathologist in Rose who had received no privileged communications from the defense -- the attorney-client privilege is appropriately asserted when a mental health expert is retained pursuant to Rule 3.216.

to counsel that he was high from inhaling gasoline at the time of his confession, and that he just told the officers what they wanted to hear because he was tired of being closed up in the room; asked him to assess the voluntariness of appellant's confession; and eventually sent follow-up letters and made phone calls trying to ascertain the reason for Merin's apparent inaction. In the penalty phase, Dr. Merin repeatedly acknowledged that when he finally returned the confidential materials to the defense, he felt "horribly guilty" (11/876-77) and "very uncomfortable about being called by both sides" (11/917), and he was still uncomfortable about it a few weeks before trial, until the prosecutor "reassured me that it was acceptable to the court, then I went ahead and accepted the commission" (11/917).

The state, unable to defend what actually occurred, hypothesizes a fantasy scenario to attack. The state argues:

> Under the reasoning advanced by appellant, any criminal defendant upon being permitted by court order to utilize an expert to prepare for his trial could simply write a letter to all licensed mental health experts in the area -- or even the entire state -- and preclude the prosecution from using any of them in response at trial, even though none of the defense selectees ever examined the defendant or considered any materials furnished by the defense. It would be an effective ploy disabling the state from meeting any defense mental health expert testimony as suggested by Nibert v. State, 574 So. 2d 1059 (Fla. 1991). Appellant cites no authority compelling Dr. Merin to serve as a mental health expert at the beck and call of defense attorney Swisher or appellant Sanders prior to his agreeing to do so and appellant's unsuccessful attempt to retain Dr. Merin did not preclude his subsequent rebuttal testimony.

(S36)

Again, nothing like this happened. Nobody is arguing that Dr. Merin was compelled to serve at anyone's "beck and call". "Unsuccessful attempts" to retain an expert do not take six months during the trial preparation stage of a capital case. It is abundantly clear from this record that Dr. Merin did not decline the appointment. To the contrary, it appears that he expressly or at least tacitly accepted the appointment, and then -- whether due to his own mistake or an intra-office snafu -- simply neglected to do the work. Dr. Merin acknowledged at trial that when he received the documents (including appellant's medical files) from defense counsel's office "there may have been some sort of communication, I may have spoken with somebody that time" (11/849). After that, Merin received from defense counsel a series of communications authorizing him to talk to appellant in the jail, and asking him to determine whether appellant's confession was involuntary in light of the circumstances and his substantial psychiatric background. [See appellant's initial brief, p.65-67]. Some seven months after defense counsel first contacted Dr. Merin, Merin wrote him a letter in which he said:

> Dear Mr. Swisher:
>
> In June 1994, you had written to me requesting that I engage in a confidential examination of your client, Mr. Sanders. For some unexplained reason, this file remained dormant with no action having been taken on it. You had sent me some documents regarding Mr. Sanders. Those documents were neither read nor analyzed.

> I would apologize for the lapse in my office resulting in this case file not having been attended to as I normally would with other cases involving a criminal action. We have no reasonable explanation for why the file had not been acted on, despite several communications from your office.

(1/168-69)

Dr. Merin closed the letter by apologizing again for "the manner in which this office has handled this file. I would certainly hope to receive future referrals from your office and would extend the assurance a similar lapse will not occur" (1/168-69).

Dr. Merin's letter of apology, and his subsequently expressed feelings of guilt and discomfort about being called by both sides, would make no sense if -- as the state implies -- he had declined the appointment. The truth is he accepted the appointment under Rule 3.216, and received confidential and privileged medical and psychiatric records from the defense. Defense counsel and appellant reasonably believed for half a year that Dr. Merin was working for the defense. Rule 3.216(a) provides, "The expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege."

The state's fanciful argument that an unscrupulous defense lawyer "could simply write a letter to all licenced mental health experts in the area -- or even the entire state" (S36), and thereby preempt the state from obtaining any expert assistance at all, bears no relationship to the reality of this case. If there exists a defense attorney so creatively unscrupulous (and moronic) as to try such a ploy, the "overriding public interest" exception to the

attorney-client privilege would prevent him from succeeding. See Pouncy v. State, 353 So. 2d 640, 642 (Fla. 3d DCA 1977); Ursry v. State, 428 So. 2d 713, 715 (Fla. 4th DCA 1983). In the instant case, Mr. Swisher did nothing wrong; he contacted one expert and provided him with the necessary documents, medical records, and authorizations. He did not provide these privileged materials to "all licensed mental health experts in the area", nor did he have any reason to, since he had retained Dr. Merin. It was the prosecutor who insisted on using the one psychologist who had previously been retained by the defense, when he could have sought the assistance of any other psychiatrist or psychologist in the Tampa Bay area or the state without violating the attorney-client privilege protected by Rule 3.216(a). See Pouncy, 353 So. 2d at 642 (finding that there was no overriding public interest to justify a violation of the attorney-client privilege, where "[o]bviously there was neither such a dearth of experts available, nor such a precarious position occupied by the State"); Ursrv, 428 So. 2d at 715 (record failed to demonstrate that prosecution made any attempt to retain other experts, and therefore failed to show that application of the Rule 3.216 attorney-client privilege "so effectively deprived the State of valuable witnesses so as to undermine the public interest and the administration of justice").

Dr. Merin's testimony was overwhelmingly harmful to appellant, and was instrumental to the state in obtaining a jury death recommendation and a death sentence. His testimony was the centerpiece of the prosecutor's argument to the jury, and the trial court

relied on his opinions to contradict the defense's expert and to reject all three statutory mitigating circumstances proffered by the defense (see 2/309-11). Dr. Merin should never have been allowed to be called as a prosecution witness, in violation of the attorney-client privilege as guaranteed by Rule 3.216(a), nor should the prosecution have been permitted to consult with him in preparing its case. Appellant is entitled by law and basic fair play to a new penalty trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 21st day of July, 1997.

Respectfully submitted,

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