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IN THE SUPREME COURT OF FLORIDA

THEODORE ROBERT BUNDY, Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO. 73585

BRIEF ON APPEAL AND APPLICATION FOR STAY OF EXECUTION

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Appellant Theodore Robert Bundy respectfully requests that this Court issue an order under Rule 9.310 of the Rules of Appellate Procedure to stay his execution now scheduled for 7:00 a.m., Tuesday, January 24, 1989, to permit the Court to fully consider the substantial issues raised in this appeal.

A. Procedural History

In this case, where the court below has denied all relief on the grounds that Appellant's claims are untimely or procedurally barred, the procedural history takes on extraordinary significance. Appellant, Theodore Robert Bundy, was convicted of the murder of Kimberly Leach and Sentenced to death by the Circuit Court for the Third Judicial Circuit on February 12, 1980 [hereinafter, the "Lake City" case]. Five years later, this Court affirmed that judgment and denied rehearing. Bundy v. State, 471 So. 2d 9 (1985). Six months before the Lake City conviction in August 1979, Appellant was sentenced to death for two murders occurring in Leon County, florida [hereinafter, the "Leon County" case]. This Court affirmed in 1984. Bundy v. State, 455 So. 2d 330 (1984).

On February 5, 1986, while Appellant's pro se petition for certiorari in the Leon county case was pending in the United States Supreme Court, the Governor of Florida signed a warrant ordering his execution in that matter by March 5. At this point, Appellant's present counsel began their representation of him.

The United States Supreme Court issued a stay of execution and present counsel supplemented Appellant's pro se petition on March 28, 1986. Certiorari review was denied on May 5, 1986. Bundy v. Florida, 106 S. Ct. 1958 (1986). Sixteen days later, on May 21, 1986, Appellant's counsel filed a petition for certiorari in the present case. The very next day, the Governor of Florida signed a death warrant in the Leon County case. After Appellant had exhausted state remedies, the Eleventh Circuit Court of Appeals granted his application for a stay of execution on July 2, 1986, and expedited the appeal. Following submission of briefs on the seventeen issues raised by Appellant's petition for writ of habeas corpus, the Eleventh Circuit heard oral arguments on October 23, 1986. On January 15, 1987, the Eleventh Circuit remanded Appellant's entire habeas petition in the Leon County case to the district court for further proceedings. Following the State's response to the petition, Appellant briefed all the issues on September 17, 1987. The district court took no further action until December 8, 1988.

In the meantime, Appellant's counsel sought to apply for executive clemency in the present case while his petition for certiorari was still pending. On its own motion, the Third Circuit held Appellant's clemency motions in abeyance pending the Supreme Court's decision on certiorari in this case on October 14, 1986. Seven days later, on October 21, the Third Circuit

granted Appellant's motion for appointment of counsel to prepare an application for clemency. That same day, however, the Governor "determined that Executive clemency, as authorized by Article IV, Section 8(a), Florida Constitution, is not appropriate," and signed a warrant ordering Appellant's execution by November 18, 1986. Such a determination and warrant without hearing and submissions by counsel was as unprecedented as it was unexpected.

On November 14, 1986, Appellant filed his initial motion for post-conviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure. Among the claims raised by Appellant in his post-conviction motion were two claims relating to his competence to stand trial: (1) that he was tired in violation of his substantive due process right not to be tried if incompetent, Dusky v. United States, 362 U.S. 402 (1960); and (2) that he was tried in violation of his separate procedural due process right to a contemporaneous determination of his competence in light of the substantial indicia of incompetence present at the time of trial, Pate v. Robinson, 383 U.S. 375 (1966). The Third Circuit court denied all relief, specifically finding that Appellant had waived his competency claims by failing to raise them in trial. This Court affirmed on the same grounds. Bundy v. State, 497 So. 2d 1209 (1986).

After the United States District Court for the Middle

District of Florida summarily denied Appellant's petition for writ of habeas corpus, the Eleventh Circuit Court of Appeals granted a stay of execution on November 18, 1986. Following briefing and argument, the Eleventh Circuit remanded Appellant's competency claims in this case to the district court for evidentiary hearing, noting that, under Pate, Appellant's competency claims were not procedurally barred because "[a] Appellant cannot waive his right not to stand trial if he is incompetent." Bundy v. Dugger, 816 F. 2d 564 (11th Cir.), cert. denied, 108 S. Ct. 198 (1987). The Eleventh Circuit based its remand order on the indicia of incompetence apparent on the record. Id.

In October and December 1987, after denying Appellant's motion for a status conference to address preliminary legal issues, the United States District Court held an evidentiary hearing in this case at which it required Appellant to prove that he in fact was incompetent to stand trial in this case. At the hearing on December 17, 1987, the Honorable Wallace M. Jopling, trial judge in this case, testified that he had "very high respect" for the Leon County trial judge and "felt that the [1979 competency] ruling [in the Leon County case], his ruling was entitled to respect from me.... I felt it was reasonable and that I would accept it." R. 466. Judge Jopling also testified that based upon his belief that the Leon County judge "would have

required a proper hearing," he assumed that the 1979 hearing "had been thorough and complete and explored all legal possibilities." R. 476.

Judge Jopling also testified that he had "learned about what went on" at the Leon County competency hearing from the state attorney's office who provided him with a transcript of the hearing. R. 467-68, 470. He testified that he received that information, that he did not recall any meeting of all counsel to discuss this information, and that it was "possible" that defense counsel were not even aware that he had received that information after the guilt phase in the present case. R. 467-68. The prosecutors had also provided him with copies of psychiatric reports prepared for the defense. Id. Judge Jopling testified as to what he learned from the prosecutors about the competency hearing in the Leon County case as follows:

> Well, I learned Mr. Brian Hayes was appointed to represent Mr. Bundy in that proceeding. Mr. Bundy not being willing to, Mr. Bundy contends that he was entirely competent and Mr. hayes was presenting that contention, that they had the testimony or reports of Doctor Cleckley, who declared him to be competent, and of Doctor Tanay who conceded Doctor Cleckley's eminence in the field of psychiatry of this type, and of Doctor Tanay's testimony, all of which was considered [by] judge Cowart.

R. 466-67. Judge Jopling did not know that Appellant's trial counsel did not testify at the competency hearing before Judge

Cowart, R. 469. When defense counsel subsequently presented these reports of Dr. Tanay to the trial judge, the judge denied as untimely the accompanying motion to present further also held that the psychiatric reports did not establish either of the two statutory mental mitigating factors.

On December 17, 1987, the district court concluded that Appellant had failed to demonstrate that he was incompetent. Bundy v. Dugger, 675 F. Supp. 622 (M.D. Fla. 1987). After an expedited briefing schedule and oral argument, the Eleventh circuit affirmed that decision, as well as, the district court's decision to deny relief on Appellant's numerous other claims without evidentiary hearing, in July, 1988. Bundy v. Dugger, 850 F. 2d 1402 (11th Cir. 1988). The Eleventh circuit found that what had appeared to be indicia of incompetence were in fact consistent with competence. Id. at 1410 n.13. The Eleventh Court noted in affirming the district court's decision that "the narrow issue of focus [for the evidentiary hearing in this case] was Bundy's competence to stand trial at the time of the trial." Bundy v. Dugger, 850 F.2d 1402, 1409 n.10 (11th Cir. 1988) (emphasis added). Both the Middle District and the Eleventh Circuit relied heavily upon Judge Jopling's testimony that he saw no reason to question Appellant's competence in this case at the time of the trial.

In August, 1987, after denying Appellant's motion for

rehearing, the Eleventh Circuit granted a stay of mandate pending certiorari review and ordered Appellant to file his petition in the United States Supreme Court by November 15, 1988. Appellant timely filed that petition, raising as worthy of certiorari review his claims regarding competency; the State's use of a hypnotized witness; and ineffective assistance of counsel for, among other things, failing to present any evidence at all during the penalty phase of his trial.

On December 8, 1988, while the certiorari petition in the present case was pending in the Supreme Court, the United States Court for the Southern District ordered a retrospective hearing on Appellant's competence to stand trial in the Leon County case, to begin on January 24, 1989. The district court implicitly rejected the State's motion for summary judgment on that issue and ruled that the competency hearing at the Leon County trial was constitutionally inadequate.

On January 17, 1989, the United States Supreme Court denied certiorari review in this case, and, on the same day, the Governor signed a warrant ordering Appellant's execution. Pursuant to that warrant, Appellant is scheduled to be executed at 7:00 a.m. on Tuesday, January 25, 1989.

The next day, Wednesday, January 18, Appellant filed the present second motion for post-conviction relief under Rule 3.850, as well as a motion to disqualify the trial judge, Wallace

M. Jopling, and a motion for evidentiary hearing. All three of the claims in the motion were based on new developments that occurred since the filing of Appellant's original 3.850 motion.

Yesterday, Thursday, January 19, the Third Circuit heard argument on Appellant's motions.

Appellant's motion to disqualify the judge was based on Appellant's claim under Gardner v. Florida, 430 U.S. 349 (1977), that he is entitled to a new sentencing hearing because the trial judge reviewed information provided by the prosecution after the guilt phase of his trial, without the knowledge of defense counsel, and used that information in sentencing Appellant to death. At yesterday's proceeding, Judge Jopling granted Appellant's motion to disqualify him, ruling that "my testimony is relevant" to Appellant's claims.

Thereafter, Judge Peach presided over the proceedings and ruled that all three of Appellant's claims were barred as untimely or procedurally barred. Appellant filed a notice of appeal and the court denied his motion for a stay pending appeal.

I. APPELLANT'S CLAIM THAT HE IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS COMPETENCE AT THE TIME OF TRIAL IS NOT PROCEDURALLY BARRED.

In his present motion for post-conviction relief, Appellant alleged that he was entitled to an evidentiary hearing on his

competence at the time of his aborted plea hearing. Appellant's conduct during the entire course of the proceedings at trial was erratic and self-destructive. Upon his arrest in February 1978, his lawyers found him difficult to communicate with and, by day, he would ask his lawyers to obtain court orders to prevent uncounseled interrogations by law enforcement personnel, but, by night, he would seemingly invite police officers to his cell for long interviews in which he discussed his "problem" caused by the "other Ted." He later attempted to proceed pro se in his two simultaneous capital cases, but did nothing to prepare until, just before accepting counsel, be conducted a flurry of 90, mostly useless, depositions.

In 1979, shortly after beginning their representation, Appellant's counsel, at his request, negotiated a joint plea agreement in this case and the Leon County case. After signing the agreement, but before the hearing, however, Appellant prepared a lengthy, single-spaced motion to fire his appointed counsel, the elected Public Defender, Micheal T. Minerva. At the hearing the following morning, May 31, 1979, after telling his counsel he could not decide whether to proceed with the motion or the plea, Appellant theatrically weighed the two documents and launched into a diatribe against his counsel. The State withdrew the joint plea. Shortly thereafter, both the State and defense counsel moved for a determination of Appellant's competence. On

June 10, 1979, trial court in the Leon County case conducted a competency hearing at which Appellant was represented by special counsel, at his request, and his trial counsel were excluded for participating either as advocates or as witnesses. The psychiatrist retained by those counsel, however, Dr. Emanuel Tanay, was called and, effectively, cross-examined by both sides. Dr. Cleckley testified for the State. The court ruled, as both parties requested, that Appellant was competent. Without the knowledge of defense counsel, Appellant was being treated with psychotropic medication by the jail physician during May and June 1979.

Although Judge Jopling participated in the joint plea negotiations and aborted plea hearing, he did not participate in the competency hearing in the Leon County case.

At the December 17, 1987, evidentiary hearing in the Middle District, Judge Jopling testified that he relied in part on Judge Cowart's determination that Appellant was competent in deciding that a competency hearing was not necessary in the present case. When the Southern District decided on December 8, 1988, that the Leon County competency hearing was inadequate so that a nunc pro tunc hearing is required, it meant that the trial judge in this case had relied at least in part, on a constitutionally inadequate determination of Appellant's competence.

At the hearing yesterday on Appellant's 3.850 motion, the

had raised the same claim in his prior post-conviction motion, except for minor differences that could have been raised before, and that the Middle District and the Eleventh Circuit had .cp3 affirmed that Appellant was competent at the time of his trial in this matter.

The circuit court below erred in concluding that Appellant's competency claim is procedurally barred. First, Rule 3.850 provides that a second motion under the ruling may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits "or the motion constitutes an abuse of procedure." None of the issues raised by Appellant regarding the determination of his competency in this case have ever been decided on the merits by either the circuit court or this Court. Both courts found that Appellant was barred from raising his competency claims because they had not been raised at trial.

Second, at best, the opinions of the Middle District and the Eleventh Circuit are unclear as to which aspects of Appellant's competency claims were decided. Although the Eleventh Circuit found indicia of incompetence sufficient under Pate v. Robinson, to remand the issue of Appellant's competence for hearing, the thrust of the State's case and the district court's opinion was that there were, in fact, no indicia of competence sufficient to trigger a competency hearing. In affirming that decision, the

Eleventh Circuit also relied on a lack of indicia, affirming for that reason the district court's reliance on the two State psychiatrists, neither of whom had examined Appellant. Appellant thus contends that the issue of his competency-in-fact, under Dusky v. United States, has been raised, but never decided by any court.

In addition, it appears that neither the Middle District nor the Eleventh Circuit -- and certainly not the State courts -- have decided the issue of whether Appellant was competent at the time of the aborted plea hearing. Both the federal courts failed to address the numerous indicia which caused the Leon County Court to hold a competency hearing, and the significant indicia of which the Leon County court should have been but apparently was not aware of: i.e., that Appellant was being treated by the jail physician with tranquilizers, without a psychiatric consultation, at the same time Appellant was allowed to destroy his plea bargain and exclude his counsel from the resultant competency hearing.

The failure of the federal courts to address the indicia of Appellant's competence at the time of the plea bargain can only be explained by reliance on the contemporaneous competency hearing conducted in the Leon County case. Even assuming that such reliance was constitutionally permissible before the Southern District's December 8, 1988, order that a new nunc pro tunc

determination must be made eliminates any valid basis for such reliance now. Finally, the Southern District's order was entered only last month.

Appellant's competency claim is not procedurally barred. His claim has not been decided on the merits in any respect by any Florida court, and Appellant contends that the federal courts did not decided either his substantive due process claim under Dusky v. United States, or his competency at any time other than the actual trial proceedings in January and February, 1980. Appellant could not have known that the trial judge relied on the prior competency hearing in the Leon County case in determining that no inquiry was necessary in the present case, nor that he learned about that hearing from the prosecutors without the knowledge of defense counsel. Finally, Appellant's claim based on the December 8, 1988, order of the Southern District was not and could not have been raised in any other motion for relief from his sentence.

II. UNDER JOHNSON V. MISSISSIPPI, APPELLANT IS ENTITLED TO A NEW SENTENCING PROCEEDING TRIAL OR, AT THE VERY LEAST, A STAY OF EXECUTION PENDING THE FINAL OUTCOME OF THE HABEAS PROCEEDINGS IN THE LEON COUNTY CASE.

Appellant's sentence to death in this case was based in substantial part on the aggravating factor of his conviction and sentence of death in the Leon County case. Appellant contended

below that if his conviction is overturned by the Southern District as a result of a constitutionally inadequate competency determination at trial or a finding of incompetency in fact, or if the conviction ultimately is overturned on appeal from a decision of that court on that issue, Appellant would be entitled to relief from his sentence in this case under the decision of the Supreme Court in Johnson v. Mississippi, 108 S. Ct. 1981 (1988).

At the hearing yesterday on Appellant's second 3.850 motion, the court ruled that Appellant did not contest his conviction for aggravated kidnapping; that the Leon County case had been affirmed and Appellant's competency determined; that the issue had been raised before; that Appellant could have challenged the use of his Leon County conviction as an aggravating circumstance before and did raise it; and that the two-year time limitation under Rule 3.850 barred relief. The court below clearly erred both on the merits of Appellant's claim and on the issues of procedural bar and timeliness.

Under Johnson v. Mississippi, Appellant is entitled to a stay pending the outcome of his current challenge to a prior conviction upon which his death sentence in this was "based in part." In Johnson the Supreme Court reversed and remanded a sentence of death based in part on an aggravating factor, a prior felony conviction, that was subsequently vacated. The Court held

that it was unconstitutional under the eighth amendment to let a death sentence stand in that circumstance. Id. at 1986. The Court stated that even if the prosecutor had not given the conviction great weight in his statements to the jury "there would [still] be a possibility the jury's belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.'" Id. at 1987 (emphasis added)(quoting, Gardner v. Florida, 430 U.S. at 359).

Appellant's sentence in this case was based in substantial part on the aggravating factor of his murder conviction in the Leon County case. Indeed, as a result of the publicity attending the trial and conviction, every member of the jury had some knowledge of that case. On December 8, 1988, the United States District Court for the Southern District of Florida ordered a hearing to determine Appellant's competency during proceedings in the Leon County case. Implicit in that order was a finding that the prior determination was constitutionally inadequate, one of the bases on which Appellant challenged his conviction in that case. Under Pate v. Robinson, 383 U.S. 375 (1966), such a finding must result in the overturning of Appellant's conviction unless the State can prove that the constitutional violation can be adequately remedied by a nunc pro tunc hearing. And, as in this case, where the court orders a nunc pro tunc hearing, the

Appellant's conviction will be overturned if he can show that he was incompetent at the time of the original hearing. In either event, if the Leon County conviction is overturned, the death sentence in this case would have to be vacated under Johnson v. Mississippi.

The court below held that because there were other aggravating factors upon which the sentence in this case could have been based, a successful challenge to the Chi Omega conviction is irrelevant. That decision is inconsistent with Johnson. The Supreme Court specifically noted in Johnson that it is the "possibility" that a prior conviction would be decisive in the choice between a life sentence and a death sentence that offends the constitution. Moreover, in Johnson itself, there were two other aggravating circumstances that were not affected by the reversal of the New York conviction. Thus, unless this Court stays Appellant's sentence of death in this case, his execution would moot his Pate v. Robinson claim in the Chi Omega case and thereby unconstitutionally deny him the opportunity to overturn his conviction in that case and his sentence in this case.

The court erred in concluding that Appellant's Johnson claim was procedurally barred and untimely. Although Appellant did previously challenge the use of the Leon County conviction as an aggravating circumstance, it was not until December 8, 1988, that

the Leon County conviction was impaired by a judicial determination. That new development significantly altered the nature of Appellant's claim.

III. THE TWO-YEAR TIME LIMIT FOR MOTION UNDER RULE 3.850 DOES NOT APPLY TO BAR APPELLANT'S CLAIM UNDER GARDNER V. FLORIDA

As described above, at the evidentiary hearing in the Middle District on December 17, 1988, Appellant learned for the first time that prior to his sentence to death in this case, the trial judge and prosecutors had ex parte communications about the 1979 Leon County competency hearing and Appellant's mental condition. The receipt of secret information by the trial judge denied Appellant a fair sentencing.

At the conclusion of the trial in this case, defense counsel for Appellant provided the trial judge copies of psychiatric reports prepared by Dr. Emanuel Tanay. In those reports, Dr. Tanay concluded that Appellant suffered from a mental illness and was probably incompetent. In mitigation, defense counsel argued from Dr. Tanay's reports that the criminal conduct for which Appellant had been convicted was the product of a mental illness.

In sentencing Appellant to death, the trial judge summarily dismissed Dr. Tanay's reports and stated that he found no mitigating factors affecting the sentence in this case. At the time however, defense counsel was not aware that the trial judge

had received secret information about Dr. Tanay's reports and Appellant's mental condition. Thus, Appellant was denied an opportunity to address that information, otherwise to know on what basis the trial judge concluded that death was the appropriate sentence in this case. This Court also was denied an opportunity to consider the secret information in its review of the sentence in this case.

As a result of the improper receipt of information by the trial judge, Appellant was denied a fair sentencing in violation of the Supreme Court's decision in Gardner v. Florida, 430 U.S. 349 (1977).

The court below did not reach the merits of this claim. Instead, the court held that the claim was barred by the two-year limitation period established for bringing claims under Rule 3.850 of the Florida Rules of Criminal Procedure.

A. There Was A Clear Violation Of Gardner v. Florida

1. Sentencing

At the time of sentencing in this case, defense counsel gave the trial judge copies of three psychiatric reports prepared by Dr. Emanuel Tanay that discussed Appellant's mental condition. Supplemental Record at 192 (hereinafter "S.R. ___"). Counsel told the court that the reports "were presented only and solely for the issue of mitigation as to be weighed against the aggravating

circumstances as were indicated by the State in the penalty phase of this case." (S.R. 171)

Based on the three psychiatric reports, defense counsel argued to the court that the person who committed the crime in this case could not have been the same person who had sat through the trial; "the only logical and rational answer is that we are dealing with two or more personalities inside of one body." (S.R. 167) He argued that the person who committed the crime had a "diminished capacity to appreciate the criminality of such acts." Id. at 167-168. In one of the psychiatric reports provided to the judge, Dr. Tanay concluded that "there was also a transient disturbance of [the Appellant's] consciousness making such behavior possible." Counsel suggested that the court postpone sentencing "to fully explore this strong possibility."

The state opposed any postponement. Among other things, the prosecution argued that Dr. Tanay's reports had been "considered by Judge Cowart in Tallahassee in the Tallahassee case and, at that time, he found Appellant competent, based upon the testimony of Dr. Tanay and on the testimony of Dr. Herbert Cleckley." (S.R. 169) There was no reference to the substance of any of the testimony in the Tallahassee case. Nor was the record of that proceeding presented to the court.

In announcing his sentence, the trial judge stated that he had "considered no evidence or factors in imposing the penalty

herein and has no information not disclosed to the Appellant or his counsel which the Appellant has not had an opportunity to deny or explain." (S.R. 190) With respect to the three psychiatric reports, the trial judge stated:

> ...the Court also was handed today at 1:30 P.M., the time set for this sentencing proceeding to begin, three psychiatric reports rendered by a Dr. Emanuel Tanay, T-a-n-a-y, of Detroit, Michigan, dated respectively April 27, 1979, May 21, 1979, and September 7, 1979. The Court has considered the contents of said reports in connection with whether there has been any mitigating circumstances established under E or F. The Court finds that the reports indicate an anti-social personality on the part of the defendant, but finds no mitigation established of either the enumerated mitigating circumstances E or F shown by said reports.

Id. at 192.

The Court then sentenced the Appellant to death. In doing so, it noted:

> It is this Court's reasoned judgment that no mitigating circumstances, either statutory or established by testimony presented in the advisory sentence proceedings or reflected in the reports to which the Court has just alluded, that would exist to outweigh or offset the aggravating circumstances which have been proved to the Court beyond and to the exclusion of every reasonable doubt.

Id. at 193.

2. Subsequent Testimony of Trial Judge

At the evidentiary hearing held in December 1987 in the United States District Court for the Middle District of Florida,

Appellant learned for the first time that prior to his sentence to death in this case, the trial judge had received information about the 1979 Chi Omega competency hearing and Appellant's mental condition.

Judge Jopling testified that sometime after that 1979 hearing he had "learned about what went on there." Transcript of December 16, 1987, hearing at 466. (Hereinafter "Tr.___"). He described what he had learned as follows:

> A. Well, I learned Mr. Brian Hayes was appointed to represent Mr. Bundy in that proceeding. Mr. Bundy not being willing to, Mr. Bundy contending he was entirely competent and Mr. hayes was presenting that contention on his behalf. And that he did make such a contention. That they had the testimony or reports of Doctor Cleckley, who declared him to be competent, and of Doctor Tinay [sic] who conceded Doctor Cleckleys eminence in the field of psychiatry of this type, and of Doctor Tinay's [sic] testimony, all of which was considered Judge Coward [sic].

Tr. 466-67.

Judge Jopling then testified as follows:

> Q Can you tell me from whom you learned the details of the competency hearing?
>
> A Probably from the state, state attorney's office.
>
> Q And can you tell me the circumstances under which you learned the details of the competency hearing from the state?
>
> A I am trying to recollect. May have been after the verdict, after the guilty verdict, and my have been after that.

Q In Chi Omega?

A No. After the guilty verdict in the Leach case.

Q Is it possible that it was before the guilty verdict?

A Could have been before that.

Q Do you recall who in the state attorney's office would have informed you?

A I am assuming that, I have no independent recollection of this. Mr. Blair or Mr. Dekle.

Id. at 467-68.

Judge Jopling did not know if defense counsel was aware that he had information about the Chi Omega competency hearing. He testified, however, that it was possible that defense counsel did not know. (Tr. 468)

The state did not attempt to clarify Judge Jopling's testimony on redirect and Jerry Blair, who testified after Judge Jopling, did not dispute the judge's recollection. Nor has the state offered anything in the record in this proceeding to dispute Appellant's characterization of the trial judge's testimony. Moreover, in disqualifying himself from considering the merits of this claim, Judge Jopling stated that his testimony "is relevant."

B. Application Of The Two-Year Bar Would Render The Florida Death Penalty Unconstitutional

Imposition of the two-year time provision of Rule 3.850 to bar Appellant's claim under Gardner v. Florida, 430 U.S. 349 (1977), "calls into question the very basis for [the Supreme Court's] approval of [the Florida death penalty] in Proffitt." 430 U.S. at 365.

As applied to the death penalty, the Eighth Amendment's prohibition against cruel and unusual punishment "involves the procedure employed by the State to select persons for the unique and irreversible penalty of death." Id. at 363 (White, J. concurring), citing, Woodson v. North Carolina, 428 U.S. 280, 2287 (1976). In upholding the Florida death penalty, one of the crucial factors relied upon by the Supreme Court was the "guarantee" expressed by this Court in Dixon v. State, 283 So. 2d 1, 10 (Fla. 1973), that the sentence of death would be imposed in a manner that assures fairness.

In addition to the requirement that the trial judge state in writing the reasons that unlie his decision to impose the death penalty, "[t]hose reasons, and the evidence supporting them, are conscientiously reviewed by [the Florida Supreme Court] which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law." Proffitt v. Florida, 428 U.S. 242, 259-260 (1976). The consideration by the trial judge in this case of information that was not part of the record, that was not identified in his written sentencing order, and that was not made known to the

Appellant or his counsel is clearly inconsistent with the guarantee made by this Court in Dixon. It also is inconsistent with the constitutional principles embodied in Gardner.

In Gardner, the Supreme Court ruled that due process requires that all information forming the basis of a death sentence be presented to counsel for rebuttal. The Court vacated and remanded the Appellant's death sentence because the sentencing judge had requested and reviewed a presentence investigation report without affording the defense counsel an opportunity to explain or deny certain confidential information contained in the report. The Court noted:

> [T]he trial judge did not state on the record the substance of any information in the confidential portion of the presentence report that he might have considered material. There was, accordingly, no similar opportunity for petitioner's counsel to challenge the accuracy or materiality of any such information.

Id. at 356.

Application of the two-year bar in the face of a clear violation of Gardner merely compounds that violation because it requires this Court to ignore its "duty to consider 'the total record', Swan v. State, 322 So. 2d 485, 489 (1975), when it reviews a death sentence." Gardner v. Florida, 430 U.S. at 361:

> Since the State must administer its capital-sentencing procedures with an even hand, see Proffitt v. Florida, 428 U.S. at 250-253, it is important that the record on appeal

> disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia....

Id. (footnote omitted).

The conduct of the trial judge in this case is even more troubling than the consideration by the judge in Gardner of the confidential portion of a presentence report. In that case, the Appellant knew that the judge had the secret information. Here, the Appellant was not even aware that the judge had the information. A system that permits such secret consideration of information by a sentencing judge was thought to be "clearly foreclosed." Gardner v. Florida, 430 U.S. at 360, citing, Furman v. Georgia, 408 U.S. at 313-14. Indeed, this Court specifically held that to be the case when it noted in Brown v. Wainwright, 392 So. 2d 1327, 1332 (Fla. 1981), that "[f]actors or information outside the record play no part in our sentence review role." Implicit in that description of the Court's role is the notion that such factors and information can play no role in the trial judge's decision to impose the death sentence.

This court's duty to remedy the Gardner violation in this case extends beyond concern for the rights of this particular Appellant. The integrity of the Florida death penalty itself is

implicated. Therefore, to ignore the violation that occurred in this case based solely on the fact that the discovery of the violation was brought to the Court's attention three months after expiration of a two-year period arbitrarily set by the Court for filing motions under Rule 3.850 would belie the promise that Florida has "established capital sentencing procedures that...assure that the death penalty will not be imposed in an arbitrary or capricious manner." Gardner v. Florida, 430 U.S. at 370 (Marshall, J. dissenting) citing Proffitt v. Florida, 428 U.S. at 253. This promise, however, is absolute; it is not conditioned upon whether and when the Appellant brings the defect to the attention of the Court.

C. Even By Its Own Terms, The Two-Year Limit for Initial Motions Under Rule 3.850 Does Not Apply to Bar Appellant's Gardner Claim

Rule 3.850 describes two types of motions requiring special scrutiny by the court. First, a motion filed more than two years after final judgment must allege that:

> (1) the facts upon which the claim is predicted were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence, or, (2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

Second,

> [a] record or successive motion may be dismissed if the judge finds that it fails to

> allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movants or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

Thus, although subject to its own strict requirements, a second or successive motion under Rule 3.850 is not subject to the two-year limitation imposed on initial motions under the rule.

To apply the two-year limit to second motions would not only be arbitrary and contrary to basic premises of statutory construction, but would subvert the very purpose of the rule to prevent piecemeal litigation. In the present case, for example, Appellant filed his initial 3.850 motion on November 14, 1986, only one month after the judgment and sentence became final, and actively litigated those same issues continuously until the United States Supreme Court denied certiorari review on January 17, 1988. If the decision below were correct, Appellant would have had to file a second 3.850 motion between December 17, 1987 and October 14, 1988, to preserve his Gardner claim; a third 3.850 motion after the December 8, 1988, decision of the Southern District to preserve his Johnson claim; and a fourth motion should any new claim arise as the result of the scheduled hearing or any change in the law -- all while litigating the original issues, with the possibility of relief being granted on one or more of those issues. This cannot be the result mandated by Rule

3.850.

The cases cited by the State in its argument and motion to dismiss below do not compel such a ridiculous result in this case or any other. In each case, this Court found that issues were raised which could have been raised before. In Foster v. State, 518 So. 2d 901 (1987), this Court ruled that the appellant's Caldwell claim should have been raised on appeal. The Court further noted that state relief is available even if appellant has federal litigation pending. Foster does not require, however, that each new claim be raised in separate 3.850 motions as they arise.

In Delap v. State, 513 So. 2d 1050 (1987), the Court found that the appellant's second petition was not within the two-year period and no cliam qualified as an exception because two of the claims were raised and rejected in a previous motion and the remaining claim was known at the time of the filing of the petition: "the merits of this appeal from the court's denial fo defendant's 3.850 motion have already been considered and denied by this court." Id. at 1051. Similarly, in White v. State, 511 So. 2d 554 (1987), the Appellant's primary issues had already been raised and disposed of. In the present case, there is no dispute that Appellant could not have raised his claims based on the December 17, 1987, testimony of Judge Jopling and the December 8, 1988, order by the Southern District in his prior

motion. These are clearly new developments.

Johnson v. State, 522 So. 2d 356 (1988), is easily distinguished from the present case and demonstrates the type of delay that the rule is meant to avoid. In that case, the court noted that evidence of the Appellant's claim of ineffective assistance of counsel for failure to investigate the crime scene was "always in existence." Furthermore, Appellant's counsel admitted that they elected initially to raise only certain claims in federal court. Finally, "there was nothing to prevent the filing of a motion for post-conviction relief in state court while Johnson's federal claims were pending."

In contrast, the present case is based on newly discovered evidence that could not have been raised in Appellant's initial 3.850 motion. As this court noted in Johnson:

> The credibility of the criminal justice system depends upon both fairness and finality. The time limitation of Rule 3.850 accommodates both interests. It serves to reduce piecemeal litigation and the assertion of stale claims while at the same time preserves the right to unlimited access to the courts where there is newly discovered evidence or where there have been fundamental constitutional changes in the law with retroactive application.

Even if the two-year limitation did apply to Appellant's claims, his motion would be proper under the exception for newly discovered evidence. In any case, Appellant's petition is not subject to dismissal for abuse. His first motion was filed only

one month into the two-year time limitation because of the timing of the signing of the death warrant by the Governor. Thus, Appellant did not have the opportunity to wait to gather all his claims in a single 3.850 motion within the two-year period. In fact, Appellant's pro bono counsel have been actively and expeditiously litigating his two separate convictions for two years. There has been no delay or intentional bypass.

In Deaps v. State, 515 So. 2d 196 (1987), this Court again dismissed a second 3.850 motion because the Caldwell claim should have been raised before, but emphasized that extraordinary circumstances the Court should intervene and invoke the "inherent power of the court to grant such relief." As discussed above in section B, the present case -- the use of secret information by the judge in capital sentencing -- requires the Court to exercise that power and to fulfill its purpose to "reduce piecemeal litigation and the assertion of stale claims while at the same time preserv[ing] the right to unlimited access to the courts where there is newly discovered evidence or where there have bene fundamental constitutional changes in the law with retroactive application." (Johnson, emphasis added).

CONCLUSION

For the reasons above, Appellant prays that this Court issue and order to stay his execution and grant his appeal.

Respectfully submitted,

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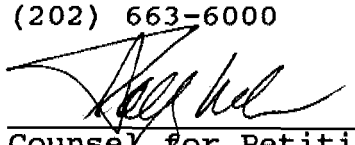
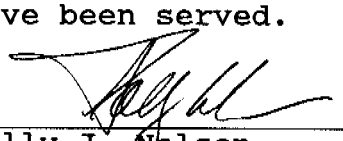


Counsel for Petitioner

January 20, 1989

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 1989, one copy of the above entitled case was hand-delivered to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, 111 - 29 North Magnolia Street, Tallahassee, Florida, 32301, counsel for respondent. I further certify that all parties required to be served have been served.



Polly J. Nelson