IN THE

SUPREME COURT OF FLORIDA

DENNIS SOCHOR,	)	
	)	
Appellant,	)	CASE NO. 71,407
	)	
vs.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Appellee,	)	
	)	

REPLY BRIEF OF APPELLANT

(On Appeal from the 17th Judicial Circuit
In and For Broward County, Florida)

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Mr. Sochor relies on the statements in his Initial Brief.

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Mr. Sochor relies on the summary in his Initial Brief.

ARGUMENT

I. GUILT ISSUES

A. SUFFICIENCY OF THE EVIDENCE

In its brief, the state asserts that issues concerning sufficiency of the evidence were not preserved because not presented in the trial court. This argument notwithstanding, in a capital case, this Court shall review the evidence to determine if the evidence is sufficient to support the conviction under rule 9.140(f), Florida Rules of Appellate Procedure, and LeDuc v. State, 365 So.2d 149 (Fla. 1978) (sufficiency of evidence to support conviction reviewed even where defendant pled guilty). It would violate the Due Process and Cruel and Unusual Punishment Clauses to uphold a murder convictin and death sentence where the evidence did not support the conviction.

1. First Degree Murder

a. Premeditated Murder

The state argues in its brief that in order to rely on a theory of heat of passion to reduce a first degree murder charge, the defense must show adequate provocation. Answer Brief, page 7. In support of this proposition, it cites Forehand v. State, 126 Fla. 464, 171 So. 241 (1936) and Wilson v. State, 493 So.2d 1019 (Fla. 1986).

In Forehand, this Court wrote at 171 So.2d page 243:

> As the element of premeditation is an essential ingredient of the crime of murder in the first degree, it is necessary that the fact of premeditation uninfluenced or uncontrolled by a dominating passion sufficient to obscure the reason based upon an adequate provocation must be established beyond a reasonable doubt before it can be said the accused was guilty of murder in the first degree as defined by our statute.

In Forehand, this Court held that the evidence was insufficient to support a first degree murder conviction where it appeared that the accused acted from a blind and unreasoning passion which momentarily obscured the reason and displaced any capacity to perform a premeditated design to kill. The adequate provocation was that the decedent, a deputy sheriff, struggled with the accused and his brother while trying to arrest them at a melee at a bar. The adequate provocation in Wilson was that the stepmother of the accused told him to keep out of the refrigerator. At bar, the decedent (according to the state's evidence) was kissing Mr. Sochor freely, accompanied him to a remote location, but then, when he came under the influence of an uncontrollable sexual urge, refused his sexual advances. Both Forehand and Wilson support Mr. Sochor's contention that where, as here, the state's evidence is that the defendant acted in a blind rage, he cannot be convicted of first degree murder by premeditated design. Neither Forehand nor Wilson purports to relieve the state of its burden to prove a premeditated design.

b. Felony Murder

In favor of its theory that kidnapping was the underlying

crime for felony murder, the state argues that there was evidence of subsequent movement done to facilitate attempted sexual battery (R910). The only case cited by the state which involves facts remotely similar to those at bar is Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1985). In Robinson, the accused agreed to help a woman with a car problem, and then, without any force or threat, drove her to a dark and isolated area where he committed a sexual battery against her. The district court of appeal held that the evidence was insufficient to establish confinement with intent to commit sexual battery, but held that it did support a theory of secret abduction to commit sexual battery. There are several problems with the application of this ingenious decision to the case at bar.

First, Robinson stands on its head the due process and statutory rules that provisions of criminal law be strictly construed in favor of the accused. "Abduction" refers properly to the illegal taking of a person "from the custody of the person legally entitled thereto." 1 C.J.S. Abduction §3. See also Black's Law Dictionary (rev. 4th ed.), p. 17. The protection of the parents' custodial interest is the principle interest in the legal bar against abduction. Wharton's Criminal Law §211 (14th ed.). The term "abducting" in the statute simply does not cover the facts in Robinson, much less the facts at bar.

Second, Robinson simply slides by the element that the abduction be against the will of the abducted person.

Third, the state's evidence at bar was that Ms. Gifford was

kissing Mr. Sochor repeatedly and willingly accompanied him to the remote location. The state's principle witness, Gary Sochor, gave no testimony that Ms. Gifford expressed any anxiety, apprehension, or surprise about the route taken or the place reached. The evidence was that there was no secret abduction.

As to its theory of attempted sexual battery as the underlying crime for felony murder, the state points to no evidence showing that a sexual battery was attempted. The evidence shows that when Mr. Sochor's sexual advances were refused, he went berserk and killed her. Making sexual advances is not the same as committing the felony of attempted sexual battery. The cases relied upon by the state do not help its case. Mercer v. State, 347 So.2d 733 (Fla. 4th DCA 1977) involves facts in which the accused planned and discussed commission of a robbery, went to the scene of the robbery with a weapon, but then did not actually commit the robbery because the person with access to the safe containing the money was not present. Monarca v. State, 412 So.2d 443 (Fla. 5th DCA 1982) involved testimony by the victim that the accused raped her twice. These cases stand in sharp contrast with the amorphous facts at bar. The evidence set out at pages 10 and 11 of the Answer Brief shows that Mr. Sochor wished to have consensual sex, went berserk, and killed Ms. Gifford in an ensuing struggle.

c. Corpus Delicti

In arguing that the evidence was sufficient to establish a corpus delicti of unlawful homicide, the state relies on Schneble v. State, 201 So.2d 881 (Fla. 1967). Since Schneble involved a

situation in which the victim was found dead from a gunshot wound, it offers little support for the state at bar. Rather more on point is Johnson v. State, 201 So.2d 492 (Fla. 4th DCA 1967). The evidence in that case was that the accused shot his wife during a scuffle, an ambulance was called and (apparently) took the wife away. There was no evidence as to when or whether the wife died. Accordingly, the court held, the state failed to prove the corpus delicti of unlawful homicide. Also more on point than Schneble is State v. Snowden, 345 So.2d 856 (Fla. 1st DCA 1977), in which the court held that a corpus delicti was not proven by the fact that the two month old child of the accused disappeared. The court went on to hold that the corpus delicti was supplied by excited utterances made by the accused shortly after the commission of the crime.

Under Johnson and State v. Snowden, the prosecution failed to prove the corpus delicti. Hence, the first degree murder conviction cannot stand.

2. Kidnapping

The state relies on Justus v. State, 438 So.2d 358 (Fla. 1983) for the proposition that a corpus delicti of kidnapping was established. In that case, the evidence was that the accused and another person confronted a woman at gunpoint, and took her to a remote location where the accused raped and killed her. The evidence at bar is quite different. The state's evidence was that Ms. Gifford accompanied Mr. Sochor voluntarily.

3. Venue

With respect to venue, the state relies on the testimony of Captain Schlein to the effect that when trying to locate the victim's body Mr. Sochor stated that the murder occurred in Southwest Broward County.

Hence, the state attempts to establish venue solely through the supposed statements of Mr. Sochor. This is a violation of the corpus delicti rule. Further, it appears that Mr. Sochor's statements in this regard were incorrect -- Mr. Sochor was unable to give any meaningful statements as to where the body was supposedly left. The testimony of Captain Schlein came in response to a question whether Mr. Sochor indicated where the killing occurred. Captain Schlein's response was: "Southwest Broward County, Fort Lauderdale, Florida" (R508). He further testified that Mr. Sochor's description of the area was no better than that of his brother Gary: "Yeah, he described it in the same fashion as his brother had. It was -- we were trying to get specifics, but it came out as a paved road leading to a dirt access road leading to a grassy area, and we were looking for some pipings and some culverts [sic]. Unfortunately, the way it looked in 1982 and the way it looked in 1986 -- it was like a different world. But was under construction at that time, dramatically, if not completely, developed, Bonaventure, I-75. There's a whole development out there, and we couldn't find anything that looked the same to him." Id.

The testimony of Captain Schlein did not establish venue. His

testimony about Southwest Broward County was conclusory (since Mr. Sochor only gave vague directions about a paved road and a dirt road), and his testimony concerning Fort Lauderdale was false. The body was not found in the location supposedly indicated by Mr. Sochor, and it appears that the prosecutor introduced this testimony solely to show the falsity of Mr. Sochor's statements.

4. Sanity

The state argues first that because no notice of intent to rely on the insanity defense was filed, Mr. Sochor cannot raise the issue of insanity. A glance at Rule 3.216(b), Florida Rules of Criminal Procedure, reveals, however, that no notice of insanity need be filed where it is the state's evidence which gives rise to the issue of legal insanity: the rule provides in pertinent part that "no evidence offered by the defendant for the purpose of establishing such defense shall be admitted in such case unless advance notice in writing of the defense shall have been given by the defendant as hereinafter provided." (E.s.). At bar, the defense presented no evidence establishing the defense of insanity, so that the state's argument on this issue falls.[1]

The state also argues that the testimony of the defense mental health experts refutes the claim of insanity. In making this argument, the state ignores that the evidence at the close of the state's case was that Mr. Sochor was insane. The evidence admitted during the defense case on this point is simply irrelevant to this

[1] In fact, the state waived its waiver argument by not objecting to the psychiatric testimony at bar and by presenting affirmative evidence of insanity.

issue. See State v. Pennington, 534 So.2d 393 (Fla. 1988). Further, the state is bound by its own evidence.

B. UNFAIRNESS OF THE GUILT PHASE OF THE TRIAL

Mr. Sochor relies on the argument in his Initial Brief, except to add the following with respect to the issue of perjured testimony. At page 20 of its brief, the state asserts that the prosecutor in the Keen case said that he "anticipated that he might help Mr. Hickey in exchange for his testimony." (Emphasis in original). The prosecutor actually said, inter alia: "I'm going to work with him on it. I think he did a bang-up job." Page 883 of the record in case 71,358. "I'm going to" is scarcely the equivalent of "might."

C. JURY INSTRUCTIONS

Throughout its argument regarding jury instructions, the state relies on State v. Smith, 240 So.2d 807 (Fla. 1970) for the proposition that the standard for fundamental error on appeal is whether the "error is so fundamental that it reaches into the very legality of the trial itself." A review of State v. Smith, however, reveals that this Court plainly stated that this high standard for fundamental error does not apply on appeal, but only on certiorari review. Id. 810. This Court wrote in State v. Smith that on an appeal it may in its discretion review anything said or done at trial which appears in the appellate record, including instructions to the jury, if it deems the interest of justice require such review.

1. Kidnapping and Felony Murder

a. Voluntary Intoxication

This is a capital case in which the jury instructions in effect called for a directed verdict for the state on kidnapping and felony murder. The trial court's jury instructions told the jury that voluntary intoxication (which was the theory of defense) was not a legal defense to kidnapping and felony murder. This incorrect instruction made it possible for the jury to convict Mr. Sochor of the offenses charged even if it believed the state's evidence that Mr. Sochor was berserk at the time of the crimes. Hence, even if the heightened standard for fundamental error claimed by the state applied to this appellate proceeding, reversal would be required.

b. Kidnapping to Inflict Bodily Harm or Terrorize

With respect to Mr. Sochor's argument that the trial court instructed the jury on an offense (kidnapping with intent to terrorize) with which he was not charged, the state argues that the prosecutor's only evidence and argument went to a theory of kidnapping with intent to commit sexual battery. Even if this were true, it would not obviate the prejudice caused by the instruction on this uncharged offense.[2]

The legal standard to apply here is whether a reasonable juror could have interpreted instructions to authorize a conviction for

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[2] A careful reading of the prosecutor's final argument reveals that the prosecutor scarcely talked about kidnapping at all. The brunt of his argument was that Mr. Sochor was a terrible person and should be convicted for that reason.

the uncharged offense of kidnapping with intent to terrorize. See Tarpley v. Estelle, 703 F.2d 157, 160 (5th Cir. 1983). As the court wrote in Tarpley, it is a sheer denial of due process (and therefore necessarily fundamental error) to allow a conviction for an uncharged offense.

c. Statute of Limitations

The state relies on Jackson v. State, 513 So.2d 1093 (Fla. 1st DCA 1987) for the proposition that a defendant can be convicted of a felony murder even where the statute of limitations has run on the underlying felony. In Jackson, the court conceded that it was addressing the issue as one of first impression in Florida. Notwithstanding the constitutional and statutory requirement that provisions of criminal law be strictly construed in favor of the accused,[3] the court construed the law in the light most favorable to the state by holding that, notwithstanding that the statute of limitations had run on the underlying felonies, the accused could be convicted of felony murder. Not only is this ruling contrary to the rule of lenity already mentioned, but it is also contrary to Mahaun v. State, 377 So.2d 1158 (Fla. 1979) (defendant cannot be convicted of felony murder when acquitted of underlying felony).

The state also argues that Mr. Sochor's flight from the jurisdiction tolled the statute of limitations. The state might have had some basis for arguing this if it had alleged tolling of the statute of limitations in the charging document, but it did

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[3] §775.021, Fla.Stat., and Dunn v. United States, 442 U.S. 100, 112, 99 S.ct. 2190, 60 L.Ed. 2d 743 (1979).

not. Hence, it was bound to try Mr. Sochor within the limitations period. Failure to instruct the jury on this issue constituted fundamental error since convictions could not have been obtained had the jury been correctly instructed.

2. Non-Death Lessers

Mr. Sochor relies on the argument in his Initial Brief.

3. Homicide

With respect to the instructions on justifiable and excusable homicide, the state asserts that the issue was not preserved, relying on Squires v. State, 450 So.2d 208 (Fla. 1984). In Squires, the accused robbed, kidnapped, and subsequently shot to death a service station attendant. There was no basis for a defense of excusable homicide or justifiable use of deadly force. Accordingly, instructions on those matters would only go to the lesser-included offense of manslaughter. Since Squires was convicted of first degree murder, this Court reasoned, the incomplete instruction on manslaughter was not fundamental error. On the other hand, where the evidence does support a theory of excusable homicide, the failure to give the "long form" instruction is fundamental error. See the discussion in Tobey v. State, 533 So.2d 1198, 1199-1200 (Fla. 2d DCA 1988).

OTHER GUILT ISSUES

1. Kidnapping

a. Statute of Limitations

By way of argument on this issue, the state simply refers back to its argument respecting the absence of jury instructions on the

statute of limitation. There, the state argued that the statute of limitations was tolled by Mr. Sochor's absence from Florida. In making this argument, the state simply ignores Sturdivan v. State, 419 So.2d 300 (Fla. 1982), in which this Court wrote that a tolling of the statute of limitations must be pled in the charging document.

b. Amending the Indictment

The state argues that this issue was waived because there was no objection during the trial, relying on Williams v. State, 547 So.2d 710 (Fla. 2d DCA 1989). Williams did not involve an unauthorized amendment charging an additional offense. Hence, it is scarcely on point. In any event, in Williams the court wrote that "there was no fundamental error because this error in the information did not violate Williams' due process rights or double jeopardy protections." Id. 711. At bar, the amendment did violate Mr. Sochor's constitutional rights. See Tarpley v. Estelle, 703 F.2d 157 (5th Cir. 1983). See also Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948) (due process forbids prosecution from switching from one statutory theory to another on appeal), Jackson v. Virginia, 443 U.S. 307, 314, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979) (due process forbids conviction on a charge not made), and Russell v. United States, 369 U.S. 749, 768, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962)(Notice Clause requires that charging document may not be so written as to let prosecution "shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal"). Further, the improper amendment to the

indictment went to the jurisdiction of the court, and therefore constituted fundamental error. See State ex rel. Wentworth v. Coleman, 121 Fla. 13, 163 So. 316 (1935) (unauthorized amendment of indictment is, in effect, a nolle prosequi divesting the court of jurisdiction over the cause).

2. Murder

a. Statute of Limitations for Underlying Felonies

Mr. Sochor relies on his argument in his Initial Brief and on his argument at Point I.C.1.c of this Brief on this point.

b. Alternative Theories of First Degree Murder

Mr. Sochor relies on the arguments in his Initial Brief.

II. PENALTY ISSUES

A. PRESENTATION AND ARGUMENT OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES

At the outset, it is worthwhile to note that the state does not dispute that Elledge v. State, 346 So.2d 998 (Fla. 1977) requires appellate review of the prosecution's use of nonstatutory aggravating circumstances even absent an objection in the trial court.

Mr. Sochor notes that Trawick v. State, 473 So.2d 1235 (Fla. 1985) (jury recommendation tainted where jury heard evidence and argument that did not properly relate to any statutory aggravating circumstance) was incorrectly cited in the Initial Brief.

1. Victim Impact Information

The state relies on Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989) and Parker v. Dugger, 550 So.2d 459 (Fla. 1989) for the proposition that the state's use of improper victim impact information cannot be reviewed on appeal absent an objection.

Jackson and Parker simply do not support the state's position. In Jackson, this Court wrote that the absence of an objection at trial would prevent the retroactive application of Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). This

decision was based on a retroactivity analysis under Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). See Jackson at pages 1198-99. The Parker analysis is of a like tenor.

As to the state's argument justifying the prosecutor's remarks, Mr. Sochor relies on his Initial Brief.

2. Lack of Remorse

The state relies on Clark v. State, 363 So.2d 331 (Fla. 1978) for the proposition that this issue has not been preserved for appeal. In Clark, this Court held that review cannot be had of a comment on the defendant's silence absent a contemporaneous objection. Clark scarcely overrules Elledge.

The state also argues that there was sufficient evidence to support the heinous, atrocious, or cruel aggravating circumstance so that there was no harm. Whether there was sufficient evidence as to that one aggravating circumstance (which Mr. Sochor disputes elsewhere) is irrelevant to the issue of whether the state presented improper nonstatutory aggravating evidence. In Pope v. State, 441 So.2d 1073 (Fla. 1983) this Court wrote that evidence of lack of remorse is irrelevant to the heinous, atrocious, or cruel aggravating circumstance. Although it affirmed the death sentence, it simply did not address the issue of whether admission of the improper aggravating evidence violated Elledge. Apparently that issue was not raised before this Court.

3. Prior Criminal or Anti-Social Behavior

The state relies on German v. State, 379 So.2d 1013 (Fla.

4th DCA 1980) for the proposition that this issue was not preserved for appeal. German, which involved the admission of collateral crimes evidence in a non-capital case, has no bearing on the issue at bar.

The state asserts that the testimony of Mrs. Neal was elicited to rebut the defense of voluntary intoxication. Since Mrs. Neal was not present at the time of the incident at bar and did not see Mr. Sochor at any time relevant to the events at bar, her testimony simply has no bearing on the issue of voluntary intoxication. Certainly if her testimony were relevant to that issue the state would have called her as a witness in the guilt phase, which it did not do. Since this is the only claimed purpose for the admission of this testimony, its admission was improper since voluntary intoxication was (the state asserts elsewhere in its brief) rejected by the jury. The testimony about things like stealing from prostitutes in Italy, in any event, could scarcely have anything to do with that issue.

Contrary to the characterization of his argument at page 30 of the answer brief, Mr. Sochor does not contend that his confession was hearsay. The hearsay was the summaries given by Detective Schlein concerning an account of a rape by Mr. Sochor in Michigan, and by Detective Russo concerning a Fort Lauderdale sexual battery. These summaries constituted improper hearsay. See

Rhodes v. State, 547 So.2d 1201 (Fla. 1989).[4]

The state claims that the evidence concerning the Michigan offense (for which no conviction was apparently obtained) was relevant to showing the inapplicability of the mitigating factor of no significant history of prior criminal activity. In making this argument, the state ignores that there was no claim by the defense of this mitigating factor, either by argument or by evidence. The record suggests that defense counsel actually waived that mitigating circumstance, since the prosecutor stated specifically that defense counsel was invoking other mitigating circumstances, enumerating them (R949).[5]

If, as the state now argues on appeal, the testimony corroborated Mr. Sochor's voluntary intoxication defense, then it went to establish a mitigating circumstance, so that the trial court's finding of no mitigating circumstances was erroneous since the state is bound by its own evidence.

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[4] In Rhodes, this Court held that introduction of a tape recorded statement made by a victim of an unrelated sexual battery during the penalty phase of a homicide case violated the hearsay rule and the Confrontation Clause. On the other hand, it upheld the admission of the testimony of a police officer regarding his investigation of another crime committed by the appellant. It appears that the appellant did not make the hearsay and Confrontation Clause arguments concerning the testimony of the police officer. Had they been made, his testimony would also have been held improper insofar as it served as a vehicle for the admission of unsworn testimony by various persons in Nevada whom the defendant could not confront.

[5] As pointed out at footnote 36 on page 91 of the Initial Brief, the prosecutor's remarks were somewhat ambiguous, but it appears that defense counsel was going to ask for the following mitigating circumstances: "two, four, five, six, and eight." The phrase "number one" apparently ws used to mean "in the first place."

4. Other Improper Argument

The state argues that the standard for consideration of improper prosecutorial argument is that it does not warrant reversal unless the error is so egregious that it could never be considered harmless. In favor of this proposition, it cites Rhodes v. State, 547 So.2d 1201, 1203 (Fla. 1989). Rhodes, however, sets out a standard with respect to improper prosecutorial argument during the guilt phase. The standard with respect to improper prosecutorial argument during the penalty phase is rather lower. See Teffeteller v. State, 439 So.2d 840, 845 (Fla. 1983) ("'unless this Court can determine from the record that the conduct or improper remarks of the prosecutor did not prejudice the accused ... [sentence] must be reversed'")[6] and Garron v. State, 528 So.2d 353, 359 (Fla. 1988) ("prosecutorial misconduct in the penalty phase must be egregious to warrant vacating the sentence"). In any event, the prosecutorial argument at bar was such as to require a new sentencing hearing.

Arguing that the prosecutor's argument (including, among other things, the prosecutor's personal belief that this was a case for application of the death penalty, argument that "if you live by the sword, you must die by the sword," and that the victim was not involved in child abuse when she was a child) was proper, the state cites to Bertolotti v. State, 476 So.2d 130 (Fla. 1985). A careful reading of Bertolotti reveals no support for what the prosecutor

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[6] Bracket in original.

did in this case.

B. JURY INSTRUCTIONS

The state argues that the jury instruction issues were not raised in the trial court and were therefore procedurally barred. Mr. Sochor concedes that his court-appointed attorney did not raise these issues in the trial court, and that prior precedents of this Court hold that the failure to raise such issues in the trial court bars appellate review. See, e.g., Smalley v. State, 546 So.2d 720 (Fla. 1989). He argues, however, that those cases violate the dictates of section 921.141, Florida Statutes and rule 9.140 (f), Florida Rules of Appellate Procedure, which call for full appellate review in capital cases. Further, application of the contemporaneous objection rule guarantees unequal application of the death penalty in violation of the Cruel and Unusual Punishment Clauses of the state and federal constitutions. It stands to reason that, if the courts are to decide whom to execute, they should take every precaution to insure the validity of the jury verdict as to the penalty. Using the contemporaneous objection rule to prevent review of jury instructions which have been plainly condemned by United States Supreme Court decisions going as far back as 1980[7] simply does not comport with the requirements of full appellate review set out in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). With respect to the mitigating circumstance

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[7] See Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (condemning jury instruction substantially similar to heinous, atrocious, or cruel jury instruction given at bar).

instructions, Mr. Sochor notes the intervening authority of Blystone v. Pennsylvania, 110 S.Ct. 1078 (1990).

C. THE JURY'S ROLE

Mr. Sochor relies on the argument in his Initial Brief.

D. AGGRAVATING AND MITIGATING CIRCUMSTANCES

1. Aggravating Circumstances

Mr. Sochor relies on the argument in his Initial Brief except to add the following:

In its brief, the state relies on Hamblen v. State, 527 So.2d 853 (Fla. 1989) and Rutherford v. State, 545 So.2d 853 (Fla. 1989) in arguing that the evidence supports the finding that the killing was "cold, calculated, and premeditated."

Hemblen became angered and killed a robbery victim when she pushed an alarm button. This Court held that the "cold, calculated, and premeditated" aggravating circumstance did not apply. The case at bar shows no greater premeditation than Hamblen. Hence Hamblen supports Mr. Sochor's position.

In Rutherford, several witnesses testified that the appellant had made known well in advance his intent to steal from a woman and then kill her in a way to make the death look accidental. Rutherford has no bearing on the facts at bar.

2. Statutory Mental Mitigating Circumstances

The state's only argument is that the evidence could have supported rejection of the mental mitigating evidence. Even if this were true (the state ignores its own evidence that Mr. Sochor was berserk), the point is that the wrong standard was used in

assessing the issue. The prosecutor misled the jury by using the legal insanity standard in his argument. The trial court used the wrong standard in rejecting the circumstances because Mr. Sochor was competent to stand trial. The rejection of the evidence in these circumstances can be upheld only if no reasonable person could accept the evidence. Cf. Butler v. State, 493 So.2d 451 (Fla. 1986) (harmless beyond reasonable doubt standard applies to erroneous jury instructions).

3. Nonstatutory Mitigating Circumstances

Mr. Sochor relies on the argument in his Initial Brief.

E. PROPORTIONALITY

Mr. Sochor relies on the argument in his Initial Brief.

F. CONSTITUTIONALITY OF THE FLORIDA DEATH PENALTY STATUTE

The state simply misses the point of Mr. Sochor's argument. Mr. Sochor's argument rests on the proposition that a capital sentencing scheme is unconstitutional only if it is structured so as to avoid freakish or arbitrary application of the death penalty. See Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). It is Mr. Sochor's position that, since Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the operation of section 921.141, Florida Statutes has promoted freakish and arbitrary application of the death penalty. In Proffitt the court held that the statute, as written, could be applied consistently with the Eighth Amendment. The court did not contemplate the regression toward arbitrary application that has occurred since Proffitt.

1. The Jury

With respect to the role of the jury, the state argues that the jury instructions were not objected to at bar, so that the issue is waived. This misuses the point. The point is that the standard instructions (which violate Maynard v. Cartwright, 108 S.Ct. 1853 (1988)) are routinely applied without objection by defense counsel. The application of the contemporaneous objection rule ensures and protects uneven application of the law. The point is that the operation of the death penalty scheme itself is so arbitrary as to violate the constitution. Mr. Sochor surely can raise this issue for the first time on appeal.

2. Counsel

The state tries to recast Mr. Sochor's argument into a claim of ineffective assistance of counsel. Mr. Sochor is not in a procedural posture to raise such a claim. His argument is that the failure of the courts to supply adequate counsel in capital cases,[8] the use of the judge-created inadequacy of counsel again and again as a procedural bar to review on the merits of capital claims cause freakish results in capital cases in violation of the constitution.

3. The Trial Judge

The state makes no meaningful argument on this issue.

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[8] Almost every capital defendant has a court-appointed attorney. The choice of the court-appointed attorney is the judge's -- the defendant has no say in the matter. The defendant becomes the helpless victim of ever-defaulting capital defense attorneys.

4. Appellate Review

The state cites Dugger v. Adams, 109 S.Ct. 1211 (1989) for the proposition that the contemporaneous objection rule is valid and legitimate. In Dugger v. Adams the court simply addressed the issue of what constitutes cause for a procedural default. It did not address the issue of whether application of the procedural default rule violates the Eighth Amendment.[9]

5. Other Problems with the Statute

Mr. Sochor relies on his Initial Brief except to note the intervening authority of Blystone v. Pennsylvania, 110 S.Ct. 1078 (1990).

G. THE KIDNAPPING SENTENCE

Application of State v. Enmund, 476 So.2d 165 (Fla. 1985) to Mr. Sochor's 1982 crime would violate the Ex Post Facto Clause.

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[9] The court did note that the federal habeas corpus procedural default rule may not apply where a constitutional violation has probably resulted in the conviction of one who is actually innocent. 108 S.Ct. at 1217-18, n. 6. At bar, Mr. Sochor is actually innocent by reason of insanity.

V. CONCLUSION

This Court should reverse Mr. Sochor's convictions; his sentence should be vacated or reduced or a new sentencing hearing should be ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Celia Terenzio, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, this 26 day of April, 1990.

_____
Of Counsel