IN THE SUPREME COURT OF FLORIDA

PAUL BEASLEY JOHNSON,

Appellant,

v.

Case No. 72,694

STATE OF FLORIDA,

Appellee.

SUPPLEMENTAL BRIEF OF THE APPELLEE

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ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S SPECIALLY REQUESTED JURY INSTRUCTION ON THE SECTION 921.414(5)(i) AGGRAVATING CIRCUMSTANCE AND GIVING THE STANDARD JURY INSTRUCTION WHICH HAS BEEN DECLARED UNCONSTITUTIONALLY VAGUE. (As stated by appellant)

In Espinosa v. Florida, 112 S.Ct. (1992), Espinosa challenged the Florida jury instruction on heinous, atrocious or cruel, claiming that it was unconstitutionally vague. The United States Supreme Court agreed that the instruction was unconstitutionally vague and further acknowledged that in a state where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment. The Court then went on to reject this Court's decision in Smalley v. State, 546 So.2d 720 (Fla. 1989), wherein this Honorable Court held that the jury is not the sentencer for Eighth Amendment purposes in Florida. Rather than excepting this Court's interpretation of Florida law, the United States Supreme Court conducted its own examination of Florida case law and determined that since a Florida court is required to pay deference to a jury sentencing recommendation, and the trial court must give great weight to that recommendation, Florida has essentially split the weighing process in two. Therefore, the Court held that by giving great weight to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that presumably the jury

found. In Espinosa, the Court concluded that if a weighing state decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances. Appellant now contends that under the United States Supreme Court's ruling in Espinosa that he is entitled to relief based upon the instruction given to his sentencing jury on heinous, atrocious or cruel.

At the outset, it should be noted that rehearings on Espinosa and it's progeny have been filed and are currently pending. Therefore, Espinosa is not yet final. Further, it is clear that even errors under Espinosa are subject to harmless error review. The United States Supreme Court has clearly held that an unconstitutionally vague jury instruction on this aggravating circumstance can constitute harmless error. In Clemons v. Mississippi, 449 U.S. 738 (1990), the Court expressly held that nothing in the constitution prevented a state appellate court from affirming its sentencing of death, after striking an aggravating circumstance which had been the product of an unconstitutionally vague jury instruction, The Court also suggested that a state appellate court could affirm a sentence on the basis that the result would have been the same had the jury instruction been properly defined before the jury. Likewise, in Stringer v. Black, ___ U.S. , 117 L.Ed.2d 367, 378 (1992), the Court held that in order for a state appellate court to affirm a death sentence after the sentencer had been instructed to consider an invalid factor, the court would have to determine

what the sentencer would have done absent the facto; Further, in Sochor v. Florida, 504 U.S. ___ (1992), the United States Supreme Court specifically held that in the context of this type of error, that this Court could affirm the death sentence on an express finding of harmless error.

This Court has most recently had occasion to discuss this type of claim in Kennedy v. Singletary, Case No. 82 (Fla. July 16, 1992). There, this Court determined that an attack upon the constitutionality of the heinous, atrocious or cruel instructions to the jury was both procedurally barred, and, in any event, any error was harmless beyond a reasonable doubt.

In the instant case, a review of the record clearly reveals that error, if any, is harmless beyond a reasonable doubt. First of all, it is undeniably clear that the heinous, atrocious or cruel aggravating factor was not found by the trial judge in his sentence imposing death in this case. Thus, under Sochor supra, citing Griffin v. United States, 502 U.S. (1991), it must be presumed that the jury would not have found heinous, atrocious or cruel because the facts did not support it.

Further, Espinosa only indicates that if the jury has no knowledge of the limiting construction of the heinous, atrocious or cruel aggravating factor, error might be presented. In the instant case, the jury was apprised of Florida's narrowing construction on the heinous, atrocious or cruel aggravating factor. During closing argument defense counsel thoroughly explained the definition of heinous, atrocious or cruel to the jury. The jury was told:

Why is the word "especially" used? Well, an; killing is cruel, any premeditated murder or even felony murder, is obviously cruel or evil. What this circumstance, though, means, is for the crime -- to separate those crimes of torture, of excessive wickedness, vileness of the person wanting to inflict not jus death, but inflict pain, whether it be by sexual battery, prolonged death by strangulation, by whatever type of horrible crimes that we hear about, unfortunately, i society today, the type of viciousness of wanting to inflict pain, and inflicting pain, more than death, that sets one first degree murder aside from the other. In this case we do not have that.

It may sound harsh to say this -- it does sound harsh to say that but, in fact, there is no quicker or less painful way of killing than shooting by firearm. And that sounds harsh, I know, but when you get to this circumstance of saying whether Mr. Johnso attempted to or actually did inflict some type of prolonged suffering or pain, that di not occur here. And this type of shootin death is not what the laws apply to when talking about this "especially" wickedness o cruelty.

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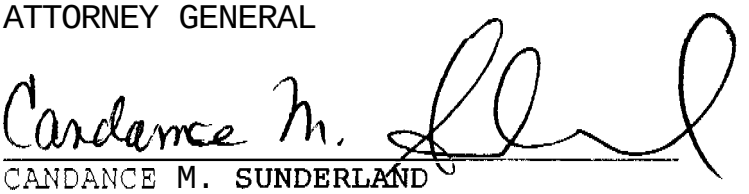
Thus, where the jury was correctly instructe n the limiting construction of heinous, atrocious or cruel as set forth by this Court and where the trial court found several substantial aggravating factors applicable to each count and did find the heinous, atrocious or cruel aggravating factor, any e or which appears in this case is harmless beyond a reasonable doubt

CONCLUSION

Wherefore, based on the foregoing argument and citations to authority, this Honorable Court should find, that error, if any, was harmless and affirm the sentence of the trial. court,

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Douglas S. ConnorAssistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830 this 11 **day of August, 1992.**

OF COUNSEL FOR APPELLEE,