IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-345
Lower Tribunal:

ERNEST CHARLES DOWNS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, STATE OF FLORIDA

APPELLANT'S REPLY BRIEF

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STATEMENT WITH CLARIFICATION OF SPECIAL TRAVERSED FACTS

1. The State mis cites the record on how the law applies to this particular case. Defendant's Answer Brief (referred to as "AB").

2. Downs' Initial Brief, (referred to as "IB"), began with an explanation that he could be heard and his claims addressed because his conviction was not mandated as required by law, and the Court was prayed to take ***Judicial Notice*** of this fact. (IB "i" with an asterisk. See also Summary of the Arguments on p. 4, n.14 on p.33, n.3 on p.53 and p.66).

3. Downs further explained that no writ of certiorari was taken from this Court's denial of his direct appeal. That the "*cert.denied*" with Downs v. State, 386 So.2d 788 (1980), is a *latent defect* because of Downs v. Florida, 449 U.S. 976 (1980) was an *interlocutory* action stemming from this Court's denial of Downs' motions to dismiss attorney Brown from his direct appeal. (IB n.14/p.33-34). For clarification of the "*cert.denied*", see APPENDIX; Attachment A with Documents 1-13. [1]

[1] Downs v. State, (1980), *supra*, was opinioned in May 1980, and its rehearing denied in September 1980. Downs' interlocutory action was initiated in January 1980, (Appendix Document 1), and the subsequent question to the Supreme Court was if this Court's denial of Downs' motions to dismiss Crown because of his egregious representation at trial and then during appeal, violated Downs' rights. (Appendix Documents 4, 7, 9, 11, 13, and IB Arguments I&II).

4. The State does not dispute that this Court's judgment against Downs on direct appeal was not mandated. Neither does the State oppose Downs' prayer for

the Court to take ***Judicial Notice*** of no mandate. Instead, the State says in it's Statement of the Case and Facts:

> **On May 22, 1980, this Court rejected each of Downs' claims and affirmed his conviction and sentence to death. Downs' motion for rehearing was denied on September 12, 1980. Downs v. State, 386 So.2d 788 (Fla.1980).**
>
> **Downs filed a petition for writ of certiorari. The United States Supreme Court denied review on November 3, 1980, and denied a petition for rehearing on January 19, 1981. Downs v. Florida, 449 U.S. 976 (1980).**

(AB, p.4). And further in its brief the State argues:

> **…Downs claims that because this Court did not issue mandate in 1980 when it affirmed his conviction and original sentence to death, his conviction and sentence have never become final. [ ].**
>
> **Downs is mistaken when he claims his conviction and sentence have never become final. For purposes of Rule 3.850 or Rule 3.851, Downs' conviction became final when the United States Supreme Court denied certiorari review on November 3, 1980, and denied certiorari for rehearing on January 19, 1981. Downs v. Florida, 449 U.S. 976 (1980). Even accepting the latter date as the date of "finality," Downs' conviction became final on January 19, 1981.**

(AB p.35. See also pp.27, 31). [2]

[2] The State's reference and reliance on Rule 3.851 (b)(1)(B), on pp.27, 35 & nn.7, 11, in connection to Downs v. State, (Fla.1980) *supra*, is clearly misplaced since Rule 3.851 did not exist in 1980.

5. The State's foregoing response, *ante* ¶4, is not only misleading and does not address Downs' contention that he can be heard now, *ante* ¶2, it ignores that *"[u]nder Florida law, a judgment against a criminal defendant does not become*

final until the issuance of a mandate on his direct appeal." Tinker v. Moore, 255 F.3d 1331, 1333 (11th Cir.2001); Dixon v. State, 730 So.2d 265, 267 n.3 (Fla.1999), (a criminal conviction for a Florida prisoner becomes final upon issuance of the mandate on direct appeal). And that "*a judgment and sentence become final for purposes of filing a motion for post-conviction relief when appellate proceedings have concluded, i.e., upon issuance of the mandate*." Jones v. State, 602 So.2d 606, 607-08 (Fla.Dist.Ct.App.1992); Huff v. State, 569 So.2d 1247 (Fla.1990), ("*Until this Court issues its mandate, the trial court has no jurisdiction to consider a motion to vacate filed pursuant to Rule 3.850*"). Thus, this Court makes clear that without a mandate, a ruling on the merits of a post-conviction motion rendered by the trial court is a *nullity*, and, consequently, a decision by the appellate court that affirms or reverses the trial court's ruling is also a *nullity*. Daniels v. State, 712 So.2d 765 (Fla.1998), accord Tompkins v. State, 894 So.2d 857, 859-60 (Fla.2005).

6. Therefore, *ex lege* holds that since Downs' conviction was not mandated in 1980, the trial court's denial of collateral challenges to his conviction are *void ab initio*, as are this Court's affirmance of the denial. Clearly, there exists judicial reasoning that this Court can address the claims in Downs' present appeal, see Hart v. State, 5 So.2d 866, 867 (Fla.1942).

ISSUE 1: The Trial Judge, In Mid Deliberation, Amended The Indictment And Altered The Verdict Form.

The State claims that Downs offers no logical explanation why this issue can be heard now, when it could have been raised on his initial direct appeal. (AB 20-21). [3]

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[3] Downs has explained that this issue was not raised initially due to Brown's egregious representation at trial and on appeal, (IB 8/n.6, p.13), and can be heard now because of no mandate, *ante* ¶ ¶ 2, 6 (IB "i"), and even addressed *ex mero motu*. (IB 12/n.9).

The State recognizes that the "*Charge of the Court*" included that since Downs was "*charged*" with a firearm charge, the verdict had to reflect if it had been proven that he "*did use a firearm*" (AB 21-22). The State also recognizes the Court explained that the essential elements needed before Downs could be convicted of murder were: "*The death was caused by* [Downs'] *act*" and "*by the means stated in the indictment*" (*i.e.* Downs shot and killed Harris). (AB 21). The State also recognizes that in mid deliberation the jury asked:

> **"In regard to the question as to whether the defendant did or did not use a firearm, must the defendant be guilty of actually pulling the trigger or is he guilty of using the firearm through association of being an accomplice in a murder in which a firearm is used."**

(AB 22-23) After questioning by the judge, the jury said the question related to the firearm Instruction at TT 814 (TT 833-34). The Court suspected its questioning "*must have confused*" the jury, (TT 833), but instead of inquiring as to any confusion, the jury was instructed to "[*j]ust totally disregard… from [their] consideration at this point*" whether or not Downs used a firearm, and ordered it "*delete[d]*" from the verdict form. (TT 836). [4]

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[4] The State does not oppose Downs' prayer for the Court to take *Judicial Notice* of the question asked by the jury. (IB 12). Nor does it oppose the Court in taking *Judicial Notice* of the fact that the "*firearms charge*" was ordered "*delete[d]*" from the verdict form. (IB 59/n.1).

The State contends the order to "*delete*" from the verdict form the use of a firearm entries was no violation because it "*was superfluous to the crime of [ ] murder*" (AB 18), since the "*shooting [Harris] to death*" and "*carried a firearm*" as charged in the indictment (IB Ex.1), was neither an "*element*" or a "f*irearms charge*" (AB 22), but was "*surplusage*" language that the order to "*delete*" simply did away with. (AB 24-25). The States contention is illogical since 1.) "*carried* (and used) *a firearm*" was an enumerated offense charged in the indictment, 2.) given the "*essential elements*" needed to convict that were explained in the court's initial charge and, 3.) the verdict form lacked "*murder as charged*". (See IB pp.5/n.1, 7/n.3, 8/nn.4&5, 9/n.7, 11, 12/n.8).

The State acknowledges Downs' claim of a *structural error*, *i.e.* the order to "*delete*", but ignores the claim that the supplemental instruction to "*[j]ust totally disregard… from* [their] *consideration*" whether or not Downs used a firearm as charged, was a *fundamental error* that amended the indictment. (IB 9-12). The State does not argue that Downs could have been convicted through constructive possession of a firearm. Instead, the State claims that in finding Downs "*guilty as charged, the jury concluded beyond a reasonable doubt that Downs murdered Mr. Harris by shooting him with a pistol*" (AB 25). The State recognizes that to be the triggerman required having actually used a firearm, but its reasoning that the jury "*concluded beyond a reasonable doubt*" that it was Downs who killed Harris, is not only illogical given the juries question, it mistakenly represents that the verdict had "*murder as charged*". [5]

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[5] The State's illogical reasoning as to what the jury "*concluded*" does validate Downs' claim that the judge's error in giving the principal instruction was a "*fatal variance*" that amended the indictment, given Browns' opening statement. (IB 6/n.2). it is recognized that juries will resist a principal's charge when, as in Downs' case, the prosecution does not discuss it during the trial; claiming only that Downs shot Harris. Garzon v. State, 939 So.2d 278, 288 (4th DCA 2006).

The State says it is "logical to conclude" the judge did not take back the verdict form to protect from disclosure any decisions already marked on it. (AB 23/n.5). Downs submits that since additional jury deliberation took only two

minutes, and several jurors came back "*weeping*," it is just as "*logical to conclude*" that the jury had already found Downs guilty of conspiracy, then, but for the unconstitutional handling of their question, would have reasoned that since Downs had not used a firearm as charged in the indictment, he was not guilty of murder. (IB 8/n.5, pp.9-12/n.8).

The unconstitutional handling of the jury's question prevented the jury from considering evidence it clearly wanted to consider, *i.e.* that Downs did not use or carry a firearm as charged in the indictment, which would have excused or mitigated his culpability. "*Florida courts have found fundamental error where the trial court incorrectly instructed the jury on an element [ ] in dispute*." Reed v. State, 837 So.2d 366, 369-70 Fla.2005). This is a case where "*a conviction should not rest on ambiguous and equivocal instruction [ ] on a basic issue.*" Bollenback v. United States, 66 S.Ct.402, 405 (1946).

As for the State's argument that the "*invited-error doctrine*" bars this claim because Brown agreed to it is without merit. (AB 18, 25). This argument fails because the claim *sub judice* constitutes a *plain fundamental error* and a *clear structural error*. Therefore, any agreement on Brown's part was *per se* ineffectiveness. (IB 8/n.6). Any agreement on Brown's part was not a reasonable, strategic or tactical decision given Brown's opening statement and furthermore

was deficient performance that weakened Downs' case. (IB 6/n.2). (See IB pp.19/n.3, 20/n.4, 26/n.6, 27/n.7, 39/n.18, 47/n.23).

ISSUE 2: Downs Was Denied Effective Assistance Of Trial (And Appellate) Counsel

The State does not argue Downs' claims of Browns' ineffectiveness are without merit, only that they should be denied because "Downs provides no explanation why he brings these claims to this Court now, having failed to raise them below." (AB 26).

Downs explained why this **IAC** claim was not raised below. (IB 56/n.4). Therefore, Downs should not be procedurally defaulted for the trial courts failure to address a timely motion for limited discovery, see *infra* **Issue 3**. State v. Grandstaff, 927 So.2d 1035, 1033 (Fla.App.4 Dist.2006). Clearly, the lower court lacked the jurisdiction to consider Downs' **IAC** claim. See *ante*, Statement with Clarification, pp.1-3.

The *crux* of Downs' **IAC** claim against Brown is *inter alia*, that after a dramatic opening statement, (IB 18, 20/n.4), Haimowitz (IB 19, 28, 29/n.9), pressured Brown to abandon Downs' sound defense, which included not letting Downs testify, (IB 25, 26/n.6, 27/n.7, 38), because it would have implicated

Haimowitz in the crime. (IB 22, 47/n.23). This claim also included an incident involving women in a hotel room. (IB 33). Brown not only concealed, but lied about being pressured and the women incident until Downs' resentencing in 1989. (IB 34, 35, 43).

In 1980, because of Downs' repeated efforts to dismiss Brown, (IB 45), from his direct appeal before it was denied, this Court *sua sponte* appointed counsel to look into Downs' claims of deficient performance on Brown's part, and file a petition for rehearing. *Ad hoc* counsel told this Court that Downs "*did not testify at trial or call any witnesses*" because "*the interest of some third party may have interfered with* [Brown's] *ability at trial [ ] to be the devoted advocate that was required… that perhaps Brown's ability at trial was not as effective as might at first glance appear.*" (IB 33/n.14, pp.43, 45).

The factual basis for this claim, though suspected by counsel *ad hoc* in 1980, (IB 33/n.14), was outside of the record until Brown admitted to it in 1989. (IB 43). In reviewing this claim, the Court can consider the trial record as well as the evidence that was produced at evidentiary hearings because Downs' conviction was not mandated.

An analysis of Brown's performance reveals that his *strategic* and *tactical* choices were so egregious that they weaken Downs' case. (IB 19/n.3, 27/n.7).

Therefore, this is a case where it can correctly be presumed that Downs was without counsel during critical stages of the proceeding. *E.g.*, the abandoning of Downs' defense and not subjecting the State's case to adversarial testing. This error alone warrants relief. But when viewed in conjunction with the numerous other instances of **IAC**, the cumulative effect of one impropriety after another (IB "iv", IAC claims a-k), was so overwhelming as to deprive Downs a fair trial. (IB 48/n.24).

ISSUE 3: The State Withheld Exculpatory Evidence, Used False Testimony, Struck A Brady Witness From Disclosure And Impeded Additional Discovery

The State argues that the Brady and Giglio claim cannot be heard because they were not in Downs' second successive motion for collateral relief. (AB 30). Moreover, Brady claim was addressed and denied in his initial motion for post-conviction relief, so it is barred by the law of the case doctrine. (AB 32).

Downs has explained that since his conviction was not mandated, any lower court decisions are a *nullity*. Therefore, the law of the case doctrine should not be invoked where it would defeat the ends of justice, especially when a prior ruling would result in a *manifest injustice*. State v. McBride, 848 So.2d 287, 291 (Fla.2003). Compare Downs v. State, 386 So.2d 788, 796 (Fla.1980), (*The record*

establishes that Johnson and Downs were not equally situated and reveals that Downs shot the victim), to Downs v. Dugger, 514 So.2d 1069, 1072 (Fla.1987), (*Johnson may have been of equal or greater guilt*).

The State argues that Downs "*implies*" that the name the State withheld was Haimowitz, (AB 33), when a clear reading of pages 54 and 55 in the initial brief shows that one name was omitted from Ms. Harris' deposition, and the State impeded discovery of the other name, and that neither was Haimowitz. (IB 54, 55).

ISSUE 4: Since Downs Was Not Convicted Of The Firearm Charge Of Which He Stood Accused, His Death Sentence Is Disproportionate [6]

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[6] This Court, in ordering a resentencing, recognized that at trial "*Downs stood accused*" of a firearms charge. Downs v. Dugger, 514 So.2d 1069, 1072 (Fla.1987)(IB 5/n.1). The State did not oppose Downs asking this Court to "take ***Judicial Notice*** of the fact that that charge was ordered '*delete[d]*' from the verdict form," *ante* n.4. (IB 59/n.1).

The State also argues this claim cannot be heard because following Downs resentencing this Court opinioned in Downs v. State, 572 So.2d 895 (Fla.1990), that since the trial court had concluded "*Downs was the triggerman*", his death sentence was proportionate. The State also argues that Downs offers no

explanation why he should be allowed to relitigate this claim anew. (AB 19, 33, 34). [7]

[7] Downs has explained he can be heard since his conviction was not mandated (IB "i", p.4), and because the altercation of the verdict form, *i.e.* order to "*delete*" whether or not Downs used a firearm was a *structural error*, (IB 8, 11, 12), that his resentencing did not correct. (IB 58-62).

The State's reliance on Downs v. State, (Fla.1990), *supra*, for assurance that Downs' sentence is just, actually reveals how the unconstitutional handling of the jury's question at trial has haunted Downs and thwarted justice for thirty years. For the opinion included that since the trial court's sentencing order failed to address any mitigation, which is "*absolutely essential to ensure meaningful appellate review in capital cases*", Woodel v. State, 804 So.2d 316, 326 (Fla.2001), this Court, contrary to its own long standing holding that "*the culling process must be done by the trial court*", Mikena v. State, 367 So.2d 606, 610 (Fla.1979), culled the record itself, (IB 62), and "*acknowledge[d] that Downs did present valid mitigating evidence*." Id. at 899. The opinion also noted that the trial court's refusal to let Downs present certain evidence was an error since it was "*valid mitigating evidence, which Downs was constitutionally entitled to present.*" But found the errors harmless because of the trial courts erroneous conclusion that "*Downs was the triggerman*." Id. at 901 n.6. (IB 60/n.2).

Downs submits but for the unconstitutional handling of the jury's question, (IB 7/n.3), and the judge's invasion of the jury's province and erroneously finding for a "*fact*" that he used the firearm and killed Harris, (IB 9/n.7), Downs would have been "*effectively acquitted*" of possession and use of a firearm. (IB 8/n.4). Therefore, State could not have made the erroneous and improper assurance before sentencing that Johnson passed a polygraph test. (IB 52/n.2, p.58). Moreover, if found guilty of murder, Downs most certainly would not have been sentenced to death. (IB 12/n.8). Instead, at the resentencing the jury was told that since Downs had been found "*guilty as charged*", he "*squeezed the trigger*" and could not get the benefit of any mitigating circumstances whatsoever. (IB 61). Therefore, the judge would not take notice of the original jury's question, and refusing to "*accept*" that Downs was not the triggerman, found no mitigation whatsoever. (IB 62). This culpability/disproportionality claim needs to be addressed in conjunction with the rest of Downs' claims, because as noted by Downs, one Strickland principle is particularly pertinent to this claim, and that is there is a reasonable probability that absent Brown's deficient performance and the judge's errors, "*the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death*." (IB 63/n.6). Instead, the invalidated sentencing factor that Downs used a firearm, added an improper

element to the aggravation scale that "skewed" the weighing process and rendered his death sentence unconstitutional, cf. Brown v. Sanders, 126 S.Ct. 884, 896 (2006).

ISSUE 5: Under Ring v. Arizona, Downs' Conviction And Sentence Are Both Unconstitutional

The State argues Ring has no retroactive application to Downs' conviction or death sentence because even though his conviction was not mandated, the Supreme Court's denial of certiorari in 1980 finalized the conviction and his resentencing was mandated in 1991. Therefore, a violent felony conviction bars Ring relief. (AB 35-36). Downs submits that since the issue "*encompasses*" conviction and sentence, (IB 64-66), it can be heard because his conviction was not mandated, *ante*.

The State says *"[e]ven if Downs were correct in his assertion the jury did not find [he] used a firearm to murder Mr. Harris, use of a firearm was not, [ ], considered as a statutory aggravator*." (AB 34/n.10). This begs the question since it was an "essential element" that needed to be proven for conviction, (IB 6, AB 21). Weighing on Ring holds that any fact that renders a person eligible for a death sentence is an element of the offense.

If a judge increases the punishment to death on a finding of "the fact", that fact must be found by the jury beyond a reasonable doubt. Clearly, there was no finding of a fact and, therefore, the Downs' conviction and sentence violate Ring's holding.

CONCLUSION

In conclusion, since the trial judge, in mid-deliberation, amended the indictment, altered the verdict form, and the juror never found Downs' used the firearm, when considered with egregious denial of effective assistance of counsel and Brady violations, Downs' conviction, which was not mandated in 1980 as required by law, requires the conviction and death sentence be reversed.

_____

JEFFERSON W. MORROW, ESQ.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief with Appendix was generated in 14 point Times New Roman, and has been furnished by U.S. Mail to Meredith Charbula, Esquire, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050, and Ernest "Wizard" Downs, DOC# 063143, Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida, this _____ day of February, 2007.

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