IN THE SUPREME COURT OF FLORIDA

STEVEN EDWARD STEIN,

Appellant,

v. CASE NO. 78,460

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN #201170
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

TABLE OF CITATIONS

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PRELIMINARY STATEMENT

Appellant relies on his initial brief to reply to the State's answer brief except for the following additions concerning Issues I, IV-A, VI, and VII:

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ADMITTING STEIN'S STATEMENTS IN EVIDENCE SINCE THE STATEMENT WAS OBTAINED IN VIOLATION OF STEIN'S RIGHTS UNDER ARTICLE I, SECTION 9 OF THE CONSTITUTION OF FLORIDA AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State's position is based on the premise that the detectives honored Stein's request for lawyer, stopped all interrogation, and only questioned him again after a break and Stein, of his own volition, reinitiated the questioning. However, this premise is not supported by the evidence.

After Stein requested a lawyer, the detectives did not stop the interrogation process. Baxter merely shifted to a subtle form of interrogation which had the effect of inducing Stein to talk. Baxter's remark about God forgiving sins[1] focused directly on Stein's statement suggesting that he would like to talk because he was a new Christian. Even if Stein's request for a lawyer was deemed equivocal because it was followed by this statement about being a new Christian and wanting to talk, Baxter was limited to merely clarifying

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[1]The State's suggestion that the record is in conflict aboutt who made this statement about God forgiving sins is incorrect. (State's brief at 10) While the transcript at one point could be interpreted to read as if Baxter said Stein made the remark (Tr 85), Baxter's later testimony on the same page and on cross-examination, clarifies that he, not Stein, made the statement. (Tr 85, 94)

whether Stein wanted a lawyer. E.g., Long v. State, 517 So.2d 664 (Fla. 1987). Telling Stein that God forgives sins cannot be interpreted as merely clarifying an equivocal request for counsel. Instead, the comment encouraged Stein to decide to talk to the detectives. Baxter testified that more that one comment occurred after Stein disclosed he was a new Christian. Baxter stated, "I talked to him about this." (Tr 85) Stein testified that Baxter said more:

> Q. Did Detective Baxter tell you that God would forgive you if you -- if you would tell them what happened?
>
> A. He told me that God would forgive me for what I did. He said -- he didn't say if I told him, and he said a number of occasions I understand how you can get in this situation. If it wasn't for the grace of God there goes I, something to that extent.

(Tr 100-101) Regardless of Baxter's subjective intent, the impact of his remarks was further, prohibited interrogation after Stein requested counsel.

The State's position that Stein testified that Baxter's remark had no effect on his decision to talk again takes testimony out of context. State's brief at 8. Stein consistently denied making any incriminating statements to the detectives. (Tr 101-102, 103, 108-110) Consequently, when he said Baxter's remarks did not have any effect on his decision to talk or not to talk, Stein was merely reiterating that he did not talk as the detectives claimed. (Tr 103) His testimony was that nothing affected his decision to talk because he never

talked to the detectives about the crime. Stein's testimony surrounding the part quoted by the State proceeded as follows:

> Q. All right. Mr. Stein, I think you talked about this conversation that -- brief conversation you had with Baxter about God. Did you indicate to him first of all I am a new Christian, I want to talk?
>
> A. No. I didn't tell him that I wanted to talk. He asked me about my last name. He asked me if I was Jewish. I said, no, I am a born again Christian. He said for how long have you been a born again Christian. I said for about a year, and he said -- what he said that -- he said that the good thing about God is that he will forgive you.
>
> Q. Okay. Specifically though you said he did not say he will forgive you if you talk to me, correct?
>
> A. No, sir. He didn't say that.
>
> Q. Okay. And you didn't have any conversation with him because of any conversation about God, did you?
>
> A. No, sir.
>
> Q. That didn't affect your decision to talk to him or not talk to him?
>
> A. No, sir.

(Tr 103) This is not, as the State asserts, Stein admitting he decided to talk and give a statement unaffected by Baxter's remarks.

The State also suggests that a period of time elapsed between Stein's initial request for a lawyer and the subsequent statement. On page 11 of the State's brief, the contention is made that at least several minutes passed. Interestingly, the State can only note that 30 minutes elapsed between the first

time Stein was advised of his rights and the second execution of a rights form which preceded the alleged statement. State's brief at 11. There is no indication of how long the detective remained in the interview room after the first time Stein was advised of his rights. Furthermore, Stein testified to a significant amount of questioning after the execution of the first rights form:

> Q. And can you tell us how many times you stated that?
>
> A. I'd say I asked for an attorney at least three times.
>
> Q. And what if anything did the detectives tell you?
>
> A. They just kept telling me -- they told me that an attorney couldn't help me, that I was screwing myself by not talking to them, an attorney was going to tell me not to talk to them and they have enough evidence to put me in Raiford and all I could do was help myself.
>
> Q. After that point did they then leave the room?
>
> A. They left the room a little while after. This went back and forth for a while, and I asked for another attorney during all this.
>
> Q. And how long did they leave the room for approximately?
>
> A. About five minutes.
>
> Q. And do you know why they left the room?
>
> A. They told me they was going to give me time to think about whether I want to talk to them or not and let them know if I made up my mind.
>
> Q. And between that time and the time they left the room you asked for an attorney how many times, three times you said?

A. I say about three times, yes, sir.

Q. All right. Did they come back into the room after five minutes?

A. Yes they did.

(Tr 99-100)

The State finally contends that the admission of Stein's confession was harmless error. State's brief at 14-16. While there was other evidence tending to prove Stein's involvement in the crime, the impact a confession, in a defendant's own words, has on a jury cannot be minimized. See, Arizona v. Fulminante, 499 U.S.___, 111 S.Ct. ___, 113 L.Ed.2d 302 (1991).

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. ... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." Bruton v. United States, 391 US, at 139-140, 20 L Ed 2d 476, 88 S Ct 1714 (White, J., dissenting). See also Cruz v. New York, 481 US, at 195, 95 L Ed 2d 162, 107 S Ct 1714 (White, J., dissenting)(citing Bruton).

113 L.Ed.2d at 322. The State had no other admissions of guilt from Stein. This is not a case where his confession the police is cumulative to testimony of other statements a defendant may have made implicating his guilt. These statements were the sole source of an admission of guilt available to the State. Admitting them was not harmless error.

ISSUE IV-A

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN FINDING THAT THE HOMICIDES WERE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The State suggests that the sentencing judge found the heinous, atrocious or cruel aggravating circumstance only for the homicide of Dennis Saunders. State's brief at 35. However, the sentencing order does not support that conclusion. (R 354-368) Both victims are referred to in the portion of the order dealing with this aggravating circumstance. (R 361-362) As to every other aggravating circumstance, the court found the factor applied to both homicides. (R 359-362) Surely, if the judge had a different intent as to the HAC circumstance, that fact would have been clearly stated. Just as the State noted, Stein disagrees with this reading of the sentencing order. State's brief at 34.

As to the homicide of Dennis Saunders, the State's position that mental anguish over knowledge of impending death is sufficient to justify finding the HAC circumstance is without merit. The cases upon which the State relies involve the methodical execution of multiple victims with a significant degree of time passing between the killings. Garcia v. State, 492 So.2d 360 (Fla. 1986)(first victim threatened with death then shot in presence of others after refusing to produce money; second victim also threatened then shot after also refusing to give defendant money); Steinhorst v. State, 412 So.2d 332 (Fla. 1982)(after shooting one victim, three others

were bound, gagged, blindfolded and transported to another area where each was shot); Henderson v. State, 463 So.2d 196 (Fla. 1985)(three victims first bound and gagged before each was shot one at a time in the presence of the others); Francois v. State, 407 So.2d 885 (Fla. 1981)(eight victims shot one at a time after defendant declared that all of them would be killed). This contrasts with the facts in this case which demonstrate that both homicides occurred virtually at the same time with only minimal intervening time. While Saunders may have had a matter of seconds to be aware of impending death as the result of the shooting of Bobby Hood, this is not the type of mental suffering which sets a homicide apart from the norm of murders committed with a firearm.

ISSUE VI

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO PRESENT IRRELEVANT VICTIM SYMPATHY ARGUMENTS TO THE JURY DURING PENALTY PHASE.

The State argues that Stein did not preserve this point for appeal for lack of a contemporaneous objection to a part of the prosecutors comments. State's brief at 51. Stein disagrees. When the offending comments began, defense counsel approached the bench to make a motion for a new penalty phase. Although the prosecutor agreed that the comments were improper, he contended he had the right to briefly touch on the subject. (Tr 872-873) The trial judge agreed and denied Stein's motion. (Tr 872-873) Defense counsel merely honored the trial judge's ruling when he did not object to the remaining remarks of the prosecutor which followed. This was not acquiescence to the trial court's error; counsel merely choose to honor the court's ruling.

ISSUE VII

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE SINCE THE EVIDENCE DID NOT SUPPORT THE GIVING OF THE INSTRUCTION, ALLOWING THE PROSECUTOR TO IMPROPERLY ARGUE THE EXISTENCE OF THE CIRCUMSTANCE BASED ON IRRELEVANT FACTORS, AND THEN, GIVING AN INSTRUCTION WHICH UNCONSTITUTIONALLY FAILED TO LIMIT AND GUIDE THE JURY'S CONSIDERATION OF THE EVIDENCE WHEN EVALUATING WHETHER THE CIRCUMSTANCE WAS PROVED.

Since the State filed its answer brief, the United States Supreme Court decided Espinosa v. Florida, ___ U.S. ____ (Case no. 91-7390, June 29, 1992) and held that Florida's heinous, atrocious or cruel jury instruction was unconstitutional under the Eighth and Fourteenth Amendments. The Espinosa decision specifically disapproved this Court's rationale in Smalley v. State, 546 So.2d 720 (Fla. 1989), the case upon which the State relies to contend the HAC instruction was constitutional. State's brief at 63.

The State asserts that Stein failed to preserve the constitutionality of the HAC jury instruction even though he raised the issue in a pretrial motion and requested a special jury instruction. (R 34-50) State's brief at 63. Stein attacked the constitutionality of the HAC instruction in the pretrial motion on the grounds that it failed to give adequate guidance to the jury of the limitations to the application of this aggravating circumstance. (R 35) Stein followed the motion with a special requested instruction at trial. (Tr 322) Consequently, unlike the situation in Sochor v. State, 580

So.2d 595 (Fla. 1991)(procedural bar holding approved Sochor v. Florida, ___ U.S. ___ (Case no. 91-5843, June 8, 1992)) where a pretrial motion attacking the constitutionality of the HAC circumstance, alone, was insufficient to preserve the issue concerning the jury instruction, Stein filed both a pretrial motion attacking the instruction and requested a special jury instruction. The trial court was well apprised of the objections to the HAC instruction. A procedural bar claim is simply not supported here.

CONCLUSION

For the reasons presented in the initial brief and this reply brief, Steven Stein asks this Court to reverse his convictions for a new trial, or alternatively, to reduce his death sentences to life imprisonment.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN #201170
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by hand-delivery to Mr. Richard B. Martell, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Mr. Steven Stein, DOC #122551, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 15th day of July, 1992.

W. C. McLAIN