IN THE SUPREME COURT OF FLORIDA

No. 71,678

EDWARD D. KENNEDY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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ARGUMENT I

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S 3.850 MOTION WITHOUT AN EVIDENTIARY HEARING.

The State gains little by relying on Harich v. State, 484 So. 2d 1239 (Fla. 1986) and Harich v. Dugger, No. 86-3167 (11th Cir., April 21, 1988), as justification for the trial court denying appellant relief without an evidentiary hearing. Harich v. State stands for the proposition that

> [u]nder rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion and record conclusively show that the movant is not entitled to relief (citations omitted).

Id. at 1240. Harich v. Dugger primarily involved a Caldwell [v. Mississippi, 472 U.S. 320 (1985)] issue which is usually one that can be resolved within the four corners of the trial transcript thereby rendering an evidentiary hearing superfluous. The point is, however, that the court must treat a petitioner's post conviction allegations "as true except to the extent that they are conclusively rebutted by the record." Harich v. State, supra at 1241. For the most part, the claims appellant raised in his post-conviction motion require extra record evidence for their resolution. Ineffective assistance of counsel is an example of just such a claim. See O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984). Moreover, none of appellant's several claims is pled in a way that the trial court could properly rule

that the record "conclusively" established that petitioner was entitled to "no relief." See Fla. R. Crim. P. 3.850. Cf. Harich v. State, supra.

ARGUMENT II

PETITIONER'S CONVICTION VIOLATES THE FOURTEENTH AMENDMENT BECAUSE HE WAS INDICTED BY A GRAND JURY PRESIDED OVER BY A FOREMAN SELECTED VIA A SYSTEM WHICH HISTORICALLY, AND IN THIS CASE, CHOSE FOREPERSONS IN A RACIALLY DISCRIMINATORY MANNER.

The State relies entirely on Kight v. State, 512 So. 2d 922 (Fla. 1987), as reason for the trial court having correctly denied this claim without an evidentiary hearing. The sole reference in Kight to this issue is found in a footnote reference where the Court merely stated that the motion to dismiss based upon discrimination in the selection of grand jury forepersons was without merit Id., 924-25 n.1. Appellant's claim, supported by pertinent appendices, was more than adequate to entitle him to a hearing. It cannot be said that the record conclusively rebutted this "claim". Unconstitutional discrimination in the selection of grand jury forepersons is proscribed by the due process and equal protection clauses of the United States Constitution. The matter was not presented at trial or on direct appeal, nevertheless, such discrimination involves "fundamental error" thereby entitling appellant to relief. See Defendant's Brief, at 28-30.

ARGUMENT III

THE TRIAL COURT AND PROSECUTOR MISLED THE JURY BY INSTRUCTING THAT THEIR SENTENCING VERDICT CARRIED NO INDEPENDENT WEIGHT, DIMINISHING THE JURY'S AWESOME SENSE OF RESPONSIBILITY FOR THE SENTENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Florida's standard jury instruction is fatally flawed and will be vulnerable to Caldwell attacks until such time as it is revised to include a simple, but significant statement to the jury that their recommendation is entitled to great weight and that the trial court is required to follow it unless it is one upon which no reasonable person could have arrived. It is only in the context of such an instruction that the jury will not be misled into "believ[ing] that the responsibility for determining the appropriateness of the Defendant's death rests elsewhere." Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 2639 (1985).

The state's response (See State's Brief at 15) criticizes appellant for his reliance on Adams v. Wainwright, 804 F. 2d 1526 (11th Cir. 1986) modified, 816 F. 2d 1493 (11th Cir. 1987), cert granted, 56 U.S.L.W. 3608 (March 7, 1988) and Mann v. Dugger, No. 86-3182 (11th Cir. April 21, 1988) and his failure to cite Harich v. Dugger, supra. It is understandable, however, why he did not do so. The Harich court simply did not find that "the remarks made by the prosecutor and judge improperly diluted the jury's sense of responsibility for their sentencing decision..." or

"misled the jury as to the importance of its advisory role" (Slip op. at 19, 21). Contrary to what the state argues, the remarks in Harich (see slip op. at 20-21), were not the "same" as those made in the case sub judice. See and compare Defendant's Brief, at 38-47, State's Brief, at 15.

The state would have this Court rely on the facts in Harich to defeat Mr. Kennedy's claim, but have this Court ignore the fact that Harich, like Adams and Mann, stands for the proposition that Caldwell does indeed apply to Florida's capital sentencing scheme. Mr. Kennedy's case does contain the "affirmative misstatement or misconduct that misleads the jury as to its role in the sentencing process." Harich, slip op. at 16.

The law on such claims is stated in Harich in the same manner as in Mann: "A proper analysis of a Caldwell claim requires an evaluation of how a reasonable juror would have understood the court's statements in the context of the entire trial." Slip op. at 1 (Tjoflat, Kravitch, Hatchett, and Anderson, JJ., concurring.)

The issue for resolution then is whether the deluge of improper comments, in combination with one later correct statement, "would mislead or at least confuse the jury." Mann v. Dugger, supra. Certainly it cannot be said that a reasonable juror could not have been confused by what the judge said and did in this case.

ARGUMENT IV

THE PROSECUTOR'S CLOSING ARGUMENT IN THE GUILT/INNOCENCE AND PENALTY PHASES RENDERED THE VERDICT AND SENTENCING UNFAIR AND UNRELIABLE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND COUNSEL'S FAILURE TO OBJECT WAS UNREASONABLE.

(A) The State argues procedural bar to the first part of this claim. Appellant would point out that trial counsel did in fact protect the record with timely objections to the prosecutor's flagrant violations of Mr. Kennedy's fifth amendment privilege against self-incrimination. See Defendant's Brief, at 48-52.

(B) In the case sub judice, defense counsel objected and moved for a mistrial several times when the prosecutor persisted in arguing that Mr. Kennedy shot a law enforcement officer. See Defendant's Brief, at 52-61. The victim's status, like "comparable worth," is an inappropriate factor upon which to base an argument or sentence. See Booth v. Maryland, 107 S.Ct. 2529, 2535 (1986); Zant v. Stephens, 462 U.S. 862, 879 (1983); Grossman v. State, 13 F.L.W. 127, 131 (Feb. 18, 1988); Defendant's Brief, 56-58. In Brown v. State, No. 68,690 (May 12, 1988), this Court held that the "mere fact that the victim [was] a police officer, as a matter of law, insufficient to establish [an aggravating circumstance]." Id. at 6-7 (citations omitted). And in Garron v. State, No. 67,986 (May 19, 1988), this Court decided that "[a]t closing argument of the penalty phase, the prosecutor made

several remarks which, notwithstanding curative instructions, were so egregious, inflammatory, and unfairly prejudicial that a mistrial was the only proper remedy. [These]...remarks, when taken in their totality, justif[ied] a new penalty proceeding" Id., slip op. at 9.

The prosecutor's remarks in Mr. Kennedy's case were at least as "egregious, inflammatory, and unfairly prejudicial" as in Garron. See and compare Garron, slip op. at 10, Defendant's Brief at 49, 54-55, 57-58, 62, 68-71. What makes Mr. Kennedy's case worse, however, is that notwithstanding five separate objections and motions for mistrial lodged by defense counsel, the judge in this case, unlike in Garron, overruled the objections and gave no curative instructions or admonitions to the jury. The court's rulings were in effect a green light for the prosecutor to continue his improper argument and a de facto judicial imprimatur on the contents of those remarks.

ARGUMENT V

AN EVIDENTIARY HEARING IS REQUIRED ON MR. KENNEDY'S ALLEGATIONS THAT SENTENCING COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

Had trial counsel acted reasonably, he would have investigated and presented evidence as to Mr. Kennedy's family history and background and that this nonstatutory mitigating evidence probably would have resulted in a different sentence. The claim warrants an evidentiary hearing.

The State relies on Burger v. Kemp, 107 S. Ct. 3114 (1987) to defeat this claim: Burger was a five-four decision. The majority felt a reasonable basis existed for trial counsel's strategic decision not to develop and present evidence of his client's troubled background. Id., 3122-26. They concluded that presenting background and character evidence would have been at best unproductive and at worst harmful. Id,, 3123-24. Noteworthy, however, is that even the majority stated: "The record at the habeas corpus hearing does suggest that [trial counsel] could well have made a more thorough investigation than he did." Id. at 3125 (emphasis added).

The four dissenters in Burger argued that a "strategic choice" can only be made after reasonable investigation has occurred and that in this instance the choice was made after "less than adequate investigation," hence the choice was not supported by "informed professional judgment." Id., 3136. The dissent characterized counsel as "disinterest[ed]" in developing any mitigation evidence. Id., 3137. Justice Powell wrote that

> [t]here [was] no indication that counsel understood the relevance, much less the extraordinary importance, of the facts of Burger's mental and emotional immaturity, and his character and background, that were not investigated or presented in this case. . . . Absent an explanation that does not appear in this record, counsel's decision not to introduce -- or even to discover -- this mitigating evidence is unreasonable, and his performance constitutionally deficient.

Id., 3140.

Burger v. Kemp is more supportive of Mr. Kennedy's position than it is of the state's since an evidentiary hearing had been conducted in Burger with regard to the allegations of ineffective assistance of counsel whereas Mr. Kennedy was never given such a hearing. Moreover, the strategic choice by counsel in Burger occurred after counsel had at least apprised himself somewhat as to the mitigating evidence that existed. Mr. Kennedy's counsel did almost nothing in preparation for the penalty phase.

Similarly in Stephens v. Kemp, No. 84-8540 (11th Cir., April 22, 1988) the Circuit Court of Appeals found ineffective assistance of counsel due to counsel's failure to "investigate, present and argue...at sentencing any evidence of the appellant's mental history and condition...." Id., slip op. at 21. A psychiatric report in Stephens' case concluded that he did not suffer from a severe mental illness at the time of the examination or the offense. Id. slip op. at 23. On this basis, trial counsel elected to discontinue his investigation into the defendant's mental condition, "in preparation for the penalty...conducted no inquiry whatsoever into the possibility of presenting evidence of appellant's mental history and condition in mitigation of punishment." Id. at 24. Since there was evidence that appellant had spent a brief period of time in a mental hospital sometime between four and six months before the crime occurred, the court found counsel ineffective for "completely ignor[ing] the ramifications of those facts as

regards the sentencing proceeding." Moreover, the court pointed out that counsel could have called others, besides the defendant's mother, to testify as to his bizarre behavior and the fact that "others did not do so undoubtedly diminished the impact on the jury of the facts [the defendant's] mother described." Id. at 25.

Mr. Kennedy's case parallels Stephens v. Kemp. Counsel obtained critical sentencing information from his client as to his background. It was his task to further "investigate, present and argue" this evidence through witnesses other than Mr. Kennedy himself. The same holds true for the circumstances surrounding the prison conditions which contributed to the offense. Without an evidentiary hearing, it was virtually impossible for the judge to conclude that this did not constitute ineffective assistance of counsel.

ARGUMENT VI

MR. KENNEDY'S CONVICTION VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HE WAS TRIED BY A PETIT JURY WHICH WAS NOT SELECTED FROM A FAIR CROSS-SECTION OF THE COMMUNITY.

The State's almost standard refrain that this issue "could have and should have been raised at trial" (see State's Brief, at 25) overlooks the fact that trial counsel "made timely objection to the venire basing his objections on the total absence of any black individuals on the venire (R. 93)" (Defendant's Brief,

109). Error of this sort is so fundamental and per se prejudicial that the matter is cognizable in post-conviction proceedings regardless of whether the record was properly protected. The claim demands an evidentiary hearing. See Amadeo v. Zant, No. 87-5277 (May 31, 1988). In Amadeo, the defendant initiated a challenge to the composition of the grand and traverse (petite) juries that had indicted, convicted and sentenced him as being unconstitutionally comprised, so as to underrepresent blacks and women. The Supreme Court reversed the Circuit Court of Appeals. The latter had found that a memorandum that gave rise to the subsequent challenge was readily discoverable in public records and that the lawyers had made a considered tactical decision not to mount a jury challenge (Slip op. at 6-13). The Supreme Court instead found the constitutional issue reasonably unknown and undiscoverable to counsel at time of trial and that state concealment rather than tactical considerations accounted for the delayed challenge. Id. at 6-8. As in Amadeo, Mr. Kennedy should likewise be given the opportunity to establish sufficient cause for his failure to raise in the trial court the jury challenge and the chance to show sufficient prejudice to excuse the procedural default.

ARGUMENT VII

MR. KENNEDY WAS DEPRIVED OF A FAIR TRIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, BECAUSE OF THE MASSIVE, PERVASIVE AND PREJUDICIAL PUBLICITY AND TRIAL ATMOSPHERE.

Chandler v. Florida, 449 U.S. 560 (1981), does not dispose of the appellant's objections to the media coverage of his trial as the State would submit it does. To the contrary, Chandler guarantees that:

> a defendant has the right on review to show that the media's coverage of his case--printed or broadcast--compromised the ability of the jury to judge him fairly. Alternatively, a defendant might show that broadcast coverage of his particular case had an adverse impact on the trial participants sufficient to constitute a denial of due process.

Id. at 582 (emphasis added).

The non-record facts asserted in this claim present error of fundamental constitutional dimension and requires a hearing.

ARGUMENT VIII

THE JURY WAS INCORRECTLY INSTRUCTED THAT MR. KENNEDY HAD NO RIGHT TO DEFEND HIMSELF FROM AN UNLAWFUL ATTACK FROM LAW ENFORCEMENT OFFICERS, A VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Again the State responds that this is an issue that "could have and should have been raised at trial. . ." (State's Brief, 28), and overlooks the fact that trial counsel did request an appropriate instruction which the State argued against and the

court denied. See Defendant's Brief, at 133. There can be no procedural bar when the error is fundamental. See Carter v. State, 469 So. 2d 194, 195-96 (Fla. 2d Dist. Ct. App. 1985). The Carter Court reasoned that when a trial judge gives an incorrect statement of the law that necessarily misleads the jury, and when the effect of that instruction is to negate the defendant's only defense, it is fundamental error and highly prejudicial to the defendant. Id. at 196. Failure to give a complete and accurate instruction is fundamental error, reviewable in the complete absence of an objection or a requested instruction. Id.(emphasis supplied).

In Mills v. Maryland, No. 87-5867 (June 6, 1988), the United States Supreme Court restated the standard as to whether a jury may have misunderstood a particular instruction to be whether the incorrect interpretation "could be" one that a juror may have adopted. Id. slip op. at 7.

In the case sub judice, "a reasonable juror could have understood the charge as meaning" that Mr. Kennedy had absolutely no right to use force to resist the arrest in this instance. Francis v. Franklin, 471 U.S. 307, 315-16 (1985), citing Sandstrom v. Montana, 442 U.S. 510, 516-17 (1979). See also California v. Brown, 479 U.S. 538, 541 (1987). "The possibility that a single juror" might have misunderstood the improper charge and acted accordingly "is one we dare not risk." Mills v.

Maryland, supra, slip op. at 16. Mr. Kennedy's convictions and sentence must be reversed and remanded for a new trial.

ARGUMENT IX

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PLAY FOR THE JURY AND COURT THE VIDEOTAPE OF HIS SURRENDER AND ARREST, WHICH REVEALED HIS TRUE CONTEMPORANEOUS REMORSE FOR WHAT HAD OCCURRED, HIS LACK OF INTENT OR DESIRE TO KILL, AND THE STRENGTH OF HIS SELF-DEFENSE CLAIM.

The videotape of Mr. Kennedy's surrender would have been relevant mitigating evidence that the sentencer could not have refused to consider and could not have been precluded from considering had counsel sought to introduce it. See Hitchcock v. Dugger, 481 U.S. ___, 107 S. Ct. 1821 (1987); Skipper v. South Carolina, 476 U.S. 1, 4, 106 S. Ct. 1669, 1671 (1986); Eddings v. Oklahoma, 455 U.S. 104, 110, 114-116, 102 S. Ct. 869, 876-78 (1982); Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964 (1978); Cooper v. Dugger, No. 71,139 (Fla. May 12, 1988) and cases cited.

The videotape would have provided poignant corroboration that Mr. Kennedy lacked any specific intent to kill and was remorseful. Whether the videotape arguably might have been counterproductive or cumulative surely cannot be determined without an evidentiary hearing where trial counsel's reasons for not introducing the evidence could be explored. A strategic choice by counsel can only be made after adequate investigation

of potential mitigating evidence and an appreciation of the importance and consequences such evidence might have to the outcome. This record is woefully inadequate to establish that there was an informed professional judgment to keep the videotape out of evidence for strategic reasons. Cf. Burger v. Kemp, 107 S. Ct. 3114, 3122-25, 3137-40 (1987). This evidence, if accepted by the jury, along with the other evidence, would have been relevant to whether Mr. Kennedy was deserving of the death penalty.

CONCLUSION

Mr. Kennedy respectfully requests that this Court remand his case for an evidentiary hearing, and that the motion to vacate judgment and sentence be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellant has been served on George

Batch, Assistant State Attorney, Duval County Courthouse, 330 East Bay Street, Jacksonville, FL 32201, and on Gary Printy, Assistant Attorney General, Department of Legal Affairs, 111-29 North Magnolia Drive, Tallahassee, FL 32301, by U.S. Mail this 21st day of June, 1988.