IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,407

DENNIS SOCHOR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

****

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellant was convicted of first degree murder of Patricia Gifford.[1] In upholding the death sentence of Dennis Sochor, this Court determined that the trial court's findings regarding mitigating evidence was supported by the record. This Court further stated that there was sufficient evidence to sustain three of the four aggravating factors found by the trial court, consequently death was still the appropriate sentence.[2] This Court found that insufficient evidence existed to sustain the "coldness factor".[3]

The United States Supreme Court has remanded this case back to this Court for clarification/articulation regarding review of the Eighth Amendment error;

> "The State tries to counter this deficiency by arguing that the four cases cited following the fourth sentence of the quoted passage were harmless-error cases, citation to which was a shorthand signal that the court

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[1] Rather than recite the evidence adduced at trial, Appellee would rely on the facts articulated by this Court on direct appeal. Sochor v. State, 580 So.2d 595 (Fla. 1990).

[2] The trial court found the existence of four aggravating factors: (1) appellant was previously convicted of a prior violent felony, Section 921.141 (5)(b), Fla. Stat. (1989); 920 the killing was committed during the course of a felony, Section 921.141(5)(d); (3) the killing was especially heinous, atrocious and cruel, Section 921.141(5)(h); (4) the killing was committed in a cold, calculated, and premeditated manner without any pretense of moral of legal justification, Section 921.141 (5)(i).

[3] Section 921.141(5)(i), Fla. Stat. (1989).

> has reviewed this record for harmless error as well. But the citations come up short. Only one of the four cases contains language giving an explicit indication that the State Supreme Court had preformed harmless-error analysis. [citation omitted]. The other three simply do not, and the result is ambiguity."

Sochor v. Florida, 504 U.S. __, 119 L. Ed. 2d 326, 341, 112 S. Ct. 2114 (1992).

STATEMENT REGARDING ORAL ARGUMENT

Appellee objects to appellant's request for oral argument. The nature of the remand from the United States Supreme Court was solely for this Court to state that a harmless error analysis was conducted, there is no need for further argument. This is especially so given that this Court has already explained its analysis in Martin v. Singletary, 599 So. 2d 119, 120 (Fla. 1992).

SUMMARY OF THE ARGUMENT

This Court should again uphold appellant's death sentence based on the harmless analysis already employed in the initial direct appeal.

ARGUMENT

Appellant asks this Court to again conduct a harmless error analysis, however, there has been no attempt to justify why one is needed. At most, all that is required is a clear statement from this Court that such an analysis was undertaken in the initial appellate review . At that time, this Court reviewed the mitigating evidence, both statutory and nonstatutory. The trial court's findings that no statutory mitigating evidence existed and the nonstatutory mitigating evidence was insignificant was affirmed.[4] Sochor, 580 So. 2d 595 at 604. (Fla. 1990). Regarding the aggravating factors, three were found to be supported by the record. Id. The death sentence was then affirmed as :

> "Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing. [citations omitted]."

Id.

Simply because the United States Supreme Court could not be sure that such an analysis was undertaken[5] , does not mean

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[4] When seeking certiorari review to the United States Supreme Court, appellant presented a question to the Court regarding whether of the Florida courts properly considered the mitigating evidence that was presented. The Court declined to address that issue.

[5] In a partial concurrence and dissent, three members of the Court found that a harmless error analysis was conducted. Sochor v. Florida, 504 U.S. __, 119 L. Ed. 2d 326, 343, 112 S.Ct. __ (1992).

that this Court failed to follow its own procedure of conducting such a review. Rivera v. State, 545 So.2d 864 (Fla. 1989); Capehart v. State, 583 So.2d 1009, cert. denied, 117 L.Ed.122, 112 S. Ct. 955 (1992); Herring v. State, 580 So.2d 135 (Fla. 1991); Bruno v. State, 574 So.2d 76 (Fla. 1991); Mitchell v. State, 527 So.2d 179 (Fla. 1988).

Finally to dispel any lingering doubt as to what was actually done to cure the Eighth Amendment error in the case sub judice, this Court has since stated:

> "In Sochor the evidence did not support one of the aggravating factors found by the trial court. Id at 603. We affirmed the death sentence because '[s]triking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing.' Id. at 604. In other words, any error was harmless."[emphasis added]:

Martin v. Singletary, 599 So.2d 119, 120, (Fla. 1992). In conclusion, it is clear that the appropriate harmless error analysis was conducted by this Court in the initial direct appeal. Martin; Sochor. There is no need to conduct a second one.

Also without merit is appellant's attempt to relitigate the claim that the trial court did not weigh the nonstatutory mitigating evidence. This issue was raised in the initial direct appeal and rejected by this Court:

> "We find no abuse of discretion in finding that the evidence did not rise to being a mitigating circumstance."

Sochor, 580 So. 2d at 604.

This Court properly affirmed appellant's death sentence. Invalidation of the "coldness factor" does not warrant

a new sentencing hearing. The jury and judge were not exposed to any inadmissible evidence, Jones v. State, 569 So. 2d 1234 (Fla. 1990), they were not precluded from considering any mitigating evidence, Stewart v. State, 558 So. 2d 416 (Fla. 1990) nor were they given any instruction that is contrary to Florida law, Omelus v. State, 584 So. 2d 563 (Fla. 1991). The striking of the "coldness factor" does not effect the balancing of appellant's sentence. The evidence demonstrates that Ms. Gifford was killed during her refusal to have sex with appellant. Sochor, 580 So. 2d at 603. Simply because his intent to kill her was not formed until the attempted rape rather than at some earlier point in time during that evening, does not require invalidation of appellant's death sentence. The lack of significant mitigation still remains along with the strength of three remaining aggravating factors. Holton v. State, 573 So. 2d 284 (Fla. 1990).

In summary, appellant's argument that a proper harmless error analysis was not conducted must fail. Martin, supra. Appellant's attempt to relitigate the trial court's findings regarding nonstatutory mitigating evidence should be barred and is also without merit.Sochor, supra. Lastly, any error must be considered harmless given the strength of the remaining aggravating factors along with the weakness of the mitigating evidence.

CONCLUSION

WHEREFORE, based on the foregoing facts and relevant Caselaw, this Court should AFFIRM its original findings that any error was harmless.

Respectfully submitted,

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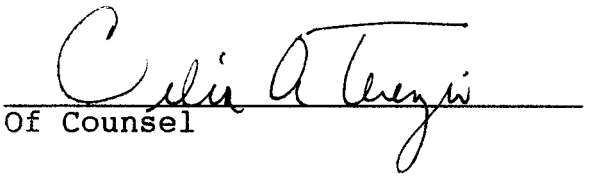
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been furnished by courier to: **GARY CALDWELL, ESQUIRE,** Assistant Public Defender, 421 3rd Street, West Palm Beach, Florida 33401 this 1st day of February, 1993.



Of Counsel

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