

IN THE SUPREME COURT OF FLORIDA

NO. 71292

BOBBY MARION FRANCIS,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary, By SC
Department of Corrections, State of Florida, Deputy Clerk

Respondent.

FILED

SID J. WHITE

OCT 15 1987

CLERK, SUPREME COURT

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF
HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION,
AND APPLICATION FOR STAY OF EXECUTION PENDING
DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

LARRY HELM SPALDING
Capital Collateral Representative

MARK E. OLIVE
Chief Assistant Capital Collateral
Representative

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I. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents issues which directly concern the judgment of this Court on appeal and hence jurisdiction lies in this Court. See, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981).

II. FACTS UPON WHICH PETITIONER RELIES

This is a jury override case. At sentencing, Mr. Francis presented the following compelling evidence in mitigation, regarding his proven capacity for possible prison adjustment:

DIRECT EXAMINATION

BY MR. ZENOBI:

Q Mr. Jordan, would you please state your full name and occupation?

A Rochester Jordan. Corrections and Rehabilitation Officer.

Q By whom are you employed, sir?

A Dade County Corrections and Rehabilitation.

Q And how long have you been employed by them?

A Approximately two years and three months.

Q And what is your job at the present time, sir?

A To make sure that the inmates are protected, taken care of, fed, whatnot, taken to court, clinic and whatnot and security.

Q And where do you work, sir?

A Fourth floor at the main jail.

Q Is that the Dade County Jail?

A Yes, sir.

Q While you've been working there, have you had in that jail Mr. Bobby Francis?

A Could you repeat that, please?

Q While you have been working there,

have you had as part of your population Mr. Bobby Francis?

A Yes, I have.

Q Do you see him in court today?

A Yes.

Q Point him out.

A The young man sitting at the table over there on the left (indicating).

Q All right.

THE COURT: So noted.

BY MR. ZENOBI:

Q Mr. Jorday, Officer Jordan, can you tell the ladies and gentlemen of the jury what kind of member of the population Mr. Francis has been since he's been in the Dade County Jail and if there's any specific incidents where he may have helped you or other officers out?

A Well, Mr. Francis, he has been a rather well-behaved inmate inside the facility.

I, myself, have never encountered any problems with him and there has been a few incidents where there are guys in the cells that are making weapons to attack one another and he would let us know what happened.

Q No, do you know what kind of weapons those are?

A Well, the inmates, they but plastic razors from the Commissary and what they do is they take the blade out of it, melt the plastic down a little and stick the blade in it.

This they can use to cut a person up or one of the officers.

This, I think, may have prevented one of us from being injured or someone in the celll.

Q And has this been Mr. Francis' intervention that this has been avoided?

A Yes, sir.

Q All right.

Have you, personally, been grateful for this, sir?

A Yes, I have, because maybe it

possibly might have been intended on being used on myself or one of the other officers on the floor.

Q So, is it or is it not a fact that Mr. Francis has been in an integrated cell, in other words, black and white?

A Yes, it is.

Q And has he done anything to maintain peace within that cell?

A He's done quite a lot, sir.

Q Can you explain to the ladies and gentlemen of the jury what he has done and how many times, sir, and what your feelings are about it?

A Well, to exactly say how many times he has done it, I really couldn't say, but there has been instances where once you get so many different nationalities of people in the cell, everybody gets into their own cliches and you have different groups trying to control the others.

Mr. Francis here, when he sees this happening, he says something to someone and we, more or less, determine who the violent ones and the agitators are and we remove them.

This way we keep harmony in the cell and we keep the dangerous individuals to ourselves and the other ones off the floor.

Q What has Mr. Francis' role been among his fellow inmates?

A Well, I look at him as being in a good role.

Q During the time that you knew Bobby Francis in the Dade County Jail, did you have any problem with him that you could tell the ladies and gentlemen of the jury?

A No problems whatsoever.

MR. ZENOBI: I tender the witness.

. . . .

DIRECT EXAMINATION

BY MR. ZENOBI:

Q Sir, may we have your name?

A My name is Michael Dave Smith.

Q And, sir, where are you employed?

A The Miami--Dade Correctional.

Q And who are you employed by, sir?

A Dade County. Dade County Jail.
I'm a counselor on the fourth floor.

Q And how long have you been a
counsel on the fourth floor?

A About a year now.

Q sir, during the past year in the
Dade County Jail as counselor, what have been
your duties, sir?

A Well, I've been on the fourth floor
over two years now, two and a half years.

I've only been a counselor a year
and my basic duties are just about
everything.

I handle the Commissary, personal
problems, see that the inmates get to the law
library, get clothing, phone calls, whatever,
a whole bunch of things.

Q Do you have contact with the
inmates at the Dade Count Jail?

A Yes.

Q Where is the Dade County Jail in
relatin to the courthousue?

A Where is it?

Q Right.

A Right across the street.

Q Do you have any interest in Bobby
Francis, other than professional, sir?

A Only professional.

Q Do you see Mr. Francis in court?

A Yes.

Q Can you point him out.

A He's the gentleman over there
(indicating).

Q The gentleman right here
(indicating)?

A Yes.

THE COURT: So noted.

MR. ZENOBI: Thank you.

BY MR. ZENOBI:

Q During the past year, sir, did you come into contact with Bobby Francis on a weekly basis?

A Every day.

Q And were you his counselor, sir?

A YES.

Q Now, as we asked Officer Jordan, can you please tell the ladies and gentlemen of the jury what kind of an inmate Mr. Francis was?

A Bobby is no problem.

I've known Bobby since he's been here.

I had no problems with him.

Basically the same as Officer Jordan says, he's been no problem.

When there are problems in the cell, he brings it to the attention of the officers or myself and I go in, we talk, and we try to settle the problem among ourselves, you know, the inmates, and we decide if this inmate can cope in the cell or not.

If not, then we try to relocate him.

Q You're not talking about Mr. Francis when you say--

A Well, it's usually him that's the mediator in the cell.

If there's a problem, he's the guy that's in the middle.

We usually try to keep down serious problems.

Q All right.

And has he been a help to you, sir?

A Yes, he has.

Q Do you recall any specific incidents or instances where he has headed off or intervened in a particular problem that would have caused injury or, perhaps, even death to anyone?

A I think once.

Well, I know once there was.

I think they had a trusty in the cell and these trusties have access outside

of the cell of the kitchen and other areas in the jail.

Somehow, I think, a knife or a fork had been taken into the cell and was hidden in the air conditioning duct and he brought this to the attention of the officers and the location of the handmade weapon and a shakedown was conducted and we found items, contraband.

Q From what you say, was the intervention and counsel of Mr. Francis a possible way to head off some injury to either an officer or another inmate?

A Yes.

Q And might this have resulted in the death of someone?

A It possibly could have.

Q And what is your opinion of Mr. Francis as an inmate, sir?

A I consider him a role model.

We have no problem.

His cell was one of the cells we had the least problem with.

MR. ZENOBI: I'll tender the witness.

MR. MILLER: One or two questions.

(R. 1260). The jury recommended life imprisonment.

The trial court overrode, and stated simply that the mitigating evidence offered was not "particularly noteworthy." This Court affirmed, stating: "[W]e find no reasonable basis discernable from the record to support the jury's life recommendation. Francis v. State, 473 So.2d 622, 676 (Fla. 1985).

III. NATURE OF RELIEF SOUGHT

Petitioner requests that this Court stay his scheduled execution, so as to allow full and complete consideration of his petition for writ of habeas corpus. In the alternative, Petitioner requests that a new appeal be granted, a stay of execution be entered, and a briefing schedule be ordered. Finally, Petitioner requests that his sentence be vacated and

that this matter be remanded to the trial court for resentencing before a jury.

IV. LEGAL BASIS FOR RELIEF

This Court did not find that adjustment to prison, saving guards lives, or being a model prisoner was a "reasonable basis" for a life recommendation in Francis v. State, 473 So.2d 672, 676 (Fla. 1985). At that time, the position of this Court on the issue was reflected in Valle v. State, 474 So.2d 796 (Fla. 1985). However, recently this Court reversed the Valle I decision, after it was remanded to the Court in light of Skipper v. South Carolina, 106 S.Ct. 1669 (1987). This Court believes that "model prisoner" information can form a reasonable basis for a jury recommendation.

Although Skipper requires only that we remand to the "sentencer" for consideration of all relevant mitigating evidence, we remand for a new jury recommendation as well. The jury's recommended sentence is given great weight under our bifurcated death penalty system. It is the jury's task to weigh the aggravating and mitigating evidence in arriving at a recommended sentence. Where relevant mitigating evidence is excluded from this balancing process, the scale is more like to tip in favor of a recommended sentence of death. Since the sentencer must comply with a stricter standard when imposing a death sentence over a jury recommendation of life, a defendant must be allowed to present all relevant mitigating evidence to the jury in his efforts to secure such a recommendation. Therefore, unless it is clearly beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new jury recommendation on resentencing. Since we cannot say beyond a reasonable doubt that the exclusion did not affect that recommendation, we remand for a new sentencing hearing with a new jury panel.

Id., 502 So. 2d at 1226. Clearly the jury had a reasonable basis for its recommendation in light of Skipper and Valle, and the override was improper.

CONCLUSION

Petitioner respectfully requests that this Court enter a stay of his execution scheduled for Monday, November 16, 1987, and grant the writ so as to allow a new direct appeal. In the alternative, Petitioner requests that his sentence of death be vacated. If fact resolution is necessary for the decision of this Court, Petitioner requests that a magistrate be appointed to take evidence.

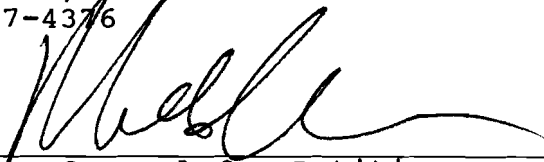
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail/Hand Delivery to Charles M. Fahlbusch and Richard E. Doran, Assistant Attorney General, 401 NW Second Avenue, Suite 820, Miami, Florida 33128, this  day of October, 1987.


Attorney