

**FILED**

SID J. WHITE

OCT 12 1984

CLERK, SUPREME COURT

By *[Signature]*  
Chief Deputy Clerk

ERNEST FITZPATRICK, JR. :

Petitioner :

v. :

LOUIE L. WAINWRIGHT, :

Secretary, :

Department of Corrections, :

State of Florida :

Respondent :

:  
oOo

CASE NO.: 65,785

REPLY TO THE RESPONSE

Petitioner, Ernest Fitzpatrick, Jr., submits the following reply to the State's Response in the above-captioned case.

A. Violation of Maggard v. State, 399 So.2d 973 (Fla. 1981)

In his Petition for Writ of Habeas Corpus (hereafter Habeas Corpus Petition), Petitioner contends that appellate counsel was ineffective in failing to argue that Maggard v. Florida, 399 So.2d 973 (1981) was violated by the introduction at the sentencing hearing below of Petitioner's juvenile record in the State's case-in-chief, evidence that allegedly was introduced to prospectively rebut the statutory mitigating circumstance codified in §921.141(6) (a). In his Response, Respondent asserts several grounds for his contention that Petitioner's appellate counsel was not ineffective in this respect. First, the State argues that: (1) "petitioner here did not expressly waive" reliance upon the mitigating circumstance of no significant history of prior criminal activity contained in subsection (6) (a), and (2) this asserted failure "is dispositive of the issue." Petitioner contends that Respondent is wrong on both counts.

First, Petitioner reiterates that, in response to the State Attorney's attempt to introduce Petitioner's juvenile record, allegedly to prospectively rebut subsection (6) (a), defense counsel expressly stated his intention to "stay away from this inquiring about why he was in Juvenile Court" (A.R. 843); he noted that "I don't feel like that we should get in the area of

why he was in this system or what he was charged with in the Juvenile System." Id. Indeed, defense counsel below did not contend in his final argument that the subsection (6) (a) mitigating circumstance was applicable. (A.R. 1165). See more detailed discussion of this issue in Petitioner's Habeas Corpus Petition at 7-10.

Any ambiguity in these comments is clarified by the legal context in which these statements were made. Specifically, the burden of proof clearly was on Petitioner to prove that he had no significant history of prior criminal activity, see discussion below, and in this context the defense counsel's promise to "stay away" from Petitioner's juvenile record communicated a defense concession that there would be no effort to carry this burden of proof; that is, there would be no defense effort to rely upon subsection (6) (a).

Moreover, Respondent's second contention - that Maggard is inapplicable in the absence of an express defense waiver of reliance on subsection (6) (a) - is neither supported by Booker v. State, 397 So.2d 910, 918 (Fla. 1982), nor consistent with the applicable statutory and case law. While dicta in Booker implies that the State may prospectively rebut statutory mitigating factor (6) (a) during cross-examination of a defendant during the defendant's sentencing-phase case, Booker clearly does not authorize prospective rebuttal during the State's case-in-chief.

In addition, the instructions given to the trial court on remand in Maggard should be interpreted as overruling Booker's implication that a defendant's reliance on mitigating circumstance (6) (a) might be presumed to exist from a defendant's silence with respect to prior criminal activity. See Alvord v. Wainwright, 564 F. Supp. 459, 483 (M.D.Fla. 1983) (apparently questioning whether the Booker dicta survived the later Maggard decision). That is, because a defendant has the burden of proving a subsection (6) (a) mitigating circumstance, State v. Dixon, 283 So.2d 1, 3, 7 (Fla. 1973), Jackson v. Wainwright, 421 So.2d 1385, 1388-89 (Fla. 1982), if he remains silent with respect to subsection (6) (a), offering no proof of the absence of a significant history of prior criminal activity (a negative proposition),

the State is entitled to the Maggard instruction that withdraws the subsection (6)(a) mitigating circumstance from jury consideration. In this respect, neither Maggard nor Florida's death penalty statute provide any basis for treating a silent waiver of defense reliance upon subsection (6)(a) any differently than an express waiver of such reliance.

Furthermore, as Petitioner stressed in his Habeas Corpus Petition at 12, subsection (6)(a) was enacted for the benefit of defendants. Section 921.141 in its entirety envisions that the defense may wait until its sentencing-phase case to decide whether or not to assert reliance on subsection (6)(a). If the State routinely were able to introduce evidence of a defendant's prior criminal activity in any case in which a defendant failed to make an express waiver of reliance on subsection (6)(a), that mitigating circumstance, intended to benefit defendants, would be converted into a prosecution weapon.

The instant case provides the clearest example of this conversion of a mitigating circumstance into a prosecution weapon. At the sentencing hearing, the State improperly used the evidence of Petitioner's juvenile record, evidence that was provided by its only sentencing-phase witnesses, both to bolster its evidence of aggravating circumstances and defeat the several mitigating circumstances upon which Petitioner relied. Specifically, there were two possible "profiles" of Petitioner created by the sentencing evidence: (1) the profile of a mentally ill defendant; and (2) the profile of a criminal. The latter profile was created chiefly by the improperly admitted evidence of Petitioner's prior juvenile record.

1. The Profile of a Mentally Ill Defendant

In his dissenting and concurring opinion in the appeal of the instant case, Fitzpatrick v. State, 437 So.2d 1072, 1079 (Fla. 1983), in which he was joined by Justice Overton, Justice McDonald said:

"The evidence was not in dispute on the character and background of Fitzpatrick. It clearly demonstrated a strong personality disorder. His juvenile record reflected a continuing inability to adapt in conformity with rules. He thought himself a 'genius' and was constantly 'inventing' things and seeking patents on them, only to find them constantly rejected. This dull

normal black boy, the eighth of thirteen children, was himself rejected by his mother. As stated by the psychologist, 'his thinking was indeed impaired and that impairment, according to a degree, was relatively severe, not so severe that he did not understand the consequences of his actions, but severe enough that in my opinion they played a part in his acting very impulsively without proper forethought and setting himself up again for failure and punishment.' The testimony is replete with episodes clearly indicating that he suffered from stress and acted under compulsion and with gross impaired thinking. As a juvenile he had been placed in a mental hospital and had attempted suicide." Id.

These factual conclusions are amplified by the record. Dr. Gilgun, the psychologist referred to above, testified that Petitioner "overdosed once. He slit his wrists and at one time I believe he attempted to hang himself." (A.R. 952). Dr. Gilgun went on to add that Petitioner was so "serious[ly] disturbed that Baker Act proceedings could have been instituted at some time." (A.R. 956, 970).

Dr. Ramos, a psychiatrist and another defense witness, testified that Petitioner "suffered from a personality disorder...." (A.R. 976), and had a "schizoid personality with passive-aggressive trends." (A.R. 987).

There was substantial additional evidence about Petitioner's mental and emotional problems, including evidence that he had been seen by psychiatrists before he was committed to Florida's Youth Services Division, while he was confined in Youth Services Division facilities (A.R. 977), and after he returned from those facilities (A.R. 1004, 1007, 1029). At various times anti-psychotic medication, e.g., stelazine, was prescribed for Petitioner (A.R. 980, 987). Petitioner's bizarre "inventions", which he believed were actually workable machines, included model planes that would actually fly (A.R. 871, 873), new versions of the light bulb (A.R. 881), an "automatic" bow and arrow that would help a hunter kill several deer at once (A.R. 1093), and bionic body parts that could turn mortals into bionic men (A.R. 1094).

Furthermore, Petitioner asserts that insanity is virtually implicit in the acts that led to Petitioner's conviction and sentence. Although the State presented evidence that Petitioner had a "plan" to rob a bank and that the taking of hostages, which

resulted in the homicides, was part of this "plan", a fair summary of this "plan" is that Petitioner "intended" to rob a bank by taking a public bus to a bus stop .7 of a mile away from a bank, taking hostages, walking hostages down an open highway, and using the hostages to rob the bank; for an escape "plan", he would either stay in the bank (A.R. 1080), or take a group of hostages back to his hotel room where he would remove his fake mustache and beard and walk away unrecognized (A.R. 1112), or catch a bus home.<sup>1/</sup>

## 2. The Profile of a Criminal

With the use of Petitioner's juvenile record, the State was able to paint a different picture of Petitioner. The State sentencing-phase witnesses indicated that Petitioner had been arrested for attempted armed robbery and that he had transported a home-made bomb to Beggs Vocational School for the purpose of taking hostages and ransoming Beggs' staff members. The Beggs school incident was particularly damaging because, since it involved an alleged attempt to take hostages, it shared some of the same factual hallmarks of the incidents that led to Petitioner's conviction and sentence below. And, while the Beggs school incident contained some evidence of Petitioner's insanity,<sup>2/</sup> the State presented it to demonstrate that Petitioner was an experienced criminal.

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<sup>1</sup> While Petitioner was being interrogated by police in police headquarters shortly after he was arrested he thought a gentleman from the Salvation Army who had a bible was trying to kill him (A.R. 1042-43) (A.R. 1047).

<sup>2</sup>For example, Mrs. Pace testified that "the young man had a mask-paint on his face and had his hands covered, and, you know, it was an unusual sight for school.... At first I thought he was playing a Halloween joke or something of this kind." (A.R. 854). Mr. Campbell testified that Petitioner's "arms were in orange and black gloves, and an orange and black ski cap" was on his head. (A.R. 861). Petitioner's purpose in ransoming the Begg's staff was to feed the starving poor in Bangladesh and patent his inventions.

In short, there can be little doubt about the prejudicial effect of the improperly admitted evidence. See the more complete discussion on this point in Petitioner's Habeas Corpus Petition at 9-10. It was a strong basis for convincing the jury to reject three mitigating circumstances: (1) that Petitioner "was under the influence of extreme mental or emotional disturbance" (subsection (6)(b)); (2) that Petitioner did not have "the capacity" "to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" (subsection (6)(f)); and (3) Petitioner's young age "at the time of the crime" (subsection (6)(g)). See more complete discussion in Petitioner's Habeas Corpus Petition at 9-10.

Respondent's final Maggard argument - that defense counsel at trial failed to "place the square peg of Maggard in the round hole of the general objection to the State's evidence at the penalty phase" - is without merit. As noted above, defense counsel's objection was not a general objection; he specifically objected to the State's attempt to prospectively rebut subsection (6)(a), saying to the State Attorney: "I have got to affirmatively try and show that he hasn't [got a juvenile record]. If I affirmatively try and show that he hasn't, then the door's open. If I don't, you can't." (A.R. 845-46). The trial court clearly understood the issue to be whether the State could adduce evidence of Petitioner's prior juvenile record in its case-in-chief to prospectively rebut subsection (6)(a). See A.R. at 844-49; discussion in Petitioner's Habeas Corpus Petition at 6-8<sup>3</sup>.

Moreover, even assuming arguendo that defense counsel failed to preserve the Maggard point at trial, appellate counsel was ineffective in failing to argue that the State's use of

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<sup>3</sup>Compare Steinhorst v. Florida, 411 So.2d 332 (Fla. 1982) (where defendant's proffered basis for extended cross-examination changed from trial, where it was contended that cross-examination was for general impeachment purposes, to appeal, where it was contended that the requested cross-examination should have been allowed to develop an entirely different (and the "only viable") defense theory); State v. Jones, 204 So.2d 515 (Fla. 1967) (where no timely objection was made).

Petitioner's juvenile record during its case-in-chief constituted "fundamental error", cognizable on appeal even in the absence of a specific contemporaneous objection by trial counsel. "Fundamental error" has been defined as "error which goes to the foundation of the case or goes to the merits of the cause of action." Clark v. State, 363 So.2d 331, 333 (1978). As noted above, the improperly admitted evidence of Petitioner's juvenile record helped defeat at least three possible mitigating circumstances upon which Petitioner relied. In Maggard v. State, 399 So.2d 973, 977 (1982), this Court held a similar error to be of "such magnitude" that a new sentencing hearing was required even though at least one viable aggravating circumstance, but no mitigating circumstance was present in that case. Thus, in both Maggard and in the instant case, allowance of prospective rebuttal was error that dramatically affected the merits of, and went to the foundations of the cases.

In addition, as noted in Petitioner's Habeas Corpus Petition at 12-13, the argument made by the State Attorney below and echoed by Respondent - specifically, that prospective rebuttal of mitigating factor (6)(a) is proper during the State's case-in-chief "so the jury cannot speculate as to whether that circumstance exists" (A.R. 844) - fundamentally misconceives both the permissible scope of evidence during the State's sentencing case-in-chief and the defendant's burden of proof with respect to mitigating circumstances. If the State were allowed to routinely introduce evidence of a defendant's prior criminal activity in its sentencing case-in-chief, the now - exclusive list of aggravating circumstances contained in §921.141 would be made open-ended. Routine admission of evidence prospectively rebutting the subsection (6)(a) mitigating circumstance also assumes that the defendant is entitled to claim the benefit of that mitigating circumstance even if he produces no evidence that he has no significant history of prior criminal activity. See discussion above. This Court's decisions in State v. Dixon, 283 So.2d 1 (Fla. 1973) and Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982) demonstrate the basic error of that assumption.

For these reasons, Petitioner contends that the Maggard error in the instant case is "fundamental error" that appellate counsel clearly should have raised on appeal even if, arguendo, defense counsel did not properly preserve the Maggard objection.

B. Failure to Argue that Pervasive and Prejudicial Publicity Denied Petitioner his Due Process Right to a Fair Trial

While Petitioner disagrees with Respondent's general argument concerning the appropriate legal standard to apply in deciding whether fair trial rights are denied by pervasive pre-trial publicity, Petitioner notes that Respondent does not challenge the continuing validity of the relevant test announced by this Court in Manning v. State, 378 So.2d 274 (Fla. 1980).<sup>4</sup> In Manning, this Court said that, while an "application for change of venue is addressed to the sound discretion of the trial court", a trial judge is bound to grant a motion for a change of venue:

when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result." Id. at 276.

The application of the Manning standard to the facts in the instant case, indeed the extraordinary similarity between the facts in the instant case and the facts in Manning, demonstrate the actual prejudice that Petitioner suffered when his appellate lawyer failed to raise the pre-trial publicity issue.

In both Manning and the instant case, the victims were popular, white deputy-sheriffs (two in the Manning case), who had been killed by black defendants and, after their deaths, were

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<sup>4</sup>The test articulated in Patton v. Yount, 81 L.Ed. 2d 847 (1984) appears to be the same test that this court announced in Manning. Both Patton and Manning indicate that: 1) a trial court's decision to deny a change of venue motion (or other motion to remedy pervasive pre-trial publicity) is entitled to substantial deference, but 2) denial of a change of venue (or other relevant motion) will be reviewed, and a conviction will be reversed when it is apparent that pervasive pre-trial publicity would naturally result in a biased and prejudiced jury.

mourned as fallen heroes.<sup>5/</sup> In both cases, the cases were "the main topic of conversation" in relatively small rural counties.<sup>6</sup> In both cases coverage of the crimes by local news media was immense.<sup>7</sup> In both cases pretrial disclosures of critical evidence by local law-enforcement officials provided slanted and prejudicial versions of the prosecutor's case to the public.<sup>8</sup> In both cases private counsel represented the defendants because the local public defender offices publicly disqualified themselves, with inherently prejudicial effects, due to their friendships with the slain deputies.<sup>9</sup> In both cases the defendants alleged that local deputy sheriffs, angered by the loss of fellow officers, harrassed and threatened them while they were being held in jail before trial.<sup>10</sup> In both cases the voir dire inquiry

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<sup>5</sup>The deceased deputy-sheriff in the instant case was described by one trial juror as "the most famous police officer in Pensacola". (A.R. 265). He left behind a popular wife and five children. See Appendices 3h11,15,17-18,23-26. Pictures of the deceased deputy-sheriff and his grief-stricken wife and children were consistently local front-page news. See Appendices 3h24,26,27-28. A memorial fund was established and it was publicized in numerous articles, with accompanying listing of the business, civic, law-enforcement, church and other local groups that established the fund. Id. An extraordinary funeral was held for the deceased deputy, with more front-page news and pictures. Appendices 3h24-27. The funeral was described as "the largest in the county's history", and the funeral procession "stretched for miles". Id.

<sup>6</sup>The Sunday circulation of the Pensacola News (69,000) is larger than the City's population (59,563). See Habeas Corpus Petition at 14-23 for a more detailed discussion of the extraordinary extent of pre-trial publicity.

<sup>7</sup>Id.

<sup>8</sup>See Petitioner's Habeas Corpus Petition at 21-22.

<sup>9</sup>As noted in Petitioner's Habeas Corpus Petition at 20, the local public defender in the instant case is the stepson of the sheriff and was a friend of both the deceased deputy sheriff and the other deputy-sheriff who was involved in the incident which led to Petitioner's arrest and conviction.

<sup>10</sup>In his Motion for Change of Venue, defense counsel argued, in part, that the "Defendant has been harrassed and threatened by deputies at the Escambia County Jail". (A.R.1238-39). See Petitioner's Habeas Corpus Petition at 16.

established that every member of the jury panel had prior knowledge of the alleged crimes through news media accounts and community discussion. And, in both cases defense counsel filed timely change of venue motions that were denied.

However, there was one difference between the instant case and Manning. In Manning, the defendant's appellate lawyer raised the pretrial publicity issue and prevailed on it. In the instant case, despite the clearest indications in the record that a fair trial had been denied by pretrial publicity<sup>11</sup>, the Petitioner's appellate lawyer did not raise the fair trial issue.

For these reasons Petitioner contends that appellate counsel clearly was ineffective in failing to raise and argue the pre-trial publicity issue, an issue which was not only meritorious but also, if successful, would have resulted in reversal of both the sentence and conviction of Petitioner. See Knight v. State, 394 So.2d 997 (Fla. 1981); Strictland v. Washington, 104 S. Ct. 2052 (1984).

C. The Introduction and Prejudicial Use at Trial of Petitioner's Juvenile Record Violated Florida Law and the United States Constitution.

Respondent acknowledges that, in order to fully counter Petitioner's claim that he was denied effective assistance of counsel on appeal, Respondent must address the merits of each of Petitioner's claims with respect to appellate counsel's omissions. See Respondent's Response at 3. Yet Respondent chooses to ignore entirely the merits of Petitioner's claim that the use of Petitioner's juvenile record during the sentencing hearing to rebut mitigating circumstance (6)(a) was specifically prohibited by Florida Statutes §39.10(4) and §39.12(6).

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<sup>11</sup>In Petitioner's Habeas Corpus Petition at 14-15, Petitioner recites the various steps taken by defense counsel below to challenge the extraordinary pre-trial publicity. These steps included a Motion to Limit Pre-trial Publicity, A Motion for Change of Venue, a Motion for Individual Voir Dire and Sequestration of Jurors During Voir Dire, and a Motion to Increase the Number of Peremptory Challenges Which the Defense may Exercise.

Respondent does not contend that Petitioner's precise argument, founded upon basic principles of statutory construction and the Constitutional justification underlying the Florida juvenile justice system, has ever been presented to, or decided by this Court. See Petitioner's Habeas Corpus Petition at 27-33. Nor does Respondent contend that Petitioner's construction of the applicable Florida statutes is implausible, contrary to the text or intent of the applicable statutes, or for any other valid reason unlikely to be adopted by this Court. Accordingly, Respondent also has failed to counter Petitioner's claim that appellate counsel rendered ineffective assistance in failing to raise this admittedly novel, but meritorious claim for relief that, if resolved in Petitioner's favor, would require reversal of Petitioner's sentence. Knight v. State, 394 So.2d 997 (Fla. 1981); Strickland v. Washington, 104 S. Ct. 2052 (1984).

#### Conclusion

For the reasons set forth both above and in Petitioner's Habeas Corpus Petition, Petitioner requests this Court to issue its writ of Habeas Corpus, and to direct that Petitioner receive a new trial or sentencing hearing; alternatively, that this Court allow full briefing of the issues presented herein, and grant Petitioner belated appellate review from his conviction and sentence.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply to the Response has been mailed postage pre-paid to Gregory C. Smith, Assistant Attorney General, State of Florida, Elliot Building, 401 South Monroe Street, Tallahassee, Florida 32301 this 11<sup>th</sup> day of October, 1984.

  
Michael A. Millemann