YOUR HONOR

10-323CF 12-16-08

Hope All is well with you this letter is in Regards to the up Comming Spencer Hearing I wish to waive my presence At this Hearing I Do Have A Right to Do so my lawyers Have said to me that i should Go to this Hearing But let me say way I Don't think i should Be there The two Doctors that will Be there DR. BloomField And DR. prichard they will Be talking about medical Terms that i will Not under-stand So How does this Help me my lawyers can Fill me in on what Happen it would Be A waste of time And money to Bring me Back For this Hearing So i please Ask For you understanding And as long as you Have this letter on Record it will Not Be overturned on Appeal I Have Had so Help on this issue And as ~~All~~ long as there is A waiver in Record of me wishing to Do this it will Not Come Back on this issue plus another Reason the Flager Jail is Not A Good place i went through Hell For 3 weeks, the worst part when i Could Shower I Had to Be Handcuffed And Shackles while I Am Showering

FILED IN THE OFFICE
CLERK OF COURT
FLAGLER COUNTY, FL
2008 DEC 22 PM 2:03
PAPER NO. 440

And that is Cruel Now if i Could Be Brought to Court From U.C.I. And then Brought Back to U.C.I After Court was over that Day that would Be ok I Have not asked But one other time So I ask Again to please grant my Request to waive my presence At the up Comming Spencer Hearing

David Snelgrove

Please See
Case i Have
Sited For your
Honor

David B. Snelgrove
#442564
Union Correctional
Institution
7819 NW 228th Street
Raiford, Fla 32026-443[illegible]

mental anguish when the suffering accompanies or results in any physical impairment, regardless of how trivial the injury. More importantly, the requirement is underinclusive because it arbitrarily denies court access to persons with valid claims they could prove if permitted to do so.

Additionally, the requirement is defective because it "encourages extravagant pleading and distorted testimony." To continue requiring proof of physical injury when mental suffering may be equally recognizable standing alone would force "victim[s] to exaggerate symptoms of sick headaches, nausea, insomnia, etc., to make out a technical basis of bodily injury upon which to predicate a parasitic recovery for the more grievous disturbance, the mental and emotional distress she endured."

Corgan v. Muehling, 143 Ill.2d 296, 158 Ill.Dec. 489, 574 N.E.2d 602, 608 (1991) (quoting *St. Elizabeth Hosp. v. Garrard,* 730 S.W.2d 649, 652 (Tex.1987)) (citations omitted).

I believe that the traditional foreseeability analysis applicable to negligence claims is the more appropriate framework for a limitation on tort recovery in this State. *See McCain v. Florida Power Corp.,* 593 So.2d 500, 502 (Fla.1992) ("The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others.").

837 So.2d at 358–59 (Pariente, J., concurring). As the Second District in this case explained, the foreseeability analysis fits logically into the factual framework presented here.

In reviewing the policy reasons behind the impact rule, we tend to agree [with Rowell that the impact rule should not bar his claim]. There is no question that the Office of the Public Defender established an attorney-client relationship with Mr. Rowell, and thus owed to Mr. Rowell a duty to exercise the degree of reasonable knowledge and skill that lawyers of ordinary ability and skill possess and exercise. *See Home Furniture Depot, Inc. v. Entevor AB,* 753 So.2d 653 (Fla. 4th DCA 2000). *Because this was a criminal matter subjecting Mr. Rowell to confinement, it was foreseeable that the neglect of such a duty could cause a loss of liberty and attendant emotional and psychological harm.* In our estimation, this case is similar to *Tanner,* 696 So.2d 705, and *Kush,* 616 So.2d 415, in that the emotional damages are a "parasitic" consequence of conduct that itself is a freestanding tort. *In other words, there is a clearly defined duty due to the direct relationship between the attorney and client that, if breached, presents a substantial risk of emotional or psychological harm. Under these circumstances, the application of the impact rule deprives Mr. Rowell of any real remedy for the malpractice of his attorney, despite the duty owed and breached and the foreseeability of the damages caused. See, e.g., Tanner,* 696 So.2d at 708 ("It is difficult to justify the outright denial of a claim for the mental pain and anguish which is so likely to be experienced."). As a practical matter, this result also insulates criminal defense attorneys from all but nominal damage awards when their negligence results in the extended incarceration of their client, absent proof that their dereliction was willful, wanton, or malicious.

Holt, 798 So.2d at 772 (emphasis supplied) (footnotes omitted).

Simply stated, since none of the policy reasons for the impact rule exist in this case, I agree with the majority that damages were properly recoverable. Moreover, as the well-reasoned opinion of the Second District in this case demonstrates, I believe the traditional foreseeability analysis is a more logical approach in these cases. Thus, I would eliminate the arbitrary requirement of the impact rule.

Thomas C. THIBAULT, Appellant,

v.

STATE of Florida, Appellee.

No. SC01–2508.

Supreme Court of Florida.

June 26, 2003.

Defendant was convicted in the Circuit Court, Palm Beach County, Marvin U. Mounts, Jr., J., of three counts of first-degree murder. Defendant appealed. The Supreme Court held that a waiver of defendant's right to a jury for the penalty phase of capital murder trial could not be presumed from record.

Reversed and remanded.

1. Jury ⚷29(6)

A waiver of defendant's right to a jury for the penalty phase of capital murder trial could not be presumed from record that contained nothing more definitive than a representation by counsel that the defense anticipated waiving a penalty-phase jury but that no final decision had been made. West's F.S.A. § 921.141(1).

2. Criminal Law ⚷1042

While a defendant facing a potential death sentence may be required to first challenge the voluntariness of a waiver of the advisory jury in the trial court before the issue is raised on appeal, that obligation applies only when an express waiver has been made; defendant who has not waived the penalty-phase jury may not be compelled to either move to withdraw the nonexistent waiver or to object to the absence of a jury during the penalty phase. West's F.S.A. § 921.141(1).

Mark Wilensky of Dubiner & Wilensky, P.A., West Palm Beach, FL, for Appellant.

Charles J. Crist, Jr., Attorney General, and Debra Rescigno, Assistant Attorney General, West Palm Beach, FL, for Appellee.

PER CURIAM.

This is an appeal from death sentences imposed on Thomas Thibault after he pled guilty to three counts of first-degree murder. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. Because the record fails to reflect that Thibault expressly waived his right to a jury for the penalty phase, we are compelled to reverse the sentences of death based on our longstanding precedent in *Lamadline v. State,* 303 So.2d 17 (Fla.1974).[1]

Thibault entered an open plea to the three murder counts and one count of armed robbery, with no agreement as to the sentence. The validity of that guilty plea, entered after a full and complete plea colloquy, is not before us. At the time of the entry of the guilty plea, the trial court,

1. Our disposition of that issue renders Thibault's remaining claim moot.

prosecutor, and defense counsel discussed Thibault's right to a jury advisory sentence during the penalty phase:

MS. SKILES (PROSECUTOR): ... [M]y understanding of what the defense is hoping to do here today is that the defendant is going to plead guilty and then we will come back for an allocution hearing and then for Your Honor without a jury, to make the determination about what the sentence would be.

....

THE COURT: All right.

And also with both lawyers, I want your response to this: He is, I am sure, legally entitled to a full phase two trial with or without a jury. And is he waiving that day or does he want that? Has that been discussed by the lawyers; and have you discussed it with the client? That is a whole bunch of questions, I realize.

....

MR. GARCIA (DEFENSE ATTORNEY): I have had quite a few conversations with Mr. Thibault over the course of the last two weeks. We have discussed many issues, one being obviously if we were to go forward with just entering a plea of guilty to the Court, we would have the right to either have a phase two with or without a jury; and it was my understanding that we would be requesting a phase two hearing with just Your Honor.

And we have been over this and discussed this. Mr. Massa [phase two counsel] is relatively new to this case, as far as the preparations he would need to make to be prepared for phase two. I believe he has been on vacation probably no more than a month. I think a month is probably even stretching it.

So this would be a decision that the three of us would make at some point in time, but I have had preliminary discussions with Mr. Thibault. This is something we had already decided we will go forward and do, if it comes down to that.

(Emphasis supplied.) Thibault appeared for status checks and scheduling conferences on six occasions between the change-of-plea hearing and the commencement of the penalty phase on May 30, 2001. There was no discussion of the waiver of a penalty-phase jury during any of these proceedings, including the penalty-phase hearing itself. The trial court sentenced Thibault to death for each of the murders, and imposed a sentence of life imprisonment for the armed robbery.

Section 921.141(1), Florida Statutes (2002), governs the procedure to be followed in the penalty phase of a capital trial. It provides, in pertinent part: "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 1974, shortly after the enactment of section 921.141, this Court stated that the defendant's right to a penalty-phase jury is

> *an essential right of the defendant under our death legislation, though it may be waived.* The question before this Court is whether the appellant has waived this right. We cannot presume a waiver where the record is silent, *Boykin v. Alabama*, [395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)]; *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); and the failure to either object or request the jury sentencing procedure cannot constitute such a waiver. We hold that *the record must affirmatively show that the defendant voluntarily and intelligently waived the right to have a sentencing jury render its opinion on the appropriateness of the death penalty*, granted him by the express provision of § 921.141, F.S.

Lamadline, 303 So.2d at 20 (emphasis supplied). In *Lamadline*, we vacated the sentence of death because there was no express waiver of the advisory jury. *Id.*

[1] The exchange between the trial court and the attorneys for the State and Thibault during the August, 2000, change-of-plea hearing does not meet the threshold established in *Lamadline* for the existence of a waiver of the right to a penalty-phase jury. Consistent with *Lamadline*, we cannot presume a waiver from a record that contains nothing more definitive than a representation by counsel that the defense anticipated waiving a penalty-phase jury but that no final decision had been made. In so holding, we distinguish our decision in *Holmes v. State*, 374 So.2d 944 (Fla.1979), in which we concluded that "an *expressed waiver* by counsel in the presence of the defendant ... was sufficient." *Id.* at 949 (emphasis supplied). Here, unlike *Holmes*, the exchange between defense counsel and the trial court during the change-of-plea hearing did not establish an express and unequivocal waiver of the right to a penalty-phase jury.

The State, relying on *Griffin v. State*, 820 So.2d 906 (Fla.2002), asserts that Thibault did not preserve this error for appeal by first raising it in the trial court. In *Griffin*, we held that a challenge to the voluntariness of a defendant's waiver of the right to a penalty-phase jury must be preserved in the trial court through a motion to withdraw the waiver. *See id.* at 913; *see also Spann v. State*, 28 Fla. L. Weekly S293, S295, — So.2d —, 2003 WL 1740646 (Fla. April 3, 2003) (relying on *Griffin* to hold that a challenge to the waiver of the sentencing jury was not preserved for appeal because Spann did not move to withdraw the waiver).

[2] We disagree with the State, and hold that *Lamadline*, rather than *Griffin*, controls in this situation. Although *Griffin* requires a defendant to first challenge the voluntariness of a waiver of the advisory jury in the trial court before the issue is raised on appeal, this obligation applies only when an express waiver has been made. *Griffin* does not compel a defendant who has not waived the penalty-phase jury to either move to withdraw the nonexistent waiver or to object to the absence of a jury during the penalty phase.[2]

Accordingly, we are constrained by *Lamadline*, 303 So.2d at 17, to reverse Thibault's death sentences and remand for a new penalty phase before a jury unless the defendant knowingly and intelligently waives that right.

It is so ordered.

ANSTEAD, C.J., and WELLS, PARIENTE, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

Marvin NETTLES, Petitioner,

v.

STATE of Florida, Respondent.

No. SC02–1523.

Supreme Court of Florida.

June 26, 2003.

Defendant pled guilty in the Circuit Court, Escambia County, Nickolas P.

2. We note that in *Griffin*, we requested the Florida Bar Criminal Procedure Rules Committee to propose a rule to guide trial judges during a colloquy on a defendant's waiver of the right to a sentencing jury. *See* 820 So.2d at 913 n. 9. An on-the-record colloquy between the court and the defendant would have prevented the error necessitating reversal of the death sentences in this case.