IN THE SUPREME COURT OF FLORIDA

DENNIS SOCHOR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 71,407

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Dennis Sochor was convicted of first degree murder and kidnapping in the disappearance of Patricia Gifford. He was sentenced to life imprisonment for the kidnapping and to death for the murder, the trial court finding four aggravating circumstances,[1] and "no mitigating circumstances to outweigh the aggravating circumstances." On appeal, this Court struck the coldness circumstance, but affirmed the convictions and sentences. Sochor v. State, 580 So.2d 595 (Fla. 1991). The Supreme Court reversed, finding that this Court had erred by affirming without undertaking a constitutional harmless error analysis respecting the trial court's erroneous use of the coldness circumstance in violation of the eighth amendment. Sochor v. Florida, 112 S.Ct. 2114 (1992).

The state's evidence at trial was that Ms. Gifford was last seen with Dennis Sochor and his brother Gary at a bar on New Year's Eve. Relying principally on the testimony of Gary and taped statements made by Dennis, the state contended that Dennis strangled Ms. Gifford and disposed of her body in the Everglades. Gary Sochor's eyewitness testimony was that he saw Dennis struggling with her in a berserk rage: "He looked to be possessed. Q What do you mean by 'he looked to be possessed'? A Well, I don't know. It wasn't him. He was possessed by something, you know. I always looked at it as the devil." R 318. Dennis told the police that he had

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[1] That the murder was cold, calculated and premeditated; that it was especially heinous, atrocious or cruel; that Mr. Sochor had previously been convicted of a violent felony; and that the murder occurred during the course of a violent felony.

killed her while possessed by "some uncontrollable feeling." R 499.

At sentencing, the state presented testimony regarding previous brutal sexual assaults committed by Mr. Sochor in Florida and Michigan, R 975-85, 989-96, and testimony from his former wife regarding violent sexual acts that he had committed against her. R 952-56. It was her opinion that Mr. Sochor's behavior was eerie and crazy, and could be characterized as psychotic. R 963-64.

Ronald Wright, a pathologist, testified that strangulation is a slow death "relatively speaking." R 968. He also said that it can be a very quick death without pain, R 972-73, and that the person can die within 13 seconds if short of breath at the time of the strangulation. R 971-72.

Mr. Sochor presented evidence from family members detailing extensive and brutal physical abuse of Dennis by his father during his childhood, showing that Dennis had been placed in a mental hospital in the past, that he could go berserk under the influence of alcohol, and that his mother abused him as a child. R 1005-1068.

SUMMARY OF THE ARGUMENT

This Court should reverse the death sentence and remand for resentencing given the constitutional error in this case, given the substantial case for mitigation, and the weakness of the state's case for aggravation.

ARGUMENT

The Supreme Court vacated and remanded for a determination whether the trial court's reliance on the coldness aggravating

circumstance was harmless in that it "did not contribute" to the sentence, under the teachings of Chapman v. California, 386 U.S. 18 (1967). Under Chapman, it is not enough to say that the result "could have been the same" without the constitutional error, Yates v. Evatt, 111 S.Ct. 1884, 1895 (1991); rather the question is whether the outcome "actually resulted" from considerations independent of the constitutional error. Id. at 1893.[2] Only when this determination is made can it be said that the error was "unimportant in relation to everything else" that the trial court considered in reaching the sentencing decision. Id. Thus it is necessary to consider all of the evidence before the sentencer both in favor of and opposed to the imposition of a sentence of death.

1. Aggravating circumstances.

The two most important aggravating circumstances are the coldness and heinousness circumstances. We already know that the coldness circumstance does not apply. Further, as a matter of law, the heinousness circumstance receives minimal weight where, as here, the defendant was berserk at the time of the murder. See Amazon v. State, 487 So.2d 8 (Fla. 1986), Mann v. State, 420 So.2d 578, 581 (Fla. 1982). And, of course, there is no doubt that, as presented to the jury, the circumstance was unconstitutional. Espinosa v. State, 112 S.Ct. 2926 (1992). On the other hand, there were two other valid aggravating circumstances: previous conviction of a violent felony, and commission of the murder during the course of a felony (although the evidence on this was rather weak).

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[2] Justice Scalia put especial emphasis on the majority's "actually resulted" standard in his concurring opinion. 111 S.Ct. at 1898.

2. Mitigating evidence.

"We have held that in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." Hitchcock v. Dugger, 481 U.S. 393, 394 (1987) (internal quotation marks omitted). "The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence...." Campbell v. State, 571 So.2d 415, 419 (Fla. 1990) (footnotes and citations omitted). "Moreover, ... the trial court is under an obligation to consider and weigh each and every mitigating factor apparent on the record, whether statutory or nonstatutory." Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990). "Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So.2d 1059, 1062 (Fla.1990). "[T]he trial court's obligation is to both find and weigh all valid mitigating evidence available anywhere in the record at the conclusion of the penalty phase." Wickham v. State, 593 So.2d 191, 194 (Fla. 1991), cert. den. 112 S.Ct. 3003 (1992). "[E]very mitigating factor apparent in the entire record before the court at sentencing, both statutory and nonstatutory, must be considered and weighed in the sentencing process.... The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor." Maxwell v. State, 603 So.2d 490, 491 (Fla. 1992) (citing cases).

In Maxwell, this Court wrote:

> The uncontroverted evidence supports at least the following reasonable mitigating factors: (1) that Maxwell had been good earlier in life and was the product of parental neglect, [cit.]; (2) that he had a disadvantaged youth, [cit.]; (3) that he has a potential for rehabilitation and might be productive within a prison setting as supported by positive personality traits and good deeds he has done in his life, [cit.]; (4) that Maxwell was a hard worker who helped members of his family and others, [cit.]; and (5) that family and friends feel he is a good prospect for rehabilitation, and that he had been friendly and helpful to others and good with children.

Id. 492.

The mitigation at bar is quite similar.[3] In oral argument before the Supreme Court, the state declined to say that the mitigating evidence regarding Mr. Sochor's childhood was untrue, conceded its mitigating effect, and agreed that harmless error review must entail examination of the mitigating evidence. At page 30 of the transcript of the oral argument,[4] the Court began questioning counsel for the state about the unrebutted mitigating evidence regarding Mr. Sochor's family history and alcoholism. The questioning continued as follows:

> QUESTION: ... I'm talking about the non-statutory mitigating, and as to that, what they said, the decision as to other particular

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[3] Further, the state's evidence was that Mr. Sochor was out of his mind at the time of the killing. "[A]ny emotional disturbance relevant to the crime" is mitigation. Cheshire v. State, 568 So.2d 908 (Fla. 1990). The state is bound by this evidence. Davis v. State, 90 So.2d 629, 632 (Fla. 1956). As in Maxwell, the record shows disparate treatment of a co-perpetrator. The lead detective testified at bar that Gary Sochor was just as culpable as Dennis. He also testified to Dennis's remorse. As to the mitigating effect of such remorse see Songer v. State, 544 So.2d 1010 (Fla. 1989).

[4] The transcript of the oral argument is in the appendix to this brief.

mitigating circumstance is proven lies with the judge and jury.

MS. SNURKOWSKI: That's correct, but they also go through the mitigation and -- in the opinion of the court, and tell -- and explain why it has been negated by other aspects of the record with regard -- for example, of the mental health. There were three mental doctor -- mental health experts who examined Mr. Sochor. And in fact, two of them were presented by the defendant at the trial. Their testimony reflected that at the most he had a personality disorder, and in fact, one of his doctors indicated that his MMPI was fake-bad, meaning that he was not -- he was trying to fool the doctor.

The third doctor, which was the State's doctor, came up with the same result.

QUESTION: Is it your understanding that they, the Florida Supreme Court concluded that the mitigating evidence offered was untrue?

MS. SNURKOWSKI: I think it was -- it was refuted, that mitigation --

QUESTION: I understand on the mental condition.

MS. SNURKOWSKI: Yes, Your Honor.

QUESTION: But as things like whether he supported the family when his father wasn't working and his alcohol problem, that that was untrue?

MS SNURKOWSKI: Well, there are -- there was evidence, for example, the very thing that you point to, that he, for a period of time, helped his father when his father was laid off. And that during that time, he would turn over his paycheck. That very well in some circumstance may be very compelling mitigation, but it may be a piece of evidence that in a given case does not rise to the level of mitigation.

QUESTION: Well, that's my point. That's my point. What did the Florida Supreme Court do with respect to that bit of evidence here?

MS. SNURKOWSKI: I don't know. I cannot --

> QUESTION: Didn't they say that that's a matter for the trial judge which we don't review?
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> MS. SNURKOWSKI: Yes. Well, there is -- no. I think what they were saying or suggesting that there is some level of a determination of the trial court -- he's the trier of fact, he as the sentencer -- has to make those determinations. And unless there is some reason why he has not done his job and has not found or done --
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> QUESTION: Well, there was a reason in this case, namely that he relied on at least one aggravating circumstance that was improper. Does that give rise to any duty to review the rest of what his determination was?
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> MS. SNURKOWSKI: Absolutely, because that would be a part of the harmless error analysis if -- given everything as they -- as it stands, absent that aggravating factor, would death be the same result? Is that the appropriate penalty for this case? And that's exactly what the Florida Supreme Court did in this case.

Transcript of oral argument, pages 31-33.

The trial court did not purport to weigh the nonstatutory mitigation. Its treatment of mitigation is identical with the treatment in Santos v. State, 591 So.2d 160 (Fla. 1991) and Dailey v. State, 594 So.2d 254, 259 (Fla. 1991). In Santos, the trial court considered and rejected various statutory mitigating circumstances then considered nonstatutory mitigation and wrote that it did "not outweigh the aggravating circumstances in this case." In Dailey, the trial court said of the nonstatutory mitigation: "This Court does not consider any of the factors presented by the Defendant to mitigate this crime." This Court held in both cases that these utterances violated the eighth amendment because they accorded no weight to the mitigating

evidence. Under Santos and Dailey, resentencing is required. Even if one accepted the trial court's cryptic statement that the mitigation did not outweigh the aggravating circumstance, the death sentence cannot stand because the aggravating circumstances were improperly weighed: the thumb rested on the side of death. Hence a reweighing of the circumstances is required in the trial court.

In Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977), the court wrote that, where, as here, the trial court has at least impliedly considered nonstatutory mitigating circumstances, the consideration of an improper aggravating factor requires new jury sentencing proceedings:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial....

See also Trotter v. State, 576 So.2d 691 (Fla. 1991), Omelus v. State, 584 So.2d 563 (Fla. 1991), Jones v. State, 569 So.2d 1234, 1238-39 (Fla. 1990).

From the foregoing, this Court should reverse the death sentence and remand for new jury sentencing proceedings.

CONCLUSION

This Court should remand this cause to the trial court for jury resentencing or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERRENZIO, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 13 day of November, 1992.

Of Counsel