

**IN THE CIRCUIT COURT OF ROBERTSON COUNTY
19th JUDICIAL DISTRICT
AT SPRINGFIELD, TENNESSEE
CRIMINAL DIVISION**

FILED
LISA M. CAVENDER, CLERK

EDMUND ZAGORSKI

Petitioner

v.

STATE OF TENNESSEE

Respondent

No. 6052

Capital Case

Post-Conviction

AT 10:10 O'CLOCK A.
BY WLS

MOTION TO REOPEN POST-CONVICTION PETITION

Pursuant to Tenn. Code Ann. § 40-30-117 and the Sixth, Eighth, and Fourteenth Amendments, Petitioner Edmund Zagorski respectfully moves this Court to reopen his post-conviction proceedings and grant him relief because the imposition of the death sentence, following the prosecution's offer of life sentences, was unconstitutional and a violation of (1) the Sixth Amendment as interpreted by United States v. Jackson, 390 U.S. 570 (1968); (2) the Eighth Amendment proscription against the arbitrary imposition of the death penalty; and (3) the Fourteenth Amendment as it relates to Mr. Zagorski's fundamental right to life. Put differently, the imposition of the death sentence following an offer of two life sentences burdened Edmund Zagorski's constitutional right to a jury trial and right not to plead guilty under the Sixth Amendment, to be free from the arbitrary infliction of death under the Eighth Amendment, and it violated Mr. Zagorski's right to due process and equal protection under the Fourteenth Amendment, given his fundamental right to life.

This Court should reopen proceedings, and grant Edmund Zagorski post-conviction relief, and vacate his death sentences.

I. THE DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Edmund Zagorski's death sentence must be vacated because it was imposed following the prosecutor's offer of two consecutive life sentences. Under the circumstances, the death sentence violates Mr. Zagorski's rights under the Sixth, Eighth, and Fourteenth Amendments.

The evidence is undisputed that the District Attorney offered Edmund Zagorski two consecutive life sentences in exchange for pleas of guilty on two counts of first-degree murder. See Exhibit 1 (Affidavit of Larry Wilks, Esq., outlining District Attorney's Offer of Life Sentences to Zagorski). Having offered life sentences, the prosecution conclusively acknowledged that this case did not warrant the death penalty. The prosecution, however, conditioned the imposition of the noncapital sentence upon Zagorski's waiver of his right to trial. Once Mr. Zagorski refused to waive his right to a jury trial, the prosecution proceeded to trial asking for, and ultimately securing, a death sentence. The imposition of the death sentence under these circumstances is unconstitutional.

A. THE DEATH SENTENCE IMPOSED ON EDMUND ZAGORSKI VIOLATES THE SIXTH AMENDMENT AS INTERPRETED BY UNITED STATES V. JACKSON

The primary effect of the prosecution's offering life if Zagorski pleaded guilty and seeking death if he went to trial was to burden Zagorski's right to seek a trial in this matter. Indeed, once the prosecution acknowledged that life was the appropriate sentence here, the only conceivable reason for seeking the death penalty at trial was to penalize Zagorski for exercising his constitutional rights.

Therefore, the death sentence was imposed in direct violation of United States v. Jackson, 390 U.S. 570 (1968). In Jackson, the federal kidnaping statute precluded imposition of the death sentence on a plea of guilty, however the defendant faced the death sentence if he sought a trial.

Under such a regime, “the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die.” Jackson, 390 U.S. at 581. An inevitable effect of such a regime is to “deter exercise of the Sixth Amendment right to demand a jury trial” and to “penaliz[e] those who choose to exercise” that right. Id. The Supreme Court in Jackson struck down that regime, holding that the government “cannot impose [the death] penalty in a manner that needlessly penalizes the assertion of a constitutional right.” Jackson, 390 U.S. at 583.

According to Jackson, it is unconstitutional for the government to employ a death-penalty regime which “permit[s] imposition of the death sentence only upon a jury’s recommendation and thereby ma[kes] the risk of death the price fo a jury trial.” Brady v. Unites States, 397 U.S. 742 (1970). See also Lockett v. Ohio, 438 U.S. 617-18 (1978) (Blackmun, J., concurring) (Ohio death sentence unconstitutional under Jackson where, upon pleading guilty, defendant would receive life, but would face death sentence upon exercise of right to trial).

In error, the Tennessee Supreme Court has claimed that there is no violation under these circumstances because Tennessee law does not statutorily reserve the death sentence for those insisting on a trial and is free to seek the death penalty following a plea. See e.g., State v. Godsey, 60 S.W.3d 759, 784 (Tenn. 2001). However, in the instant case, the death penalty was in fact reserved for Zagorski only if he sought a trial because the prosecution would not have sought death following a plea of guilty. There is no logical difference between the situation here and the one in Jackson. In Jackson, the burden was statutorily created, while here, the burden was created by the prosecution’s offer, but in both cases, the defendant was subjected to a state-created burden upon the

exercise of his constitutional right to trial by jury. Exactly as in Jackson, therefore, Zagorski is entitled to relief, because his Sixth Amendment rights were violated.

B. THE PROSECUTION'S PRE-TRIAL OFFER OF LIFE AND THEN SEEKING DEATH AT TRIAL VIOLATES THE EIGHTH AMENDMENT'S PROSCRIPTION AGAINST THE ARBITRARY IMPOSITION OF THE DEATH PENALTY

In addition, the prosecution violated the Eighth Amendment proscription against the arbitrary imposition of the death penalty when it offered Edmund Zagorski life pre-trial and then sought death at trial. It is wholly arbitrary for the state to agree that life is an appropriate sentence, but then seek death afterwards. Such a tactic smacks of gamesmanship with the Constitution and roulette with the defendant's life. The case against Mr. Zagorski was identical at the plea stage as it was at trial; thus, it is arbitrary for the state to impose a death sentence when a life sentence had previously been deemed to be wholly appropriate. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(en banc) (arbitrary to impose death sentence following breach of plea agreement after petitioner had initially pleaded guilty and received 48-49 year sentence which state and judge initially agreed was an appropriate penalty); Gregg v. Georgia, 428 U.S. 153, 189 (1976)(state may not arbitrarily impose death sentence).

C. IN OFFERING LIFE PRE-TRIAL, THE PROSECUTION'S SEEKING OF DEATH VIOLATED EDMUND ZAGORSKI'S FUNDAMENTAL RIGHT TO LIFE

In offering a life sentence pre-trial, the prosecution has shown that the imposition of the death sentence is not "necessary to promote a compelling state interest" under the Fourteenth Amendment's due process and equal protection guarantees. According to Supreme Court precedent, when a party's fundamental rights are at stake, under principles of substantive due process and equal

protection, the state cannot deprive the individual of that right unless such deprivation is both: (a) necessary to promote a compelling state interest; and (b) the government uses the least restrictive means of achieving that interest. See e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). In particular, the Fourteenth Amendment's guarantee of due process of law includes a substantive component, which forbids the government from infringing any fundamental right "at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 302 (1993).

Here, with Edmund Zagorski's fundamental right to life at issue, the prosecution's offer to life sentences conclusively demonstrates: (a) there is "no compelling state interest" in executing Mr. Zagorski, for if there were, the District Attorney never would have offered life; (b) taking Mr. Zagorski's life is not "necessary" to promote any state interest because the District Attorney's willingness to accept life as a punishment shows that a death sentence was not, as is not, "necessary" to promote any state interest whatsoever; and (c) there is a less restrictive means of achieving all of the state's interests in punishing Mr. Zagorski (namely, a sentence of life) which was made clear by the fact that the District Attorney previously agreed to life sentences as the appropriate and acceptable punishment under the circumstances.

D. ZAGORSKI'S DEATH SENTENCE VIOLATES THE CONSTITUTION

Thus, where the prosecution offered life before trial, but sought and received death after trial, Mr. Zagorski's death sentence was imposed in violation of his Sixth, Eighth, and Fourteenth Amendments. This Court should so conclude.

II. THIS COURT SHOULD REOPEN PROCEEDINGS UNDER TENN. CODE ANN. § 40-30-117

This Court should reopen proceedings under Tenn. Code Ann. § 40-30-117, because this matter involves a request for the recognition of new rights in Tennessee and their retroactive application here.

To date, notwithstanding the Supreme Court's decision in United States v. Jackson, 390 U.S. 570 (1968), Tennessee has yet to apply Jackson to invalidate any death sentence imposed in violation of Jackson. Rather, the Tennessee Supreme Court has erroneously refused to acknowledge the applicability of Jackson when analyzing factual scenarios in which a petitioner challenges his sentence of death following a pre-trial offer of life. See State v. Mann, 959 S.W.2d 503, 511 (Tenn. 1997); State v. Godsey, 60 S.W.3d 759, 784 (Tenn. 2001); State v. Hester, 2010 Tenn. LEXIS 987, *26 (Tenn. Oct. 5, 2010). Moreover, Tennessee courts have failed to acknowledge that under principle of substantive due process and equal protection, the fundamental right to life can only be taken when necessary to promote a compelling state interest and the least restrictive means of achieving any state interest. See State v. Holton, 126 S.W.3d 845, 871-72 (Tenn. 2004); State v. Bush, 942 S.W.2d 489, 523 (Tenn. 1997); State v. Black, 815 S.W.2d 166, 190 (Tenn. 1991). Nor have the Tennessee courts acknowledged that it violates the Eighth Amendment to impose the death sentence after an offer of life.

Ultimately, therefore, in seeking relief from his death sentence, Mr. Zagorski is requesting that Tennessee courts recognize and apply for the first time well-settled federal law from Jackson and Gregg, as well as the Supreme Court's longstanding jurisprudence involving the Eighth and Fourteenth Amendments. Because the requested relief would establish new rules in Tennessee, but

such rules are retroactive in this case because they are based upon old, settled federal constitutional law which predates Mr. Zagorski's death sentence, a motion to reopen is proper under Tenn. Code Ann. § 40-30-117(a)(1). Indeed, in a motion to reopen, this Court can properly recognize and apply governing legal principles for the first time, find them to be retroactive, and then grant relief to the individual filing the motion to reopen. See Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001)(motion to reopen granted on retroactive application of a new constitutional right).

This Court should therefore reopen the post-conviction proceedings, conduct an evidentiary hearing on these claims, and ultimately grant post-conviction relief vacating the death sentence under the Sixth, Eighth, and Fourteenth Amendments.

III. CONCLUSION

This Court should grant Edmund Zagorski's motion to reopen and conduct an evidentiary hearing and/or grant relief on his claims that the sentence of death violated: (1) the Sixth Amendment and United States v. Jackson; (2) the Eighth Amendment's proscription against the arbitrary imposition of the death penalty; and (3) the Fourteenth Amendment's due process and equal protection clauses, because taking Mr. Zagorski's fundamental right to life is, as a matter of fact and law, not supported by any "compelling state interest," "necessary" to promote any such interest, and not narrowly tailored to serve any such interest. This Court should vacate Mr. Zagorski's death sentences.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "D. Dawson", followed by a horizontal line.

Donald E. Dawson BPR #10723
Post-Conviction Defender
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530 Church Street, Suite 600
Nashville, Tennessee 37219-8068
(615) 741-9331

VERIFICATION

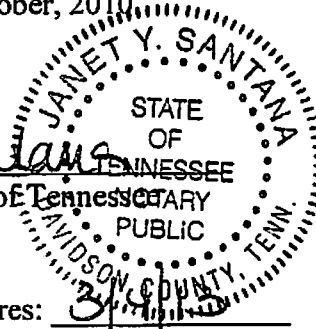
I affirm under penalty of perjury that the foregoing is true and correct.

Signed on 10-20-2010

Ed Zagorski
Edmund Zagorski

Sworn to and subscribed before me this the 10th day of October, 2010.

Janet Y. Santana
Notary Public, State of Tennessee



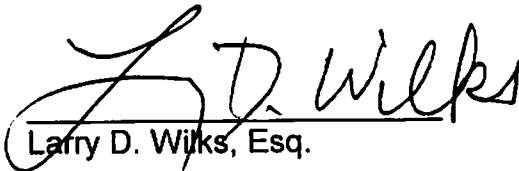
My commission expires: 3/31/15

AFFIDAVIT OF LARRY WILKS, ESQ.

State of Tennessee)
)
County Of Robertson)

1. I am an adult citizen of Springfield, Robertson County, Tennessee.
2. In 1983 and 1984, along with James Walton, I was defense counsel for Edmund Zagorski when he faced two charges of first-degree murder.
3. The prosecution sought the death penalty in Mr. Zagorski's case.
4. Prior to trial, the district attorney conveyed to me an offer to settle the case for a sentence less than death.
5. The prosecution's offer of a non-capital sentence was as follows: In exchange for pleas of guilty, the district attorney would agree to two consecutive sentences of life imprisonment.
6. I conveyed the offer of two consecutive life sentences to Mr. Zagorski, but he rejected it.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief


Larry D. Wilks, Esq.

Subscribed and sworn before me this 20th day of October, 2010




Notary Public, State of Tennessee

My Commission Expires: 3-19-2013