IN THE SUPREME COURT OF FLORIDA

RONALD KNIGHT,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 93,473
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____ /		

On Appeal from the Circuit Court of the 15th Judicial Circuit
Palm Beach County, Criminal Division, Case No. 97-5175 CF A02

APPELLANT'S REPLY BRIEF

(as amended for font size)

CURTIS G. LEVINE, ESQ.
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TABLE OF CONTENTS

CERTIFICATE OF FONT STYLE AND SIZE

Pursuant to this Court's Administrative Order of July 13, 1998, Counsel for Appellant hereby certifies this Brief contains the following print characteristics:

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PRELIMINARY STATEMENT

Appellant was the Defendant, and Appellee the Prosecution, in the Trial Court of the Fifteenth Judicial Circuit, In and For, Palm Beach County, Florida, Criminal Division, the Hon. Edward A. Garrison presiding.

In this Brief, the parties shall be referred to as they appear before this Honorable Supreme Court.

The symbol "R" shall refer to the Record on Appeal, the symbol "EB" shall refer to the Appellee's Brief, and the symbol "T" shall refer to the Transcript of the trial proceedings.

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TABLE OF CITATIONS

Florida Cases ***Page***

Federal Cases

CURTIS G. LEVINE, ESQ.
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Florida Rules of Criminal Procedure

Florida Statutes

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STATEMENT OF THE CASE AND OF THE FACTS

Appellant will rely upon Appellant's Statement of the Case and of the Facts previously stated on pages 8-18 of Appellant's Initial Brief filed June 15, 1999.

SUMMARY OF ARGUMENT

I.

As an indigent facing not only criminal charges but a capital offense, Appellant clearly had a right to not only court-appointed counsel, but effective representation by said counsel. After voicing numerous written concerns to the Trial Court about the apparent lack of interest displayed by court-appointed counsel in any preparation of a defense to the case, the Trial Court removed Appellant's sole counsel and required Appellant to represent himself without conducting an inquiry required by *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973).

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II.

Although Appellant may be deemed to have waived his right to counsel at pre-trial proceedings, the Trial Court had an obligation to meaningfully renew the offer of assistance of counsel at each subsequent stage of the proceeding. Appellant, who did not finish ninth grade and who was previously diagnosed with severe mental and emotional disturbances who could not coherently answer questions by the Trial Court as to Appellant's waiver of counsel prior to trial, could not be deemed to have knowingly and intelligently waived counsel for trial.

III.

Appellant's prior criminal conviction was used as an aggravating factor to impose the death penalty, despite the circumstance the date of the offense of said prior conviction was two years after the offense in the case at bar. Section 921.141(5)(b), *Florida Statutes*, is unconstitutional on its face and was applied in a vague, overbroad, arbitrary and inconsistent manner.

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ARGUMENT

I.

THE TRIAL COURT ERRED BY FAILING TO CONDUCT A MEANINGFUL *NELSON* INQUIRY IN RESPONSE TO APPELLANT'S PRE-TRIAL MOTION TO HAVE APPELLANT'S COURT-APPOINTED COUNSEL DISMISSED AND NEW COUNSEL APPOINTED.

Appellee characterizes Appellant's complaints about Appellant's lack of competent legal pre-trial representation by Mr. Sosa by minimizing said circumstance, claiming Appellant's complaints were that court-appointed counsel "… had not been consulting sufficiently with the appellant." (EB 6).

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"Appellant was unwilling or unable, however, to pinpoint any particular deficiency on the part of Mr. Sosa except to note some ill defined sense that he was not speaking with him enough", claimed Appellee (EB 6).

The Record reflects Appellant complained to the Trial Court on December 9, 1997 that Appellant's remaining court-appointed counsel **had no contact** with the Appellant since Appellant's first-chair counsel was removed (R 300-301).

The total failure of Appellant's sole remaining trial counsel to, in any way, contact or communicate with Appellant rises to a more serious level of misfeasance and neglect that simply, as Appellee, connotes, "…not speaking with him (Appellant) enough" (EB 6).

Although Appellee claims, …"the State was under no obligation to provide appellant with a second chair or co-counsel…" (EB 23), Appellant clearly had a fundamental Sixth Amendment right to effective representation by the court-appointed counsel he had, whether it was first or second chair. *Anders v. State*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); *Chalk v. Beto*, 429 F.2d 225 (5 Cir. 1970).

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Once Appellant notified the Trial Court he sought to discharge his court-appointed counsel, the trial judge, in order to protect Appellant's right to effective counsel, should make an inquiry of him as to the reasons for the request to discharge. *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973); *Hardwick v. State*, 521 So.2d 1071 (Fla. 1988); *Haugabook v. State*, 689 So.2d 1245 (Fla. 4th DCA 1997); *Dunn v. State*, 730 So.2d 309 (Fla. 4th DCA 1999).

At no time in the Record does Appellant claim he wants to discharge all counsel and assume full legal representation of the trial of his case *pro se*. On the contrary, the Record throughout the pre-trial process reflects Appellant wanted counsel who would be effective and would provide some meaningful defense.

The Trial Court removed Ann Perry, Appellant's first chair counsel, October 31, 1997 (R 9). On December 9, 1997, after Mr. Sosa, Appellant's remaining counsel, wholly failed in any way to communicate with Appellant while Mr. Sosa was sole counsel, Appellant came "… to the conclusion that Mr. Sosa does not want to represent me in this case, nor do I wish to retain him as counsel any longer. (R 300).

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This is more than merely, as Paul Neuman's character in *Cool Hand Luke* was told, a "failure to communicate." This total absence of communication provides Appellant with a reasonable expectation of neglect and/or malfeasance in his remaining counsel's preparation of Appellant's case.

Appellee claims"…it appears appellant was unhappy with the **level of consultation** with Mr. Sosa and **his inability to obtain certain papers or documents** previously held by Ms. Perry." (emphasis added) (EB 25). Appellee seeks to minimize Appellant's well-founded concerns that Appellant's case was being neglected by his court-appointed counsel.

The Record reflects **no level of consultation by Mr. Sosa**, and **no papers relating to Appellant's prosecution** were **ever given** the Appellant. Appellant had received no pleadings, discovery materials or any information whatsoever from Mr. Sosa or his office since Mr. Sosa remained as sole counsel in Appellant's case, just as Appellant had not received them previously from Ms. Perry. (R 1063-1067).

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The Trial Court does not question Mr. Sosa as to why no contact was ever made between attorney and client. Instead, the Trial Court admonishes Appellant, stating "At this point, you need to cooperate with Mr. Sosa…" (R 1067).

No where in this Record is there any indication Appellant has done anything not to cooperate. Apparently, the Trial Court's definition of Appellant's failure to cooperate with counsel is Appellant's rightful and accurate complaint of counsel neglect.

Under *Nelson*, *supra*, the Trial Court should have made a sufficient inquiry of Appellant's court-appointed counsel, Mr. Sosa, to determine whether there was reasonable cause to believe that the court-appointed counsel is not rendering effective assistance to the Appellant. The Trial Court failed to question Mr. Sosa as to the crux of Appellant's complaint, and wholly failed to protect Appellant's rights to effective assistance of counsel.

Appellee shrugs off Mr. Sosa's failure to take any action as counsel by simply stating:

"…appellant's general complaints about Mr. Sosa did not raise an allegation of incompetency as the reason for Mr. Sosa's dismissal.

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Therefore, the trial court was under no obligation to conduct a full *Nelson* inquiry." (EB 23).

Appellant was not afforded his fundamental right to effective assistance of counsel before the Trial Court. Such activity by the Trial Court constitutes an abuse of discretion, mandating a reversal of the judgment and sentence of the Trial Court, remanding the cause for a new trial as well as representation of the Appellant by court-appointed counsel. *Beaton v. State,* 709 So.2d 172 (Fla. 4th DCA 1998).

ARGUMENT

II.

THE APPELLANT CANNOT BE DEEMED TO HAVE KNOWINGLY AND INTELLIGENTLY WAIVED THE RIGHT TO COUNSEL AT TRIAL WHEN THE TRIAL COURT FAILED TO PRESENT

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THE ENTIRE PROCESS OF OFFERING COUNSEL AND MAKING A THROUGH INQUIRY OF APPELLANT'S ABILITY TO MAKE A KNOWING AND INTELLIGENT WAIVER OF ASSISTANCE OF COUNSEL PRIOR TO THE COMMENCEMENT OF TRIAL, CONTRARY TO RULES 3.111 (d) (2), (5), *FLA. R. CRIM. P.*

A defendant's waiver of the right to counsel applies only to the stage of the proceedings during which the waiver is made. *Traylor v. State*, 596 So.2d 957, 968 (Fla. 1992).

A defendant shall not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a through inquiry has been made into both the accused's comprehension of that offer and the accused's capacity to make a

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knowing and intelligent waiver. Before determining whether the waiver is knowing and intelligent, the court shall advise the defendant of the disadvantages and dangers of self-representation. Rule 3.111 (d) (2), *Fla. R. Crim. P.*

Under Florida law, a defendant, although competent to stand trial, lacks capacity to stand trial without benefit of counsel, where he had be committed twice to mental institutions, where he had no prior experience in dealing with criminal proceedings, and where he had limited work experience. *Reilly v. State Dept. of Corrections*, 847 F. Supp. 951 (M.D. Fla. 1994).

On February 18, 1998, the trial court conducted pre-trial hearings on the State's withdrawal of its *William's Rule* motion and ordered Appellant to furnish his witness list within 48 hours (R 11).

On February 20, 1998, Appellant was present in open court while the trial court heard pending motions of the co-defendant (R 13).

On February 27, 1998, the trial court heard and reserved ruling on the Appellant's Motion to Continue (R 14).

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On March 2, 1998, the trial court granted a motion to take deposition (R 15).

On March 4, 1998, the trial court granted defendant's motions for deposition and for continuance, and denied the State's motion for continuance. The case was passed until March 11, 1998 (R 16, 17).

The non-jury trial began March 11, 1998 (R 18, T 3).

The waiver of counsel applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented. *Traylor v. State, supra,* 968.

The commencement of trial is a critical stage of the proceeding. *Enrique v. State,* 408 So.2d 635 (Fla. 3rd DCA 1981).

Where the trial court fails to renew the process of offering the assistance of counsel at the beginning of trial, the appellate court is compelled to reverse the judgment of conviction and remand for a new trial. *Sproule v. State,* 719 So.2d 349 (Fla. 4th DCA 1998).

Appellee's argument that the Trial Court's finding of Appellant's waiver of counsel was knowing, intelligent and voluntary is entitled to great deference (EB 38) must be tempered with the Record reflecting

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Appellant repeatedly wanted competent counsel and not counsel who were neglecting and/or ignoring his case.

ARGUMENT

III.

SECTION 921.141(5)(b) FLORIDA STATUTES, IS UNCONSTITUTIONAL ON ITS FACE AND WAS APPLIED IN A VAGUE, OVERBROAD, ARBITRARY AND INCONSISTENT MANNER AS AN AGGRAVATING FACTOR IN SUPPORT OF THE TRIAL COURT'S IMPOSITION OF THE DEATH PENALTY, WHEN THE CRIMINAL ACTIVITY CITED AS AN AGGRAVATING CIRCUMSTANCE OCCURRED AFTER THE MURDER IN THE CASE AT BAR.

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Appellee's reliance on Elledge v. State, 346 So.2d 998 (Fla. 1977) disregards this Honorable Court's subsequent ruling in Pardo v. State, 563 So.2d 77 (Fla. 1990), which holds only the criminal activity, not the convictions for that activity, must occur prior to the murder for which the defendant is being sentenced to be considered an aggravating factor warranting the death penalty. *Pardo v. State,* 563 So.2d 77 (Fla. 1990). See also *Perry v. State*, 522 So.2d 817 (Fla. 1988).

In its Sentencing Order, the Trial Court found the Appellant had a prior capital felony conviction, as contained in Sections 921.141(5)(b), *Florida Statutes,* and relied upon same as an aggravating circumstance in support of the sentence of death imposed upon Appellant (T 579-583).

The word "prior" gives rise to the inference that the penalty will be greater for the offense if it committed subsequent to a previous offense. Otherwise, an enhanced penalty would constitute an unacceptable ex post facto punishment.

When ambiguities exist in sentencing guidelines, the rule of equity dictates that the ambiguity be resolved in favor of the defendant. *U.S. v. Pharis*, 176 F. 3d 434 (C.A. 8 Mo. 1999).

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The vague and overbroad application of the definition of "prior" conviction as applied in the case at bar does not relate to the purpose of it as an aggravating factor, to wit: to punish more severely those who have committed violent crimes in the past. Penalty statutes must be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion. *California v. Brown,* 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987).

The sentence of death imposed upon Appellant should be vacated, and this case remanded to the Trial Court.

CONCLUSION

For the reasons contained herein, Appellant requests this Honorable Court to vacate and set aside the Judgments and Sentences imposed on Appellant herein, and to remand this cause to the Trial Court, with Appellant afforded the opportunity to have effective counsel appointed on his behalf, or in the alternative solely to correct the matters contained in Point III above, and as a request of last resort, to have the sentence of death vacated in Count One of the Indictment and set aside and to remand this cause to the Trial Court to impose a sentence of life

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imprisonment as to Count One to run concurrently with the sentence imposed in Count Two of the Indictment, and for any and other such relief as this Honorable Court deems reasonable, necessary and appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was furnished by First Class U.S. Mail to Scott A. Browne, Assistant Attorney General, Westwood Center, Suite 700, 2002 North Lois Avenue, Tampa, Florida 33607 [Telephone 813/873-4739] this 30th day of November, 1999.

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