IN THE SUPREME COURT OF FLORIDA

JOHNNY L. ROBINSON,

Appellant,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 74,113

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ST.JOHNS COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

Respectfully submitted,
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IN THE SUPREME COURT OF FLORIDA

JOHNNY L. ROBINSON, Appellant, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. 74,113

REPLY BRIEF OF APPELLANT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF ROBINSON'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO ACCURATELY INSTRUCT THE JURY ON A CRITICAL ELEMENT RELATING TO APPELLANT'S THEORY OF DEFENSE.

Florida Rule of Criminal Procedure 3.390 does not require a written request of a standard jury instruction. Fla.R.Crim.P. 3.390; Flint v. State, 463 So.2d 554 (Fla. 2d DCA 1985); see also Watkins v. State, 519 So.2d 760 (Fla. 1st DCA 1988). This issue has clearly been preserved for review by this Court.

The state also erroneously concludes that the

credibility of Bernard Fields was completely irrelevant at the penalty phase. Appellant is astounded that the Appellee could reach such a faulty conclusion. The jury's perception of Bernard Fields' credibility was absolutely critical in this case. Appellant detailed the extreme importance of the jury's perception on this issue in his initial brief.

The fact that defense counsel argued the relative culpability of the two men at length in his closing argument does not cure the error. Without a proper instruction from the trial court, the jury could not properly weigh Fields' credibility. Contrary to the state's assertion, the requested instruction is not covered in the instructions given to the jury in this case. The jury never heard that they:

> . . . should use great caution in relying on the testimony of a witness who claims to have helped the defendant commit a crime. . .

Fla.Std.Jury.Instr. (Crim.) 2.04(b).

Appellee goes to great lengths to convince this Court that the error was harmless. The state's reliance on Seckington v. State, 424 So.2d 194 (Fla. 5th DCA 1983) is completely misplaced. The Seckington trial court ordered defense counsel to avoid any argument relating to a theory of defense. The error was harmless since defense counsel ignored the trial court's ruling and argued the theory anyway. The state points out that, even without Fields' testimony, there is substantial, competent evidence to sustain the verdict. Appellant points out that this

Court is reviewing an eight to four death recommendation, not a guilty verdict. Four reasonable, intelligent jurors concluded from the evidence presented by the state (even without proper instructions) that Johnny Robinson deserved to live. The state cannot establish, beyond a reasonable doubt, that at least two more jurors would not have been swayed towards life with proper instruction on the law.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF ROBINSON'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE NONSTATUTORY MITIGATING CIRCUMSTANCES WHICH WERE SUPPORTED BY THE EVIDENCE AND THE LAW AFTER SPECIFIC REQUESTS BY BOTH THE APPELLANT AND THE JURY.

The state once again contends that this issue is not preserved for review based upon the argument that defense counsel's request was not submitted in writing. Appellant points out that, while he did request such an instruction during the charge conference, the point on appeal focuses a jury question. Appellant suggested an ideal answer to the question submitted by the jury during deliberation. Additionally, Appellant points out that a failure to request a special instruction in writing does not necessarily preclude review of that error. See, e.g., Wilson v. State, 344 So.2d 1315 (Fla. 2d DCA 1977).

Appellee argues that the defense counsel's proposed answer to the jury question was misleading. The state contends that the answer would have misled the jury into believing that the listed mitigating circumstances had been established by the evidence. This conclusion is completely unfounded. The standard penalty instructions given in this case clearly state:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: . . . .

(R80-81) (emphasis supplied). Similarly, the standard instruction relating to mitigating circumstances states:

> . . . Among the mitigating circumstances you may consider, <u>if established by the evidence</u>, are: . . . .

(R83) (emphasis supplied). Simply listing the non-statutory mitigating circumstances of which the defense presented evidence and argument, could easily have been limited by a caveat to the jury that they could only consider these circumstances if the evidence reasonably convinced them that they existed.

Appellant emphasizes that defense counsel's request manifested itself as a result of a jury question and not <u>merely</u> as a specially requested jury instruction. The jury clearly found the standard instructions to be inadequate in this case. During their deliberations, they asked a simple question and were rebuffed by the trial court who denied them any guidance whatsoever. The state cannot meet its burden of establishing beyond a reasonable doubt that this error was harmless in light of the fact that four reasonable, intelligent jurors were convinced that Robinson did not deserve to die, even with the uncorrected error that occurred.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF ROBINSON'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9 AND 16, FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN RESTRICTING ROBINSON'S PRESENTATION OF EVIDENCE.

In addition to relying upon the argument set forth in the initial brief on this issue, Appellant wishes to emphasize that, as to the question asked on redirect, the state clearly opened the door. The main thrust of the state's attack on Dr. Krop's testimony and conclusions was that the evidence was entitled to little consideration since Dr. Krop had obtained most of his information as a result of Robinson's self-report. (R524-25,527-28) On redirect, defense counsel attempted to rebut the state's assault by asking Dr. Krop, based upon his professional experience, if he was confident in the truthfulness of Robinson's statements during his evaluation. (R547-58) Appellant submits that the state, through their attempts to belittle Dr. Krop's conclusions, opened the door to this question on redirect examination. It is interesting to note that the trial court, much like the prosecutor did to the jury, emphasized in the findings of fact that, "Most of what [Dr. Krop] learned about [the] Defendant came from the Defendant." (R111) Once the state assailed the veracity of Robinson's self-reports to Dr. Krop, defense counsel should have been permitted to ask

Dr. Krop, based on his professional expertise, about the degree of confidence that Dr. Krop had in Robinson's answers.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY, THE TRIAL COURT ERRED IN DENYING THE MOTION FOR MISTRIAL WHEN THE VENIRE WAS APPRISED THAT ROBINSON HAD BEEN PREVIOUSLY TRIED AND, THUS, LOGICALLY CONCLUDED THAT ROBINSON HAD PREVIOUSLY BEEN SENTENCED TO DEATH.

The state expresses a severe lack of confidence in a layman's understanding of this country's Constitution. Appellant sincerely believes that, once the jury discovered that this proceeding was a retrial, they knew that Robinson had previously been sentenced to death.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF ROBINSON'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN IMPOSING THE SENTENCE OF DEATH WHICH IS NOT JUSTIFIED IN THAT IT IS BASED UPON INAPPROPRIATE AGGRAVATING CIRCUMSTANCES, ADDITIONAL MITIGATING CIRCUMSTANCES SHOULD HAVE BEEN FOUND, AND THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

A. THE TRIAL COURT ERRED IN FINDING THE INAPPROPRIATE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS, AND CRUEL.

The record does not support the state's claim that the victim was in a position to hear Appellant's alleged statement to Fields.

B. THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING FACTOR OF COLD, CALCULATED, AND PREMEDITATED WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION.

It is disconcerting that the state relies upon this Court's holdings limiting "a pretense of moral or legal justification" to cases involving colorable claims of self-defense. If this Court limits the plain meaning of that phrase to such claims, the constitutionality of the entire statute is called into question. Such a limitation would lead to that result.

D. THE TRIAL COURT ERRED IN ITS CONSIDERATION OF THE MITIGATING EVIDENCE.

Appellant wishes that he possessed the ability of the Assistant Attorney General to decipher the trial court's written

findings of fact. As stated in the Initial Brief, Appellant is unsure if the trial court found three of four non-statutory mitigating circumstances. It is also difficult to determine if the trial court rejected certain non-statutory mitigating circumstances or found them to be established but gave them little weight. Appellant urges this Court to closely examine the trial court's written findings in its own attempt to interpret them.

Appellant is also concerned about the state's apparent belief that non-statutory mitigating circumstances are, as a matter of law, entitled to less weight than statutory mitigating circumstances. Appellant is not aware of any decision by this Court that would support Appellee's opinion. Furthermore, Appellant does not believe that the state's assumption is a valid one.

POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF JOHNNY ROBINSON'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO PRECLUDE DEATH AS A POSSIBLE PENALTY AND IN FAILING TO GRANT AN EVIDENTIARY HEARING.

Appellee's reliance on this Court's holding in Fuente v. State, 549 So.2d 652 (Fla. 1989) is completely misplaced. In Fuente, as well as several federal decisions cited by the state, the defendants never alleged that the state intentionally provoked the motion for mistrial. Fuente argued to the trial court that the prosecutor was "grossly negligent" in asking the objectionable question. This Court pointed out that, because intent was never placed in issue, no finding of prosecutorial intent was made. Johnny Robinson clearly placed the prosecutor's intent in issue below, but the trial court refused to conduct an evidentiary hearing to resolve the issue, despite Robinson's request to do so.

CONCLUSION

Based on the foregoing, cases arguments and authorities, and those in the Initial Brief, Appellant requests that this Honorable Court vacate the death sentence and grant the following relief:

As to Points I - IV and VII-XIII, remand for the imposition of a life sentence or, in the alternative, a new penalty phase;

As to Point V, remand for the imposition of a life snetence;

As to Point VI, remand for the imposition of a life sentence or, in the alternative, to declare Florida's Death Penalty Statute to be unconstitutional.

Respectfully submitted,

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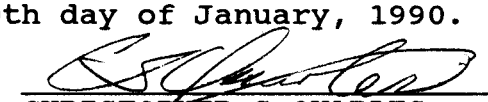
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Fla. 32114 in his basket at the Fifth District Court of Appeal and mailed to Johnny Robinson,#102767, P.O.Box 747, Starke, Fla. 32091 on this 30th day of January, 1990.



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