IN THE SUPREME COURT OF FLORIDA

GEORGE MICHAEL HODGES,

Appellant,

v.

Case No. 74,671

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CANDANCE M. SUNDERLAND
Assistant *Attorney* General
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

OF COUNSEL FOR APPELLEE

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ISSUE I

WHETHER **HODGES** IS ENTITLED TO A NEW SENTENCING HEARING IN LIGHT OF ESPINOSA V. FLORIDA.

On October 5, 1992, the United States Supreme Court summarily granted George M. Hodges' Motion for Leave to Proceed in Forma Pauperis and the Petition for Writ of Certiorari, vacating **the** sentence and remanding the case to this Honorable Court for further consideration in light of Espinosa v. Florida, 505 U.S. ___ (1992). Upon reconsideration of the case in light of the remand the state urges this Honorable Court to 1) apply the procedural bar that exists in the instant case, **2)** find that even if error did exist that it was harmless beyond a reasonable doubt and, 3) reassert that Florida law does not make the jury the sentencer in the State of Florida.

A. Procedural Default

First, and foremost, Hodges is not entitled to relief in the instant case, **as** this claim is procedurally barred. Although Hodges argued on appeal to this Court that it was error to instruct the jury on the aggravating factor of cold, calculated, and premeditated, Hodges did not present this objection to the trial court. The only objection **made** below **was** to the vagueness of the aggravating factor. Counsel argued to the trial court that the factor "should not be considered constitutionally because of its vagueness as an aggravating circumstance." (R 706) Counsel **did** not ask the court to amend the standard jury

instruction but, rather, urged the trial court to preclude all consideration.

In Sochor v. Florida, 504 U.S. ___, 112 S. Ct. ___, 119 L.Ed.2d 326 (1992), the United States Supreme Court made it clear that challenges to the heinous, atrocious or cruel jury instruction are procedurally barred where the defendant fails to present the challenge to the lower court. Since Espinosa this Court has reaffirmed that the failure to specifically challenge the instruction precludes appellate relief.

> "We find that the issues raised by this petitioner have been litigated or should have been litigated, in these prior proceedings and thus are procedurally barred. There was no objection at trial made to the wording of the instruction on heinous, atrocious or cruel . . ."

Kennedy v. Singletary, 602 So. 2d 1285 (Fla. 1992), cert. denied, ___ U.S. ___, 113 S.Ct., 120 L.Ed.2d 931 (1992). See, also, Melendez v. State, 17 F.L.W. 5699 (Fla. November 12,1992) (finding on direct appeal that matter was not preserved is dispositive of 3.850 claim); Fotopoulos v. State, 17 Fla. L. Weekly S695 (Fla. October 15, 1992) (failure to object to penalty phase jury instructions bars appellate review). The Eleventh Circuit Court of Appeals has also honored and applied the procedural bar. Kennedy v. Singletary 967 F.2d 1482 (11th Cir. 1992); Atkins v. Singletary, Eleventh Circuit Case No. 90-3737 (Attached); Henderson v. Dugger, 925 F.2d 1309, 1316-1317 (11th Cir. 1982). In Kennedy the court stated:

> "The claim now asserted by Kennedy is that his sentencing jury was tainted by a constitutionally deficient instruction concerning the allegedly heinous aspect of the murders and that the Florida Supreme Court failed to cure that constitutional error by conducting a proper harmless error review. Kennedy has failed to persuade us that the Florida Supreme Court improperly interposed a procedural bar. In any event, we conclude that the presentation of this claim constitutes an abuse of the writ."

Thus, in the instant case, where it is absolutely clear that no objection was ever made to the trial judge on the basis of purportedly vague instructions on aggravating factors, this Honorable Court should make it clear that this claim is procedurally barred.

B. Harmless Error

Assuming, *arguendo*, that this claim was not procedurally barred, the sentence imposed on Hodges should be affirmed, as error, if any, is harmless. Chapman v. California, 386 U.S. 18, 24 (1967). In the instant case the trial court found two substantial aggravating factors balanced against minimal mitigation. In Maynard v. Cartwright, 486 U.S. 356 (1988), the Court expressly held that even where the jury is improperly instructed the error may be cured when the appellate court has adopted a narrowing construction and where the court has held striking of one aggravating factor can be harmless. See also, Parker v. Dugger, 488 U.S. ___, 112 L.Ed.2d 812, 111 S.Ct. 738 (1991); Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). This Court has adopted a narrowing

construction and has consistently conducted harmless error analysis when an invalid factor has been considered. Sochor v. Florida, 504 U.S. ____ (1992); Holton v. State, 573 So.2d 284 (Fla. 1990). As in Sochor, the striking of one possibly invalid aggravating factor is harmless in the instant case. In addition to cold, calculated, and premeditated, the trial court found that the capital felony was committed to disrupt or hinder law enforcement. As there were two valid aggravating factors and minimal mitigation found by the court, error, if any, was harmless.

The alleged error is further rendered harmless by the substantial evidence that supported the finding of cold, calculated, and premeditated. In support of the finding the trial court below stated:

> "The evidence presented by the state convinces the court that the defendant, GEORGE MICHAEL HODGES, having been accused by the victim of indecent exposure, sought to have the victim drop those charges against him and that upon the refusal to do so, the defendant **stalked** the victim **in** the early morning hours of January 8, 1987, ambushed her **as** she approached her place of employment and then with the calculation of a professional killer, the defendant **walked** up to her and **with** virtually no **emotion,** shot her down in cold blood.
>
> The killing of BETTY RICKS by GEORGE MICHAEL HODGES did not occur in a moment of domestic anger **as** is so often the case. Nor was it done in a moment of passion of desperation or under the pressure of any exigent circumstances. The killing of BETTY RICKS was simply an execution performed by the defendant in a cold, calculated and premeditated manner in order to prevent his prosecution from a simple misdemeanor charge.

> The killing of BETTY RICKS was simply all out of proportion to the acts by her that the defendant sought to prevent. Such a killing, for such an insignificant purpose, and done with emotionless dispatch, sets this murder aside from the norm. (R 907)

In addition to the above evidence, the defendant's stepson, Jessie Watson, also testified that the defendant told him that he walked up behind the girl and said, "Sorry about this" and shot her four or five times. This statement, when coupled with the evidence that after concocting an alibi, the defendant procured a gun, waited for the arrival of Betty Ricks, killed her **and** departed within a matter of moments supports the trial court's finding that this was not a normal first degree murder but rather was cold, calculated and committed with heightened premeditation. See Koon **v.** State, 513 So.2d 1253 (Fla. 1987).

The murder in the instant **case** was an execution-style killing for the sole **purpose** of preventing the prosecution of Mr. Hodges for lewd and lascivious assault. This crime is by itself the definition of the words, cold, calculated and premeditated without any pretense of legal or moral justification. When the foregoing facts are balanced against minimal evidence of Hodges' good character, which in no way serves to mitigate the instant crime, it is beyond a reasonable doubt that the erroneous instruction did not contribute to the sentence.

C. Florida **Death Sentencing Procedure**

In Espinosa **v.** Florida, Espinosa challenged the Florida Jury Instruction on heinous, atrocious or cruel claiming that it **was**

unconstitutionally vague. The United States Supreme Court agreed. The Court further acknowledged that in a state where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstances 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 Court held that the jury is not the sentencer for Eighth Amendment purposes in Florida. Rather than accepting this Honorable Court's interpretation of Florida law, the Court conducted its own examination of Florida case law and determined that since a Florida trial court is required to pay deference to a jury sentencing recommendation, and the trial court must give great weight to the jury's recommendation, Florida has essentially split the weighing process in two. The Court held that by giving great weight to the jury recommendation, the trial court indirectly weighed an invalid aggravating factor that presumably the jury found. Finally holding 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.

As the state has consistently maintained, the United States Supreme Court's decision in Espinosa is wrong because it ignores a long lines of cases that precludes the United States Supreme Court from interpreting state law contrary to a holding of the state's highest court. It is for the state courts to say what duty or discretion the trial court may have and federal courts

are not at liberty to set up their awn interpretation of state law as a basis for declaring that due process has been denied. Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948). Federal courts are thus bound by the state courts' interpretation of the state law. California v. Freeman, 488 U.S. 1311, 109 S.Ct. 854, 102 L.Ed.2d 957 (1989); Griffin v. Wisconsin, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987); 324 Liquor Corp. v. Duffy, 479 U.S. 335, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987); Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981); International Union of Automobile, A & A. I. W. v. O'Brien, 339 U.S. 454, 70 S.Ct. 781, 94 L.Ed. 978 (1950).

In the instant case, this Court rejected Hodges' claim based upon Brown v. State, 565 So. 2d 304 (Fla.), cert. denied, 111 S. Ct. 537 (1990). In Brown this Court once again held that the Supreme Court's decision in Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), did not apply in Florida because in Florida the jury merely gives an advisory opinion to the judge who then passes sentence. This Court has also consistently interpreted Section 921.141 Fla. Stat. as making the judge the sentencer in the State of Florida. At no time has this Court deemed that the jury is a component of the sentencer or that the decision is split between the two. To the contrary this Court has repeatedly held that the final decision rests with the judge. Combs v. State, 525 So.2d 853, 855 (Fla. 1988) (holding that the trial judge is the sale sentencer in the State of Florida).

Additionally, in Combs, supra., this Court recognized that even the United States Supreme Court "has expressly characterized the jury's role in Florida to be 'advisory' in nature." Combs, at 858. The Combs court relied upon the majority opinion authored by Justice Blackmun in Spaziano v. Florida, 468 U.S. 447 (1984):

> In Florida, the jury's sentencing recommendation in a capital case is *only advisory*. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances and, "[n]otwithstanding the recommendation of a majority of the jury," is to enter a sentence of life imprisonment or death; in the latter case, specified written findings are required. Fla. Stat. §921.141(3)(1983).

Combs, supra, at 858. The Combs court also recognized that the Supreme Court has consistently upheld the validity of Florida's advisory jury system, citing Barclay v. Florida, 463 U.S. 939 (1983); Dobbert v. Florida, 432 U.S. 282 (1977); Proffitt v. Florida, 428 U.S. 242 (1976). Most recently, the Court again observed that constitutional challenges to Florida' death sentencing scheme have been repeatedly rejected, a scheme "which provides for sentencing by the judge, not the jury". Walton v. Arizona, 497 U.S. ___, 110 S.Ct. 3047, 111 L.Ed.2d 511, 524 (1990). See, also, Lewis v. Jeffers, 497 U.S. ___, 111 L.Ed.2d 606 (1990). Despite this clear statement of Florida law, the Supreme Court granted the writ based on a contrary interpretation of state law. Therefore, in addition to the relief requested above, the state urges this Court, once again, to make it clear

that the judge, not the jury, **is the sentencer in the State of Florida.**

CONCLUSION

WHEREFORE, based upon the foregoing argument and citation to authority the State urges this Honorable Court to find 1) that the claim is procedurally barred, 2) that error, if any is harmless, and, 3) once again, affirm the judgment and sentence of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CANDANCE M. SUNDERLAND
Assistant Attorney General
Florida Bar ID#: 0445071
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

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. Connor, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow, Florida 33830, this 25 day of January, 1993.

OF COUNSEL FOR APPELLEE