

No. _____

In the Supreme Court of the United States

DOMINICK A. OCCHICONE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

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Appendix A.

235 So.3d 299
Supreme Court of Florida.

Dominick A. OCCHICONE, Appellant,
v.

STATE of Florida, Appellee.

No. SC17-1112

[January 30, 2018]

Synopsis

Background: Defendant who had been sentenced to death filed a motion for collateral relief. The Circuit Court, Pasco County, No. 511986CF001355CFAXWS, Stanley R. Mills, Senior Judge, denied the motion. Defendant appealed.

[Holding:] The Supreme Court held that *Hurst v. State*, 202 So. 3d 40, which required a jury to unanimously find that aggravating factors were sufficient to impose death, did not apply retroactively to defendant's death sentence.

Affirmed.

Pariente, J., filed an opinion concurring in result.

Lewis and Canady, JJ., concurred in result.

An Appeal from the Circuit Court in and for Pasco County, Stanley R. Mills, Senior Judge—Case No. 511986CF001355CFAXWS

Attorneys and Law Firms

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Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Stephen D. Ake, Senior Assistant Attorney General, Tampa, Florida, for Appellee

Opinion

PER CURIAM.

*300 We have for review Dominick A. Occhicone's appeal of the circuit court's order denying Occhicone's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. See art. V, § 3(b)(1), Fla. Const.

Occhicone's motion sought relief pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and our decision on remand in *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), cert. denied, — U.S. —, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). This Court stayed Occhicone's appeal pending the disposition of *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), cert. denied, — U.S. —, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017). After this Court decided *Hitchcock*, Occhicone responded to this Court's order to show cause arguing why *Hitchcock* should not be dispositive in this case.

After reviewing Occhicone's response to the order to show cause, as well as the State's arguments in reply, we conclude that Occhicone is not entitled to relief. Occhicone was sentenced to death following a jury's recommendation for death by a vote of seven to five. See *Occhicone v. State*, 570 So.2d 902, 904 (Fla. 1990).¹ His sentence of death became final in 1991. *Occhicone v. Florida*, 500 U.S. 938, 111 S.Ct. 2067, 114 L.Ed.2d 471 (1991). Thus, *Hurst* does not apply retroactively to Occhicone's sentence of death. See *Hitchcock*, 226 So.3d at 217. Accordingly, we affirm the denial of Occhicone's motion.

¹ Occhicone was convicted of two counts of first-degree murder, and the jury recommended a sentence of death for each count; however, the trial court sentenced Occhicone to death for only one count of first-degree murder. *Occhicone*, 570 So.2d at 904. While the jury vote is not in this Court's opinion on direct appeal, this Court's opinion addressing the circuit court's denial of Occhicone's initial postconviction motion states that the jury recommended sentences of death for both murders by a vote of seven to five. *Occhicone v. State*, 768 So.2d 1037, 1039 (Fla. 2000).

The Court having carefully considered all arguments raised by Occhicone, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

LABARGA, C.J., and POLSTON, and LAWSON, JJ., concur.

PARIENTE, J., concurs in result with an opinion.

LEWIS and CANADY, JJ., concur in result.

QUINCE, J., recused.

PARIENTE, J., concurring in result.

I concur in result because I recognize that this Court's opinion in Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, — U.S. —, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

All Citations

235 So.3d 299, 43 Fla. L. Weekly S50

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Appendix B.

Supreme Court of Florida

MONDAY, SEPTEMBER 25, 2017

CASE NO.: SC17-1112

Lower Tribunal No(s):
511986CF001355CFAXWS

DOMINICK A. OCCHICONE

vs. STATE OF FLORIDA

Appellant

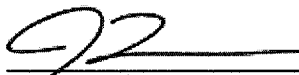
Appellee

Appellant shall show cause on or before Monday, October 16, 2017, why the trial court's order should not be affirmed in light of this Court's decision Hitchcock v. State, SC17-445. The response shall be limited to no more than 20 pages. Appellee may file a reply on or before Thursday, October 26, 2017, limited to no more than 15 pages. Appellant may file a reply to the Respondent's reply on or before Monday, November 6, 2017, limited to no more than 10 pages.

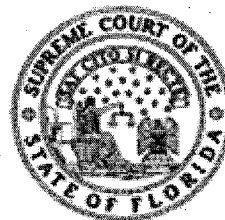
Motions for extensions of time will not be considered unless due to a medical emergency.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



ks

Served:

STEPHEN D. AKE
RAHEELA AHMED
MARIA PERINETTI
LISA MARIE BORT

No. _____

In the Supreme Court of the United States

DOMINICK A. OCCHICONE,
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DEATH PENALTY CASE

Appendix C.

Supreme Court of Florida

WEDNESDAY, JUNE 14, 2017

CASE NO.: SC17-1112

Lower Tribunal No(s):
511986CF001355CFAXWS

DOMINICK A. OCCHICONE

vs.

STATE OF FLORIDA

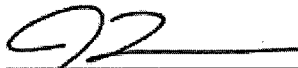
Appellant(s)

Appellee(s)

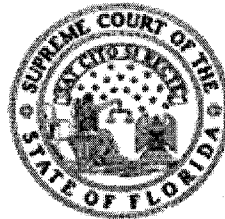
This appeal is stayed pending disposition of Hitchcock v. State, SC17-445. The record on appeal in this case shall still be transmitted in accordance with this Court's June 14, 2017, order on the preparation of the record on appeal.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



jat

Served:

STEPHEN D. AKE
RAHEELA AHMED
MARIA PERINETTI
LISA MARIE BORT
HON. ANTHONY RONDOLINO,
CHIEF JUDGE

HON. PAULA O'NEIL, CLERK
OFFICIAL COURT REPORTERS
HON. STANLEY RICHARD MILLS,
JUDGE
SARA ELIZABETH MACKS

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Appendix D.

RECEIVED BY
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MAY 24 2017

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA,

CASE NO.: CRC86-01355CFAWS
UCN: 511986CF001355CFAXWS
DIVISION: 3

v.

DOMINICK OCCHICONE,
SPN: 0011019, Defendant. /

**ORDER DISMISSING THE DEFENDANT'S "SUCCESSIVE MOTION TO VACATE
DEATH SENTENCE;" DIRECTIONS TO THE CLERK**

THIS CAUSE came before the Court on the Defendant's "Successive Motion to Vacate Death Sentence," filed January 7, 2017, pursuant to Florida Rule of Criminal Procedure 3.851 and following an extension of time, the State's response, filed March 2, 2017. On March 13, 2017, the Defendant filed a "Notice of Supplemental Authority," listing 11 additional cases for this Court's consideration, in support of his initial motion. On March 14, 2017, the State, in response to the Defendant's supplemental filing, filed its "Notice of Supplemental Authority," listing one additional case for this Court's consideration. On March 22, 2017, the Court heard the legal arguments of the parties at a case management conference. Having considered the Defendant's motion, the State's response, court record, the applicable law, supplemental authority, and the oral arguments of the parties, the Court finds as follows:

PROCEDURAL HISTORY

On September 18, 1987, following a jury trial, the Defendant was found guilty of two counts of first-degree murder, in connection with the murder of his former girlfriend's mother and father. Following a penalty phase, the jury recommended death for each count, by a vote of seven to five. On November 9, 1987, the presiding court sentenced the Defendant to life imprisonment for the killing of his former girlfriend's father and to death for the killing her mother. The Defendant's convictions and sentences were affirmed on appeal. *Occhicone v. State*, 570 So. 2d 902 (Fla. 1990).

On April 8, 1993, the Florida Supreme Court denied the Defendant's habeas petition as procedurally barred. *Occhicone v. Singletary*, 618 So. 2d 730, 731 (Fla. 1993). On May 20, 1993, the Defendant filed his first motion for postconviction relief, which was ultimately denied.

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On June 29, 2000, the Florida Supreme Court affirmed denial of the Defendant's motion for postconviction relief. *Occhicone v. State*, 768 So. 2d 1037 (Fla. 2000).

On November 13, 2001, after exhausting both his direct appeals and his state collateral appeals, the Defendant filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Florida. On March 31, 2005, the Middle District of Florida denied the Defendant's petition. However, on November 8, 2005, it granted a certificate of appealability on the issue of *Giglio* error. On July 14, 2006, the United States Court of Appeals, Eleventh Circuit, affirmed the issue of *Giglio* error. *Occhicone v. Crosby*, 455 F.3d 1306 (11th Cir. 2006). On January 7, 2017, the Defendant, through counsel, filed the instant motion.

ANALYSIS

A motion for collateral relief from a death sentence must be filed within one year after the judgment and sentence becomes final. See Fla. R. Crim. P. 3.851(d)(1). Here, the Defendant's convictions and sentences were affirmed on October 11, 1990, and the mandate was filed with the trial court on January 25, 1991. The Defendant's instant motion is therefore untimely, unless he can establish an applicable exception to the time limit. In an effort to establish an exception to the time limit, the Defendant alleges that his motion is based upon a fundamental constitutional right that has been held to apply retroactively. See Fla. R. Crim. P. 3.851(d)(2). Specifically, the Defendant alleges that the United States Supreme Court's ruling in *Hurst v. Florida*, 136 S. Ct. 616 (2016) ("*Hurst v. Florida*") and the Florida Supreme Court's subsequent ruling in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) ("*Hurst*"), created new Sixth and Eighth Amendment rights that are retroactive to his case.

On June 24, 2002, the United States Supreme Court held the Arizona capital sentencing statute unconstitutional, "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring v. Arizona*, 536 U.S. 584, 609 (2002). A major development occurred in 2016, when on January 12, 2016, the United States Supreme Court held that the "analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's." *Hurst v. Florida*, 136 S. Ct. at 622. On remand, the Florida Supreme Court held that the Sixth Amendment requires that the jury unanimously find the existence of aggravating factors beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the

mitigating factors. *Hurst*, 202 So. 3d at 53. The court further held that the Eighth Amendment requires that the jury's recommended sentence of death be unanimous in order for the trial court to impose a sentence of death. *Id.* The Florida Supreme Court then had to determine the retroactive effect of *Hurst v. Florida* and *Hurst*, and in doing so; it announced a bright-line rule that *Hurst* does not apply retroactively to sentences that were final before the United States Supreme Court issued its opinion in *Ring*. See *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), *reh'g denied*, SC16-102, 2017 WL 431741 (Fla. Feb. 1, 2017); but see *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), *reh'g denied*, SC14-2108, 2017 WL 510491 (Fla. Feb. 8, 2017) (holding that *Hurst* applies retroactively to sentences that were final **after** *Ring* was issued) (**emphasis added**). For the reasons discussed below, the Court finds that none of the Defendant's claims warrants the retroactive application of either *Hurst v. Florida* or *Hurst*.

Claim 1(a): The Defendant's Sentence Violates the Sixth Amendment and is Unconstitutional under *Hurst v. Florida*

The Defendant first claims that his death sentence violates the Sixth Amendment of the United States Constitution as interpreted by the United States Supreme Court in *Hurst v. Florida* and that the decision announced in *Hurst v. Florida* "invalidates" his death sentence. The Defendant goes on to claim that *Hurst v. Florida* is retroactive to him under a *Witt*¹ analysis. He also claims that *Hurst v. Florida* should be applied retroactively to his case because it would ensure fairness and uniformity. To that end, he points this Court's attention to *Mosley* and argues that just as in *Mosley*, if this Court did not apply *Hurst v. Florida* retroactively to his case, it would be fundamentally unfair and would lead to disparate treatment among Florida capital defendants. At oral argument, counsel for the Defendant conceded that case law did not support their argument that the Defendant was entitled to retroactive application of *Hurst v. Florida*, but argued that the Florida Supreme Court was wrong on this matter.

In its response, the State argues that since the Defendant's sentence became final in 1991, well before *Ring* was decided, *Hurst v. Florida* does not apply retroactively to him. The State draws support from *Asay* for this argument, where the Florida Supreme Court ruled that *Hurst v. Florida* does not apply retroactively to cases that were final when *Ring* was decided. 210 So. 3d at 22. As to the Defendant's claim that fairness requires retroactive application of *Hurst v.*

¹ See *Witt v. State*, 387 So. 2d 922 (Fla. 1980).

Florida, the State argues that just as *Ring* did not enhance the fairness or efficiency of death penalty procedures, neither does *Hurst v. Florida*. Similarly, the State argues that the Defendant's argument concerning uniformity is of no avail to him because the landscape of retroactivity analysis necessarily calls for a situation whereby some cases will benefit from retroactivity, whereas others will not. At oral argument, the State reiterated its position that the Defendant's motion is untimely and should be summarily denied.

The Court finds that, in accordance with the Florida Supreme Court's opinion in *Asay*, *Hurst v. Florida* is not retroactive to the Defendant's case. 210 So. 3d at 22. As the State points out, the Defendant's conviction was final in 1991; accordingly, he is not entitled to relief based on *Hurst v. Florida*. *Id.*; see also *Gaskin v. State*, 42 Fla. L. Weekly S16 (Fla. Jan. 19, 2017) (denying defendant's claim that he is entitled to retroactive application of *Hurst v. Florida* when the defendant's sentence became final in 1993); *Lambrix v. State*, 42 Fla. L. Weekly S307 (Fla. Mar. 9, 2017), *reh'g denied*, SC16-56, 2017 WL 1927739 (Fla. May 10, 2017) (denying defendant's claim that he is entitled to retroactive application of *Hurst v. Florida* when the defendant's sentence became final in 1986). Notably, not only did the Defendant concede during oral argument that case law did not support his request for retroactive application, but in his written motion, the Defendant also concedes that *Asay* forecloses retroactive application in his case, but argues that his case "should be decided on an individual basis." Such an argument is essentially asking this Court to ignore, and effectively overrule, case law by which it is bound. It also ignores the fact that the issue before this Court is whether the Defendant can establish an exception to the clearly enunciated time bar under Rule 3.851. In order to do so, the Defendant is relying on Rule 3.851(d)(2), which allows an otherwise untimely claim *if* it is based on a fundamental constitutional right that has been held to apply retroactively. However, as explained above, there is no authority holding *Hurst v. Florida* retroactive to the Defendant.

As to the Defendant's claim that he is entitled to retroactive relief under a *Witt*² analysis, the Court finds such an argument inconsistent with the Defendant's recognition that *Asay*

² Under *Witt*, a change in the law does not apply retroactively unless the change 1) emanates from the Florida Supreme Court or U.S. Supreme Court, 2) is constitutional in nature, and 3) constitutes a development of fundamental significance. *Witt*, 387 So. 2d at 931. The third factor is analyzed under the three-fold test of *Stovall* and *Linkletter*, which requires courts to analyze three factors, including, in pertinent part, the effect that retroactive application of the new rule would have on the administration of justice. *Id.* at 926; *Stovall v. Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *Linkletter v. Walker*, 381 U.S. 618, 636, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

forecloses retroactive application of *Hurst v. Florida* to his case. To be sure, the *Asay* court conducted a *Witt* analysis in determining whether the defendant in that case was entitled to retroactive application of *Hurst v. Florida* and ultimately determined that *Witt* analysis forecloses retroactive application. *Asay*, 210 So. 3d at 15-22. In reaching this conclusion, the court determined that although *Hurst v. Florida* satisfied the first two prongs under *Witt*, it did not satisfy the third prong because the potential negative effect on the administration of justice weighed heavily against retroactive application of the new rule to pre-*Ring* individuals such as the Defendant. *Id.* at 22.

The Defendant also claims that “fundamental fairness” entitles him to retroactive application of *Hurst v. Florida* and suggests that certain decisions involving the death penalty should be given retroactive effect on the basis of fundamental fairness. He draws support for this argument from the *Mosley* court’s discussion of *James v. State*, 615 So. 2d 668 (Fla. 1993). *Mosley*, 209 So. 3d at 1274. The *James* opinion was founded upon “fundamental fairness,” rather than a *Witt* retroactivity analysis; however, the Defendant’s argument is misplaced. The Defendant overlooks the fact that the *Mosley* court expressly addressed the fact that *Asay* foreclosed retroactive relief to capital defendants, whose sentences, like the Defendant’s sentence, became final before *Ring*. 209 So. 3d at 1274. The only question left open in *Mosley* concerned the retroactive application to post-*Ring* defendants and as the Defendant acknowledges, he is not a post-*Ring* defendant. *Id.* Again, the Defendant’s sentence became final well before *Ring*; therefore, *Asay* is controlling. The Defendant also cites to a portion of the *Mosley* holding where the court concluded that fundamental fairness required retroactive application of *Hurst v. Florida*, when the defendant had the foresight to raise a *Ring* claim at his first opportunity, but was rejected each time. *Id.* at 1275. It appears the Defendant cites to this portion of *Mosley* for further support of his fundamental fairness argument; however, this portion of the *Mosley* holding is of no benefit to the Defendant, because he does not claim that he had the foresight to make a *Ring*-type claim prior to the issuance of *Ring*. In fact, at oral argument, counsel for the Defendant acknowledged that the Defendant had never raised any *Ring* type claims. Regardless, even if the Defendant did make such an argument, his claim would be denied because this same type of argument was implicitly rejected by the majority opinion in *Asay*, by which this Court is bound. *But see Asay*, 210 So. 3d 1, 30 (Lewis, J., concurring) (“the majority opinion has incorrectly limited the retroactive application of *Hurst* by barring relief to

even those defendants who, prior to *Ring*, had properly asserted, presented, and preserved challenges to the lack of jury [fact finding] and unanimity in Florida's capital sentencing procedure at the trial level and on direct appeal, the underlying gravamen of this entire issue.”). Finally, the Court notes that the Defendant’s fundamental fairness argument was addressed in both the concurring and dissenting opinions of *Asay*. See *Asay*, 210 So. 3d at 36 (J. Pariente concurring in part and dissenting in part) (“The majority’s conclusion results in an unintended arbitrariness as to who receives relief depending on when the defendant was sentenced or, in some cases, resentenced. For example, many defendants whose crimes were committed before 2002 will receive the benefit of *Hurst* because they were previously granted a resentencing on other grounds and their newest death sentence was not final when *Ring* was decided.”). Clearly, the Florida Supreme Court was aware of the impact of the bright-line rule it announced and the potential for non-uniformity. The Defendant is asking this Court to issue a ruling that is in clear opposition to the Florida Supreme Court’s explicit holding on this issue; however, it declines to do so. See *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976) (holding that where the Florida Supreme Court has decided an issue, Florida circuit courts are bound to adhere to that ruling). For the foregoing reasons, the Court finds that the Defendant is not entitled to retroactive application of *Hurst v. Florida*.

Claim 1(b): The Defendant is Entitled to the Retroactive Effect of *Hurst v. State* (“*Hurst*”), Under Federal Law

The Defendant also argues that he is entitled to relief under federal law because *Hurst*, in particular, announced substantive changes in constitutional law, which requires state courts to grant retroactive relief in collateral proceedings. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016), *as revised* (Jan. 27, 2016) (“[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.”). Specifically, the Defendant claims that the Florida Supreme Court in *Hurst*, announced changes rooted in the Sixth and Eighth Amendments by requiring that all findings necessary before the court can impose death, including the final recommendation of death, must be found unanimously by the jury. The Defendant contends that based on the fact these are substantive changes to constitutional law, Florida courts must give them retroactive effect.

The State does not specifically address the Defendant’s argument on this point; however,

the State's argument is consistent concerning the Defendant's entitlement to retroactivity; namely, that pursuant to *Asay*, the Defendant is not entitled to retroactive relief.

The Court does not find persuasive the Defendant's argument that the changes announced in *Hurst* are substantive in nature. The Defendant acknowledges that *Ring* is the basis of *Hurst v. Florida* and cites to *Schriro v. Summerlin* in also acknowledging that the United States Supreme Court has previously found that *Ring* set forth a procedural change and was therefore not retroactive on federal collateral review; these are apt acknowledgments given case law on this matter. See *Schriro v. Summerlin*, 542 U.S. 348, 354-55; 358 (2004) (holding that the United States Supreme Court's opinion in *Ring* set forth a procedural, rather than substantive, rule and therefore did not apply retroactively to cases already final on direct review); see also *Montgomery*, 136 S.Ct. at 729-30 (explaining that "[s]ubstantive rules...set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose," and "procedural rules are designed to enhance the accuracy of a conviction or sentence by regulating the manner of determining the defendant's culpability.") (quoting *id* at 353) (internal quotations omitted). Indeed, the aforementioned case law supports the finding that where an evolution in death penalty jurisprudence modifies the procedure required to impose the death penalty and does not altogether bar the imposition of the death penalty to a category of individuals, then the change is procedural in nature and state courts are not required to give such changes retroactive effect. *Id.*

Furthermore, the Florida Supreme Court has determined the limit of the retroactive application of *Hurst*. There is no authority holding either *Hurst* opinion retroactive to the Defendant. Like *Hurst v. Florida*, *Hurst*'s retroactivity is limited to death sentences that became final after *Ring* was issued. See *King v. State*, 211 So. 3d 866, 889 (Fla. 2017), *reh'g denied*, SC14-1949, 2017 WL 961818 (Fla. Mar. 13, 2017) (quoting *Mosley*, 209 So. 3d at 1273-74) ("we further held that our decision in *Hurst v. State* applies retroactively to those postconviction defendants whose sentences were final after the United States Supreme Court's 2002 decision in *Ring* . . ."); *Asay*, 210 So. 3d at 22 ("we conclude that *Hurst v. State* should not be applied retroactively to *Asay*'s case"); *Archer v. Jones*, --- So. 3d ---, 2017 WL 1034409, at *1 ("We hereby deny Archer's petition pursuant to our holding in *Asay* . . . that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to capital defendants whose death sentences were final when *Ring* . . . was decided."). For the foregoing reasons, the Court finds that the Defendant is

not entitled to retroactive application of *Hurst*.

Claim 2: The Defendant's Death Sentence Violates the Eighth Amendment under *Hurst v. State* ("*Hurst*")

The Defendant claims that evolving standards of decency now require that a jury recommendation for death be unanimous and because the jury recommendation of death was not unanimous in his case, his death sentence should be vacated for violating the Eighth Amendment of the United States Constitution as interpreted by *Hurst*. He argues that the *Hurst* holding, that the Eighth Amendment requires a unanimous jury recommendation, created a protected class of defendants and that he is a member of this protected class (i.e. defendants that had at least one jury member vote against imposing the death penalty).

In its response, the State argues that the Defendant's claim on this point is both time barred and without merit. The State points this Court's attention to *Spaziano v. Florida*, where the United States Supreme Court held that the Eighth Amendment is not violated in a capital case when the ultimate responsibility of imposing death, rests with the judge. 468 U.S. 447, 463-64 (1984), *Spaziano v. Florida*, 468 U.S. 447, 465 (1984), *overruled in part by Hurst v. Florida*, 136 S. Ct. at 616. The State argues that in deciding *Hurst v. Florida*, the United States Supreme Court analyzed the case on Sixth Amendment grounds and overruled *Spaziano* only to the extent it allows a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty, but that the court never addressed the issue of any possible Eighth Amendment violation nor did it overrule *Spaziano* on Eighth Amendment Grounds. *Hurst v. Florida*, 136 S. Ct. at 618. The State argues that since the United States Supreme Court has never held that a unanimous jury recommendation is required under the Eighth Amendment, *Spaziano* is surviving precedent that this Court is bound by and this Court cannot overrule this precedent.

At the outset, the Court notes that although the United States Supreme Court has not addressed the issue of whether unanimity is required in the jury's advisory verdict in capital cases under the Eighth Amendment, as the Defendant points out, the Florida Supreme Court has. In *Hurst*, the court acknowledged that although the United States Supreme Court has not addressed this issue, "the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death." *Hurst*, 202 So. 3d at 59-60. Despite the *Hurst* court's holding on this matter, the Defendant's argument is based on a limited reading of

Hurst and the Defendant is not entitled to retroactive relief based on a limited portion of the *Hurst* holding. The fact that the jury verdict in the Defendant's case was not unanimous does not negate the fact that the Defendant's sentence became final long before *Ring* was decided. The fact remains that the Florida Supreme Court has explicitly limited the retroactive application of *Hurst*, which forecloses retroactive relief to defendants, like the Defendant in the instant case, whose sentences were final before *Ring* was issued; a ruling by which this Court is bound. *Asay*, 210 So. 3d at 22; *Dwyer*, 332 So. 2d at 335

Finally, having found that the Defendant is not entitled to retroactive application under either *Hurst* opinion, this Court need not address whether the *Hurst* error in this case was harmless.

Accordingly, it is:

ORDERED AND ADJUDGED that the Defendant's "Successive Motion to Vacate Death Sentence," is hereby **DISMISSED**.

THE CLERK IS HEREBY DIRECTED, in accordance with Florida Rule of Criminal Procedure 3.851(f)(5)(F), to promptly serve a copy of this order upon the State, the Attorney General, and counsel for the Defendant with a certificate of service.

THE DEFENDANT IS HEREBY NOTIFIED that this is a **FINAL** order, and he has 30 days from the rendition date of this order to file an appeal, should he choose to do so.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida, this 18th day of May, 2017. A true and correct copy of this order has been furnished to the parties listed below.


Stanley Mills, Senior Judge

cc: Staff Attorney
Sara Macks, Assistant State Attorney; Sixth Judicial Circuit; P.O. Box 5028; Clearwater, FL 33758

Stephen D. Ake, Senior Assistant Attorney General
Office of the Attorney General
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Maria Christine Perinetti, Raheela Ahmed, and Lisa M. Bort, Assistant CCRCs
The Law Office of the Capital Collateral Regional Counsel – Middle Region
12973 North Telecom Parkway
Temple Terrace, FL 33637

No. _____

In the Supreme Court of the United States

DOMINICK A. OCCHICONE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE.

Appendix E.

768 So.2d 1037
Supreme Court of Florida.

Dominick OCCHICONE, Appellant,

v.

STATE of Florida, Appellee.

No. SC93343.

June 29, 2000.

Rehearing Denied Oct. 10, 2000.

Synopsis

Following affirmance, 570 So.2d 902, of convictions of murder and sentence of death, petitioner filed motion for postconviction relief. The Circuit Court, Pasco County, Stanley R. Mills, J., denied motion. Petitioner appealed. The Supreme Court held that: (1) State did not violate *Brady*, and (2) defendant was not denied effective assistance of counsel at trial.

Affirmed.

Pariente, J., concurred in result only.

Attorneys and Law Firms

*1038 Harry P. Brody, Assistant CCRC, and John P. Abatecola, Staff Attorney, Capital Collateral Regional Counsel-Middle, Tampa, Florida, for Appellant.

Robert A. Butterworth, Attorney General, and Carol M. Dittmar, Assistant Attorney General, Tampa, Florida, for Appellee.

Opinion

PER CURIAM.

We have for review the denial of Dominick Occhicone's initial motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the following reasons, we affirm the trial court's denial.

PROCEEDINGS TO DATE

In 1986, Occhicone was convicted for the first-degree murders of the mother and *1039 father of his former girlfriend, Anita Gerrety. The circumstances of the murders were described by this Court on direct appeal:

In the early morning hours of June 10, 1986 Occhicone awakened his former girlfriend by knocking on the sliding glass door to her bedroom in a house she shared with her children and her parents. The woman refused to talk with him and he left. He returned an hour or so later, armed with a handgun, and cut the telephone lines and roused the household. When the woman's father confronted him outside the house, Occhicone shot him. The woman and her daughter fled the house while Occhicone was breaking into it through a locked door. Once inside Occhicone shot the woman's mother four times.

Occhicone v. State, 570 So.2d 902, 904 (Fla.1990). At trial, Occhicone asserted a voluntary intoxication defense claiming that his level of intoxication on the night of the murders, as well as his documented drinking habit, prevented him from having the requisite mental state to premeditate the murders. However, the jury found him guilty and recommended the death penalty for both murders by a seven-to-five vote.

Although the trial judge sentenced Occhicone to life in prison for the murder of his ex-girlfriend's father, he sentenced him to death for the murder of her mother. In support of the death sentence, the trial judge found three aggravating factors: (1) previous conviction of a violent felony; (2) murder committed during a burglary; and (3) murder committed in a cold, calculated, and premeditated manner. As statutory mitigation, the trial judge found that the murder was committed while Occhicone was under the influence of extreme mental and emotional disturbance. Finally, as nonstatutory mitigation, the judge found that Occhicone was a good prisoner and had acclimated to his custodial environment. On appeal, this Court affirmed Occhicone's conviction and sentence. See *Occhicone v. State*, 570 So.2d 902 (Fla.1990). The United States Supreme Court denied Occhicone's petition for writ of certiorari on May 20, 1991. See *Occhicone v. Florida*,

500 U.S. 938, 111 S.Ct. 2067, 114 L.Ed.2d 471 (1991). On July 7, 1992, Occhicone filed a petition for writ of habeas corpus in this Court, which was denied on April 8, 1993. See *Occhicone v. Singletary*, 618 So.2d 730 (Fla.1993).

On May 20, 1993, Occhicone filed his initial 3.850 motion raising seven issues.¹ The trial court summarily denied claims (1), (4), (5), (6), and (7) in their entirety and claims (2) and (3) in part. The trial court then conducted an evidentiary hearing on the remaining portions of Occhicone's ineffective assistance of counsel allegations contained in claims (2) and (3), and subsequently denied the remaining portions of these claims.

¹ The seven issues were as follows: (1) whether the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); (2) whether counsel provided ineffective assistance during the guilt phase; (3) whether counsel provided ineffective assistance during the penalty phase; (4) whether Occhicone was denied a competency evaluation; (5) whether the trial judge provided unreasonably vague and confusing jury instructions; (6) whether the death sentence was based on an unconstitutionally obtained prior conviction; and (7) whether the cumulative impact of judicial error denied Occhicone a fair trial.

APPEAL

[1] [2] [3] [4] On appeal, Occhicone raises a number of issues relating to the trial court's denial of his claims.² We conclude *1040 some of these issues are procedurally barred,³ and, upon review, find the rest are without substantial merit.

² In addition to the denial of his specific claims, Occhicone alleges he was denied a fair hearing by the court's refusal to hear three alleged mitigation witnesses and the court's allowing the state attorney to testify.

Occhicone alleges that the trial court erred by preventing him from presenting three witnesses who did not testify at trial and who allegedly could have provided mitigating evidence. At the hearing, the judge ruled that postconviction counsel had failed to lay an adequate predicate for this testimony in that counsel did not allege that trial counsel either knew of these witnesses or should have discovered them through the use of due

diligence. We find no abuse of discretion, especially in view of the fact that on appeal, Occhicone has still failed to point to proper allegations as to trial counsel's conduct.

As to this second claim, Occhicone alleges that the court erred in allowing the lead attorney for the State at trial and at the evidentiary hearing, Michael Halkitis, to testify as a rebuttal witness at the evidentiary hearing. At the hearing, Occhicone called Dr. Mussenden to establish that after reviewing affidavits prepared by Lilly Lawson, Joanne Parmenter (Carrico), and Ann Montana during the postconviction process, his opinion on Occhicone's state of mind at the time of the offense had changed in favor of Occhicone. During his testimony, an issue arose as to whose depositions Dr. Mussenden had reviewed prior to his testimony at trial. Although Dr. Mussenden remembered having reviewed certain depositions and that Halkitis had sent him a letter referring him to certain depositions, Dr. Mussenden did not remember exactly whose depositions they were. The evidentiary hearing judge allowed Halkitis to testify as to whose depositions he had sent Dr. Mussenden and relied on part of this testimony in his order denying Occhicone's 3.850 motion for relief.

It is generally understood that under the "advocate-witness" rule, a prosecutor should avoid appearing as both an advocate and a witness except under extraordinary circumstances. See *United States v. Hosford*, 782 F.2d 936, 938 (11th Cir.1986); see also *Shargaa v. State*, 102 So.2d 809 (Fla.1958). These extraordinary circumstances usually arise when the evidence is not otherwise available. See *United States v. Johnston*, 690 F.2d 638, 644-45 (7th Cir.1982). Even under these circumstances, some suggest that counsel should withdraw from further participation in the case. See *id.*

Although the policy considerations for this rule remain applicable when the prosecutor testifies before a judge instead of a jury, more flexibility may be permitted when it occurs before a judge. See *id.* at 644. After weighing the circumstances and factors surrounding Halkitis' testimony, we find that the trial judge did not abuse his discretion in allowing Halkitis to testify for this very limited purpose. Because the trier of fact at the evidentiary hearing was the judge, not a jury, we believe any potential prejudice was considerably diminished. Moreover, the transcript reflects that counsel for both the State and Occhicone, as well as the judge, first tried to obtain the actual letter and depositions

that were allegedly sent to Dr. Mussenden before allowing him to testify. Finally, because Halkitis did not testify until the end of the evidentiary hearing, it would have created a hardship to the State for him to withdraw as counsel that late in the proceedings. Furthermore, we find that Halkitis' testimony was not of the type that would materially prejudice Occhicone. As noted, Dr. Mussenden himself conceded that he had reviewed several depositions provided by Halkitis before rendering his opinion at trial, but could not remember which depositions.

3

Claims (5), (6), and (7) raised below are procedurally barred. In claim (5), Occhicone alleges that the penalty phase jury instructions were unreasonably vague and confusing. As noted by the court below, this claim is procedurally barred because claims challenging the validity of jury instructions should be raised on direct appeal, not on motions for postconviction relief. *See Buenoano v. Dugger*, 559 So.2d 1116, 1118 (Fla.1990); *Gorham v. State*, 521 So.2d 1067, 1070 (Fla.1988).

In claim (6), Occhicone alleges that his death sentence was based upon an unconstitutionally obtained prior conviction (resisting arrest with violence). However, Occhicone has not provided any reasons for failing to raise this issue at trial or on direct appeal; therefore, he is procedurally barred from raising the issue now. Further, as noted by the State, a defendant must first collaterally challenge his prior conviction in a separate proceeding before bringing this claim. *See Buenoano v. State*, 708 So.2d 941, 951-52 (Fla.1998); *Eutzy v. State*, 541 So.2d 1143, 1146 (Fla.1989). Occhicone has not challenged this prior conviction nor has he alleged how his conviction for resisting arrest with violence was obtained in violation of his constitutional rights. Finally, this claim also fails on its merits because this aggravating factor could also have been applied solely based on the additional and contemporaneous murder conviction obtained in this case.

Lastly, in claim (7), Occhicone alleges that the cumulative impact of judicial error at trial denied him his right to a fair trial. However, any claim that cumulative errors committed at trial prejudiced the outcome of his case must be raised on direct appeal; therefore, Occhicone is procedurally barred from raising this claim here. *See Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1323-24 (Fla.1994).

CLAIMS SUMMARILY DENIED

Occhicone alleges that the lower court erred in summarily denying several of his *1041 other claims including: his *Brady* claim, the claim that the State presented false evidence, his competency to stand trial claim, and parts of his ineffective assistance of counsel claims.

[5] [6] To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or the record must conclusively refute them. *See Fla. R.Crim. Pro. 3.850(d)*; *Peede v. State*, 748 So.2d 253 (Fla.1999); *Rivera v. State*, 717 So.2d 477 (Fla.1998). Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations as true to the extent they are not refuted by the record. *See Peede*, 748 So.2d at 257; *see also Lightbourne v. Dugger*, 549 So.2d 1364, 1365 (Fla.1989); *Harich v. State*, 484 So.2d 1239, 1241 (Fla.1986).

[7] As his first claim, Occhicone alleges that the State withheld the names of material witnesses Lilly Lawson, Anita Gerrety, Debra Newell, Phillip Baker, David Hoffman, Barbara Talbert, and Kimberly Connell, all of whom had information of Occhicone's intoxication on the night of the offense and would have assisted the presentation of his voluntary intoxication defense. As to witnesses Hoffman and Talbert, Occhicone maintains that the State withheld notes of interviews it had with each one of them in which they told the State they saw Occhicone on the day of the murders at Shooter's Bar. Specifically, Hoffman told the State that Occhicone "had a buzz." As to Connell, Occhicone alleges that the State failed to disclose notes of an interview it had with Goddard, Connell's sister, wherein Goddard told the State that Connell had been with Occhicone on the day of the murders. Finally, as to Gerrety, Occhicone claims that the State failed to reveal notes of an interview it had with Gerrety where she stated that on the night of the murders and prior to the shootings, Occhicone had difficulty walking and was staggering, evidence which could have been used to cross-examine her at trial.

Just recently, the United States Supreme Court restated the three components that a defendant must show to successfully assert a *Brady* violation:

The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). This prejudice is measured by determining "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at 290, 119 S.Ct. 1936 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). In applying these elements, the evidence must be considered in the context of the entire record. *See Haliburton v. Singletary*, 691 So.2d 466, 470 (Fla.1997) (quoting *Cruse v. State*, 588 So.2d 983, 987 (Fla.1991)).

At issue in this claim are notes about possible witnesses. This Court had stated that notes of witness interviews maintained by the State constitute *Brady* material. *See Young v. State*, 739 So.2d 553 (Fla.1999) (finding that attorney notes of interviews with State witnesses withheld from the defendant constituted a *Brady* violation); *see also Kyles*, 514 U.S. at 446-50, 115 S.Ct. 1555. The court below denied Occhicone's claim based on the materiality prong of the test as well as the fact that the record affirmatively reflects that Occhicone was aware of these witnesses and, more importantly, he knew about the information they would testify to.

[8] Based on the record in this case, we conclude the trial court's summary denial of Occhicone's claims on this issue was proper. In fact, as conceded by Occhicone, these witnesses are allegedly material precisely because they were with him during the hours before the murders. Therefore, no one better than Occhicone *1042 himself could have known about these witnesses. Moreover, in several evaluations conducted by mental health experts appointed in this case, Occhicone stated that he had visited Shooter's Bar the days before the murders and discussed some of the people he had visited with.⁴ Therefore, this serves as further proof that Occhicone knew he had visited Shooter's Bar before the murders and was aware of these people. Additionally, some of these witnesses now complained about testified at trial; therefore, Occhicone clearly was aware of them. As noted by the trial court,

Occhicone has failed to even allege that he did not know of these witnesses. Although the "due diligence" requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.

4 Several witnesses also stated in pretrial depositions that Occhicone frequented this bar and was a heavy drinker. Moreover, Newell stated that she had seen Occhicone at the bar the night of the murders.

Next, Occhicone alleges that the State knowingly provided false testimony. In support of this claim, Occhicone relies on a sworn affidavit by State witness Lilly Lawson, a barmaid at Shooter's Bar, wherein she states: "There was tremendous pressure put on me by the police pretrial; they made things very difficult for me, and they put words in my mouth. They wanted me to testify a certain way, and they made sure I did so." Additionally, Occhicone alleges that the State failed to disclose a deal it had made with Phil Baker, a "jailhouse snitch," and that it remained silent at trial when Baker denied having any understanding with the State. The trial court summarily denied these claims, finding that the testimony of both of these witnesses was not material.

[9] Lawson's most damaging testimony at trial was that a couple of weeks prior to the murders, Occhicone told her that he felt like murdering Gerrety's parents and making her watch. However, as noted by the trial court, Lawson has not alleged that she actually lied or testified falsely at trial as to any particular fact. Moreover, she was not the only witness who testified that Occhicone did not like Gerrety's parents and wished they were not around. Hence, Occhicone has failed to allege that he was prejudiced by the State's alleged misconduct.

[10] Baker testified at trial that while he and Occhicone were together in jail, Occhicone had told him that "the only mistake he made was not killing her [Gerrety] too." Additionally, Occhicone told him "they [Gerrety's parents] were fucking assholes and he should have shot them a long time ago." At the time Baker was contacted by the State, he had four felony convictions, was on parole, and was facing a charge of grand theft. Before Occhicone's trial, Baker received a downward departure sentence to probation instead of jail time on this grand

theft charge because of his agreement with the State to testify against Occhicone. On cross-examination at trial, although he testified that he was expecting a favorable recommendation to the parole board, he said that he did not have a specific understanding with the prosecutor for testifying against Occhicone.

Even though the court below recognized that a deal had been made with Baker, it denied Occhicone's claim, finding no reasonable probability that the false testimony affected the jury's judgment. As conceded by Occhicone, Baker's credibility had already been called into question at trial when he testified that he was expecting a favorable recommendation to the parole board, and when it was revealed that he had prior convictions for other crimes involving dishonesty besides the recent grand theft charge. Finally, as noted earlier, *1043 there were several more damaging statements of premeditation made by Occhicone to other witnesses who testified at trial and there was independent evidence of premeditation such as Occhicone cutting the telephone wires of Gerrety's home before entering. Because of these circumstances, we uphold the trial court's ruling.

[11] As his next claim, Occhicone argues that the trial court erred in summarily denying his claim that he was forced to undergo trial while legally incompetent, and that counsel failed to adequately investigate his mental health and failed to provide the experts with relevant and necessary background information. After a review of the record, we affirm the lower court's findings and find that this claim is also conclusively refuted by the record.

The record reflects that three different mental health experts evaluated Occhicone before trial and all three testified that as part of their evaluations, they conducted competency evaluations. Two of these three experts specifically testified that Occhicone was competent to stand trial. Dr. DelBeato, who was court-appointed, testified there was no question in his mind that Occhicone was competent to stand trial. Dr. Fireman, who was appointed by the defense to evaluate Occhicone, also opined that Occhicone was competent to stand trial. Finally, Occhicone does not present any expert who can opine that based on evidence that was not presented to these experts, Occhicone was not competent to stand trial. As such, the trial court correctly ruled that Occhicone's claim on this issue was conclusively refuted by the record.

Finally, Occhicone alleges that the trial court erred in denying portions of his ineffective assistance of counsel claims summarily. Specifically, as to the guilt phase representations, Occhicone alleges that the trial court erred in denying his claims that counsel was ineffective for (1) failing to present evidence of Occhicone's cocaine use; (2) failing to provide the defense experts with sufficient background information; (3) failing to question potential jurors as to a possible taint after a spectator during voir dire made a comment that Occhicone was guilty; and (4) failing to object to a deputy's testimony that Occhicone had refused to submit to an atomic absorption test. In summarily rejecting these claims, the trial court attached relevant portions of the trial record that refute Occhicone's claims. After a review of these portions of the record, we find that the trial court's findings are supported by the record.

In support of this first subclaim, Occhicone alleges that Joanna Carrico had stated that if asked by counsel, she would have testified that Occhicone began using cocaine heavily after Gerrety broke up with him. However, the transcript of the penalty phase reflects that Carrico was specifically questioned about Occhicone's drug use and at that time did not mention any cocaine use by Occhicone. As for counsels' failure to question potential jurors as to a possible taint, the record reflects that defense counsel specifically questioned jurors about the spectator's comments during voir dire.⁵ Also, on appeal, this Court addressed the merits of Occhicone's claim concerning his failure to allow his hands to be swabbed for an atomic absorption test and concluded that the issue had no merit.

⁵ Although we noted on direct appeal that "counsel did not so inquire during voir dire," see *Occhicone v. State*, 570 So.2d 902, 904 (Fla.1990), after a second review of the record, we note that counsel did ask some of the members of the voir dire panel about the spectator's comments.

Finally, Occhicone's claim that defense counsel failed to present experts with background information must fail because none of his experts were called during the guilt phase of the trial, and he does not specifically allege what evidence counsel failed to provide the experts with, nor does he allege that counsel would have otherwise called these witnesses. Moreover, during their penalty-phase testimony the *1044 experts discussed the extensive information that had been provided to them by way of

deposition and background. Therefore, we approve the trial court's summary denial of these claims.

As to the penalty phase, Occhicone alleges that counsel were ineffective for failing to provide their experts with sufficient background information, for failing to present evidence regarding Occhicone's personal hardships, for failing to present evidence of Occhicone's cocaine problem, and for failing to request a special jury instruction adequately defining the aggravating circumstances. Again, after reviewing the record and proceedings in this case, we agree that Occhicone's claims on this issue are refuted by the record.

First, Occhicone alleges that if counsel had provided the experts with background information, the experts would not have been as easily attacked on cross-examination. However, each defense expert testified that they relied on numerous depositions and statements to assist them in preparation for testifying at Occhicone's trial. Therefore, even assuming they did not review this information before they evaluated Occhicone, they clearly had reviewed it before they were cross-examined by the State. For example, the record reflects that Dr. Fireman talked to Occhicone's sister before evaluating him and Dr. Szabo read depositions before he interviewed him.

Similarly, Occhicone's claim that defense counsel failed to present evidence of Occhicone's personal hardships is also refuted by the record. The mental health experts testified that Occhicone had emotional problems as a result of Gerrety's decision to abort their baby and their eventual break-up. Moreover, other witnesses, including Occhicone himself, testified about his wife's death due to cancer and his responsibility of having to raise a child by himself. As noted in connection with his claim of ineffective assistance of counsel at the guilt phase, this claim was also properly denied because defense counsel inquired as to Occhicone's prior drug use at trial during Carrico's testimony at the penalty phase. Finally, we find no error with the jury instructions defining the aggravating circumstances; therefore, defense counsel could not have been ineffective, as is now alleged, for failing to request a specific instruction.

EVIDENTIARY HEARING

As noted above, the court below conducted an evidentiary hearing on parts of Occhicone's ineffective assistance of counsel claims concerning both the guilt and penalty phases of the trial. We first address the claim as to counsel's performance during the guilt phase.

Ineffective Assistance of Counsel at Guilt Phase

As previously noted, Occhicone's main defense at trial was that he was voluntarily intoxicated. Occhicone does not question the strategy to present this defense; rather, he disagrees with the particulars regarding how the defense was presented to the jury. At trial, counsel attempted to establish the defense through the cross-examination of State witnesses rather than by separately presenting independent evidence or witnesses on the issue. Trial counsel testified extensively as to this strategy at the hearing below.

[12] In order to prove ineffective assistance of counsel in failing to adequately assert a defense, Occhicone must establish two elements:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*1045 *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Rutherford v. State*, 727 So.2d 216, 219 (Fla.1998); *Rose v. State*, 675 So.2d 567 (Fla.1996). In *Maxwell v. Wainwright*, 490 So.2d 927 (Fla.1986), this Court further explained the application of the *Strickland* standard:

A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. First, the claimant must identify particular

acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Id. at 932 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Downs v. State*, 453 So.2d 1102 (Fla.1984)).⁶ Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the *Strickland* test. See *Stephens v. State*, 748 So.2d 1028, 1032 (Fla.1999) (citing *Rose v. State*, 675 So.2d 567, 571 (Fla.1996)). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. See *id.*

⁶ The U.S. Supreme Court has explained: "The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding...." *Lockhart v. Fretwell*, 506 U.S. 364, 370, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

[13] [14] In support of his claim, Occhicone alleges that counsel rendered ineffective assistance at the guilt phase by failing to effectively cross-examine State witnesses Lily Lawson and Cheryl Hoffman; for failing to present the testimony of Patricia Goddard, Kimberly Connel, Michael Stillwagon and Audrey Hall; and for failing to present experts during the guilt phase. Occhicone claims that this evidence would have painted a different picture of Occhicone's intoxicated state on the night of the murders. As we have noted in the past, voluntary intoxication is a recognized defense to premeditated first-degree murder. See *Gardner v. State*, 480 So.2d 91, 92-93 (Fla.1985). Moreover, evidence elicited during cross-examination of prosecution witnesses may provide sufficient evidence for a jury instruction on voluntary intoxication. See *id.*

[15] At trial, both Lilly Lawson and Cheryl Hoffman, barmaids at Shooter's Bar, testified as State witnesses to help establish premeditation.⁷ Specifically, Ms. Lawson testified that two weeks before the murders, Occhicone had told her that he wanted to shoot Gerrety's parents.

Ms. Hoffman also testified that on at least two occasions, Occhicone had told her that he wanted to kill Gerrety's parents. On cross-examination, they admitted that Occhicone was a heavy drinker, but they were not asked about their contact with Occhicone on the day and night of the murders.⁸ However, at the postconviction evidentiary hearing, they both testified that Occhicone had been drinking for prolonged periods on the day and night of the murders.

⁷ The defense deposed both of these witnesses before trial.

⁸ Because the murders occurred at 4 a.m. on the morning of June 10, we will refer to the events that transpired on June 9, as the day and night of the murders.

Specifically, Ms. Lawson testified that during her morning shift, she saw Occhicone consume approximately ten shots of schnapps and also drink a vodka and cranberry. She also testified that she saw Occhicone at the bar again at 7:30 p.m. that evening and that Occhicone was again drinking. Finally, at some time prior to 11 p.m. on the night of the murders, she saw Occhicone leaving the bar with a bottle of vodka. Ms. Hoffman, who had the afternoon *1046 shift, testified at the evidentiary hearing that she had served Occhicone alcohol the day of the murder and that she could tell he had been drinking prior to the beginning of her shift.

Occhicone also claims that counsel were ineffective in failing to call Kimberly Connell and Patricia Goddard. At the evidentiary hearing they testified that they had met Occhicone on June 8, two days before the murders, when Occhicone crashed his car into a tree outside of Goddard's house. Although they were contacted by the State, they were never contacted by Occhicone's attorneys or investigators prior to trial. Ms. Connell testified that at the time of the crash, Occhicone smelled of alcohol and that he appeared drunk. She further testified that from the day of the crash until the night of the murders, she had drunk with Occhicone and had smoked marijuana with him. Ms. Connell also maintained that she saw Occhicone at approximately 2:30 a.m. on the morning of June 10, just a short time before the murders, and that Occhicone was intoxicated and was very upset and emotional over his ex-girlfriend, Gerrety. Ms. Goddard testified at the evidentiary hearing that when she first came in contact with Occhicone after the accident, he smelled of alcohol,

had slurred speech and had trouble standing. She also testified that she saw Occhicone briefly the day after the accident, that he was very distraught over Gerrety, and that he had a gun.

Occhicone alleges that counsel also erred in failing to present Michael Stillwagon and Audrey Hall as witnesses. At the evidentiary hearing, Stillwagon testified that he saw Occhicone at Shooter's Bar at approximately 6:30 p.m. on June 9 and left with Occhicone that evening in Occhicone's car at approximately 8:30. According to Stillwagon, Occhicone appeared to be intoxicated. As to Hall, Occhicone alleges that she could have testified that Occhicone routinely parked his car at the Artzers' house where it was found on the night of the murders when he would go to visit Gerrety. He claims that this testimony should have been presented to rebut the State's argument that parking his car away from the victim's house on the night of the murder demonstrated his premeditation rather than his routine practice.

As the final category of evidence supporting his ineffective assistance of counsel claim on this issue, Occhicone claims that counsel was ineffective for failing to present experts at trial who had evaluated Occhicone and could have testified that Occhicone did not have the mental state to premeditate the murders. In support of this claim, Occhicone presented Dr. Fireman and Dr. Mussenden at the postconviction evidentiary hearing, both of whom had testified previously during the penalty phase of the trial. Dr. Fireman testified on behalf of the defendant while Dr. Mussenden testified on behalf of the State.

At the evidentiary hearing, Dr. Fireman testified that he was requested by the defense team to provide a mental status examination on Occhicone. He was asked to concentrate on the following areas: (1) competency to stand trial; (2) competency at the time of the offense; and (3) sentencing issues. He testified that Occhicone's trial attorneys never consulted with him about assisting them in preparing the guilt phase of Occhicone's trial, even though they could have utilized his expert testimony in the area of diminished capacity by reason of voluntary intoxication. He also testified that counsel never communicated to him that they were attempting to put on a voluntary intoxication defense during the guilt phase. As to the possible harmful rebuttal testimony of Dr. Mussenden concerning Occhicone's detailed description of the events of the murder, Dr. Fireman testified that he could have

aided in impeaching the State's expert since, in his opinion, Dr. Mussenden was inadequately informed about the complexity of the case, the data base he used was unreliable for the conclusions he had, and the presence of other people during Occhicone's evaluation placed a constraint on the reliability of *1047 the information provided by Occhicone. Notwithstanding this testimony, during cross-examination at the evidentiary hearing, Dr. Fireman concluded that although Occhicone had a diminished capacity to premeditate, he did not have an inability to do so. Moreover, during Dr. Fireman's direct examination, he stated that Occhicone had no equivocation under the diminished responsibility by voluntary intoxication.

Dr. Mussenden also testified at the evidentiary hearing. He had testified for the State at the penalty phase of the trial and had opined that Occhicone had the cognitive ability to premeditate. At the evidentiary hearing, he testified that his opinion had now changed in part because of his review of Lawson's and Ann Montana's recent affidavits. He also stated that if he had been aware of these affidavits at the time of trial, he would have testified consistently with the testimony that he was providing at the evidentiary hearing. Moreover, he also conceded that he was not comfortable with the results of his evaluation performed on Occhicone because he had evaluated him in the presence of counsel for the State and the defendant; therefore, Occhicone may not have been completely open with his responses.

At the evidentiary hearing, all three defense attorneys testified extensively concerning their reasons for failing to present the evidence and witnesses now claimed by Occhicone to have been critical. They testified that although they intended to present witnesses at the guilt phase of the trial, they changed their minds after the State had rested because they felt that sufficient evidence of Occhicone's intoxication had been presented during their cross-examination of the State's witnesses to permit them to advance the intoxication defense. Moreover, they all testified that it was important for them to be able to have the first and last word with the jury before deliberations, a right they would lose if they presented evidence independent of the State's case. Attorney LaPorte also testified that, to the best of his knowledge, he was not aware of Patricia Goddard or Kimberly Connell and that he only learned of Stillwagon after the guilt phase and prior to the penalty phase.

As to Hall, defense counsel testified they did not present her as a witness because they had tried to elicit this same testimony in Gerrety's cross-examination. In addition, attorney Young recalled that the State had a witness available to rebut Hall's testimony that Occhicone routinely parked his car at the Artzers' house, which neighbored Gerrety's house. Moreover, attorney Boyer also noted that presenting Hall would have led to testimony concerning Occhicone's pattern of routinely annoying the neighbors when he would drive away loud and fast at about 3 or 4 a.m.

Finally, all three of the defense attorneys testified concerning the reasons for not presenting the additional experts. Boyer testified that his intent and strategy was simply to present sufficient evidence at the guilt phase as to Occhicone's intoxication, without presenting the doctors, and to then use the doctors during the penalty phase only in order to secure more information from their testimony. Young and LaPorte testified that they refrained from presenting any experts during the guilt phase because of the potential harmful rebuttal that could have been presented by Dr. Mussenden concerning Occhicone's vivid recall to him of the details surrounding the murders, a recall inconsistent with heavy intoxication. Moreover, immediately after the State rested its case, the trial court denied Occhicone's motion to exclude and prevent the State from using the taped statements made by Occhicone to Dr. Mussenden during his evaluation. Hence, there was no doubt that the experts could have been cross-examined on these statements. Finally, the attorneys had concluded that there was very little chance of obtaining a verdict of less than first-degree murder, and they consciously decided that they could not credibly and *1048 effectively utilize the doctors at both phases of the trial without diminishing their effectiveness.

[16] [17] Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. See *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight...."); *Cherry v. State*, 659 So.2d 1069, 1073 (Fla.1995) ("The standard is not how present counsel would have proceeded, in hindsight...."). Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was

reasonable under the norms of professional conduct. See *Rutherford*, 727 So.2d at 223; *State v. Bolender*, 503 So.2d 1247, 1250 (Fla.1987).

In the instant case, all three attorneys testified at the evidentiary hearing that they consciously chose not to present evidence during their case because they believed they had presented enough evidence to the jury through cross-examination, and they felt it was more important to have the first and last word with the jury during closing argument. Moreover, they testified they had intended to present several witnesses, including mental health experts, but finally decided against it when the court denied their motion to prevent the State from introducing the taped statements made to Dr. Mussenden, which in part showed that Occhicone had a good recall of what transpired the night of the murders and therefore was not intoxicated to the level of not being able to premeditate the murders. Further, they believed they could not credibly offer these witnesses at both phases of the trial. Finally, as to witness Audrey Hill, counsel testified that they strategically chose not to present her because the State had a witness available to rebut her testimony, and her testimony would have opened the door for negative evidence of Occhicone's behavior when he would regularly visit Gerrety. Clearly, this testimony suggests a carefully considered and planned defense and provides a proper evidentiary basis for the trial court's ruling denying relief. For these reasons, we affirm the trial court's ruling.

As to the prejudice prong of this claim, the trial court also concluded that presentation of the independent evidence now advanced would not have materially affected the outcome of the trial because it was cumulative to the other substantial evidence of intoxication that was already before the jury: namely that Occhicone was a heavy drinker, that Newell had served him two drinks the night of the murders and that Gerrety had smelled alcohol on him and had stated that he could not stand up straight and staggered when he came to her house the night of the murders. A review of the record supports the trial court's findings, and we find that the trial court's legal conclusions are also supported by our prior decisions.⁹

⁹ See *Koon v. Dugger*, 619 So.2d 246, 249-50 (Fla.1993) (finding no ineffective assistance of counsel for failing to present voluntary intoxication defense where defense was inconsistent with defendant's detailed testimony and where notwithstanding, counsel had

presented evidence that defendant was a chronic alcoholic and was intoxicated at the time of the murder); *Routly v. State*, 590 So.2d 397, 401 (Fla.1991) (finding defendant did not demonstrate reasonable probability that outcome would have been different because the evidence not presented by counsel was already before the judge and jury, but in a different form); *White v. State*, 559 So.2d 1097, 1099 (Fla.1990) (rejecting defendant's ineffective assistance of counsel claim for failing to assert the voluntary intoxication defense where counsel testified that such a defense was inconsistent with the deliberateness of defendant's actions).

After a review of the record and the trial court's findings, we find no proper basis for overturning the trial court's conclusion that defense counsel were not deficient nor was Occhicone sufficiently prejudiced by the alleged deficiency to mandate *1049 a new trial. We find no error in the trial court's conclusion that counsel's conduct and decision not to present any independent evidence of Occhicone's intoxication constituted a strategic decision of counsel. If we were to accept Occhicone's challenge to this conduct, we would find ourselves engaging in the hindsight analysis so many courts have warned should not occur when evaluating ineffective assistance of counsel claims. The issue is not what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense. *See, e.g., Atkins v. Dugger*, 541 So.2d 1165, 1166 (Fla.1989) (finding counsel was not deficient for failing to present expert testimony where the record showed that counsel presented substantial evidence of defendant's intoxication).

Ineffective Assistance of Counsel at Penalty Phase

[18] Occhicone also contends that defense counsel were ineffective at the penalty phase for failing to present the testimony of Ann Montana and Father Ed Lamp as mitigation. Occhicone alleges that Ms. Montana could have testified about Occhicone's relationship with Gerrety and his fragile emotional state after Gerrety left him. Moreover, Father Lamp could have testified concerning the couple's tumultuous relationship and Occhicone's drinking problem.¹⁰

¹⁰ Occhicone also asserts that counsel were ineffective for failing to provide the mental health experts with

information concerning Occhicone's background. This claim is without merit because Occhicone does not allege what information counsel failed to provide to these experts. Moreover, although some of the experts may have evaluated Occhicone and submitted their reports before reviewing outside information and depositions, the record reflects that at the time they testified, they had actually reviewed this information.

In order to obtain a reversal of his death sentence on the ground of ineffective assistance of counsel at the penalty phase, Occhicone must show "both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different." *Rose v. State*, 675 So.2d 567, 571 (Fla.1996) (quoting *Bolender v. Singletary*, 16 F.3d 1547, 1556-57 (11th Cir.1994)); *see also Hildwin v. Dugger*, 654 So.2d 107, 109 (Fla.1995).

After reviewing the record below, we again find no error in the trial court's conclusion that counsel were not deficient in failing to call these witnesses nor was Occhicone prejudiced by the failure to call them. As far as Ms. Montana is concerned, attorney LaPorte testified at the hearing that defense counsel were aware of her possible testimony at trial, but chose not to present her as a witness because the substance of her testimony had already been provided to the jury through various other witnesses. As to counsel's failure to present Father Lamp, the attorneys testified at the evidentiary hearing that they had contacted all the priests that had been named to them by Occhicone. Therefore, the trial court concluded that counsel conducted a thorough investigation of Occhicone's background and they provided valid reasons for not presenting these witnesses.

Although Ms. Montana's and Father Lamp's testimony would have been admissible as mitigating evidence, the trial court found that when compared to the testimony adduced during the penalty phase and throughout the trial, the evidence would have been cumulative because counsel had already presented evidence of Occhicone's intoxication, habit of heavy drinking, and his distraught state and depression over his relationship with Gerrety. Specifically, Joanne Carrico, a friend of Occhicone's who had known him for about a year at the time of trial, described the "highs and *1050 lows" of Occhicone's

relationship with Gerrety after the break-up. She also described Occhicone's reaction to the news that Gerrety had gotten an abortion and testified about how she helped him write a letter to Gerrety asking her to leave him alone and stop calling him if she was not going to stay with him.

Occhicone also presented three doctors at the penalty phase, who testified that Occhicone was under extreme mental and emotional distress and that his ability to appreciate the criminality of his conduct and conform his conduct to the requirements of law was substantially impaired. Finally, Occhicone himself testified during the penalty phase about how his prior wife had died of cancer and how he was the father of a young child.

Again our decisions support the trial court's conclusion that counsel cannot be deemed to have provided ineffective assistance for failing to present this evidence. *See Rutherford v. State*, 727 So.2d 216, 224-25 (Fla.1998) (stating that counsel was not ineffective for failing to present evidence that was essentially cumulative to the testimony presented by trial counsel at the penalty phase); *Routly v. State*, 590 So.2d 397, 401-02 (Fla.1991) (denying defendant's ineffective assistance of counsel claim since most of the evidence that defendant claimed should have been presented was already before the judge and jury,

except in a different form than originally proffered); *Lusk v. State*, 498 So.2d 902, 906 (Fla.1986) (finding that evidence concerning defendant's family background was largely cumulative where defendant had already testified about his background and personal problems during the penalty phase).

CONCLUSION

For the foregoing reasons, we affirm the trial court's order in all respects.

It is so ordered.

HARDING, C.J., and SHAW, WELLS, ANSTEAD and LEWIS, JJ., concur.

PARIENTE, J., concurs in result only.

QUINCE, J., recused.

All Citations

768 So.2d 1037, 25 Fla. L. Weekly S529

No. _____

In the Supreme Court of the United States

DOMINICK A. OCCHICONE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix F.

570 So.2d 902
Supreme Court of Florida.

Dominick OCCHICONE, Appellant,

v.

STATE of Florida, Appellee.

No. 71505.

Oct. 11, 1990.

Rehearing Denied Dec. 26, 1990.

Synopsis

Defendant was convicted in the Circuit Court, Pasco County, Lawrence E. Keough, J., of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court held that: (1) spectator misconduct did not justify mistrial; (2) admission of evidence that defendant refused to take hand swab atomic absorption test to detect alcohol abuse was admissible for purposes of refuting defendant's claim of diminished capacity because of constant intoxication; and (3) when instructing jury on aggravating factor of murder committed during course of burglary, court's failure to define crime of burglary was not fundamental error.

Affirmed.

Grimes, J., concurred and filed opinion in which Ehrlich, J., concurred.

Kogan, J., concurred in part and dissented in part and filed opinion.

Attorneys and Law Firms

*903 James Marion Moorman, Public Defender, and Douglas S. Connor, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., and Peggy A. Quince, Asst. Atty. Gen., Tampa, for appellee.

Opinion

PER CURIAM.

Dominick Occhicone appeals his convictions of first-degree murder and sentence of death. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution, and affirm both his convictions and sentence.

*904 In the early morning hours of June 10, 1986 Occhicone awakened his former girlfriend by knocking on the sliding glass door to her bedroom in a house she shared with her children and her parents. The woman refused to talk with him and he left. He returned an hour or so later, armed with a handgun, and cut the telephone lines and roused the household. When the woman's father confronted him outside the house, Occhicone shot him. The woman and her daughter fled the house while Occhicone was breaking into it through a locked door. Once inside Occhicone shot the woman's mother four times. A jury found Occhicone guilty of two counts of first-degree murder and recommended death for each count. The trial court sentenced Occhicone to life imprisonment for killing the woman's father and to death for killing her mother.

[1] [2] [3] As his first point on appeal, Occhicone argues that, during opening argument, the state anticipated his defense of insanity and argued proof that never came into evidence and that the trial court erred in overruling his objection to the prosecutor's opening statements.¹ Opening remarks are not evidence, and the purpose of opening argument is to outline what an attorney expects to be established by the evidence. *Whitted v. State*, 362 So.2d 668 (Fla.1978). Our review of the record discloses no more than a good faith attempt to do that. Insanity had not been abandoned as a defense at that point, and we do not see how the prosecutor's brief reference to physicians being expected to testify at trial prejudiced Occhicone. The control of comments is within the trial court's discretion. *Breedlove v. State*, 413 So.2d 1 (Fla.), *cert. denied*, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). Occhicone has shown no abuse of discretion, and we find no merit to this point.

1 Occhicone had given notice of an intent to rely on insanity as a defense. After the trial started, the plea of not guilty by reason of insanity was supplanted by the claim that he lacked the capacity to form premeditated intent.

[4] Occhicone also argues that the court erred in not granting his motion for mistrial based on a spectator's

alleged misconduct. During voir dire, according to Occhicone, a spectator told a prospective juror that she thought Occhicone was guilty. When brought to its attention, the court questioned the spectator and Occhicone's niece, the person who claimed to have overheard the comments. Afterwards, the court denied Occhicone's motion for mistrial, finding that the jury pool had not been tainted. The court told defense counsel that he could ask the prospective jurors if they had heard the spectator say anything, but counsel did not so inquire during voir dire. The trial court promptly considered this alleged impropriety, and Occhicone has shown no abuse of discretion in the court's actions or rulings.

[5] [6] Occhicone relied on diminished capacity as a defense.² To refute Occhicone's claim that his state of constant intoxication prevented his knowing what he was doing, the state presented a deputy's testimony as to Occhicone's refusal to allow his hands to be swabbed for an atomic absorption test. The deputy stated that Occhicone pulled his hands away and said: "You're going to have to force me to [take the test]." The defense did not object to this testimony, but, later, tried to object to its admission. The court found the objection untimely because, at a bench conference prior to the deputy's testimony, the prosecutor stated exactly what the deputy would say and defense counsel did not object at that time or when the deputy testified. The prosecutor commented on this testimony during closing argument, and defense counsel objected to that comment.

² In *Chestnut v. State*, 538 So.2d 820 (Fla.1989), we disallowed using diminished capacity as a defense and held that evidence of an abnormal mental condition not constituting legal insanity is inadmissible to prove that a defendant could not have formed the specific intent needed to be held responsible for committing a crime. The intoxication defense is still allowed if it can be shown that the defendant is unable to entertain the requisite intent of premeditation. *Gurganus v. State*, 451 So.2d 817 (Fla.1984).

Occhicone now argues that allowing the prosecutor to comment on his refusal to *905 take the hand swab test constituted penalizing him for exercising his post-*Miranda*³ rights. We disagree and find Occhicone's reliance on *Herring v. State*, 501 So.2d 19 (Fla.3d DCA 1986), misplaced. In *Herring* the prosecutor argued that Herring's refusal to have his hands swabbed was convincing proof of his consciousness of his guilt.

Herring's counsel objected to this argument, and the district court found reversible error. Here, on the other hand, the prosecutor commented on the evidence only to refute Occhicone's claim of diminished capacity, not to demonstrate his guilt, and defense counsel did not object in a timely manner. We find no merit to this issue.

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[7] We also find no merit to Occhicone's claim that the trial court erred in not telling Occhicone specifically that he had the right to testify in his own behalf. As Occhicone concedes, we decided this issue in *Torres-Arboleda v. State*, 524 So.2d 403 (Fla.), cert. denied, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988), and we decline his invitation to revisit it.

Our review of the record discloses sufficient evidence to support Occhicone's convictions, and we affirm them.

[8] [9] The trial court found that three aggravating factors had been established: previous conviction of a violent felony; committed during a burglary; and cold, calculated, and premeditated. Occhicone now argues that the last factor should not have been found. The totality of the circumstances relied upon by the trial judge⁴ support his finding the murder to have been committed in a cold, calculated, and premeditated manner with no pretense of moral or legal justification. When there is a legal basis to support finding an aggravating factor, we will not substitute our judgment for that of the trial court and, therefore, affirm this finding. The other aggravating factors are well supported by the record.

⁴ The trial court found, in part:

Statements by the defendant to female bartenders and to William Anderson within weeks of the murders revealed defendant's dislike for [the former girlfriend's] parents and his thoughts of murdering them. He also had expressed the thought of killing [her] parents while [she] watched, and he made statements to [her] which constituted threats against her relatives.

Defendant possessed a gun and bullets when he presented himself at the home of the murder victims at about 4:00 A.M. on June 10, 1986. He also damaged the telephone line at the residence

and made the telephones inoperative before he shot and killed [the victim].

Although there appears to have been no acts or conduct on the part of [the victim] of a provoking or hostile nature, after breaking through a locked door, the defendant shot the victim four times, thereby bringing to fruition the numerous earlier expressed thoughts and threats.

Defendant had contemplated and verbalized this murder for days and weeks prior to June 10, 1986, and heightened premeditation existed when he, in an execution style, and without any pretense of justification, repeatedly shot at close range this unarmed grandmother.

[10] Using as a predicate his claim that the court should not have found cold, calculated, and premeditated, Occhicone also argues that death is disproportionate in his case. The cases he relies on are factually distinguishable. This case involved substantially more than a passionate obsession; it was the culmination of avowed threats to terminate the lives of parents standing between Occhicone and his former girlfriend. We do not find death a disproportionate sentence here.

[11] Occhicone also claims the court committed reversible error in not defining the crime of burglary when instructing the jury on the aggravating factor of murder committed during the course of a burglary. We find no merit to this claim for several reasons. During the sentencing proceeding charge conference, Occhicone objected to all of the proposed aggravating circumstances. Regarding the instant one, he argued that "the facts, evidence and circumstances" did not support it. After hearing argument from both sides, the court held that the state could argue this factor and that the jury would be instructed on it. Occhicone did not object again and, most importantly, did not object on the *906 specific ground now advanced, i.e., failure to define burglary, or request the giving of such definition. "In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court." *Bertolotti v. Dugger*, 514 So.2d 1095, 1096 (Fla.1987). This claim, therefore, has not been preserved.

[12] [13] [14] Even if the issue had been preserved, however, we would find any error regarding this instruction harmless. If the state proceeds in the guilt phase on theories of both premeditated and felony murder, the underlying felony must be defined. *Franklin v. State*, 403 So.2d 975 (Fla.1981). Here, however, the

state charged Occhicone with two counts of premeditated first-degree murder and the court instructed on and the state argued only premeditated murder. The state need not charge and convict of felony murder or any felony in order for a court to find the aggravating factor of murder committed during the course of a felony. *Ruffin v. State*, 397 So.2d 277 (Fla.), *cert. denied*, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981). While the jury should have been told what constitutes burglary, the failure to do so is not fundamental error when there are other valid aggravating circumstances. The jury does not have to specify what factors it relied on in making its recommendation. Speculating that Occhicone's jury may have relied on one word without knowing its specific legal definition is of no moment here because the judge as the sentencer must make written findings supporting the sentence. We must assume that the instant judge knew the technical definition of burglary, and the facts⁵ support his finding the mother's murder to have been committed during a burglary.

5 After shooting the father, Occhicone broke into the house through a locked door and killed the mother.

[15] [16] We find no merit to the rest of Occhicone's claims. *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), did not make Florida's penalty instructions on cold, calculated, and premeditated and heinous, atrocious, or cruel unconstitutionally vague. *Brown v. State*, 565 So.2d 304 (Fla.1990); *Smalley v. State*, 546 So.2d 720 (Fla.1989). We find no support for Occhicone's claim that the prosecutor's cross-examination of witnesses "insinuated" that he had an extensive criminal record. Allowing a deputy to testify about the events leading to Occhicone's prior arrest and conviction of resisting arrest with violence was not error. *Rhodes v. State*, 547 So.2d 1201 (Fla.1989); *Dufour v. State*, 495 So.2d 154 (Fla.1986), *cert. denied*, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987); *King v. State*, 436 So.2d 50 (Fla.1983), *cert. denied*, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 163 (1984). The court did not err in allowing lay witnesses to express their opinions as to Occhicone's not being intoxicated when they came into contact with him two to four hours after he committed these murders, especially in light of Occhicone's claiming that he lived in a constant state of intoxication. See *Carroll v. State*, 353 So.2d 1268 (Fla. 1st DCA 1978). Finally, we do not agree that the trial court impermissibly restricted the presentation of mitigating evidence by

refusing to allow the introduction of four photographs of Occichicone's young son. The defense did not pursue the court's invitation to demonstrate the relevance of that many photographs, and, in light of Occichicone's testimony about the child and other witnesses' testimony that he did not treat the child well, we find no violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Therefore, in addition to his convictions we also affirm Occichicone's death sentence.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, EHRLICH and BARKETT, JJ., concur.

GRIMES, J., concurs with an opinion, in which EHRLICH, J., concurs.

KOGAN, J., concurs in part and dissents in part with an opinion.

***907 GRIMES, Justice, concurring.**

I write only to explain my position with respect to Occichicone's contention that the prosecutor's reference to his refusal to take hand-swab tests was an impermissible comment upon his right against self-incrimination. Occichicone refers to *Herring v. State*, 501 So.2d 19 (Fla.3d DCA 1986), in which the district court of appeal held that evidence of the defendant's refusal to take such a test which had been admitted to prove consciousness of guilt was reversible error.

Occichicone's contention must fail because the refusal to take the hand-swab test is not protected by the constitutional privilege that no one may be compelled to testify against himself. As noted in *Macías v. State*, 515 So.2d 206, 208 (Fla.1987):

It was testimonial compulsion, rather than every kind of compulsion, for which the privilege was originated. 8 Wigmore, *Evidence*, § 2263 (1961). According to 4 S. Gard, *Jones on Evidence*, § 22:3, at 10 (6th ed. 1972), "[t]he more recent authorities clearly show a tendency to adhere to the Wigmore concept that only oral testimony and the production of documents or other objects by the witness, and acts of an assertive character, are within the privilege." (Footnote omitted.)

Just as he could have been required to submit to fingerprinting, photographing, or blood tests, *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), Occichicone could have been compelled to undergo the hand-swab test. Having refused to take the test, evidence of this fact was admissible for any relevant purpose. Thus, W. LaFare & J. Israel, *Criminal Procedure* § 7.2(c) (1985), states:

What happens if a defendant refuses to cooperate in an identification procedure which requires his active participation? One possibility is that the prosecutor may be permitted to comment on the refusal to cooperate. If the identification procedure in which the defendant has refused to participate or cooperate, such as a lineup or taking of exemplars, is not protected by the Fifth Amendment, then of course there is no right to refuse and thus the act of refusal is not itself a compelled communication. Rather, that refusal is considered circumstantial evidence of consciousness of guilt just as is escape from custody, a false alibi, or flight.

(Footnote omitted.)

In *South Dakota v. Neville*, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983), the United States Supreme Court considered whether evidence of a defendant's refusal to submit to a blood-alcohol test offended the right against self-incrimination. The Court held that the refusal to do so after a police officer had lawfully requested it was not an act coerced by the officer and thus not protected by the privilege against self-incrimination. The Court distinguished *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), which had held that a prosecutor could not use the defendant's silence after *Miranda*⁶ warnings to impeach his testimony at trial because it was fundamentally unfair to assure a suspect that his silence would not be used against him and thereafter use his silence to impeach an explanation subsequently offered at trial. The Court said that, unlike the instruction in *Doyle*, it was not fundamentally unfair to use Neville's refusal to

take the test as evidence of guilt. Even though he was not warned that his refusal could be used against him, Neville had not received any "misleading implicit assurances" as to the consequences of refusing the test. *Neville*, 459 U.S. at 565, 103 S.Ct. at 923.

6 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

This rationale also explains the distinction between the instant case and *Wainwright v. Greenfield*, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986), upon which Occhicone also relies. In *Greenfield*, the United States Supreme Court held that the state could not introduce evidence of what the defendant said after receiving *Miranda* warnings in order to prove that he was sane. The Court explained that:

*908 Greenfield received "the sort of implicit promise to forgo use of evidence that would unfairly 'trick' [him] if the evidence were later offered against him at trial." 459 U.S., at 566, 103 S.Ct., at 924.

474 U.S. at 293, 106 S.Ct. at 639 (footnote omitted).

Herring is inapplicable, not because the evidence of Occhicone's refusal to take the test was introduced to demonstrate diminished capacity rather than guilt, but because *Herring* is based on an erroneous premise. Unlike the case where *Miranda* warnings are given which advise the defendant that he has the right to refuse to make a statement, Occhicone was not told that he could refuse

the hand-swab test. There was no misleading assurance. The fact that the police chose not to force him to take the test when he did refuse is irrelevant. Thus, the evidence of Occhicone's refusal was properly admitted and subject to comment by the prosecutor.

EHRlich, J., concurs.

KOGAN, Justice, concurring in part and dissenting in part.

I concur with the majority's affirmance of the conviction of first-degree murder, but dissent as to the penalty. The trial judge found that the defendant at the time of the commission of the offense was under the influence of an extreme mental or emotional disturbance, that he was a heavy drinker, and an alcoholic who was also experiencing depression. The judge found that this depression and alcoholic condition combined to produce in the defendant an extreme mental or emotional disturbance; that fact, coupled with the bizarre facts of this case, indicate a crime committed by a mentally and emotionally disturbed individual. I can only conclude that death is not proportionate here. *E.g., Fitzpatrick v. State*, 527 So.2d 809 (Fla.1988).

All Citations

570 So.2d 902, 15 Fla. L. Weekly S531

No. _____

In the Supreme Court of the United States

DOMINICK A. OCCHICONE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix G.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY
Case No. 8601355CFAWS

STATE OF FLORIDA

vs.

DOMINICK OCCHICONE

FINDINGS, COUNT II

The Court having considered and given great weight to the advisory sentences rendered by the jury on Counts I and II, and the Court having considered all of the evidence in the case and having weighed the aggravating and mitigating circumstances, and having determined that the proper sentence on Count I, notwithstanding the advisory sentence of the jury to the contrary, is a sentence of life imprisonment, and the proper sentence on Count II is a sentence of death, does hereinafter set forth the findings in support of the sentence of death on Count II, as follows:

A. Statutory aggravating circumstances enumerated as Florida Statute 921.141(5)(a) (The capital felony was committed by a person under sentence of imprisonment); (c) (The defendant knowingly created a great risk of death to many persons); (e) (The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody); (f) (The capital felony was committed for pecuniary gain); (g) (The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws); (h) (The capital felony was especially heinous, atrocious or cruel); do not apply and are inapplicable.

Although the victim was shot four times, three of the shots may have been fired rapidly and more than one bullet was fatal. Although there was evidence in the record justifying the jury's consideration of the aggravating circumstance under §921.141-(5)(h) (The capital felony was especially heinous, atrocious or cruel), it has not been established beyond a reasonable doubt when compared with the facts surrounding other murders.

The statutory aggravating circumstances hereinafter set forth do apply and are applicable:

1. Florida Statute 921.141(5)(b) The defendant has been previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

At the time of the imposition of sentence on Count II, the defendant had also been convicted of the capital felony on Count I (the first degree murder of Raymond L. Artzner).

The crime of resisting arrest with violence is a felony involving the use or threat of violence to another person, and the

defendant was previously convicted of that crime.

2. Florida Statute 921.141(5)(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb.

The capital felony was committed while the defendant was engaged in a burglary. He broke glass and unlocked the door and he remained in the structure with the premeditated intent to kill Martha E. Artzner, and all of the elements of burglary were established by the evidence.

3. Florida Statute 921.141(5)(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Defendant was infatuated with Anita Garrity, and he disliked her parents. She and her parents were the subjects of discussions by defendant with others prior to the time that he shot and killed Anita Garrity's parents. Statements by the defendant to female bartenders and to William Anderson within weeks of the murders revealed defendant's dislike for Anita Garrity's parents and his thoughts of murdering them. He also had expressed the thought of killing Anita Garrity's parents while Anita Garrity watched, and he made statements to Anita Garrity which constituted threats against her relatives.

Defendant possessed a gun and bullets when he presented himself at the home of the murder victims at about 4:00 A.M. on June 10, 1986. He also damaged the telephone line at the residence and made the telephones inoperative before he shot and killed Martha E. Artzner.

Although there appears to have been no acts or conduct on the part of Martha E. Artzner of a provoking or hostile nature, after breaking through a locked door, the defendant shot the victim four times, thereby bringing to fruition the numerous earlier expressed thoughts and threats.

Defendant had contemplated and verbalized this murder for days and weeks prior to June 10, 1986, and heightened premeditation existed when he, in an execution style, and without any pretense of justification, repeatedly shot at close range this unarmed grandmother.

B. Statutory mitigating circumstances set forth by Florida Statute 921.141(6)(a) (The defendant had no significant history of prior criminal activity); (c) (The victim was a participant in the defendant's conduct or consented to the act); (d) (The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor); (e) (The defendant

acted under extreme duress or under the substantial domination of another person); (f) (The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired); (g) (The age of the defendant at the time of the crime) do not apply and are inapplicable.

There was evidence in the record justifying the jury's consideration of the mitigating circumstance under §921.141(6)(f) (The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.) However, this mitigating circumstance has not been fully established.

The defendant was in the habit of consuming large quantities of alcoholic beverages on a frequent basis. He also smoked marijuana. Notwithstanding his routine of heavy drinking and other substance abuse, he was able to ambulate, converse and generally function without apparent symptoms of impairment. There was no reliable evidence warranting a finding that the defendant was to any significant degree more under the influence of alcohol or drugs or both on June 10, 1986, at the time he killed Martha E. Artner, than his common after substance intake condition, which was a routine condition typically perceived as an unintoxicated state. He deservedly earned a reputation of being able to hold his liquor well. His tolerance of alcohol was plentifully nourished.

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, upon consideration of all circumstances and factors including his relationship with Anita Garrity was undoubtedly impaired to some extent but not substantially; however, this limited impairment has been fully considered.

The statutory mitigating circumstance hereinafter set forth does apply and is applicable:

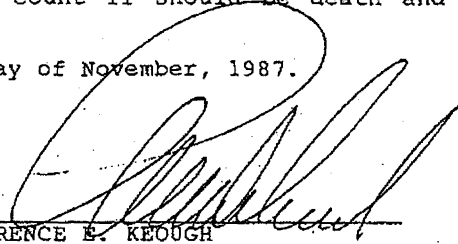
1. Florida Statute 921.141(6)(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Defendant did not suffer from significant brain damage and was not psychotic; however, he was extravagantly enamored with Anita Garrity and was arguably somewhere between a passive aggressive to an emotionally unstable person. He was a heavy drinker and an alcoholic with an extremely high tolerance for alcohol, who was experiencing some amount of depression. He was disturbed by the professed termination by Anita Garrity of her relationship with him. Some of his sexual activity with her was perverse and frightening. The combative and hurtful relationship with Anita Garrity, mixed with his depression and alcohol consumption, combined in him to produce an extreme mental or emotional disturbance.

2. As a non-statutory mitigating circumstance, the defendant has been a good prisoner and has acclimated to his custodial environment.

All of the evidence having been considered and the aggravating circumstances having been weighed against the mitigating circumstances, and the Court having concluded that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances regarding Count II, the sentence imposed on Count II should be death and that sentence has been imposed.

DONE AND ENTERED this 18th day of November, 1987.



LAWRENCE E. KEOUGH
CIRCUIT JUDGE

cc: State Attorney
Bruce Boyer, Esq.

No. _____

In the Supreme Court of the United States

DOMINICK A. OCCHICONE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix H.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY

STATE OF FLORIDA

VS.

86-1355CFAWS

DOMINICK OCCHICONE

FILED FOR RECORD
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Florida
Pasco

MOTION TO DECLARE SECTION 921.141
FLORIDA STATUTES (1985), UNCONSTITUTIONAL

Defendant, DOMINICK OCCHICONE, by and through the undersigned attorney, Bruce Boyer, respectfully moves this Honorable Court to declare Florida's death penalty statute, Section 921.141, Florida Statutes (1985) unconstitutional as violative of the Florida and United States Constitutions, and asserts the following grounds in support of this motion:

1. The State of Florida is unable to justify the death penalty as the least restrictive means available to further its compelling goals where a fundamental right, human life, is involved, as required under Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973). Studies indicate that the death penalty is not an effective deterrent to crime and that there are other less drastic methods of punishment available which serve the same goals of the state. Since the death penalty serves no useful purpose, Section 921.141, Florida Statutes (1985) violates the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 9 of the Florida Constitution.

2. Although the Florida and United States Supreme Courts have upheld the constitutionality of Section 921.141, Florida Statutes (1985) the death penalty has in fact been administered and applied in a manner which is inconsistent with the premises of these Courts' decisions. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that harsh punishments be fairly and even-handedly imposed. Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110 (1942). Studies have shown that the race of the victim is the paramount consideration in determining whether a defendant receives the death sentence. The sentencing decision patterns of juries and

judges under Section 921.141, Florida Statutes (1983), have exhibited a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972). Death sentences in Florida are imposed irregularly, unpredictably, and whimsically in cases which are no more deserving of capital punishment, under any rational standard that considers the character of the offender and the offense, than many other cases in which sentences of imprisonment are imposed. Inconsistent and arbitrary jury attitudes and sentencing recommendations, uneven and inconsistent prosecutorial practices in seeking or not seeking the death penalty, divergent sentencing policies of trial judges and erratic appellate review by the Florida Supreme Court all contribute to produce an unreliable, irregular and freakish pattern of life or death sentencing results. Therefore, as it has been and is being applied, Section 921.141, Florida Statutes (1985) violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9 and 17 of the Florida Constitution.

3. Should the Court feel that the death penalty is a deterrent to murder, or that the death penalty has not been applied in an arbitrary and capricious manner in Florida since 1972, Defendant moves for an evidentiary hearing at which Defendant will prove each of the allegations in this motion.

a. Proof of these allegations will require the use of expert testimony presented by one or more experts in this area of study.

b. In order that Defendant may present such expert testimony, the defense moves for the entry of an order approving the taxing of reasonable costs to the county for expert witness fees, housing, and transportation.

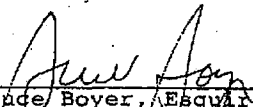
c. Defendant is indigent and has no means to pay for expenses incurred in an evidentiary hearing.

d. To deny Defendant the expenses necessary to conduct an evidentiary hearing to prove the allegations of this motion is to deny Defendant the effective assistance of counsel, due process of law, and equal protection under the law, in violation of Article I, Sections 9 and 16 of the Florida Constitution and the Fifth, Sixth, and Fourteenth Amendments to the U. S. Constitution.

WHEREFORE, Defendant prays this Honorable Court to declare Section 921.141, Florida Statutes (1985) unconstitutional, or in the alternative, to conduct an evidentiary hearing so Defendant may prove the allegations in this motion, costs of said hearing being taxed to the County of Pasco, Florida.

I HEREBY CERTIFY that the original of the foregoing Motion has been furnished to the Clerk of the Pasco County Court, Pasco Government Center, 7530 Little Road, New Port Richey, Florida, and a copy to the Office of the State Attorney, Pasco County Government Center, 7530 Little Road, New Port Richey, Florida, by personal service on

30th day of April, 1987.


Bruce Boyer, Esquire
Attorney for Defendant
525 Chestnut Street
Clearwater, Florida 33516
SPN 50340

No. _____

In the Supreme Court of the United States

DOMINICK A. OCCHICONE,
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v.

STATE OF FLORIDA,
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ON PETITION FOR A WRIT OF CERTIORARI TO
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Appendix I.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY

STATE OF FLORIDA

VS.

86-1355CFAWS

DOMINICK OCCHICONE

FILED FOR RECORD
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CLERK'S OFFICE
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PASCO COUNTY
Florida

MOTION TO DECLARE THAT
DEATH IS NOT A POSSIBLE PENALTY

Defendant, (5), by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, respectfully moves this Honorable Court to declare that death is not a possible penalty in this cause, or to declare that Florida Section 921.141, Florida Statutes (1983), is unconstitutional in its application to this case, and asserts the following grounds in support of this motion:

1. Based on the character of Defendant and the facts and circumstances of this offense, the classification of this case as a capital offense is arbitrary and without rational basis, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9 and 17, of the Florida Constitution. There is no compelling state interest in taking the life of Defendant in this case, and a compelling state interest in the taking of life must be demonstrated before the infliction of death can be justified. See Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110 (1942).

2. To impose the death penalty upon Defendant under the facts and circumstances of this case would be to impose punishment that is disproportionate to the nature of the offense and to the character of Defendant in violation of Article I, Sections 9 and 17 of the Florida Constitution, Section 921.141, Florida Statutes (1983), and holdings of the Florida Supreme Court that uphold the constitutionality of the application of the death penalty in this state. Herring v. State, 9 FLW 49 (Fla. S.Ct. 2/10/84); Sullivan v. State, 441 So.2d 609 (Fla. 1983); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981); State v. Dixon, 283 So.2d 1 (Fla. 1973).

3. To impose the death penalty upon Defendant under the facts and circumstances of this case would result in the unreliable imposition of capital punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 17 of the Florida Constitution.

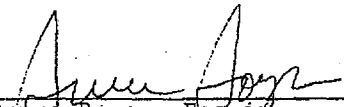
4. In Florida, it has been and is the regular and uniform pattern and practice of prosecuting attorneys and courts to decline to seek or impose the death sentence in cases where the defendant pleads guilty to the charged offense or some lesser included offense, although these cases are often factually indistinguishable from those in which the death sentence is sought and imposed upon other defendants for convictions following trial by jury. This systematic practice is designed and effected to encourage defendants charged with capital crimes to plead guilty and it employs the death sentence as a penalty for the exercise of such defendants' right to trial by jury.

5. To impose the death penalty upon Defendant should he be convicted of a capital offense at trial would be to penalize the defendant for the exercise of his right to trial by jury. The imposition of the death penalty under such circumstances would violate the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, and 16 of the Florida Constitution. See United States v. Jackson, 350 U.S. 510, 88 S.Ct. 1209 (1968), and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978), concurring opinion of Justice Blackmun at 2969.

WHEREFORE, Defendant prays this Honorable Court to declare that death is not a possible penalty in this cause.

I HEREBY CERTIFY that the original of the foregoing Motion has been furnished to the Clerk of the Pasco County Court, Pasco Government Center, 7530 Little Road, New Port Richey, Florida, and a copy to the Office of the State Attorney, Pasco County Government Center, 7530 Little Road, New Port Richey, Florida, by personal service on

30th day of April, 1987.


Bruce Boyer, Esquire
Attorney for Defendant
525 Chestnut Street
Clearwater, Florida 33516
SPN 50340

No. _____

In the Supreme Court of the United States

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STATE OF FLORIDA

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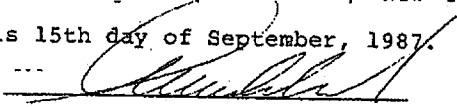
CASE NO. 86-01355CFAWS

ORDER TO DECLARE 921.141 FLORIDA
STATUTES (1985) UNCONSTITUTIONAL

THIS CAUSE coming before the Court upon Defendant's Motion to Declare 921.141 Florida Statutes (1985) Unconstitutional, and the Court having heard argument of Counsel and being otherwise duly advised in the premises, it is:

ORDERED AND ADJUDGED that said Motion be and the same hereby is denied.

DONE AND ORDERED in Chambers at the Courthouse, New Port Richey, Pasco County, Florida this 15th day of September, 1987.


Lawrence E. Keough
Circuit Judge

Copies Furnished to:
State Attorney's Office
Bruce Boyer, Esq.

No. _____

In the Supreme Court of the United States

DOMINICK A. OCCHICONE,
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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL COURT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY

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vs.

DOMINICK OCCHICONE

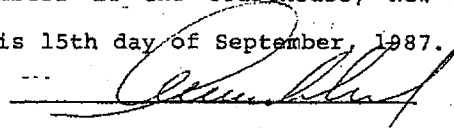
CASE NO. 86-01355CFAWS

ORDER DENYING MOTION TO DECLARE THAT DEATH PENALTY
IS NOT A POSSIBLE PENALTY

THIS CAUSE coming before the Court upon Defendant's Motion to Declare that Death Penalty is Not a Possible Penalty, and the Court having heard argument of Counsel and being otherwise duly advised in the premises, it is:

ORDERED AND ADJUDGED that said Motion be and the same hereby is denied.

DONE AND ORDERED in Chambers at the Courthouse, New Port Richey, Pasco County, Florida this 15th day of September, 1987.


Lawrence E. Keough
Circuit Judge

Copies Furnished to:
State Attorney's Office
Bruce Boyer, Esq.

No. _____

In the Supreme Court of the United States

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Appendix L.

(b) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding a sentence of imprisonment:

1. The defendant's criminal conduct neither caused nor threatened serious harm.
2. The defendant did not know and had no reason to know that his criminal conduct would cause or threaten serious harm.
3. The defendant acted under a strong provocation.
4. There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense.
5. The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that the victim sustained.
6. The defendant has no history of prior delinquency or criminal activity or had led a law-abiding life for a substantial period of time before the commission of the present crime.
7. The defendant's criminal conduct was the result of circumstances unlikely to recur.
8. The character and attitudes of the defendant indicate that he is unlikely to commit another crime.
9. The defendant is particularly likely to respond affirmatively to noncustodial treatment.

(2)(a) A court shall sentence a defendant to pay a fine unless it finds that the defendant is unable or will be unable to pay the fine and the imposition of a fine will not prevent the defendant from being rehabilitated or from making restitution to the victim of his crime.

(b) A court shall sentence a defendant to pay a fine whenever the imposition of a fine is sufficient to punish the defendant and protect the public.

(c) A court shall sentence a defendant to pay a fine in addition to imprisonment or probation if, in the opinion of the court, the defendant has derived a pecuniary gain from his crime or the fine is specially adapted to deterrence of the particular crime or to the punishment and rehabilitation of the offender.

History.—s. 7, ch. 83-131.

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 255, ch. 19554, 1939; CGL 1940 Supp. 8663(264); s. 121, ch. 70-339.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19554, 1939; CGL 1940 Supp. 8663(267); s. 122, ch. 70-339.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) **SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.**—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) **ADVISORY SENTENCE BY THE JURY.**—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) **FINDINGS IN SUPPORT OF SENTENCE OF DEATH.**—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death

sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) **REVIEW OF JUDGMENT AND SENTENCE.**—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) **AGGRAVATING CIRCUMSTANCES.**—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

(6) **MITIGATING CIRCUMSTANCES.**—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19554, 1939; CGL 1940 Supp. 8663(246); s. 119, ch.

70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353; s. 177, ch. 83-216; s. 1, ch. 87-368.

Note.—Former s. 919.23.

921.143 Appearance of victim or next of kin to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has been convicted of any felony or who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced, or the next of kin of the victim if the victim has died from causes related to the crime, to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which statement shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims or, when appropriate, their next of kin that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any harm, including social, psychological, or physical harm, financial losses, and loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 76-274; s. 3, ch. 84-363.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the Governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 260a, ch. 19554, 1939; CGL 8426, 8427; CGL 1940 Supp. 8663(270); s. 123, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—

(1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively.