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DEC 28 1997

CLERK, SUPREME COURT.

By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 76928

CHARLES STREET,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
CRIMINAL DIVISION

SUPPLEMENTAL BRIEF OF APPELLANT
CHARLES STREET

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STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

The Appellant respectfully relies upon and restates the Statement of the Facts and Statement of the Case presented in his initial brief.

STATEMENT OF THE ARGUMENT

Under the holding of the United States Supreme Court in Espinosa v. Florida, 6 FLW Fed. 5662, it is now clear that this Defendant was denied his Eighth Amendment right to not be subjected to cruel and unusual punishment and his Fourteenth Amendment right to be accorded the due process of law by the judge having charged that it should consider the applicability of the "Heinous, Atrocious and Cruel" aggravating circumstance as set forth in Fla. Stat. 921.141(2).

ARGUMENT

THE DEFENDANT WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HE WAS DENIED THE DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE SENTENCING ADVISORY JURY HAVING BEEN CHARGED TO CONSIDER THE APPLICABILITY OF THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE AS SET FORTH IN THE FLORIDA DEATH PENALTY TRIAL PROCEDURE STATUTE, I.E., 921.141(2).

The trial court in this cause included amongst its charges to the sentencing advisory jury the following charge: "The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence....Five, the crime which the defendant is to be sentenced was specially heinous, atrocious, or cruel."

This part of the court's instructions, of course, embodies the statutory aggravating circumstances set forth at subsection (5)(h) of the Death Penalty sentencing statute, Sect. 921.141(2).

The Supreme Court of the United States in its recent decision in Espinosa v. Florida, 6 FLW Fed. 5662 (June 29, 1992), reversed the upholding of a death penalty by this Court in almost an identical situation as is involved here. In Espinosa, the judge instructed the sentencing advisory jury, in pertinent part, "...that it was entitled to find as an aggravating factor that the murder of which it had found Espinosa guilty was 'especially wicked, evil, atrocious or cruel'." Further, in Espinosa----as in the instant case----the trial court did not know whether the sentencing advisory jury had found the "HAC" aggravating

circumstance to be applicable because the Florida sentencing procedure does not require the jury to specifically advise the court as to which aggravating circumstances and which mitigating circumstances it found to be applicable and as to how it weighed them and, further, because the trial court did not cure this deficiency by submitting to the jury a special interrogatories verdict regarding aggravating circumstances and mitigating circumstances.

And in both the instant case and in Espinosa, the trial court did not find the HAC aggravating circumstance to be applicable (in its sentencing order).

But, as the United States Supreme Court intoned in Espinosa, the fact that the trial court did not find the applicability of the HAC aggravating circumstance in no way vitiates the error that that court committed by instructing the jury on the HAC aggravating circumstance because under this Court's holdings in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), et al, "...the trial court is required to pay deference to a sentencing court's recommendations, in that the trial court must give 'great weight' to the jury's recommendation whether that recommendation be life....or death." (Espinosa at page 663 of 6 FLW Fed.)

CONCLUSION

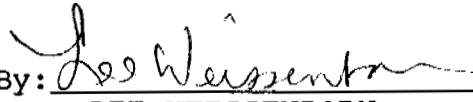
For these reasons and based upon the aforescribed holding in the Espinosa case, Appellant-Defendant Charles Street herewith avers to the Court that his Eighth Amendment (to the United States Constitution) right to not be subjected to cruel and unusual

punishments and, as well, his Fourteenth Amendment right to be accorded the Due Process of Law was violated and that therefore the Death Penalty imposed upon Charles Street should be vacated and set aside.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was mailed this 18 day of ~~December~~ 1992 to the Office of the Attorney General, 401 N.W. 2nd Avenue, Miami, Florida.

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