

IN THE SUPREME COURT OF FLORIDA

NO. SC02-1106

ASKARI ABDULLAH MUHAMMAD,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

**REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS
CORPUS**

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INTRODUCTION

COMES NOW, the Petitioner, **Askari Abdullah Muhammad**, by and through undersigned counsel and hereby submits this *Reply* to the State's *Response* to Mr. Muhammad's *Petition for Writ of Habeas Corpus*. Petitioner will not reply to every issue and argument. However, he expressly does not abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Petitioner stands on the arguments presented in his *Petition for Writ of Habeas Corpus*.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE AND FACTS

Respondent states:

this petition is being pursued concurrently with the appeal from **the order denying Defendant's motion for post conviction relief. *Allen v. State, No. SC02-371*. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.**"

Response at 1 (emphasis added). Respondent's statement is incorrect. In fact, Circuit Court Judge Chester B. Chance **granted** Mr. Muhammad penalty phase relief on the motion for postconviction relief after holding an evidentiary hearing. In granting relief, Judge Chance, who also originally presided over Mr. Muhammad's

case and imposed the improper death sentence, stated:

In this case, it cannot be said with any certainty that the newly-discovered evidence presented by Defendant would not have resulted in a different outcome, and *this Court finds that the interests of justice require that a new sentencing hearing be held.*

(See *Order Granting Motion for Post-Conviction Relief in Part* at PCR V. 1 at 911)(emphasis added). The State appealed Judge Chance's order granting penalty phase relief and filed an *Initial Brief* on February 22, 2002. Mr. Muhammad filed his *Answer Brief* on May 13, 2002, as well as his *Initial Brief* of his *Cross-Appeal* regarding Judge Chance's failure to consider the Brady material as it relates to the guilt phase.¹ Concurrently, Mr. Muhammad filed his *Petition for Writ of Habeas Corpus*. The State filed its *Response* to Mr. Muhammad's *Petition for Habeas Corpus* on August 16, 2002, and through the instant pleading, Mr. Muhammad hereby files his *Reply*.²

Additionally, the facts of Allen v. State, SC02-371, upon which respondent relies (*Response* at 1), are irrelevant to Mr. Muhammad's case. Mr. Muhammad's direct appeal can be found at Muhammad v. State, 494 So. 2d 969 (Fla. 1986),

¹ The State filed its *Reply Brief* and *Answer Brief* on August 16, 2002.

² Concurrently, Mr. Muhammad files his *Reply Brief* in his *Cross-Appeal*.

cert. denied, 479 U.S. 1101 (1987). The relevant facts are set forth in Mr. Muhammad's *Petition for Writ of Habeas Corpus* and his *Answer Brief/Initial Brief of Cross-Appellant*.

REPLY TO CLAIM II

In responding to the claim that Mr. Muhammad was involuntarily absent from certain proceedings during his capital trial, the State overlooks that Mr. Muhammad was proceeding *pro se*. Thus, when Mr. Muhammad was not present, he was also not represented by counsel. For instance, during the sentencing hearing, an unrecorded sidebar conference occurred between the State and the trial judge (R. 1586-87). Mr. Muhammad was not included in this sidebar nor did any attorney appear on his behalf.

In Snyder v. Massachusetts, 291 U.S. 97, 104 (1934), upon which the State relies heavily (*Response* at 13), the United States Supreme Court held that the defendant did not have a constitutional right to be present during a trip for the jury to view the crime scene. Mr. Muhammad's absence is in no way analogous to the defendant's absence in Snyder. In fact, the Snyder court explained that a view is unlike other parts of the proceedings, as the judge may or may not be present and the viewing may be held anywhere. See id. at 118-19. The Snyder court also acknowledged that while some states consider a view to be part of the trial, other

states do not. See id. at 119. In Florida, a view is not considered part of the trial; thus, the defendant does not have a constitutional right to be present. See Washington v. State, 98 So. 605 (Fla. 1924). This Court explained in Washington that fairness and justice do not require a defendant’s presence for two reasons. First, a defendant cannot lawfully make any statements at the view. Secondly, a defendant essentially already possesses the right to be present, “for he is represented at the view by a shower, selected by himself and formally approved by the court; this shower points out such parts as the accused has directed” See id. at 607 (“[I]f . . . the defendant is not allowed to have one shower appointed as his representative, then the unfairness and disadvantage in such a court arises”).³

The proceedings for which Mr. Muhammad was absent – part of both the penalty phase and the sentencing hearing – were undisputably part of his capital trial. Furthermore, he was not represented during his absences, since he was a *pro se* litigant. As such, any communications between the prosecutor and the court during Mr. Muhammad’s absences amounted to *ex parte* communications.

³ It should be noted, however, that Florida Rules of Criminal Procedure, Rule 3.180(a)(7), provides for the presence of a criminal defendant at any view by the jury. Nevertheless, the reasoning in Washington is significant regarding the State’s reliance on Snyder.

The State urges this Court to find that Mr. Muhammad's absences were harmless. However, that would be an inaccurate and unsupported conclusion. For instance, during the sidebar at the sentencing hearing, the prosecutor and the judge engaged in *ex parte* communications, which were unrecorded. Therefore, the State cannot now allege that Mr. Muhammad's absence was harmless. Immediately after the sidebar, the court announced that it had not found any nonstatutory mitigators. What was said during the sidebar is unknown. Consequently, it is both improper and inaccurate for the State to describe the sidebar conference as a communication whereby the prosecutor "merely reminded the trial court of its duty to consider nonstatutory mitigation." (*Response* at 15). The sidebar was unrecorded, thus the State cannot now speculate (nor introduce non-record evidence) as to what was said. The prosecutor may have argued against the existence of nonstatutory mitigation, or the judge may have neglected to previously consider nonstatutory mitigation before the prosecutor declared that there was no nonstatutory mitigation. If the latter is the case, then any bias in the State's "reminder," even inadvertent bias, certainly could have affected the court's decision, as the declaration that the court found no nonstatutory mitigation came immediately after the State's "reminder." See Smith v. State, 708 So. 2d 253 (Fla. 1998) ("The other party should not have to bear the risks of factual oversights or inadvertent negative

impressions that might be easily corrected by the chance to present counter arguments’”) (quoting Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992)).

Furthermore, Mr. Muhammad was denied an opportunity to rebut whatever was said and argued by the State at the sidebar. As the United States Supreme Court explained in Gardner v. Florida, 430 U.S. 349 (1977), a capital defendant must be provided an opportunity to rebut any information that the court considers in sentencing the defendant.

Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.

Id. at 360. The Gardner court held that the defendant “was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.” Id. at 361. Likewise, Mr. Muhammad was denied due process when he was precluded from rebutting the State’s arguments that were offered at the *ex parte* sidebar when Mr. Muhammad was involuntarily absent.

In addition, it is fundamental error for a prosecutor and a judge to have *ex parte* communication during the most crucial point of a trial – the pronouncement of aggravating and mitigating factors and the declaration that the defendant is

sentenced to death. See Smith, 708 So. 2d at 255. This Court held in Smith that the capital defendant’s due process rights were violated when the judge engaged in conversations with a state attorney, concerning the preparation of a postconviction order and the contents of the order. See id. The Court also rejected the State’s contention that the claim was not preserved and that defense counsel had “ample opportunity to object to the substance of the proposed order.” See id. at 255.

REPLY TO CLAIM V

In its response to the instant claim, the State attacks Mr. Muhammad’s reliance on Costello v. United States, 350 U.S. 359 (1956), and United States v. DiBernardo, 552 F. Supp. 1315 (S.D. Fla. 1982).

The State alleges that Mr. Muhammad’s reliance on Costello is “misplaced.” (*Response* at 39). However, Mr. Muhammad cited Costello for the proposition that the Fifth Amendment of the U.S. Constitution “requires that an indictment be issued by a legally constituted and unbiased grand jury.” (*Petition* at 41). In fact, the Costello court explains exactly that the Fifth Amendment requires that “[a]n indictment be returned by a legally constituted and unbiased grand jury.” See id. at 363. Consequently, Mr. Muhammad’s reliance on Costello was both accurate and proper.

Similarly, the State contends that Mr. Muhammad wrongly cited to

DiBernardo. However, Mr. Muhammad cited to DiBernardo as support for the Fifth Amendment's requirement of an unbiased grand jury. The DiBernardo court explained that "[t]he right to indictment by an unbiased grand jury is guaranteed by the Fifth Amendment." See id. at 1328. This proposition has not been overruled by any court since DiBernardo. See generally Albright v. Oliver, 510 U.S. 266, 282 (1994).

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Muhammad respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing *Reply to Response to Petition for Writ of Habeas Corpus* has been furnished by United States Mail, first-class postage prepaid, to Sandra Jaggard, Assistant Attorney General, Rivergate Plaza, Suite M950, 444 Brickell Avenue, Miami, Florida 33313, counsel of record on this 21st day of October, 2002.

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Heidi E. Brewer