IN THE SUPREME COURT OF FLORIDA

DAVIDSON JOEL JAMES,

Appellant,

v.

Case No. 78,161

STATE OF FLORIDA,

Appellee.

SUPPLEMENTAL BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

On October 7, 1992, this Honorable Court heard oral argument on the appeal from the trial court's summary denial of a second and successive motion for post-conviction relief. At that time the entire oral argument was devoted to the effect of Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854, 112 S.Ct. ___ (1992). Subsequently, appellant requested permission to submit a supplemental brief (even though appellant's reply brief had already cited Espinosa) and on October 21, 1992, this Court granted the motion. Appellee now submits its responsive Supplemental Brief.

ARGUMENT

ISSUE I

Appellant reasserts his claim that the imposition of the sentence of death is violative of the Eighth and Fourteenth Amendments because the jury instructions provided no limiting construction to the Heinous, Atrocious or Cruel (HAC) or Cold, Calculated and Premeditated (CCP) aggravating factors and the trial court applied no limiting construction to these aggravators.

I.

The HAC Factor --

The record on appeal on James' direct appeal reflects that appellant requested a special penalty phase instruction on HAC and objected to its not being given at trial. (R 919, 575) On his direct appeal Mr. James argued in Issue IV that the lower court had failed to give a more expansive definition of HAC than the mere statutory language. In Issue VIII he had argued that it was error to make a finding of HAC.

This Honorable Court affirmed the judgment and sentence, finding no error in denying the requested instructions. The Court further reasoned that the trial court had found five aggravating factors,[1] that the finding of HAC was improper, that

[1] These included prior conviction of violent felonies, homicide committed during burglary and robbery, homicide to avoid or prevent arrest, heinous, atrocious and cruel, cold, calculated and premeditated.

no mitigating circumstances were found and that the finding of the presence of four other aggravators was proper. A resentencing was not required. James v. State, 453 So.2d 786 (Fla. 1984).

Appellant contends that with the announcement of decisions such as Sochor and Espinosa there has been a sufficient change in law to warrant revisiting the claim. In Witt v. State, 387 So.2d 922 (Fla. 1980), this Court announced the view that only major constitutional changes of law would be cognizable in capital cases under Rule 3.850. Id. at 929.[2] To meet the Witt standard, the new decision relied upon must cast serious doubt on the veracity or integrity of the original trial proceeding. Espinosa does not do so.

Appellee would note initially that the Supreme Court's Espinosa decision appears to rest on a mischaracterization of state law, a misapprehension that Florida "has essentially split the weighing process in two" and decided to place capital-sentencing authority "in two actors rather than one." Appellee submits this is not an accurate statement of Florida law and this Court should so state. Obviously, the United States Supreme

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[2] This Court has previously stated that decisions like Sochor v. Florida, Stringer v. Black, 503 U.S. ___, 117 L.Ed.2d 367 and Parker v. Dugger, 498 U.S. ____, 112 L.Ed.2d 812 are not major changes in the law that should be applied retroactively under Witt v. State, 387 So.2d 922 (Fla. 1980) to give relief in post conviction proceedings. Mills v. Singletary, ___ So.2d ___, 17 F.L.W. S 657 (Fla. 1992), Case No. 80,124).

Court is the final arbiter as to what the United States Constitution requires, but the state's highest court views on what state law is, is binding on all federal courts. See Wainwright v. Goode, 464 U.S. 78, 85, 78 L.Ed.2d 187 (1983); Wainwright v. Stone and Huffman, 414 U.S. 21, 38 L.Ed.2d 179 (1973). Indeed, even in Stringer v. Black, 503 U.S. ___, 117 L.Ed.2d 367, 381 (1992), the Court acknowledged that it would be a strange rule of federalism that ignores the views of the highest court of a state as to the meaning of its own law.

The legislature has expressly made the judge not the jury the sentencer. F.S. 921.141(3) provides that notwithstanding the recommendation of a majority of the jury the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death. The legislature did not elevate the jury to a co-actor. This Court has consistently insisted that the trial judge is required to make an independent determination of the sentence based on aggravating and mitigating factors Grossman v. State, 525 So.2d 833, 839 (Fla. 1988); Ross v. State, 386 So.2d 1191, 1197 (Fla. 1980); Rogers v. State, 511 So.2d 526, 536 (Fla. 1987).

That the jury is not a co-sentencer is confirmed by the fact that the statute also authorizes that a jury can be waived -- F.S. 921.141(1) -- and the trial judge may still impose a sentence of death. State v. Carr, 336 So.2d 358 (Fla. 1976). Moreover, the trial judge may base his sentencing decision on information not presented to the jury. See, e.g., Cochran v. State, 547 So.2d 928, 931 (Fla. 1985).

Concededly, there is tension between some of this Court's decisions and among the Justices of this Court concerning the significance to be attached to the jury's recommendation of life imprisonment or death. See, e.g., Burch v. State, 522 So.2d 810 (Fla. 1988); Grossman v. State, 525 So.2d 833 (Fla. 1988); Combs v. State, 525 So.2d 853 (Fla. 1988); Dolinsky v. State, 576 So.2d 271 (Fla. 1991).

The Court should take the opportunity to clarify and declare positively that the trial judge is the sole sentencer; the role of the jury merely is to make a recommendation, to provide a sense of the community's feeling; but it is not a binding judgment. Cf. Spaziano v. Florida, 468 U.S. 447, 82 L.Ed.2d 340 (1984).

But even if this Court were to reject the foregoing argument, relief should still be denied.[3] Under Witt, supra, appellant is not entitled to relief unless he can demonstrate that the new law changes cast serious doubt on the veracity or integrity of the trial proceeding. The "HAC" instruction given to the jury does not cast doubt on the integrity of the proceedings in light of the limited prosecutorial argument on the aggravating factor, the countervailing argument given by trial

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[3] Any suggestion by James that a new sentencing proceeding is constitutionally required must fail; for that was the argument presented by the defense in Clemons v. Mississippi, and rejected by the Supreme Court; there is no infirmity in the appellate court's conducting a harmless error analysis or conducting a reweighing itself to determine the appropriate sentence.

counsel and this Court's prior elimination of this aggravating factor from the equation and finding of harmless error on direct appeal -- along with the trial court's finding the presence of no mitigating factors -- all combine to require a finding that Witt standard remains unsatisfied. Collateral reconsideration of this claim is not required. In any event, as described below, the harmless error doctrine precludes relief.

Appellant cannot legitimately argue sub judice that the error relied on here (an alleged vague HAC jury instruction) is similar in nature to error committed violative of Hitchcock v. Dugger, 481 U.S. 393 , 95 L.Ed.2d 347 (1987). Hitchcock error precludes the jury from considering valid proffered mitigating evidence, leading to a probable erroneous result -- certainly an incomplete assessment skewing the result. No such error occurred here -- the jury was permitted to and did consider all about appellant's life that was presented. In contrast, error under Espinosa involves merely a determination by the appellate court -- based on the record and prior precedents -- whether a single vague instruction constitutes harmless error given the multiple aggravators and extremely weak proferred mitigation.

Harmless Error --

Any error in this regard must be deemed harmless under the circumstances. First of all, this Court on direct appeal has previously concluded and determined that the sentencing trial judge's finding of HAC to be harmless and not sufficiently egregious to warrant a remand to the lower court. 453 So.2d at

792. See also Kennedy v. State, 455 So.2d 351 (Fla. 1984); Kennedy v. Singletary, 599 So.2d 991 (Fla. 1991); Kennedy v. Singletary, 602 So.2d 1285 (Fla. 1992); White v. Dugger, 565 So.2d 700, 702 (Fla. 1990) (to remove any doubt, we again apply this analysis [harmless error] and conclude that the trial court's ruling would have been the same beyond a reasonable doubt even in the absence of the invalid aggravating factors).

Additionally, this Court can determine that the HAC instruction given to the jury constituted only harmless error by a review of the closing arguments of the prosecutor and defense counsel. The prosecutor made a brief comment in support of this aggravator noting Mrs. Satey's apparent apprehension of death as the gun was pointed to her head. (R 609) The defense responded that there were a lot of crimes more vicious, citing instances in which victims were tortured; Mrs. Satey didn't suffer like that. (R 617 - 618) The jury would know from the evidence presented that Mrs. Satey's demise was relatively quick with a single gunshot wound to the head. Dr. Diggs had explained that with this type of wound a person generally would not have remained conscious (R 299 - 300). Cf. Sochor v. Florida, 504 U.S. ___, 119 L.Ed.2d 326, 340 (jury is likely to disregard an option simply unsupported by evidence and decline to presume jury error).

In the instant case, for example, no argument by trial counsel was presented nor evidence offered regarding appellant's having suffered in an abusive background; rather the testimony

presented at penalty phase from defense witnesses Frances George, Judy Sharrot and Gretta Bryant Walker essentially dealt with his having contributed to their support and the effort to provide better schooling for this bright young man. (R 587 - 597)

This Court has held, correctly, that it will look to the trial court's order and the record on appeal to determine the correctness of the sentence imposed. Echols v. State, 487 So.2d 568, 576 (Fla. 1986). To engage in the hypothetical speculation that the removal of the weak HAC factor would have made a difference to the jury and the sentencing judge where, as here, no mitigation was found would encourage the type of arbitrariness condemned in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346 so ably articulated by Justice Ehrlich's dissent in Dolinsky v. State, supra.

The great weight of the evidence including the presence of four valid aggravating factors, after elimination of the HAC factor, the extremely weak evidence proffered in mitigation leads ineluctasbly to the conclusion that that is the appropriate sentence and that had the HAC instruction not been given, the result would have been the same.

ISSUE II

We turn next to the CCP aggravating factor. The record on appeal on James' direct appeal from the imposition of the judgment and sentence reveals that appellant made no special requested jury instruction relating to this aggravator at the jury instruction conference. Appellant only complained that in his view the evidence was insufficient to support a CCP finding (R 575). Moreover, while appellant did request five special penalty phase instructions, two of which were granted, none of the five related to the CCP factor. (R 915-919). In his brief on direct appeal appellant complained only that the evidence was insufficient to support a finding of CCP; no argument was advanced that the instruction to the jury on that factor was unconstitutionally vague or otherwise impermissible. (See appellant's brief, Issue VIII D, Pages 56-58, Case No. 62,557). Any claim now advanced attacking the constitutional validity of the jury instruction is untimely and this claim is, was, and remains procedurally barred. See Kennedy v. Singletary, 599 So.2d 991 (Fla. 1992), Kennedy v. Singletary, 602 So 2d 1285 (Fla. 1992); Ragsdale v. State, ___ So.2d ___, 17 FLW S 620 (Fla. 1992), Parker v. State, ___ So.2d ___, 17 F.L.W. S 641 (Fla. 1992), Fotopoulous v. State ___ So.2d ___, 17 F.L.W. S 643 (Fla. 1992).

Appellant acknowledged at the previous oral argument on October 7 that the attack on the CCP aggravator instruction to

the jury was not preserved and argued on appeal, but contended that such reliance on procedural default is no longer viable. We disagree. First of all, on June 8, 1992, the United States Supreme Court reaffirmed the significance and enforceability of procedural default policy by refusing to consider the petitioner's attack on the HAC aggravating factor in Sochor v. Florida. 504 U.S. ___, 119 L.Ed.2d 326, 338 (1992):

> The quoted passage indicates with requisite clarity that the rejection of Sochor's claim was based on the alternative state ground that the claim was "not preserved for appeal" and Sochor has said nothing in this Court to persuade us that this state ground is either not adequate or not independent. Hence, we hold ourselves to be without authority to address Sochor's claim based on the jury instruction about the heinousness factor.

The Court then in a footnote addressed and rejected the dissenting view of Justice Stevens that the type of error being urged by Sochor might constitute fundamental error.

Appellant can obtain no solace from Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (1992) with respect to procedural default jurisprudence because that decision does not address it. Rather, Espinosa involved review of a Florida Supreme Court decision wherein this Court solely disposed of an attack on the validity of the HAC instruction on the merits, without relying upon or enforcing a default for the failure to preserve for appellate review. Thus, once the state court, for whatever reason, chooses not to base its decision on procedural default grounds and instead addresses and resolves the claim on the

merits of a federal constitutional claim, the federal courts will and must do likewise. See County Court of Ulster County v. Allen, 442 U.S. 140, 60 L.Ed.2d 777 (1979), Harris v. Reed, 489 U.S. 255, 103 L.Ed.2d 308 (1989).

Appellant is not aided either by Sochor v. Florida, 504 U.S. ___, 119 L.Ed.2d 326 (1992) or Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (1992). In fact Sochor is supportive of the state's position. As stated above, the Supreme Court refused to consider Sochor's HAC jury instruction claim because the claim had not been preserved for appeal and this Honorable Court had enforced the procedural default policy by ruling that the claim was unpreserved. The Supreme Court granted relief on the CCP claim because this Court had found insufficient evidence of this aggravator but had failed to comply with the requirements of Clemons v. Mississippi, 494 U.S. 738, 108 L.Ed.2d 725 (1990) by conducting a harmless error or reweighing analysis.

Espinosa does not assist James on this point since that case did not involve the CCP factor; rather, the former HAC instruction was found vague. And the Court did not discuss defaults.

Appellant cannot obtain comfort from Hodges v. Florida, ___ U.S. ___, 52 Cr.L. 3015 (October 5, 1992), since the Court merely vacated and remanded "for further consideration in light of Espinosa. While it is true that the petitioner was challenging the "CCP" jury instruction in that case, a perusal of this Court's decision in Hodges v. State, 595 So.2d 929 (Fla. 1992)

reveals (a) there was no overt reliance on the enforcement of a procedural default -- this Court simply rejected the claim on the merits and (b) the only discussion merely cited Brown v. State, 565 So.2d 304 (Fla. 1990) and the analysis in Brown mirrored the argument, rejected in Espinosa, that Maynard v. Cartwright, 486 U.S. 356, 100 L.Ed.2d 372 (1988) is inapplicable in Florida. The United States Supreme Court has not held the "CCP" instruction unconstitutional; it simply has provided an opportunity to this Court to reconsider its prior analysis. A similar situation arose, for example, in Puiatti v. State, 495 So.2d 128 (Fla. 1986) when the Supreme Court vacated for reconsideration in light of the recently-decided Cruz v. New York, 481 U.S. 186, 95 L.Ed.2d 162 (1987) -- see Puiatti v. Florida, 481 U.S. 1027, 95 L.Ed.2d 523 -- and then let stand this Court's subsequent affirmance following remand. Puiatti v. State, 521 So.2d 1106 (Fla. 1988) cert. denied, 488 U.S. 871, 102 L.Ed.2d 153.

Appellant contends, however, that the claim is not procedurally barred. He is wrong for two reasons. First of all James did not preserve at the trial for appellate review any question pertaining to the constitutional validity of the jury instruction of the CCP aggravating factor.

Second, appellant did not, contrary to James' argument here, urge an attack on the "CCP" instruction in his direct appeal brief. Appellant has alluded to Issue IV at pages 26 - 31 of James' direct appeal brief and a close examination of it reveals that James was complaining about the five specially requested

instructions, of which three were denied. (R 572 - 74, 915 - 919) None of these five challenged the constitutional validity of CCP.

While appellant did cite Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398 (1980) -- brief at page 30 - that was in conjunction with his attack on the HAC aggravator and indeed his only complaint about CCP was that there was no evidence to support it. Appellant's brief at pages 30 - 31, 56 - 58.

The state reasserts that the claim presently urged remains procedurally barred.

CONCLUSION

For the foregoing reasons, the lower court's order denying post-conviction relief should be affirmed.

Respectfully submitted,

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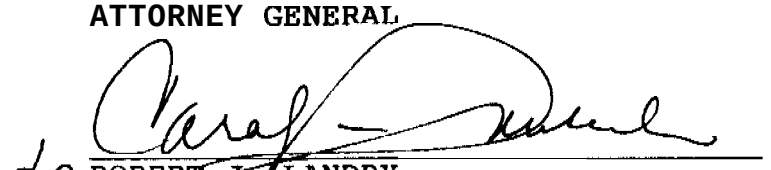

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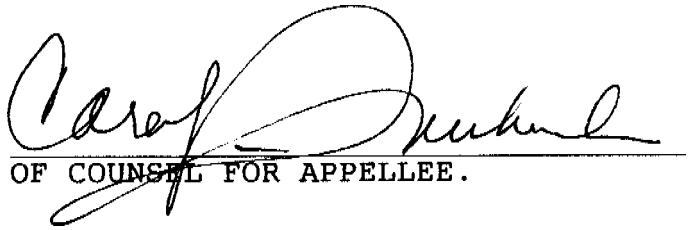
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 17th day of November, 1992.



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