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PRELIMINARY STATEMENT

Ricky Corbett relies on the arguments presented in his initial brief to respond to the state's answer brief except for the following additions regarding Issues I, III, and VIII:

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING A CONTINUANCE AFTER THE LATE DISCLOSURE OF A MATERIAL STATE'S WITNESS WHICH DEPRIVED THE DEFENSE OF THE OPPORTUNITY TO INVESTIGATE POTENTIAL IMPEACHMENT EVIDENCE TO USE AGAINST THE WITNESS.

On page 19 of the state's brief, the contention is made that there was no need for further investigation as the defense claimed. The suggestion was also made that the need for the investigation was speculative. However, on page 229 of the record, defense counsel stated he wanted to investigate and interview the other inmates present in the cell during this time period. Counsel said:

Last night we took the deposition of Sgt. Tim Crenshaw of the Walton County Sheriff's Department. It is a situation, Judge, that the jail does not maintain records to be able to keep up with who stays in which cell, cannot even say who was in a particular cell at a particular time. The only information I have available to me, Judge, is the information I have been able to gather from my client as far as who could have been in the cell with him.

I need the opportunity to try to find some of these witness to find out if the were a party to any of this and if any of this is a situation where there may have been some defenses. Without the

opportunity to try to contact these people, and there are approximately ten different people at this point that I know of, Judge. Based on that I would renew my motion for a continuance at this point in this particular case.

(R 229-230). Contrary to the state's assertion, the potential investigation was not speculative. Counsel had identified ten potential witnesses who were inmates in the cell during that time. He was requesting time to find and interview these witnesses.

The state also claims that this case is similar to Diaz v. State, 513 So.2d 1045 (Fla. 1987) in which this Court affirmed a trial court's denial of a continuance. There are distinguishing facts between Diaz and the instant case. Defense counsel in Diaz had one week notice of the potential witness. Counsel immediately deposed the witness. On the first day of trial, counsel moved for a continuance claiming "insufficient time to discuss these statements with Diaz or to investigate their truth." Id. at 1047. Counsel in Diaz apparently wanted more time to discuss the matter with his client. Ricky Corbett's lawyer wanted more time to talk to other inmates in the cell during the time the statements were allegedly made. The reason for the continuance request in Diaz was substantially different than the reason for the continuance request in this case.

ISSUE III

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE SENTENCING JUDGE, WHO DID NOT PRESIDE OVER THE TRIAL AND PENALTY PHASE, ERRED IN SENTENCING CORBETT AFTER MERELY REVIEWING THE TRANSCRIPTS OF THE TRIAL, AND WITHOUT PERSONALLY HEARING THE TESTIMONY OF THE WITNESSES PERTINENT TO THE SENTENCING DECISION.

Initially, the state contends that Corbett suffered no prejudice when Judge Barron sentenced him without having heard the live testimony of the witnesses because his sentence was in conformity with some handwritten notes left by the late Judge Wells. (State's brief pages 23, 25). Any notes or indication of a sentencing decision left by Judge Wells is an irrelevant consideration in this case. The death sentence was imposed by Judge Barron. If Ricky Corbett is to die in the electric chair, it will be upon Judge Barron's sentencing order, not Judge Wells'. Ricky Corbett was entitled to have the judge who sentenced him to death, at the very least, listen to the live testimony of witnesses.

The state also relies upon this Court's Florida Rule of Criminal Procedure 3.231. This rule merely provides that a successor judge may proceed with a trial or post-trial proceedings upon the death of the judge originally assigned the case. The rule, however, must be read in conjunction with the legislature's voice on this subject found in Section 38.12, Florida Statutes. That provision provides that no party shall suffer a detriment as a result of the death of judge. The legislature's enactment and this court's rule are not an opposite. Moreover, this court's rule could not be applied in a manner which would

act to deprive Ricky Corbett of his rights to due process in the death penalty proceedings in this case.

ISSUE VIII

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN GIVING PENALTY PHASE JURY INSTRUCTIONS WHICH FAILED TO ADEQUATELY ADVISE THE JURY AS TO THE LIMITATIONS AND FINDINGS NECESSARY TO SATISFY THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE.

On page 37 of the state's brief, the state contends that this court has rejected this argument several times. However, all of the cases the state's cites, were decided prior to the United States Supreme Court's decision in Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 1 (1990). This Court has not addressed this issue in light of Shell.

CONCLUSION

For the reasons presented in the initial brief and this reply brief, Corbett asks this Court to reverse his judgment and sentence.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



W. C. McLAIN #201170
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply has been furnished by U.S. Mail to Giselle D. Lysten, Assistant Attorney General, Department of Legal Affairs, Florida Regional Service Center, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida, 33128; and a copy has been mailed to appellant, Ricky Corbett, #097382, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 16 day of September, 1991.



W. C. McLAIN