IN THE SUPREME COURT OF FLORIDA

NO. 80,124

GREGORY MILLS,

Petitioner,

v.

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent.

REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner, Gregory Mills, pursuant to this Court's order dated July 16, 1992, ordering Respondent, Harry K. Singletary, Secretary, Florida Department of Corrections, to show cause why Mr. Mills' Petition for Extraordinary Relief and for a Writ of Habeas Corpus should not be granted, hereby responds to the Response to Petition for Writ of Habeas Corpus filed in this Court on July 29, 1992.

CLAIM I

MR. MILLS WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS AS SECURED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, WHEN THIS COURT INVALIDATED THREE AGGRAVATING CIRCUMSTANCES AND UPHELD THE JURY OVERRIDE IN HIS APPEAL FROM THE IMPOSITION OF THE DEATH PENALTY AND IN HIS POST-CONVICTION PROCEEDINGS, CONTRARY TO BOCHOR V. FLORIDA, STRINGER V. BLACK, AND PARKER V. DUGGER.

In its response to Mr. Mills' Petition for a Writ of Habeas Corpus, Respondent summarily concludes that Sochor v. Florida, 112 S. Ct. 2114 (1992), and Stringer v. Black, 112 S. Ct. 1130 (1992) are not new law, (Response at 6), and therefore the claim is procedurally barred (Id. at 5). The Respondent in no way addresses the fact that Sochor and Stringer both overturned this Court's longstanding position that Maynard v. Cartwright, 486 U.S. 356 (1988), is inapplicable to Florida. See Mills (John) v. Dugger, 574 So. 2d 63, 65 (Fla. 1990); Porter v. Dugger, 559 So. 2d 201, 203 (Fla. 1990); Brown v. State, 565 So. 2d 304 (Fla. 1990); Occhicone v. State, 570 So. 2d 902 (Fla. 1990). Moreover,

in proceeding to the merits of Mr. Mills' claim, Respondent presumably concedes that eighth amendment error did occur in Mr. Mills' case, for its Response only addresses the issue of the adequacy of this Court's harmless error analysis in Mr. Mills' direct appeal.

In writing that there is no new law that requires relief, the Respondent argues that, under Sochor, the appropriate harmless error analysis is that found in Chapman **v.** California, 386 U.S. 18 (1967), and that this Court has adopted the Chapman standard (Response at 6). Mr. Mills agrees with this proposition (**see** Petition for Writ of Habeas Corpus at 6). In the case sub judice, because eighth amendment error occurred when the trial court considered three invalid aggravating circumstances in overriding the life recommendation, Sochor mandates that a constitutionally adequate harmless error analysis be undertaken. Sochor, 112 **s**. Ct. at 2123. What the Respondent does not discuss is that Sochor held that this Court's application of Chapman to eighth amendment error does not comport with constitutional requirements.

In so holding, the Sochor Court referred to Yates v. Evatt, 111 **s**. Ct. 1884 (1991), **a** case in which the United States Supreme Court reversed a state supreme court's constitutionally inadequate harmless error analysis. Because the state court "did not undertake any explicit analysis to support its view of the scope of the record to be considered in applying Chapman" and because "the state court did not apply the test that Chapman

formulated," Yates, 111 S. Ct. at 1894, the Supreme Court reversed. This is precisely the position in which Mr. Mills finds himself after Sochor -- this Court has not been properly applying Chasman in the context of eighth amendment error. Sochor is new law that establishes this proposition.

Respondent contends that "[t]his court made a specific finding that striking the aggravating circumstances was harmless error in compliance with Chapman." (Response at 6). This is not true under Sochor; this erroneous contention was the root of the problem in the state supreme court's application of the ~~Chasman~~ standard in Yates, an application which was reversed by the United States Supreme Court. ~~Yates~~, 111 S. Ct. at 1897. According to the Supreme Court in ~~Yates~~, "the Chapman test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" 111 S. Ct. at 1892. In Yates, the Supreme Court found that a bare recitation that an error is harmless is not a constitutionally sufficient application of this standard. The Supreme Court in Sochor found the same fatal flaw in this Court's application of the Chapman standard to eighth amendment error.

The fact that this Court has not been properly applying Chapman to eighth amendment error was recognized in ~~Sochor~~ by Justice O'Connor, who wrote that ~~Sochor~~ did not stand for the proposition that "an appellate court can fulfill its obligations of meaningful review by simply reciting the formula for harmless error." Sochor, 112 S. Ct. at 2123 (O'Connor, J., concurring).

Justice O'Connor recognized that the Chapman test "is a justifiably high standard, and while it can be met without uttering the magic words 'harmless error,' . . . the reverse is not true." Id. It is thus clear that what Justice O'Connor was saying was that this Court, whether it uses the words "harmless error" or not, has not been complying with Chapman. While it is true that the Sochor Court did not announce "a particular formulaic indication" for state courts to follow, Id. at 2123, the Court did indicate that a "detailed explanation based on the record" would be required "when the lower court failed to undertake an explicit analysis supporting its 'cryptic,' one-sentence conclusion of harmless error." Id. at 2123-24 (O'Connor, J., concurring). "The real issue . . . is whether an express and meaningful harmless error analysis has occurred within the four corners of the appellate opinion." Kennedy v Singletary, 17 FLW S271, S273 (Fla. Apr. 30, 1992)(Kogan, J., specially concurring). Under Sochor, rectification of eighth amendment error in Florida has been constitutionally inadequate.[1]

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[1] While this Court used the magic words "harmless error" in Mr. Mills' direct appeal opinion, Mills v. State, 476 So. 2d 172, 179 (Fla. 1985), this analysis "verges on boilerplate, and it is certainly devoid of any meaningful analysis." Kennedy v. Singletary, 17 FLW S271, S273 (Fla. April 30, 1992) (Kogan, J., specially concurring). This Court's treatment of Mr. Mills's direct appeal, where three aggravating factors were struck, mitigation was in the record, and the jury recommended a life sentence, was constitutionally inadequate: "[e]mpty words devoid of analysis," Kennedy, 17 FLW at S273, do not satisfy the mandate of Sochor.

In arguing that Florida courts have always applied the Chapman harmless error standard, Respondent also failed to discuss the line of cases where aggravating circumstances were struck on direct appeal, yet this Court applied the rule of automatic affirmance announced in Dixon v. State, 283 So. 2d 1, 9 (Fla. 1973): "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances."[2] This was the test employed by this Court on direct appeal in Sochor, see Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991), a standard which was reversed by the United States Supreme Court. It is thus patently incorrect that, as Respondent argues, "Florida courts have always applied the Chasman harmless error standard." (Response at 6). If Respondent's position were correct, then Sochor would have been affirmed by the Supreme Court.

Mr. Mills' case is a clear example of a case in which this Court failed to apply a constitutionally-adequate harmless error analysis. See Sochor; Stringer. The jury recommended a life sentence. The judge overrode that recommendation, finding there was no mitigation presented at the penalty phase. On direct appeal, a majority of Justices affirmed the override; Justices Overton and McDonald found the presence of mitigation in the

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[2] See Mr. Mills' Petition for Writ of Habeas Corpus for a list of cases in which this standard was employed in affirming the imposition of the death penalty despite the striking of one or more aggravating circumstances.

record, and concluded that the override should not be sustained. Mills, 476 So. 2d at 180 (Overton and McDonald, JJ., dissenting in part). Since the direct appeal, five justices on this Court have agreed that upholding the override was erroneous. Most recently, in rejecting an ineffective assistance of counsel claim, a majority of Justices listed a full paragraph of mitigation that was presented at Mr. Mills' penalty phase. Mills v. State, 17 FLW S339 (Fla. June 4, 1992). It cannot be said that the erroneous consideration of three aggravating circumstances "'was harmless beyond a reasonable doubt' in that 'it did not contribute to the [sentence] obtained.'" Sochor, 112 S. Ct. at 2123 (quoting Chapman, 386 U.S. at 24). In light of the mitigation that was before the jury that recommended a life sentence, the erroneous application of three aggravating factors cannot be harmless beyond a reasonable doubt. Mr. Mills' sentence of death "cannot stand on the existing record of appellate review." Sochor, 112 S. 2d. at 2123. Had a meaningful review taken place in Mr. Mills' case, the override would have been reversed on direct appeal. Mr. Mills respectfully requests that his unconstitutional death sentence be vacated at this time, and that this Court reinstate the jury's life recommendation to which he is entitled.

CLAIM II

MR. MILLS' SENTENCE RESTS UPON *AN* UNCONSTITUTIONAL AUTOMATIC CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Respondent is correct in stating that this issue was presented on direct appeal (Response at 7). As Mr. Mills' petition explained, the issue has been represented in light of Stringer V. Black, 112 S. Ct. 1130 (1992). Respondent simply contends that this claim is procedurally barred because Stringer is not new law which entitles Mr. Mills to relief (Response at 7). No analysis whatsoever is provided in order to support this summary conclusion. Mr. Mills relies on his argument in his Petition for Habeas Corpus in support of this argument.

CONCLUSION

This Court has already determined that Mr. Mills' Petition for Extraordinary Relief and for a Writ of Habeas Corpus demonstrates a basis for relief. See Order to Show Cause, July 16, 1992. Mr. Mills respectfully requests that, based on his arguments in his Petition and in this Reply, this Court vacate his unconstitutional death sentence, and impose the life sentence that his jury recommended and to which he is entitled.

I HEREBY CERTIFY that a true copy of the foregoing Reply to Response to Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 18, 1992.

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