

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,706

CLARENCE EDWARD HILL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REPLY TO STATEMENT OF THE CASE AND FACTS	1
ARGUMENT IN REPLY	5
CONCLUSION	12

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Adams v. State,</u> 380 So. 2d 424 (Fla. 1980)	4
<u>Clemons v. Mississippi,</u> 110 S. Ct. 1441 (1990)	9
<u>Davis v. State,</u> 589 So. 2d 896 (Fla. 1991)	6
<u>Eddings v. Oklahoma,</u> 455 U.S. 104 . . . (1982)	10
<u>Funchess v. State,</u> 399 So. 2d 356 (Fla. 1981)	6
<u>Gardner v. Florida,</u> 430 U.S. 349 (1977)	7
<u>Hall v. State,</u> 541 So. 2d 1125 (Fla. 1989)	9
<u>Henry v. State,</u> 377 So. 2d 692 (Fla. 1979)	4
<u>Hill v. State,</u> 515 So. 2d 176 (Fla. 1987)	9
<u>Hill v. State,</u> 515 So. 2d 179	5
<u>Hitchcock v. Dugger,</u> 481 U.S. 393 (1987)	6
<u>Lawyers Title Insurance Corp. v. Little River Bank and Trust Co.,</u> 243 So. 2d 417 (Fla. 1970)	4
<u>Lockett v. Ohio,</u> 438 U.S. 586 . . . (1978)	10
<u>Mystan Marine, Inc. v. Harrington,</u> 339 So. 2d 200 (Fla. 1976)	4
<u>Parker v. Dugger,</u> 111 S. Ct. 731 (1991)	10, 11
<u>Parker v. State,</u> No. 63,700	5

Sullivan v. State,
372 So. 2d 938 (1979) 4

Witt v. State,
387 So. 2d 922 (Fla. 1980) 4

REPLY TO STATEMENT OF THE CASE AND FACTS

In its Statement of the Case and Facts, and throughout its brief, the State contends that Mr. Hill's case is before this Court pursuant to a "limited remand" from the United States District Court for the Northern District of Florida (Answer Brief at 5, 6, 17, 22, 27, 28, 30). The State mischaracterizes the federal district court's order and that court's authority. First, the federal district court found constitutional error in Mr. Hill's case. For example, the district court found, "Hill was sentenced to death based on an unsupported finding of fact, without proper attention to the capital sentencing standards required by the United States Constitution" (Order at 73-74). Regarding this Court's review of Mr. Hill's sentence after striking an aggravating factor, the district court concluded that this Court "did not give a principled explanation" of why the Court affirmed the death sentence despite striking the aggravating factor (Order at 82). The district court also concluded that this Court's "harmless error analysis was . . . flawed by the exclusion of unrefuted nonstatutory mitigating evidence from the sentencing balance. Without such evidence in the balance, meaningful harmless error analysis was impossible; and without meaningful harmless error analysis, the Florida Supreme Court's affirmance of Hill's death sentence is invalid" (Order at 82-83). Thus, the district court did not simply "remand" Mr. Hill's case, but found that constitutional error occurred in Mr. Hill's sentencing and direct appeal. The State's

characterization of this proceeding as simply a "remand"-- apparently an attempt to trivialize these proceedings--is not in conformity with the district court's conclusions. This proceeding is not simply an adjunct to the federal proceedings: the district court found constitutional error and granted habeas corpus relief. A finding of constitutional error infecting a death sentence imposed in a state court invalidates that death sentence and requires reconsideration of the sentence. That is what the district court found in Mr. Hill's case--i.e., that the death sentence is not constitutionally valid--a finding which the State elected not to appeal.

Additionally, a federal district court does not have the authority to remand a case to this Court or any other state court. A federal habeas corpus proceeding is an independent civil proceeding authorized by federal law. A federal habeas corpus proceeding is not an appeal of a state court proceeding. In fact, in Mr. Hill's case, after finding constitutional error, the district court specifically declined to direct any specific state court proceedings but granted habeas corpus relief. Thus, the State's novel "limited remand" theory is not based upon the district court's order, which clearly states:

1. Petitioner Hill's Petition for Writ of Habeas Corpus is hereby GRANTED unless the State of Florida, within a reasonable period of time, initiates appropriate proceedings to reconsider Hill's death sentence. The court expresses no opinion about whether a new sentencing hearing is required.

(Order at 85) (emphasis added).¹

The State's characterization of this proceeding as a "limited remand" also fails to recognize that Mr. Hill asked this Court to reopen his direct appeal. The State raised no objection to this request, and this Court granted Mr. Hill's motion. This proceeding is being conducted under the case number of Mr. Hill's original direct appeal and, as the State's brief mentions only in passing (Answer Brief at 39), is intended to reconsider Mr. Hill's death sentence. Thus, the State's "limited remand" theory finds no support in this Court's order, which states:

Appellant's Motion for Establishment of Briefing Schedule is granted and the briefs in the above styled case are to be served as follows. . . .

(Emphasis added).

¹Of course, the State did not make any attempt to initiate appropriate proceedings in the state courts, although in its Answer Brief the State says that it dismissed its appeal of the grant of habeas corpus relief because "[u]pon further reflection of the issues upon which the State did not prevail in the federal district court, the State elected to dismiss its appeal and return to the state appellate courts for further appellate review" (Answer Brief at 5). Because the State did not comply with the district court's order, Mr. Hill moved to reopen his direct appeal. The State did not object to this motion, and this Court granted the motion.

²Mr. Hill's motion, which was filed under the original direct appeal case number, provided:

Comes now appellant, Clarence Edward Hill, by and through counsel and respectfully moves this court to reopen the direct appeal in this matter. . . .

Motion for Establishment of Briefing Schedule, February 4, 1994, Case No. 68,706, Supreme Court of Florida (emphasis added).

This Court's jurisdiction encompasses only the narrow class of cases described in Article V, Section 3(b) of the Florida Constitution. Mystan Marine, Inc. v. Harrington, 339 So. 2d 200, 201 (Fla. 1976); Lawyers Title Insurance Corp. v. Little River Bank and Trust Co., 243 So. 2d 417 (Fla. 1970). The State has made no attempt, other than simple fiat, to demonstrate how this alleged "limited remand", even if it did exist, falls within this class of cases. Its allegation is nothing more than a bid to induce this Court to ignore its order reopening Mr. Hill's direct appeal and to replace that proceeding with a time barred and improper reconsideration of its own decision in light of a subsequent ruling of a federal district court.

This Court has repeatedly held that res judicata principles preclude revisiting issues previously determined absent compliance with the standards enunciated in Witt v. State, 387 So. 2d 922, 930 (Fla. 1980). In Witt, this Court specifically concluded that a decision of a federal district court (or even a United States Court of Appeals) did not warrant deviation from the general rule that res judicata precludes revisiting previously addressed issues. Numerous times this Court has held that it will not revisit issues previously addressed. Sullivan v. State, 372 So. 2d 938 (1979); Henry v. State, 377 So. 2d 692 (Fla. 1979); Adams v. State, 380 So. 2d 424 (Fla. 1980). The State of Florida is not entitled to a different rule of law than collateral capital defendants. This Court's jurisdiction, therefore, rests upon Mr. Hill's request to reopen his direct

appeal, as was done in Parker v. State, No. 63,700. If indeed it does not, the matter should simply be remanded for a resentencing proceeding in the circuit court, or, alternatively, this Court should expressly indicate that it lacks jurisdiction to carry out the State's obligation under the United States District Court for the Northern District of Florida's Order granting Mr. Hill's Petition for Writ of Habeas Corpus so that the writ may issue.

ARGUMENT IN REPLY

Throughout its brief, the State contests the district court's conclusions that constitutional error occurred (Answer Brief at 33-34, 37, 38). For example, regarding this Court's affirmance of Mr. Hill's death sentence after striking an aggravating factor, the State argues, "the federal district court did not believe this Court did a proper harmless error analysis . . . in spite of the fact that this Court, in Hill v. State, 515 So. 2d 179, in doing its balancing analysis, acknowledged that four remaining aggravating factors existed and one mitigating circumstance existed" (Answer Brief at 33-34). The State also argues, "Contrary to the federal district court's finding, the state trial court did not fail to consider submitted mitigating evidence" (Answer Brief at 37), and that "there is nothing in this Court's opinion on direct appeal at 515 So. 2d at 176, to suggest that this Court did not factor in the aforementioned pieces of evidence" (Answer Brief at 38). Although now appearing to take issue with the district court's conclusions, the State previously dismissed its appeal of the district court's decision.

The State's dismissal of its appeal was certainly a concession that constitutional error did occur in Mr. Hill's case. If this Court follows the State's advice and reimposes the death sentence by committing the same errors previously identified by the federal district court, Mr. Hill's case will simply bounce back and forth between the state and federal courts. Since the State did not appeal the district court's findings, those findings are binding.

In the argument section of its brief, the State argues that the claims presented by Mr. Hill should not be considered because this proceeding involves a "limited remand" from the district court. The State supports this argument with citations to Davis v. State, 589 So. 2d 896 (Fla. 1991), and Funchess v. State, 399 So. 2d 356 (Fla. 1981) (Answer Brief at 17-18). However, these cases provide no authority for the State's argument. In Davis, the federal district court did not find constitutional error, but dismissed the habeas corpus petition as unexhausted and stated that the petitioner could either present his unexhausted claim to the state courts or refile the federal petition without the unexhausted claim. In Davis, the federal district court did not "remand" the case to the Florida courts. The petitioner then filed a motion under Fla. R. Crim. P. 3.850, presenting a Hitchcock v. Dugger, 481 U.S. 393 (1987), claim. This Court considered this claim on the merits because it had previously determined that Hitchcock claims were cognizable in Rule 3.850 proceedings and rejected the other claims as procedurally barred

based upon the rules regarding the cognizability of claims in a Rule 3.850 proceeding. In Mr. Hill's case, by contrast, this Court has reopened Mr. Hill's direct appeal because a federal court found constitutional error. This is not a Rule 3.850 proceeding but a direct appeal proceeding. In Funchess, this Court remanded the case to the trial court in light of Gardner v. Florida, 430 U.S. 349 (1977), and on appeal from that remand refused to consider other claims which the appellant attempted to present. This Court, of course, has the authority to remand a case to a trial court, whereas a federal district court has no authority to remand a case to the state courts. Further, as explained above, the district court did not "remand" but found constitutional error infecting Mr. Hill's death sentence and therefore found Mr. Hill's death sentence to be constitutionally invalid. Thus, Mr. Hill's death sentence must be reconsidered, a process which at least requires consideration of all of the errors which occurred during the sentencing proceeding. When a new direct appeal or resentencing is ordered because of constitutional error infecting the prior proceeding, the new proceeding is not intended to simply fix that error and do everything else wrong. Rather, the new proceeding must really be new and must permit consideration of all matters affecting the reliability and fairness of the proceeding. Thus, all of Mr. Hill's claims must be considered in this new direct appeal proceeding.

Despite recognizing that one purpose of this direct appeal proceeding is "ascertaining whether the striking of one of the statutory aggravating factors (CCP) and factoring in 'unrebutted' nonstatutory mitigating evidence would have resulted in the imposition of the death penalty" (Answer Brief at 5-6), the State never addresses this issue. Rather the State only adverts to this issue in the very last paragraph of its argument:

Terminally, all concerns registered by the federal district court with regard to whether this Court did a proper harmless error analysis, will dissipate upon this Court's reconsideration of whether, after finding one statutory aggravating factor invalid, it concludes that based on the remaining four statutory aggravating factors and the mitigation presented, any error with regard to considering that invalid aggravating factor, was harmless beyond a reasonable doubt.

(Answer Brief at 39). In actuality, what the State is asking this Court to do is perpetuate and repeat the errors which the district court concluded rendered Mr. Hill's death sentence invalid.

The issues regarding the striking of the aggravating factor and the unrebutted nonstatutory mitigation are presented as Arguments I and II of Mr. Hill's Initial Brief. These arguments discuss the proper harmless error analysis of the striking of the aggravating factor and the proper analysis of the trial court's and this Court's failure to consider unrebutted nonstatutory mitigation. The State simply never addresses these arguments.

On direct appeal, after striking the "cold, calculated and premeditated" aggravating factor, this Court simply concluded

that consideration of this invalid aggravator "is not such a change under the circumstances of this sentencing proceeding that its elimination could possibly compromise the weighing process of either the jury or the judge." Hill v. State, 515 So. 2d 176, 179 (Fla. 1987). As the district court found, this statement constituted constitutional error because it does not provide the "principled explanation" required by Clemons v. Mississippi, 110 S. Ct. 1441 (1990). As Argument I of Mr. Hill's Initial Brief explains, a "principled explanation" must take numerous factors into account. For example, although the "cold, calculated and premeditated" aggravating factor was invalid in Mr. Hill's case, the State was permitted to introduce otherwise inadmissible evidence in the guise of providing support for this aggravator; this aggravator was emphasized in the State's penalty phase closing argument; substantial unrebutted nonstatutory mitigation was presented to Mr. Hill's jury and judge. This Court's direct appeal analysis did not consider that the determination of whether constitutional error was harmless beyond a reasonable doubt requires determining whether the jury would have had a reasonable basis for a life recommendation. Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989). As the unrebutted nonstatutory mitigation found by the district court establishes, there was a reasonable basis for a life recommendation. Further, any proper harmless error analysis must also consider the other errors which render Mr. Hill's death sentence unreliable. These errors are discussed in Arguments III through XI of Mr. Hill's initial

brief. The "principled explanation" required by the Constitution requires consideration of how all of these matters "compromise[d] the weighing process of [both] the jury [and] the judge." Hill, 515 So. 2d at 179.

The State's brief discusses none of these matters, but simply urges this Court to find the error harmless because other aggravating factors remain. This is precisely the analysis forbidden by Clemons and Parker v. Dugger, 111 S. Ct. 731 (1991): "An automatic rule of affirmance [based on the existence of other aggravating factors] in a weighing State would be invalid under Lockett v. Ohio, 438 U.S. 586 . . . (1978), and Eddings v. Oklahoma, 455 U.S. 104 . . . (1982), for it would not give defendants the individualized treatment [required by the Constitution]." Clemons, 110 S. Ct. at 1450 (parallel citations omitted).

Argument II of Mr. Hill's Initial Brief addresses the trial court's and this Court's failure to consider the unrebutted nonstatutory mitigation contained in the record. Regarding this issue, the State disputes the district court's conclusions, despite the extensive factfindings made by the district court, which the State previously chose not to appeal. Instead of confronting the error, the State simply relies upon the trial court's sentencing order (which the district court concluded did not take into account the substantial unrebutted nonstatutory mitigation) and baldly asserts that the order demonstrates that "the trial court did consider nonstatutory mitigating factors"

(Answer Brief at 37). The State ignores the sentencing order's statement regarding nonstatutory mitigation that "[t]he Court is of the opinion that the evidence is insufficient to support this mitigating circumstance" (R. 842). This statement clearly establishes, as the district court found, that the trial court failed to take into account the unrebutted nonstatutory mitigation. The State then again baldly asserts that this Court's direct appeal opinion contains nothing "to suggest that this Court did not factor in the aforementioned pieces of evidence" (Answer Brief at 38). The State points to nothing in this Court's direct appeal opinion indicating that the Court did consider the unrebutted nonstatutory mitigating evidence. As the district court found, this Court did not consider this evidence, in violation of Parker v. Dugger, 111 S. Ct. 731 (1991). Proper consideration of this unrebutted evidence establishes that the error in the jury's and judge's consideration of the invalid "cold, calculated and premeditated" aggravating factor cannot be found harmless beyond a reasonable doubt.

The State does not address the merits of any of the claims presented in Mr. Hill's initial brief. Thus, regarding the merits of those claims, Mr. Hill relies upon the presentation in his initial brief. Contrary to the State's "limited remand" theory, all claims presented by Mr. Hill must be considered in this new direct appeal proceeding. Failure to consider those claims would deprive Mr. Hill of a reliable and fair determination of his sentence. Based upon the claims presented,

Mr. Hill is entitled to a resentencing proceeding before a jury and judge.

CONCLUSION

For all of the reasons discussed herein and in his initial brief, Mr. Hill respectfully urges the Court to reverse the trial court and to order a resentencing before a newly empaneled jury.

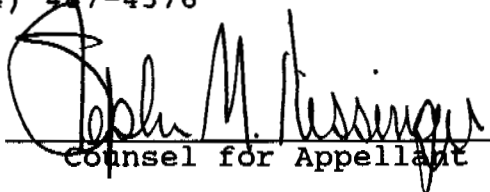
I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on April 29, 1994.

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