IN THE SUPREME COURT OF FLORIDA

GEORGE MICHAEL HODGES,

Appellant,

vs.

Case No. 74,671

STATE OF FLORIDA,

Appellee.

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

REPLY 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

ATTORNEY5 FOR APPELLANT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The Brief of the Appellee has renamed the issue on appeal and has subdivided it into different sections from the format used in Appellant's initial brief on remand. In the interest of clarity, and because Appellant is replying to Appellee's argument, this brief adopts Appellee's format.

STATEMENT OF THE CASE

Appellant will rely upon the Statement of the Case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his initial brief.

SUMMARY OF THE ARGUMENT

Appellant has not procedurally defaulted his claim. This Court has already reached the merits in the original opinion, At trial, counsel specifically argued that the cold, calculated and premeditated aggravating circumstance was unconstitutionally vague when requesting that the jury not be allowed to consider it.

While Appellee's assertion that there was evidence to support the cold, calculated and premeditated aggravating circumstance under the limiting construction given to it by this Court is correct, this fact does not make the Espinosa error harmless. The penalty jury was also asked by the prosecutor to weigh improper

aspects of the offense under the cold, calculated and premeditated aggravating circumstance. Compared to a recent case where this Court found the Espinosa error prejudicial, the case at bar shows an even greater likelihood that the instructional error could have played a role in the jury's recommendation.

ARGUMENT

ISSUE

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

Initially, Appellant notes with some astonishment that Appellee has not even contended that the section 921.141(5)(i) aggravating circumstance (cold, calculated and premeditated) passes constitutional muster. It appears that Appellee is abandoning the longstanding precedent of this Court denying any Eighth and Fourteenth Amendment vagueness problem with the aggravating circumstance. See e.g., Fotopoulos v. State, 17 F.L.W. S 643 at S 646 (Fla. October 15, 1992); Klokoc v. State, 589 So. 2d 219 at 222 (Fla. 1991); Brown v. State, 565 So. 2d 304 (Fla.), cert.den., 111 S. Ct. 537 (1990). Instead, Appellee argues for application of a procedural bar, that the error was harmless, and that "the United States Supreme Court's decision in Espinosa is wrong." Brief of Appellee, p.6.

A. Procedural Default

There are several reasons why Appellee's argument that Hodges' claim should be procedurally barred is faulty. First and foremost is the fact that this Court reached the merits in the original round of this direct appeal. Hodges v. State, 595 So. 2d 929 at 934 (Fla. 1992). The United States Supreme Court remanded the

holding for further consideration. The State simply cannot get the horse back into the barn at this point.

Secondly, defense counsel preserved this claim for appeal when he argued that the cold, calculated and premeditated aggravating circumstance was unconstitutionally vague and should not be considered by the jury (R706). Thus, the case at bar is entirely different from the authority cited by the State, Kennedy v. Singletary, 602 So. 2d 1285 (Fla,), cert.den., 113 S. Ct. 2, 120 L. Ed. 2d 931 (1992), and this Court's decision in Johnson v. Singletary, 18 F.L.W. S 90 (Fla. January 29, 1993). In both Kennedy and Johnson the only trial objection to the challenged aggravating circumstance was lack of evidence. This Court found procedural bars because of "failure to object to the instruction based on vagueness or other constitutional defect." Johnson, 18 F.L.W. at S 91.

Finally, the record on appeal reflects that the charge conference itself was not reported; the defense counsel was simply asked to put on the record his "comments. . .as to the giving of thase aggravating circumstances" (R703-4). The trial judge concluded:

> THE COURT: Arguments noted for the record. Defense argument is denied. The Court will be giving aggravating circumstances in the statute I believe it's G and I; is that correct, now?
>
> MR. PERRY: Yes, sir, G and I.
>
> THE COURT: Under the standard jury instruction 7 and 9.

(R706) This is a sufficient record to show that Appellant did not waive his constitutional challenge to instruction on the cold, calculated and premeditated aggravating circumstance. If for any

reason, this Court thinks otherwise, Appellant would request opportunity to reconstruct the record of the unreported charge conference to cure any deficiency.

B. Harmless Error

Appellee basically argues, with extensive citation to the trial court's sentencing order, that there is evidence from which the jury could have found the cold, calculated and premeditated aggravating circumstance within the proper limiting construction. While this is true, it does not render harmless the error in failing to inform the jury of the proper limiting construction. Because the penalty jury is instructed to weigh the evidence rather than simply count the number of applicable factors, weight might well be given to aspects of the offense which do not comport with the limiting construction.

Such erroneous weighing is particularly likely in the case at bar because neither the judge nor the prosecutor informed the jury of the proper construction of the cold, calculated and premeditated aggravating Circumstance. Indeed, as pointed out in Appellant's initial brief on remand, the prosecutor urged the jury to weigh evidence that the victim was shat twice as an aspect of the cold, calculated and premeditated factor (Initial brief of Appellant, p.11-2, R715). Thus, the jury was not only passively uninformed, it was actively misled.

This Court should conduct its harmless error analysis under Espinosa in the same manner as in Hitchcock v. State, 18 F.L.W. 587

(Fla. January 28, 1993). In Hitchcock, the inadequate jury instruction was held to be prejudicial error despite a total of four aggravating circumstances and ample evidence from which a properly instructed jury could properly find the heinous, atrocious, or cruel aggravating circumstance. At bar, there are at most, two aggravating circumstances (including the constitutionally invalid cold, calculated and premeditated factor) to weigh against the mitigating evidence. Moreover, this Court previously found that part of the prosecutor's penalty argument was improper and Appellant has now shown a further impropriety in the failure to restrict argument to facts within the limiting construction adopted by this Court of the aggravating circumstance. A new penalty proceeding should be ordered.

C. Florida Death Sentencing Procedure

Appellee's argument that the United States Supreme Court misinterpreted Florida law in Espinosa has been foreclosed by this Court's recent decision in Johnson v. Singletary, 18 F.L.W. S 90 (Fla. January 29, 1993). There, this Court agreed that "the Florida penalty-phase jury is a co-sentencer under Florida law," citing Espinosa. 18 F.L.W. at S 90.

CONCLUSION

Appellant will rely upon his conclusion as presented in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 12th day of February, 1993.

Respectfully submitted,

Douglas A. Connor

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