IN THE SUPREME COURT OF FLORIDA, STATE OF FLORIDA

KEITH BRENNAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

SUPREME COURT NO.: 90,279

LOWER COURT
CASE NO.: 95-911CFB

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

REPLY BRIEF OF APPELLANT

J.L. "Ray" LeGrande, Esquire
LeGRANDE & LeGRANDE, P.A.
P.O. Box 2429
Fort Myers, Florida 33902-2429
Telephone: 941/337-1213
Fax: 941/337-1401
E-mail: legrande@gate.net
Florida Bar Number 193147

ATTORNEY FOR APPELLANT

TOPICAL INDEX TO REPLY BRIEF

TABLE OF CITATIONS

ISSUES ON APPEAL

ISSUE I

THE IMPOSITION OF THE DEATH SENTENCE ON THIS APPELLANT WHO WAS SIXTEEN YEARS OF AGE AT THE TIME OF THE OFFENSE CONSTITUTES CRUEL AND/OR UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ISSUE II

THE TRIAL COURT PERMITTED THE TESTIMONY OF A CRITICAL WITNESS WHO WAS "DEFINITELY INCAPACITATED"

OR ALTERNATIVELY

THE TRIAL COURT PERMITTED THE TESTIMONY OF A CRITICAL WITNESS WHO WAS "DEFINITELY INCAPACITATED" WITHOUT MAKING FINDINGS REQUIRED BY CASE LAW.

ISSUE XII

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY WEIGHING THE AVOIDANCE OF ARREST CIRCUMSTANCE.

ISSUE XIII

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY WEIGHING THE CIRCUMSTANCE THAT THE CRIME OCCURRED DURING THE COMMISSION OF A ROBBERY.

PRELIMINARY STATEMENT

In this Reply Brief, Appellant presents specific replies to the State's Answer in Issues I, II, XII and XIII.

As to other issues, Appellant relies upon his initial brief, with the adoption of his Issue II reply argument when the State raises a F.S. 924.051 contention.

ISSUE I

THE IMPOSITION OF THE DEATH SENTENCE ON THIS APPELLANT WHO WAS SIXTEEN YEARS OF AGE AT THE TIME OF THE OFFENSE CONSTITUTES CRUEL AND/OR UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The issue of imposition of the death penalty on a child who was sixteen years of age at the time of the crime has not been addressed nor resolved in Florida. In Farina v. State, 679 So.2d 1151 (Fla. 1996) this Court indicated:

> We do not address Farina's first issue of whether it is unconstitutional to execute someone who is sixteen years of age at the time of the crime.

As related in detail in Appellant's Initial Brief (IB) in over a quarter of a century only three other children who were sixteen at the time of the offense were sentenced to death and none were executed. [IB-27][1]

Appellant contends, as the Court concluded in Allen v. State, 636 So.2d 494 (Fla. 1994), that under these circumstances the Appellant's sentence of death is cruel or unusual.

In its Answer Brief (AB) the State cites Stanford v. Kentucky, 492 U.S. 361 109 S.Ct. 2969 (1989) for the proposition that the execution of a sixteen year old child is not prohibited by the federal constitution. [AB-5, 6] Interestingly, Stanford has never

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[1]One of these, Farina, is currently scheduled for resentencing.

been cited by any Florida appellate court.[2]

There was a 5-4 plurality opinion in Stanford. Justice Brennan writing the dissenting opinion reflected at 109 S.Ct. 2982:

> I believe that to take the life of a person as punishment for a crime committed when below the age of 18 is cruel and unusual and hence is prohibited by the Eighth Amendment. The method by which this Court assesses a claim that a punishment is unconstitutional because it is cruel and unusual is established by our precedents, and it bears little resemblance to the method four Members of the Court apply in this case.
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> Our judgment about the constitutionality of a punishment under the Eighth Amendment is informed, though not determined...by an examination of contemporary attitudes toward the punishment, as evidenced in the actions of legislatures and of juries...The views of organizations with expertise in relevant fields and the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society.... Currently, [p. 2983] 12 of the States whose statutes permit capital punishment specifically mandate that offenders under age 18 not be sentenced to death...When one adds to these 12 States the 15 (including the District of Columbia) in which capital punishment is not authorized at all...it appears that the governments in fully 27 of the States have concluded that no one under 18 should face the death penalty. A further three States explicitly refuse to authorize sentences of death for those who committed their offense when under 17,...making a total of 30 States that would not tolerate the execution of petitioner...Congress' most recent enactment of a death penalty statute also excludes those under 18.

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[2]No citation of this case is contained in West CD-ROM Libraries Florida Cases Southern Second Volume 1 through Volume 703, page 865.

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...The fact that juries have on occasion sentenced a minor to death shows...[p. 2984] that the death penalty for adolescents is not categorically unacceptable to juries...we have never adopted the extraordinary view that a punishment is beyond Eighth Amendment challenge if it is sometimes handed down by a jury.

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...imposition of the death penalty on adolescents is distinctly unusual. Adolescent offenders make up only a small proportion of the current death-row population...

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[p. 2985] Further indicators of contemporary standards of decency that should inform our consideration of the Eighth Amendment question are the opinions of respected organizations ...Where organizations with expertise in a relevant area have given careful consideration to the question of a punishment's appropriateness, there is no reason why that judgment should not be entitled to attention as an indicator of contemporary standards...The American Bar Association has adopted a resolution opposing the imposition of capital punishment upon any person for an offense committed while under age 18, as has the National Council of Juvenile Family Court Judges. The American Law Institute's Model Penal Code similarly includes a lower age limit of 18 for the death sentence. And the National Commission on Reform of the Federal Criminal Laws also recommended that 18 be the minimum age.

Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendments analysis... Many countries...over 50, including nearly all in Western Europe--have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason ...Twenty-seven others do not in practice impose the death penalty...Of the nations that retain

capital punishment, a majority--65--prohibit the execution of juveniles...[p. 2986] Since 1979, Amnesty International has recorded only eight executions of offenders under 18 throughout the world, three of these in the United States. The other five executions were carried out in Pakistan, Bangladesh, Rwanda, and Barbados. In addition to national laws, three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties. Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.

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The Court has explicitly stated that "the attitude of state legislatures and sentencing juries do not wholly determine" a controversy arising under the Eighth Amendment...because "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the [constitutional] acceptability of" a punishment...

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...juveniles so generally lack the degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty that the Eighth Amendment forbids that they receive that punishment.

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[p. 2989]...18 is the dividing line that society has generally drawn, the point at which it is thought reasonable to assume that persons have an ability to make, and a duty to bear responsibility for, their judgments. Insofar as age 18 is a necessarily arbitrary social choice as a point at which to acknowledge a person's maturity and responsibility, given the different developmental rates of individuals, it is in fact "a conservative estimate of the dividing line between adolescence and adulthood.

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[p. 2993] Juveniles very generally lack that

degree of blameworthiness that is...a constitutional prerequisite for the imposition of capital punishment under our precedents concerning the Eighth Amendments proportionality principle.

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Under a second strand of Eighth Amendment inquiry into whether a particular sentence is excessive and hence unconstitutional, we ask whether the sentence makes a measurable contribution to acceptable goals of punishment ...Excluding juveniles from the class of persons eligible to receive the death penalty will have little effect on any deterrent value capital punishment may have for potential offenders who are over 18: these adult offenders may of course remain eligible for a death sentence. The potential deterrent effect of juvenile executions on adolescent offenders is also insignificant. The deterrent value of capital punishment rests "on the assumption that we are rational beings who always think before we act, and then base our actions on a careful calculation of the gains and losses involved."..."[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."

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[p. 2994] Because imposition of the death penalty on persons for offenses committed under the age of 18 makes no measurable contribution to the goals of either retribution or deterrence, it is "nothing more than the purposeless and needless imposition of pain and suffering,"

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There are strong indications that the execution of juvenile offenders violates contemporary standards of decency: a majority of States decline to permit juveniles to be sentenced to death; imposition of the sentence upon minors is very unusual even in those States that permit it; and respected

> organizations with expertise in relevant areas regard the execution of juveniles as unacceptable, as does international opinion. These indicators serve to confirm...that the Eighth Amendment prohibits the execution of persons for offenses they committed while below the age of 18, because the death penalty is disproportionate when applied to such young offenders and fails measurable to serve the goals of capital punishment.

Justice O'Connor at 109 S.Ct. 2981 provided the "swing vote" in Stanford. She attached a condition:

> ...In Thompson v. Oklahoma, 487 U.S. 815, 857-858, 108 S.Ct. 2687, 2710-2711, 101 L.Ed.2d 702 (1988)...I expressed the view that a criminal defendant who would have been tried as a juvenile under state law, but for the granting of a petition waiving juvenile court jurisdiction, may only be executed for a capital offense if the State's capital punishment statute specifies a minimum age at which the commission of a capital crime can lead to an offender's execution and the defendant had reached that minimum age at the time the crime was committed.[3]

Justice O'Connor noted that:

> ...Florida clearly contemplates the imposition of capital punishment on 16 year olds in its juvenile transfer statute, see Fla. Stat. § 39.02(5)(c) (1987)...

The statute cited by Justice O'Connor was repealed prior to the homicide in this case, and replaced with F.S. 39.022. The provision contained in F.S. 39.02(5)(c) was deleted from this jurisdictional statute.

If, as Justice O'Connor opined, it can be reasonable

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[3]But, "As a threshold matter, I indicated that such specificity is not necessary to avoid constitutional problems if it is clear that no national consensus forbids the imposition of capital punishment for crimes committed at such an age."

argued that F.S. 39.02(5)(c) reflects the basis for executing children, it can be equally argued that its deletion by the legislature from the jurisdictional statute reflects the opposite intent.

Appellant's onerous position of being the only sixteen year old child that the State of Florida has decided to execute in over 25 years makes the sentence of death cruel or unusual.

ISSUE II

THE TRIAL COURT PERMITTED THE TESTIMONY OF A CRITICAL WITNESS WHO WAS "DEFINITELY INCAPACITATED"

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ACKNOWLEDGEMENT OF INCAPACITY

The State acknowledges that the judge indicated that Maples was incapacitated, but nonetheless the judge "determined to proceed and permitted the state to have Maples correct his testimony". [AB-10] Such acknowledgement is clearly mandated by the trial court's unambiguous statement: "...he's definitely incapacitated at this point..." [XV-T-529]

NOT PRESERVED FOR APPEAL

The State contends that the defense counsel failed to properly object and thus the issue is not preserved for appeal. In addition to his motion to strike Maples' testimony, counsel indicated to the court his concerns about the witness' competency [XV-T-532] and the trial court had previously noted Maples was "definitely incapacitated". [XV-T-529] The issue was before the court. At the end of Maples' testimony, defense counsel renewed "all our prior objections that we made in the back room as to Dr. Maples' testimony..." [XV-T-540] The trial judge was clearly on notice that an error may have been occurring and was provided with an opportunity to correct it.

HARMLESS ERROR AND BURDEN OF PROOF

The State contends that any error was harmless and that Appellant, pursuant to Florida Statutes 924.051 has the burden of proving such error was prejudicial.

In State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), the Florida Supreme Court adopted the harmless error rule of the United States Supreme Court in Chapman v. California, 386 U.S. 18 (1965). This rule places the burden on the State, as the beneficiary of the error, to demonstrate beyond a reasonable doubt that the error did not contribute to the conviction or affect the jury's verdict. Chapman, at 23-24; DiGuilio, at 1135. Regardless of state law, the Chapman harmless error standard must be applied to any violations of federal constitutional rights, such as those argued in other issues of the initial brief of Appellant. Chapman, at 21; see Sochor v. Florida, 504 U.S. 527, 539-540 (1992).

Section 924.051, Florida Statutes (Supp. 1996), provides in part,

> (1) As used in this section:
> (a) "Prejudicial error" means an error in the trial court that harmfully affected the judgment or sentence.
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> (3) An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or,of not properly preserved, would constitute fundamental error.
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> (7) In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

Section 924.051 (7) purports to change the standard of review in criminal appeals by shifting the burden to the Appellant to show that an error was harmful.

The State contends that section 924.051, Florida Statutes (Supp. 1996), applies to this appeal. [AB-14] Appellant disagrees. The offense occurred on March 10, 1995. [I-R-2] As a general rule, "an amendment to a criminal statute does not affect the prosecution of, or the punishment for, a crime committed before the amendment." State v. Battle, 661 So.2d 38, 39 (Fla. 2d DCA 1995); Saavedra v. State, 576 So.2d 953, 963 (Fla. 1st DCA 1991), affirmed, 622 So.2d 952 (Fla. 1993), cert. denied, 114 S. Ct. 901, 127 L. Ed. 2d 93 (1994); Castle v. State, 305 So.2d 794, 797 (Fla. 4th DCA 1974), affirmed, 330 So.2d 10 (Fla. 1976); Art. X, § 9, Fla. Const.

The Florida Attorney General has insisted that the provisions of Florida Statute 924.051 are substantive in nature. Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773, 774 (Fla. 1996). The general rule of statutory construction is that a "substantive statute is presumed to operate prospectively rather than retrospectively..." Alamo Rent-A-Car, Inc. v. Mancusi, 632 So.2d 1352, 1358 (Fla. 1994); see also, State v. Lavazzoli, 434 So.2d 321, 323 (Fla. 1983); State v. Kelley, 588 So.2d 595, 597 (Fla. 1st DCA 1991).

In State v. McGriff, 537 So.2d 107, 108-109 (Fla. 1989), the Court held that an amendment to the sentencing guidelines statute which changed the appellate standard of review for departure sentences by requiring affirmance when one reason for departure was valid could not be applied to offenses which occurred prior to the effective date of the amendment. The decision in McGriff was premised upon the ex post facto clause of the United States Constitution, Article I, section 10. But, see Lynce v. Mathis, 117 S. Ct. 891, 137 L. Ed. 2d 63, 72 (1997).

The basic principle that new laws must not be retroactively applied should appertain. In Lynce, 137 L. Ed. 2d at 71, Supreme Court observed,

> The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." Landgraf v. USI Film Products, 511 U.S. 244, 265...(1994).

Moreover, the due process clause protects the interests in fair notice and repose that may be compromised by retroactive legislation. Lynce, 137 L. Ed. 2d at 71 n. 12, quoting, Landgraf, at 266.

Retroactive application of the change in the harmless error standard of review would violate the ex post facto clause of Article I, Section 10, Florida Constitution. In Dugger v. Williams, 593 So.2d 180, 181 (Fla. 1991), this Court construed the state constitution's ex post facto clause.

> In Florida, a law or its equivalent violates the prohibition of ex post facto laws if two conditions are

> met: (a) it is retrospective in a effect; and (b) it diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense. Art. I § 10, Fla. Const.

Retrospective application of F.S. 924.051(7) would diminish Appellant's right to appeal by shifting the burden to him to show that an error is harmful rather than placing the burden on the state to show that an error is harmless pursuant to DiGuilio.

If the Legislature's attempt to change the harmless error standard of review by enacting F.S. 924.051(7) is deemed procedural instead of substantive, the statute violates the separation of powers provision of Article II, section 3, Florida Constitution:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Article V, Section 2(a), Florida Constitution gives this Court exclusive jurisdiction to "adopt rules for the practice and procedure in all courts." Enactment of a procedural rule by the legislature violates separation of powers. See Johnson v. State, 336 So.2d 93, 95 (Fla. 1976).

ISSUE XII

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY WEIGHING THE AVOIDANCE OF ARREST CIRCUMSTANCE.

Appellant contends that Duest v. Dugger, 555 So.2d 849 (Fla. 1990), cert. denied, 507 U.S. 1034 (1993) is not applicable to this issue, nor to Issue XIII.

Appellant's initial brief is not "merely making reference to" nor "simply referring to" arguments presented.

Appellant's initial brief, while adopting the language and usage of experienced trial counsel, states the issue, provides the arguments, and asserts the applicable case law. This is the purpose of an appellate brief.

After appellate counsel has thoroughly researched the issue and found that trial counsel's memorandum of law adequately meets this purpose, there is no additional justice served by Appellate counsel's rewriting, massaging, manipulating or otherwise plagiarizing trial counsel's work product.

While asserting the applicability of Duest, the State proceeds to present an alternative argument with appropriate case law. The issue presented in the initial brief should be addressed by this Court.

ISSUE XIII

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY WEIGHING THE CIRCUMSTANCE THAT THE CRIME OCCURRED DURING THE COMMISSION OF A ROBBERY.

The Appellant adopts the position asserted in Issue XII of his reply brief.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Appellant respectfully asks this Honorable Court to reverse the judgment and sentence of the lower court.

CERTIFICATE OF SERVICE

I hereby certify that a copy has been mailed to Attorney General Robert Butterworth, Suite 700, 2002 N. Lois Avenue, Tampa, Florida 33607, on this 8th day of April, 1998.

LeGrande & LeGrande, P.A.
Attorneys for Appellant
P.O. Box 2429
Fort Myers, FL 33902-2429
Telephone: 941/337-1213
Fax: 941/337-1401
E-Mail: legrande@gate.net

By: J. L. Ray LeGrande
J. L. "Ray" LeGrande
Florida Bar No. 193147