IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2535

ROBERT DEWEY GLOCK, II

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PASCO COUNTY

REPLY BRIEF OF APPELLANT

EMERGENCY MOTION, CAPITAL CASE DEATH WARRANT SIGNED, EXECUTION SET FOR JANUARY 11, 2001 AT 6 P.M.

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PRELIMINARY STATEMENT

This appeal is from the December 18, 2000 summary denial of Mr. Glock's Emergency Motion for Post-Conviction Relief and for Stay of Execution by Circuit Court Judge Wayne Cobb, Sixth Judicial Circuit, Dade City, Pasco County, Florida, following a hearing held at 5 p.m. on December 7, 2000. Mr. Glock is scheduled to be executed at 6 p.m. on Thursday, January 11, 2001.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT IN REPLY

ARGUMENT I

THE TRIAL COURT ERRED IN FAILING TO WRITE ITS OWN ORDER AND SUMMARILY DENYING RELIEF.

The State argues in its Answer Brief that if Mr. Glock did not like the State's proposed order, "he certainly did not offer any such alternative." Answer Brief at 22. In fact, Mr. Glock did. He filed objections to the State's Proposed Order and urged the judge to use its own judgment in drafting its own order instead of relying on the State's improper order. In its objections, Mr. Glock pointed out that the State's proposed order failed to reflect the Court's rulings and the State interjected its own reasons for denying Mr. Glock relief -- not reasons that the judge found at the December 7, 2000 hearing.

Mr. Glock pointed out that the judge said simply that Mr. Glock failed to demonstrate any basis for believing that the stop in New Jersey was based on unlawful or unconstitutional profiling. The State's proposed order, however, expounded for three pages and listed in great detail why it believed the stop was legal. The State relied on portions of the record on appeal that the trial court never addressed or even mentioned in his oral ruling from the bench. None of this detail was

mentioned or alluded to by the judge at the December 7,2000 hearing. This fact was ignored by the judge when he adopted the State's order as his own.

The State argues that the judge "deleted certain portions of the proposed order submitted by the State, presumably, in part, to satisfy concerns urged in Mr. Glock's objections." (Answer Brief at 21). The State failed to mention that the judge

deleted a total of 11 words and one sentence from the State's seven page proposed order. Those words were "even frivolous" "more than the time provided in many other cases" and one sentence that said it was only a matter of time until Glock and Puiatti would have been arrested by some other officer.

The judge made no effort to substantially change the State's proposed order, even after Mr. Glock lodged his objections. The Court's deletions of 11 words and one sentence were not even omitted from the order. Instead, the judge drew a line through the 11 words and one sentence by hand. Mr. Glock's objections were completely ignored.

The State erroneously cited Diaz v. Dugger, 719 So. 2d 865 (Fla. 1998) to support its position. But Diaz involved ex parte communication when the court asked the State to submit a proposed order. Id. at 867. A proposed order was submitted

but the defense failed to object. The facts of Diaz do not involve a judge abdicating its responsibility and acting biased and partial. The cases of Maharaj v. State; 2000 WL 1752209 (Fla. November 20, 2000) and Card v. State, 652 So. 2d 344 (Fla. 1995) are precisely on point.

ARGUMENT II

THE NEWLY-DISCOVERED EVIDENCE CLAIM

The State repeatedly insists that because Mr. Glock and Mr. Puiatti are white men, that the New Jersey officers involved in racial profiling could not apply (Answer Brief at 23). This statement shows the State's misunderstanding of the newly-discovered evidence established by Mr. Glock.

The newly-discovered evidence obtained by Mr. Glock showed that in August, 1983, while on the New Jersey Turnpike, state troopers were illegally targeting blacks, Hispanics, Jamaicans, Italians, young people, and those driving with out-of-state plates. In spite of the law, troopers relied on "hunches" in determining whether to stop a car. The trooper didn't care if the stop was illegal. All that mattered was whether illegal stops turned into "good arrests." While the race of the people played a role in the profiling, the State seems fixated on the idea that since Mr. Glock and Mr. Puiatti are white, this claim must fail. See, State v. Letts, 254 N.J. Super. 390, 603 A. 2d 562 (1992).

The race of those people illegally stopped and the race of those who stopped the cars was only one of many factors that Mr. Glock alleged in his Rule 3.850 motion that was ignored by the court and

the State in its Answer Brief. Mr. Glock pled sufficient facts to show that he fit the profile. Affidavits and photographs attest to what the men looked like in August, 1983 (Appendix at 13). Statements from ex-troopers and statistical evidence obtained from the New Jersey authorities on November 28, 2000 and pled in the Rule 3.850 motion show that Mr. Glock and Mr. Puiatti were a typical profile traffic stop. Yet despite the large volume of unrebutted evidence pled in the Rule 3.850 motion and the appendix, the State insists on arguing that because the men were white, no violation occurred.

This is an absurd position, as was the State's argument at the December 7, 2000 hearing where the State repeatedly argued that there could be no racial profiling when the arresting officer was black.

Had the State reviewed the records submitted by Mr. Glock, the State would have learned how black state troopers were as much a part of the drug profiling as white troopers. See appendix 3-4. Kenneth Wilson, a black trooper, testified to what he was taught and how to follow the profile policy. The notion that only white troopers can be racist and use a racist departmental policy is naive.

The State argues that this claim is procedurally barred because Mr. Glock failed to raise it at trial, on direct

appeal, in post-conviction or in federal habeas corpus. Answer Brief at 23.

This information only became available to the public on November 28, 2000. Mr. Glock could not have discovered this drug profiling information through due diligence because the State refused to disclose the documents. It wasn't for Mr. Glock's lack of trying.

At each opportunity, Mr. Glock sought information from the State, but at each opportunity, he was blocked by the State. On October 14, 1983, counsel for Mr. Glock demanded discovery from the state. This drug profiling information was not released at that time. On October 27, 1984, counsel for Mr. Glock moved for production of police reports. This drug profiling information was not released at that time. On November 8, 1983, counsel for Mr. Glock filed a motion for Brady material. This drug profiling information was not released at that time. Also on November 8, 1983, counsel for Mr. Glock filed a motion to disclose impeaching information. Again, this drug profiling information was not released at that time.[1] On November 23, 1983, counsel for Mr. Glock filed a motion to compel discovery. This drug profiling information

[1]These pre-trial motions are part of the record on appeal, Vol. 1, but are not paginated.

was not released at that time.

After trial and in post-conviction, in 1988, Mr. Glock again sought information from the State and New Jersey authorities under their "Right to Know" Act. Again, this drug profiling information was not released at that time.

The State's argument that Mr. Glock failed to assert this claim is inaccurate. Had the State provided these records, as requested since 1983, Mr. Glock could have raised the issue earlier. But the State only disclosed the records on November 28, 2000. See, Ventura v. State, 673 So.2d 479 (Fla. 1996). When the State's inaction in failing to disclose public records results in a capital post-conviction litigant's inability to fully plead claims for relief, the State is estopped from claiming that the post-conviction motion should be denied or dismissed. "The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act."

Defense counsel attempted to learn the truth from Trooper Moore during a January 19, 1984 pre-trial deposition, but again was thwarted by the State. The State prevented Trooper Moore from answering questions about the illegal stop, when clearly the defense was concerned about the legality of the

stop.

Defense counsel asked what was discussed on the way from the Tampa airport to Pasco County. Trooper Moore was asked if he read over any transcripts or typed statements. He was asked if he listened to any taped statements. He was specifically asked what he discussed with detectives Stahl and Wiggins. The State repeatedly objected, and said it was part of the State Attorney's investigation.

Defense counsel asked the following questions of Trooper Moore. None of the questions were answered because the State Attorney repeatedly objected. But it was clear from the tenor of the questions that there was serious concern about the legality of the stop. The defense was unable to prove their suspicions.

> Q: What did you discuss with Detective Stahl and Detective Wiggins about this?

(Deposition at 5).

> Q. When you discussed this case with Detective Stahl and Detective Wiggins, did you all discuss the procedures used in stopping the vehicle? And what basis you had in stopping the vehicle?

(Deposition at 6).

> Q: Did either Mr. Van Allen, or Mr. Stahl, or Mr. Wiggins, discuss with you in any way, the legality of the stop that you made in New Jersey of that particular vehicle?

(Deposition at 6).

> Q: Did either Mr. Van Allen, or Mr. Stahl or Mr. Wiggins, when you discussed this with them yesterday, express to you any concern about the legality of your stop?

(Deposition at 7).

> Q: Did either Mr. Stahl, Mr. Wiggins or Mr. Van Allen, yesterday in your conversation there with them, that lasted approximately one hour, which I believe occurred in the State Attorney's Office, did you discuss the statements that you received from Carl Puiatti or Mr. Glock?

(Deposition at p. 7-8).

In each instance, the assistant state attorney refused to allow Trooper Moore to answer the questions and certified them to the trial court. But the judge never addressed the certified questions and Trooper Moore was never compelled to answer them.

The State argued that the drug profiling information was available on April 20, 1999 and that Mr. Glock should have availed himself of that information "rather than waiting more than a year for an eleventh hour, last minute application to stave off imminent execution." Answer Brief at 25.

The April 1999 report fails to address the fact that racial profiling begin in the early to mid 1980s. That information only became available on November 28, 2000 when the New Jersey Office of the Attorney General released 91,000

pages of documents on the drug and racial profiling on the New Jersey Turnpike. Those 91,000 pages of documents showed that the DEA's own records showed that New Jersey Troopers began making drug seizures along Interstate 95 – the corridor from Florida to the Northeast. New Jersey Troopers established their own highway drug interdiction programs in the early to mid 1980s. Appendix 2. New Jersey Troopers also disclosed that they targeted physical characteristics of various ethnic groups never before targeted such as Italians. Before November 28, 2000, the New Jersey authorities refused to acknowledged that drug profiling occurred in 1983. Mr. Glock had no good faith basis to believe profiling occurred before 1988 because the New Jersey State Police hid the information. The New Jersey State Police still have not publicly admitted that profiling occurred before 1988, but the records released indicate otherwise.

With the release of the 91,000 pages of documents, Mr. Glock discovered that the New Jersey State Police actively hid as much information as possible, even from one of their own, the Department of Justice. See Appendix 8. It is obvious that if the Department of Justice could not get the information, they certainly would not disclose it to Mr. Glock or his defense attorney.

The State argues that because Mr. Glock already filed a motion to suppress, "he is not entitled now simply to attempt to relitigate any argument that the stop was improper," Answer Brief at 27-28. This information was never litigated. Mr. Glock has shown every reason why the information was not available. The State has failed to show how Mr. Glock was to have obtained this information.

Mr. Glock is entitled to have this newly-discovered evidence considered by the trial court and then weighed with the newly-discovered evidence and the evidence that was introduced at trial. Jones v. State, 691 So. 2d 911, 916 (1991). The lower court failed to weigh the evidence, despite the State's attempt to do it for the judge in its proposed order.

The State suggests that even if the stop was illegal, the subsequent confessions would be admissible because of sufficient intervening factors (Answer Brief at 29). The State, however, failed to specify what those intervening factors were. Mr. Glock and Mr. Puiatti were illegally stopped on the New Jersey Turnpike on August 20, 1983. They were arrested and taken to the Moorestown Police Station. Within hours, on August 21, 1983, two Pasco County Sheriff's deputies arrived in New Jersey, the two men were questioned

separately and each gave an oral and taped statement (R. 1830-32, 1836-1838). The two men were returned to Florida, but were never separated from the two Pasco County Sheriff deputies. On their return to Florida, on August 24, 1983, the two men provided written statements to law enforcement (R. 1844-1845, 1847), and then participated in a joint oral statement (R. 1853). The men were never out of state custody. The Pasco County deputies were in constant contact with Mr. Glock.

There were no intervening factors, nor has the State indicated what any of those factors were. In Voorhees v. State, 699 So. 2d 602 (Fla. 1997), cited by the State to support its argument, does not apply here. Mr. Voorhees was illegally detained, but when the detention became legal, he made incriminating statements. Those facts do not exist here. From the moment he was stopped, Mr. Glock was illegally detained. Unlike Voorhees, Mr. Glock's confessions were given to Pasco County Sheriff's dDeputies, not out-of-state officers from other agencies. Unlike Voorhees, Mr. Glock's detention never became legal. Unlike Voorhees, Mr. Glock's awareness of the murder investigation was not an intervening factor. Unlike Voorhees, no span of time was an intervening factor. The State's argument fails on all levels and must be rejected.

ARGUMENT III

THE CLEMENCY CLAIM

The State has completely mischaracterized Mr. Glock's clemency argument. The purpose of Mr. Glock's submitting the information contained in the Appendix is to show that the governor failed to consider the evidence that could have granted Mr. Glock clemency had Mr. Glock not been arbitrarily denied access to the clemency process.

The State erroneously argues that Mr. Glock is attempting to have this court "reconsider" information that is has already considered (Answer Brief at 39-40), but that is untrue. This court has never considered the merits of Mr. Glock's mitigation case. This court has never seen the excerpts of the federal evidentiary hearing. The State argues that this court addressed Mr. Glock's mitigation when considering his first Rule 3.850 Motion. This is wrong.

The State is confused as to when information was presented on Mr. Glock's behalf. Neither the 1988 nor the current clemency board ever considered Mr. Glock's background history. The State argued was that "...as soon as the first warrant was signed Glock was able to present as an Appendix to his initial motion for post-conviction relief multiple affidavits of family members, friends and others to support an

assertion that a hearing was required on the claim of ineffective assistance of counsel at the sentencing phase" (Answer Brief at 35).

The State misses the point. At no time did the clemency board ever consider the mitigation evidence that was developed in post-conviction. All of Mr. Glock's background and history was developed in post-conviction. None of it was available at the time of Mr. Glock's first clemency hearing. Mitigation was only developed on Mr. Glock's case in November, 1988, as a result of the warrant being signed. That was **after** the clemency board had already made its decision to deny Mr. Glock clemency.

On October 28, 1986, Mr. Glock's direct appeal was denied by this Court. Before any Rule 3.850 motion was filed, Mr. Glock underwent clemency proceeding. The clemency board heard extensively from State Attorney Bernie McCabe, who knew nothing of Mr. Glock's background and history, said that Mr. Glock had no "psychological base mitigation," and that Mr. Glock's "family problems do not provide any justification for this type of conduct."

Mr. Glock's clemency counsel at the time, Mr. Dayton, was as ignorant about Mr. Glock's background and history as was the prosecutor McCabe, who sought his execution. Mr. Dayton

told the clemency board that:

> Mr. Glock is a small person whose traumatic childhood seems to have retarded his emotional development. Having failed to find steady employment and having found Carl Puiatti, a man head and shoulders taller than Glock, and a man who seems to have taken an almost paternal interest in Glock's progess in crime.

States Exhibit 1.

No other information was presented to the clemency board. Clemency was denied on October 28, 1988 when Governor Martinez signed a death warrant against Mr. Glock.

Little has changed since 1988. The clemency board of 1988 heard none of the mitigating information about Mr. Glock. The clemency board of 2000 refused to consider mitigation about Mr. Glock despite the fact that the information was a matter of record and the governor had instigated the second clemency investigation.

Like the biased clemency hearing from 1988, Governor Bush similarly and arbitrarily determined that "Executive Clemency...is not appropriate." See, November 14, 2000 warrant. Neither the governor nor any members of the clemency process considered any of the available information on Mr. Glock. As stated in Ohio Adult Parole Authority, et al. v. Woodard, 118 S. Ct. 1244 (1998), the courts are the appropriate avenue to bring forward a due process violation

regarding clemency proceedings. Mr. Glock's clemency proceedings were afflicted with due process violations that resulted in arbitrary determination.

In this case, as in Woodward, "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." Id. Such is Mr. Glock's case.

The State never address the triggering language of the governor's New Rules of Executive Clemency. Nor does the State deal with the documented fact that Governor Bush requested a second clemency investigation, not Mr. Glock. This distinction makes Mr. Glock's case different from Provenzano v. State, 739 So. 2d 1150 (Fla. 1999) and Bundy v. State, 497 So. 2d 1209 (Fla. 1986) because the governor triggered the due process requirements under his own rules and under federal law in Woodard, supra.

The State also suggests that Mr. Glock's counsel should have "updated his (clemency) application" on a regular basis. State Answer Brief at 42. The State fails to explain how Mr. Glock was to update and supplement his file. His original clemency attorney's representation terminated when Mr. Glock's

clemency was denied. His collateral counsel, Capital Collateral Counsel (CCR), was prohibited by statute from participating in any clemency proceeding. Unless a perpetual clemency attorney is appointed, no one would be in a position to update this information. This new update suggestion by the State is the first time any new duty has been imposed on Mr. Glock to repeatedly submit clemency material to the govenror when he is litigating claims in court and is not under warrant. The State never addressed the fact that while Mr. Glock was litigating his case in federal court, he expected to get relief on his claims, thereby obviating any need for a clemency proceeding. These new arguments, while novel, do not relieve the governor of his obligation to provide due process and give Mr. Glock clemency counsel to represent his interests. Mr. Glock is entitled to a new clemency proceeding.

ARGUMENT IV

THE PUBLIC RECORDS CLAIM

The substance of the State's argument is that Mr. Glock should have requested more public records before Fla. R. Crim. P. 3.852 changed in 1998 and precluded such requests. The State argues that Mr. Glock's "eleventh hour" exercise of his right to public records should not warrant a stay (Answer

Brief at 45-19). Both positions are wrong.

Mr. Glock argued that if this Court created a rule governing public records, then a death-sentenced defendant should have the right to exercise this rights and have a meaningful ability to review the documents. Giving a right to request documents under Rule 3.852 then not allowing sufficient time to make meaningful use of the documents is the same as not having the right at all. It is an equal protection violation under the Eighth and Fourteenth Amendments to the United States Constitution not to give adequate time to exercise a right. See e.g., Bush v. Gore, 2000 WL 1811418, 23 (U.S. Dec. 12, 2000). Regardless of the objections the state agencies had to public records, most attempted to comply. Therefore, any objection they had about last minute requests is waived. The State's argument that the agencies did not have to comply and simply could have objected is irrelevant. An agency is entitled either to object or comply. If it complies, the objection is waived.

The remainder of the State's arguments are answered sufficiently in Mr. Glock's Initial Brief. Due to the time constraints of the warrant briefing schedule, Mr. Glock relies on that pleading for the remainder of his argument.

CONCLUSION

Mr. Glock has been denied due process of law and his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding Florida law. This s Court should stay Mr. Glock's impending execution and remand this case to the lower court for an evidentiary hearing providing Mr. Glock the opportunity to vindicate his constitutional rights or grant any other relief this Honorable Court deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by U.S. mail, postage prepaid to Robert Landry, Assistant Attorney General, 2002 N. Lois Avenue, Suite 700, Tampa, 33607 this 21st day of December,

2000.

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