IN THE SUPREME COURT OF FLORIDA

LAWRENCE SINGLETON,	:	
Appellant,	:	
vs.	:	Case No. 93,035
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

PRELIMINARY STATEMENT

This brief is filed on behalf of the appellant, Lawrence Singleton, in reply to the answer brief of the appellee, the State of Florida. Appellant relies upon his argument in his Initial Brief on Issues IV, V, VI, and VII.

References to the record on appeal are designated by a Roman numeral for the volume number, R for the record proper and T for the trial transcript, followed by the page number.

ARGUMENT

ISSUE I

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO AN IMPARTIAL JURY BY DENYING CAUSE CHALLENGES TO THREE PROSPECTIVE JURORS WHO HAD SOME KNOWLEDGE OF APPELLANT'S PRIOR OFFENSES AND ANOTHER WHO DID NOT FEEL THAT ALCOHOL WAS AN EXCUSE FOR ANY CRIME.

The State erroneously relies on Bundy v. State, 471 So. 2d 9, 20 (Fla. 1985), cert. denied, 479 U.S. 894 (1986), for the proposition, "It is sufficient if the juror can lay aside his opinion or impression and render a verdict based on the evidence presented in court." Answer Brief at 31. In Kessler v. State, 24 Fla. L. Weekly S544, 1999 WL 1044173 (Fla. Nov. 18, 1999), this Court expressly ruled that Bundy was "inapplicable" to a case involving the denial of a cause challenge. Slip op. at 6. "Our ruling in Bundy was in the context of a motion for change of venue -- not a dismissal for cause.... The practical and policy considerations underlying these two issues are vastly different." Id.

In Kessler, this Court ruled:

> The trial court standard for granting an excusal for cause is based on reasonable doubt: "The juror should be excused if there is any reasonable doubt about the juror's ability to render an impartial verdict." Turner v. State, 645 So. 2d 444, 447 (Fla. 1994).

Slip op. at 4.

In Bolin v. State, 736 So. 2d 1160, 1166 (Fla. 1999), this Court explained,

> Trial courts must ascertain whether prospective jurors possess information which is not admissible in the trial in which they will serve as jurors and which is so prejudicial to the defendant that the jurors' knowledge of the information creates doubt as to whether the jurors can decide the case based solely upon the evidence that will be admitted at trial.

Moreover, in Kessler, slip op. at 5-6, this Court reaffirmed its prior decision in Reilly v. State, 557 So. 2d 1365, 1367 (Fla. 1990), "wherein we concluded that it would be unrealistic to believe that a prospective juror could unring this bell:"

> While Mr. Blackwell subsequently gave the right answers with respect to whether or not he could be an impartial juror, it is unrealistic to believe that during the course of deliberations he could have entirely disregarded his knowledge of the [suppressed] confession no matter how hard he tried. Thus, we conclude that reversible error was committed by the failure to excuse juror Blackwell for cause.

Appellee's assertion that "[t]he extrinsic information in this case, unlike the 'confession' in Reilly, had no bearing on appellant's guilt or innocence in this case," Answer Brief at 37, is misguided. Irrelevant collateral crime evidence is inadmissible in a criminal trial precisely because the jurors may erroneously infer the defendant's guilt of the crime charged from their knowledge of his past crimes. In Peek v. State, 488 So. 2d 52, 56 (Fla. 1986) (quoting Straight v. State, 397 So. 2d 903, 908 (Fla. 1981)), this Court ruled:

> Our justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that the defendant

> may have a propensity to commit the particular type of offense. The admission of improper collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged."

The same danger arises when the jurors are aware of the defendant's prior crimes because of pretrial publicity -- they are likely to infer the defendant's guilt of the crime charged from their knowledge of the defendant's bad character and propensity to crime. In Singleton's case, no evidence of his prior crimes was admitted in the guilt phase of the trial, so the prospective jurors were aware of extremely prejudicial information that would not otherwise have been available to them while deciding Singleton's guilt or innocence.

In quoting the "reasonableness" test for abuse of discretion contained in Canakaris v. Canakaris, 382, So. 2d 1197, 1203 (Fla. 1980), Answer Brief at 45, appellee omitted the limitation on discretion imposed by this Court in that case:

> The discretionary power that is exercised by a trial judge is not, however, without limitation .... The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial court's discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result.

Id.

Appellee erroneously argues that appellant has not established a prejudicial error because he failed to suggest that Noriega, the

juror he would have excused had the trial court granted his request for an additional peremptory challenge, was incompetent to serve on his jury. Answer Brief at 45. Appellant has no burden to establish that Noriega was incompetent. Appellant is required to show only that he "exhausted all peremptory challenges and identified an objectionable juror who had to be accepted and who sat on the jury." Mendoza v. State, 700 So. 670, 674 (Fla. 1997), cert. denied, 119 S. Ct. 101, 142 L. Ed. 2d 81 (1998); Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990).

In Hill v. State, 477 So. 2d 553, 556 (Fla. 1985), this Court explained,

> Florida and most other jurisdictions adhere to the general rule that it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied.

The trial court's error in denying appellant's cause challenges was prejudicial, not because the court seated an incompetent juror, but because it "abridged appellant's right to peremptory challenges by reducing the number of those challenges available [to] him." Id. Both the prosecution and the defense are allowed to use peremptory challenges to excuse potential jurors without explanation, except in instances where it appears that peremptory challenges are being used to discriminate against prospective jurors on the basis of race, ethnicity, or gender. See Abshire v. State, 642 So. 2d 542 (Fla. 1994) (gender); State v. Alen, 616 So. 2d 452 (Fla. 1993) (ethnicity); State v. Neil, 457 So. 2d 481 (Fla.

1984) (race). Thus, appellant had no duty to provide an explanation for why he found Noriega objectionable since the prosecutor never objected that a peremptory strike of Noriega was based on race, ethnicity, or gender.

Appellee questions the validity of the Hill decision, Answer Brief at 46 n. 17, but fails to offer any compelling reason to recede from this well-established precedent. Although this Court is not bound by "blind allegiance to precedent," under the doctrine of stare decisis, "intellectual honesty continues to demand that precedent be followed unless there has been a clear showing that the earlier decision was factually or legally erroneous or has not proven acceptable in actual practice." Brown v. State, 719 So. 2d 882, 890 (Fla. 1998) (Wells, J., dissenting). Chief Justice Harding has observed,

> The doctrine of stare decisis provides stability to the law and to the society governed by that law. While no one would advocate blind adherence to prior law, certainly a change from that law should be principled. Where a rule of law has been adopted after reasoned consideration and then strictly followed over the course of years, the rule should not be abandoned without a change in the circumstances that justified its adoption.

State v. Schopp, 653 So. 2d 1016, 1023 (Fla. 1995) (Harding, J., dissenting). In the absence of a compelling showing by the State that the Hill decision was erroneous, has not proven acceptable in actual practice, or that there has been a change in the circumstances which justified the decision, this Court should adhere to the Hill precedent and apply it in deciding Singleton's case.

ISSUE II

THE TRIAL COURT ERRED BY ADMITTING THE VIDEO RECORDING OF SINGLETON WEARING JAIL CLOTHING AND HANDCUFFS WHILE IN CUSTODY ON THE NIGHT OF HIS ARREST.

Appellant concedes that the primary thrust of defense counsel's argument to the trial court was that admission of the video would violate Singleton's Fifth Amendment right to silence because he was shown in police custody responding "no comment" to reporter's questions. [XXXIV T 3630-33, 3635, 3641, 3643] See Answer Brief at 50. Nonetheless, defense counsel also clearly called the court's attention to the fact that the video showed, "Mr. Singleton is in a blue Hillsborough County Jail issued uniform and is handcuffed behind his back and has an officer holding each arm and officers behind him and surrounding him." [XXXIV T 3631] Defense counsel argued that the video was "not anymore probative than if the state were intending to just show a video of him being led away, you know, handcuffed and in the condition I've described." [XXXIV T 3633] Defense counsel further argued that "none of this is probative." [XXXIV T 3633] Thus, defense counsel's argument was sufficient to fairly apprise the trial court of the error argued in Issue II of his Initial Brief, that the probative value of the video was outweighed by the prejudicial effects of showing Singleton in jail clothing and handcuffs.

Appellee's reliance on Alston v. State, 723 So. 2d 148, 155-157 (Fla. 1998), Answer Brief at 51, is misplaced because this

Court did not expressly address the prejudicial effects of showing the accused in jail clothing and handcuffs in that case.

This Court's decision in Anderson v. State, 574 So. 2d 87, 93 (Fla. 1991), Answer Brief at 52, is adverse to appellant's argument, but appellant respectfully suggests that in light of the argument and authorities presented in Issue II of his Initial Brief, Anderson was wrongly decided. Furthermore, this Court's rationale in Anderson that "there was no 'constant reminder of the accused's condition'" when the jury was shown a brief video of the defendant in jail clothing overlooked the fact that even a brief video display can implant an indelible image in the minds of the jurors. In Singer v. State, 109 So. 2d 7, 24 (Fla. 1959), this Court observed that "it is difficult, if not impossible, for any individual to completely put out of mind knowledge, opinions or impressions previously registered. Such cannot be erased from the mind as chalk from a blackboard."

Appellee's reliance on Grant v. State, 171 So. 2d 361, 364-65 (Fla. 1965), Answer Brief at 52-53, is misplaced because Grant was decided before Estelle v. Williams, 425 U.S. 501 (1976). Moreover, Grant concerned the admissibility of a film of a voluntary reenactment of the crime by the defendant, while Singleton did not voluntarily place himself before the news reporters' video cameras in the present case. Also, this Court treated the question in Grant as one of first impression in Florida, while overlooking its prior observation in Schultz v. State, 179 So. 764, 765 (Fla. 1938), that it is "highly improper to bring a person who has not

been convicted of crime, clothed as a convict and bound in chains, into the presence of a ... jury by whom he is to be tried ...."

Appellee's reliance on Heiny v. State, 447 So. 2d 210 (Fla. 1984), Neary v. State, 384 So.2d 881 (Fla. 1980), and United States v. Diecidue, 603 F. 2d 535 (5th Cir. 1979), is misplaced because each of those cases involved the inadvertent sight of the defendant in handcuffs. There was nothing inadvertent about the State showing the jury the video of Singleton in jail clothing and handcuffs; it was quite deliberate.

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO EVALUATE EACH MITIGATING FACTOR PROPOSED BY THE DEFENSE AND BY FAILING TO EXPLAIN HOW IT WEIGHED THE MITIGATING FACTORS IT FOUND TO BE ESTABLISHED.

Appellee's out-of-context quote from Lucas v. State, 568 So. 2d 18, 23 (Fla. 1990), Answer Brief at 59, is misleading. The passage quoted refers to this Court's prior decisions in Mason v. State, 438 So. 2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984), and Brown v. State, 473 So. 2d 1260, 1268 (Fla.), cert. denied, 474 U.S. 1038 (1985), in which this Court found no error in the trial courts' failure to expressly address each nonstatutory mitigating circumstance. However, the next sentence in Lucas explained that the law had changed:

> More recently, however, to assist trial courts in setting out their findings, we have formulated guidelines for findings in regard to mitigating evidence in Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988), and Campbell v. State, [571 So. 2d 415 (Fla. 1990)].

568 So. 2d at 23.

Campbell actually overruled Mason and Brown by holding that "the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant ...." 571 So. 2d at 419 (emphasis added). However, in Lucas defense counsel had failed to identify for the trial court the specific nonstatutory mitigating circumstances he was attempting to establish. 568 So. 2d at 23-24. Nevertheless, this Court vacated

Lucas's death sentence and remanded for reconsideration and rewriting of the findings of fact because the trial court's original findings did not satisfy the requirement that the findings must be of "unmistakable clarity." Id., at 24.

As argued in Issue III of appellant's Initial Brief, Singleton's trial counsel identified thirty-three proposed nonstatutory mitigating circumstances, but the trial court expressly evaluated only ten of those circumstances, rejecting one and finding nine were established. [VIII R 1289-93] Appellee seeks to substitute his own evaluation of the remaining proposed nonstatutory mitigating circumstances for the evaluation the trial court was required to perform. Answer Brief at 61-64. However, this Court has ruled that trial courts must independently weigh the aggravating and mitigating circumstances in deciding whether to impose a death sentence and cannot delegate their responsibility to the State. Patterson v. State, 513 So. 2d 1257, 1261 (Fla. 1987). Similarly, appellee's after-the-fact evaluation of the proposed mitigating circumstances cannot cure the trial court's failure to conduct its own independent evaluation.

The trial court's failure to comply with the requirements of Campbell mandates reversal of the death sentence and remand for resentencing by the trial court. Hudson v. State, 708 So. 2d 256, 259 (Fla. 1998); Walker v. State, 707 So. 2d 300, 319 (Fla. 1997). The resentencing proceedings must comply with the procedural requirements of Jackson v. State, No. SC93925 (Fla. Jan. 27, 2000), and Reese v. State, 728 So. 2d 727 (Fla. 1999).

ISSUE VIII

THE DEATH SENTENCE IMPOSED BY THE TRIAL COURT IS DISPROPORTIONATE BECAUSE SINGLETON'S CRIME IS NOT ONE OF THE MOST AGGRAVATED AND LEAST MITIGATED OF FIRST-DEGREE MURDERS.

The death penalty is a "unique punishment" which "must be limited to the most aggravated and least mitigated of first-degree murders." Larkins v. State, 24 Fla. L. Weekly S379, 1999 WL 50968, slip op. at 2 (Fla. July 8, 1999). In Almeida v. State, 24 Fla. L. Weekly S336, 1999 WL 506965, slip op. at 7 (Fla. July 8, 1999), this Court explained:

> Thus, our inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders.

Accord Cooper v. State, 1999 WL 459249, slip op. at 2 (Fla. July 8, 1999). In contrast with the cases cited under Issue VIII of the Answer Brief, Singleton's case does not qualify as one of the most aggravated and least mitigated of first-degree murders.

Appellee's reliance on Ferrell v. State, 680 So. 2d 390 (Fla. 1996), cert. denied, 137 L. Ed. 2d 341 (1997), Lindsey v. State, 636 So. 2d 1327 (Fla.), cert. denied, 513 U.S. 972 (1994), and Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, 510 U.S. 969 (1993), for the proposition that Singleton's prior violent felony convictions constituted an "especially weighty" aggravating circumstance, Answer Brief at 93, is misplaced. Each of those cases involved a prior murder conviction. Although Singleton's

prior crimes against Mary Vincent were reprehensible, he did not kill Ms. Vincent. [VIII R 1288]

In Larkins, as in the present case, the trial court found two aggravating factors: (1) prior violent felony convictions in 1973 for manslaughter and assault with intent to kill, and (2) pecuniary gain. Slip op. at 1-2. While pecuniary gain is a less serious aggravator than the heinous, atrocious, or cruel (HAC) aggravator found in Singleton's case, [VIII R 1288-89] Larkins' prior violent felonies were worse than Singleton's because Singleton did not kill his prior victim. [VIII R 1288] Thus, the aggravating circumstances in Larkins' case were comparable to those in Singleton's case.

The mitigating circumstances in Larkins' case were also comparable to the mitigating circumstances in Singleton's case. Larkins had two statutory mitigators, extreme mental emotional disturbance and substantially impaired capacity, slip op. at 2, while Singleton has three statutory mitigators, extreme mental or emotional disturbance, substantially impaired capacity, and the age of 69. [VIII R 1289-90] Larkins had eleven nonstatutory mitigators, including prior conviction for manslaughter instead of murder, poor reading skills, difficulty in school, dropped out of school in the fifth or sixth grade, low intelligence, barren cultural background, poor memory, chronic mental problems caused by drugs and alcohol, difficulty establishing relationships, the offense resulted from impulsivity and irritability, and consumption of alcohol on the night of the incident. Sip op. at 2. The trial

court found that nine similar or more compelling nonstatutory mitigators apply to Singleton, including prior convictions committed in 1978 when Singleton was 51 years old, intent to kill formed during argument or disagreement between Singleton and Hayes, since 1987 release on parole Singleton has never been accused or arrested for any offense except petit theft [until the present murder case], at the time of the offense Singleton was under the influence of alcohol and other possible medication, alcoholism, mild dementia, prior attempted suicide, honorable service in the armed forces, and model prisoner while incarcerated in California. [VIII R 1292-93]

In Larkins, slip op. at 5, this Court concluded that "considering the nature and extent of both the aggravating and mitigating circumstances, we find that life in prison, rather than death, would be the more appropriate sentence under the totality of the circumstances of this case." Admittedly, one of the considerations supporting this conclusion was the absence of the HAC and cold, calculated, and premeditated (CCP) aggravators. Id. In Singleton's case the trial court found HAC, but it did not find CCP. Nonetheless, based upon the preceding comparison of the aggravating and mitigating circumstances in Larkins and the present case, this Court should reach the same conclusion, that life is the more appropriate sentence under the totality of the circumstances in Singleton's case.

Appellee's reliance on Guzman v. State, 721 So. 2d 1155 (Fla. 1998), Answer Brief at 94 and 97, is misplaced because that case

was both more aggravated and less mitigated than Singleton's. Guzman had four valid aggravators, prior violent felony, committed during a robbery, avoid arrest, and HAC, weighed against only one nonstatutory mitigator, alcohol and drug dependency.

Appellee's reliance on Brown v. State, 565 So. 2d 304 (Fla.), cert. denied, 498 U.S. 992 (1990), Answer Brief at 97, is misplaced for the same reason. Brown's case was both more aggravated and less mitigated than Singleton's. Brown had three aggravating factors, felony murder, prior violent felony conviction, and CCP, weighed against the nonstatutory mitigators of mental capacity, mental and emotional distress, social and economic disadvantage, and a nonviolent criminal past.

In Almeida, slip op. at 7, this Court found that the first "most aggravated" prong of proportionality review was satisfied by prior convictions for two first-degree murders. However, this Court vacated the death sentence because the second "least mitigated" prong was not satisfied where the trial court found three statutory and many nonstatutory mitigators, including both mental health mitigators, age 20, brutal childhood, a history of alcohol abuse, and drinking on the night of the crime. Slip op. at 7-8. The similarity of the mitigating circumstances in Singleton's case compel the same conclusion. The trial court found both mental mitigators, a history of alcoholism, and drinking at the time of the offense. Singleton's advanced age of 69 combined with mild dementia and suicidal depression is at least as mitigating as the age of 20. Singleton's honorable military service and success in

the merchant marine are positive character traits as mitigating as Almeida's brutal childhood. Singleton's case is not among the least mitigated of first-degree murders, so the death sentence must be vacated.

In Cooper, slip op. at 2, this Court also found that the first "most aggravated" prong of proportionality review was satisfied by three aggravating circumstances, prior violent felony convictions for a robbery-murder (committed several days after the murder for which the death sentence was imposed), commission during a robbery for pecuniary gain, and CCP. CCP is a serious aggravator like HAC. Larkins, slip op. at 5. Cooper's case was more aggravated than Singleton's because, unlike Singleton, he killed his prior violent felony victim and because he committed the murder for which he was sentenced to death during the commission of a robbery for pecuniary gain, an aggravator not present in Singleton's case. Despite those three aggravating circumstances, this Court found that Cooper's death sentence was disproportionate because his was "one of the most mitigated killings we have reviewed" based upon findings of extreme mental or emotional disturbance, extreme duress, low intelligence (borderline retarded), brain damage, a history of seizures, impaired judgment, poor impulse control, and an abusive childhood. Slip op. at 1-2. Once again, the mitigating circumstances found in Singleton's case, as set forth above, are comparable to those in Cooper's case. Since Singleton's case is less aggravated and comparably mitigated when compared with Cooper's case, this Court should hold that the death penalty is

disproportionate for Singleton's crime, vacate the sentence, and remand for imposition of a life sentence.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Scott A. Browne, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of February, 2001.

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