FILED
SID J. WHITE
JUL 20 1992
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

PAUL BEASLEY JOHNSON,

Appellant,

vs. : Case No. 72,694

STATE OF FLORIDA, :

Appellee. :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ALACHUA COUNTY
STATE OF FLORIDA

SUPPLEMENTAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DOUGLAS S. CONNOR
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 350141

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

ARGUMENT

ISSUE XIII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S SPECIALLY REQUESTED JURY INSTRUCTION ON THE SECTION 921.141-(5)(h) AGGRAVATING CIRCUMSTANCE AND GIVING THE STANDARD JURY INSTRUCTION WHICH HAS BEEN DECLARED UNCONSTITUTIONALLY VAGUE.

In Espinosa v. Florida, Case No. 91-7390, the United States Supreme Court considered an Eighth Amendment attack on the constitutionality of Florida's capital penalty instruction which allows the jury to find that a murder is "especially wicked, evil, atrocious or cruel" as an aggravating circumstance. The Court examined Florida case law and concluded that capital sentencing authority is split between the jury and the judge. cf., Foster v. State, 518 So.2d 901 at 903 (Fla. 1987) (Barkett, J. concurring). The Espinosa court held that a Florida capital jury cannot be instructed on an aggravating circumstance in a manner which is "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor."

At bar, Appellant's penalty jury was instructed as an aggravating circumstance:

> the crimes for which the defendant is to be sentenced were especially wicked, evil, atrocious or cruel. This may be considered to Evans and Beasley cases only.

(R3609). This is the same penalty instruction which the United States Supreme Court found unconstitutionally vague in Espinosa.

Appellant preserved this issue for appeal because he specifically requested that this standard instruction not be given (R3406-11). He proposed a special jury instruction[1] on the section 921.141(5)(h) aggravating circumstance which the trial court denied (R3408-11). Appellant's argument in the trial court anticipated the rationale of the Espinosa decision:

> without instruction, the jury may be wondering what these words mean in terms of this particular case. The Dixon court, when presented with the objection that the words of the statute, "heinous, atrocious and cruel," - I should say "Especially heinous, atrocious and cruel," were not clear enough to meet and pass constitutional muster under vagueness, the Florida Supreme Court said well, we will tell you what these words mean and gave definitions.
>
> If the words need those definitions to pass constitutional muster, they also need those definitions for the jurors to understand. It's important -- as important for the jurors to understand what the words mean as it is for the courts of the State of Florida to understand what those words mean,...

(R3406-7).

Accordingly, this Court should now grant Johnson a new penalty trial before a new jury.

---

[1] Appellant's request that the record be reconstructed to include the Defense specially requested jury instruction No. 1 was denied by this Court. See, Issue XII.

CONCLUSION

Appellant renews the conclusion of his initial brief and requests in addition that he be granted a new penalty trial on the basis of the argument in this supplemental brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sunderland, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 17th day of July, 1992.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
(813) 534-4200

DOUGLAS S. CONNOR
Assistant Public Defender
Florida Bar Number 350141
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

DSC/ddv