IN THE SUPREME COURT OF FLORIDA

NO. 81,112

RICKEY BERNARD ROBERTS,

Petitioner,

v.

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

Respondent.

PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

THOMAS H. DUNN
Special Assistant CCR
Florida Bar No. 871753

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR PETITIONER

INTRODUCTION

Rather than address the claims presented by Mr. Roberts, the State has argued only that a procedural bar precluded consideration of the merits of Mr. Roberts' claims. Implicit in the Response is a concession that the jury instructions violated Espinosa. Thus, Mr. Roberts' death recommendation by a 7-5 vote of the jury resulted only after the jury received instructions which violated the Eighth Amendment.

Moreover, the State does not address Mr. Roberts' claim that the facially vague and overbroad statutory language was not cured by consideration of a narrowing construction during the jury's sentencing calculus. The State never once distinguishes, let alone mentions State v. Johnson, 18 Fla. L. Weekly 55, 56 (Fla. 1993), wherein this Court held that fundamental error which is "equivalent to the denial of due process" may be raised at any time even without a contemporaneous objection.

FUNDAMENTAL ERROR

In the Response, the State does concede that Hitchcock v. Dugger, 481 U.S. 393 (1989), did establish the presence of fundamental error in the Florida capital sentencing process, and thus the issue did not need to be preserved by a contemporaneous objection in order to be considered in post-conviction proceedings. However, the State then argues that Espinosa error is not as fundamental as Hitchcock error. The State's argument is premised upon the theory that mitigation is somehow more important than aggravation in the sentencing calculus. However,

such an argument does not withstand scrutiny. The jury instructions indicated that the jury was to consider both in reaching its death recommendation. The jury was not told mitigation was qualitatively more important. In fact, if anything, the instructions placed more importance upon aggravating circumstances. First, the jury was required to find sufficient aggravating circumstances to warrant death. Second, the jury was told to weigh the aggravation and the mitigation in deciding which sentence to recommend. Thus, aggravating circumstances played two critical roles in the process.

Eighth Amendment jurisprudence has held that the channeling and narrowing function performed by aggravating circumstances is an absolute necessity in order to limit the class eligible for a death sentence. Richmond v. Lewis, 113 S. Ct. 528 (1992); Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Shell v. Mississippi, 111 S. Ct. 313 (1990); Clemons v. Mississippi, 110 S. Ct. 1441 (1990); Maynard v. Cartwright, 486 U.S. 356 (1998); Godfrey v. Georgia, 446 U.S. 420 (1980). In a weighing state, like Florida, aggravating circumstances are even more important in that they serve a second function. As explained in Stringer:

> A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty that he might be otherwise be by

> relying upon the existence of an illusory circumstance.

112 S. Ct. at 1139.

The State's argument here undervalues the role of aggravating circumstances. Instructional error regarding aggravating circumstances is certainly just as fundamental in nature, if not more so, than mitigating circumstances. Aggravating circumstances first are necessary to determine who is death eligible. They then serve as the counter weight to the mitigating circumstances. Their function is identical to that given to the mitigating circumstances, they are placed on the scales used to determine what sentence is imposed. There can be no rational basis for distinguishing between Hitchcock error and Espinosa error on the basis asserted by the State.

Moreover, Espinosa went well beyond simply declaring the jury instruction on heinous, atrocious or cruel unconstitutional. As explained recently by this Court, Espinosa established that a Florida capital jury is a co-sentencer. Johnson v. Singletary, 18 Fla. L. Weekly 90 (Fla. 1993). This means that Mr. Roberts was deprived of due process when his jury was given unfettered discretion to recommend death by virtue of the facial vague and overbroad statutory language defining the aggravating circumstances which was submitted over objection for the jury's consideration. In the words of this Court's opinion in State v. Johnson, 18 Fla. L. Weekly at 56, fundamental error occurred.

COUNSEL DID OBJECT

In its Response, the State asserts "In the instant case there was no objection whatsoever to the HAC jury instruction at trial" (Response at 3). However, the record shows otherwise:

> [THE COURT]: We come to "Number eight. The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious --" I'll hear the argument.
>
> MR. LANGE: I'll restate what I said before. The reason that is absolutely not applicable is there case law that surrounds this particular aggravating circumstances, it's clearly pertaining to the type of murder where someone lingered, where someone was the killer and it was their intention, in a sense, keeping that person alive and torturing; that someone at the time to make it a vicious, wicked and evil killing, that's not what we have.
>
> The Medical Examiner and Ms. Rimondi said that he comes up after he gets him against the car, he at that time sends one massive blow to the head and he goes into a coma and that's it.
>
> He's not awake or alert to know that he was hit again two or three or four times.

(R. 3225-26).

> THE COURT: "The crime for which the Defendant is to be sentenced was committed while the Defendant was engaged in the commission of an attempt to commit --"
>
> MR. HOWELL: We need to add --
>
> MR. LANGE: Sexual battery.
>
> MR. SHEFFRIN: "And/or kidnapping."
>
> MR. GLICK: We will have that changed.
>
> THE COURT: Sexual battery.

MR. HOWELL: It will be typed up. We won't need it today.

THE COURT: "And/or kidnapping."

MR. LANGE: I have an objection to that.

THE COURT: Note the objection.

This goes here, "The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding . . . the lawful pursuit," that's out.

"The crime for which the Defendant is to be sentenced was committed for financial gain" is out.

" . . . lawful exercise of governmental function" is out.

" . . . atrocious, cruel ." I ruled on that, over the objection of the defense.

(R. 3241-42).

Trial counsel has explained in an affidavit which is attached:

I, KEN LANGE, hereby depose and state that:

1. I have been an attorney licensed to practice in the State of Florida.

2. I represented Ricky Bernard Roberts in a capital trial (circuit court case #84-13010) pursuant to a court appointment. I was not provided a second chair to assist me.

3. I have always felt that Fla. Stat. § 921.141 was facially invalid because the statute fails to adequately define the aggravating circumstances so as to sufficiently channel the sentencing jury's discretion. In particular, the statutory aggravating circumstances of "in the course of a felony" and "heinous, atrocious, or cruel" failed to provide the sentencing jury sufficient guidance so as to narrow and

> channel its sentencing discretion. Moreover, the jury instructions given in Mr. Robert's case did not contain a narrowing construction for these vague aggravating circumstances, and thus Mr. Robert's jury had virtually unlimited discretion at the penalty phase. For that reason I objected to the improperly vague instructions (R. 3241-42). I attempted to explain that the instructions failed to give the jury sufficient guidance regarding the case law construing the aggravating circumstance of "heinous, atrocious or cruel." I stated: "The reason that is absolutely not applicable is there is case law that surrounds this particular aggravating circumstance" (R. 3225). To the extent a court concludes that I failed to adequately object to the vagueness of these instructions, I obviously had no strategy reason for that failure. I intended to object, and certainly believe to this day that I did object to the vague jury instructions regarding the overbroad aggravating circumstances. However at the time of the penalty phase proceeding, I was totally drained and mentally exhausted. If I failed to adequately object, it was due to an oversight on my part. Certainly, the jury should have been given guidance as to the narrowing constructions adopted through case law.

DEFICIENT PERFORMANCE

If this Court finds that the object was inadequate, counsel's failure to adequately object was deficient performance. Counsel obviously meant to object, and in fact thought he was objecting. His failure to adequately carry out his intention was not reasonable performance.

Recently in Lockhart v. Fretwell, 113 S. Ct. 838 (1993), it was conceded that the failure to adequately object to a jury instruction on an aggravating circumstance was deficient performance. 113 S. Ct. at 842 n.1. Similarly in Atkins v.

Attorney General, 932 F.2d 1430 (11th Cir. 1991), the Eleventh Circuit found counsel's failure to object to evidence of previous arrests was deficient performance. In Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989), the failure to object at sentencing to consideration of a prior plea of nolo contendere was found to be deficient performance.

Here, to the extent this Court finds counsel's deficient, Mr. Roberts was prejudiced. Had an objection been made, reversal would be required. James v. State, 18 Fla. L. Weekly ___ (Fla. March 4, 1993).

FAIRNESS

In James v. State, 18 Fla. L. Weekly ___, this Court ordered a resentencing because "it would not be fair to deprive [James] of the Espinosa ruling. Under this fairness standard, Mr. Roberts is entitled to relief. Mr. Roberts' jury received the same instruction found constitutionally inadequate in Espinosa. The jury was thus "without sufficient guidance for determining the presence or absence of the factor." 112 S. Ct. at 2928. As a result, it must be presumed that the jury weighed an invalid aggravating circumstances in returning a death recommendation. Id. Thus, Eighth Amendment error occurred at Mr. Roberts' trial.

In its Response, the State does not contest the presence of Eighth Amendment error. It instead argues that trial counsel failed to object to the jury instruction. The record shows that claim is FALSE. The judge specifically noted that the

instruction was given over objection ("... atrocious, cruel ... I ruled on that, over the objection of the defense" R. 3242).

Thus, the State's only argument is that counsel failed to use the right words in registering his objection that "case law" had limited and narrowed the aggravating factor (R. 3225). The question is whether such a distinction is fair. Clearly, it is not fair. Mr. Roberts was provided court appointed counsel who was physically and mentally exhausted by a very hard guilt phase trial. He did not have a second chair assisting him, as occurred at Mr. James' sentencing. Nevertheless, he objected to the jury instruction and explained "case law" had limited the scope of the aggravator. He meant his objection to be to the vague and overbroad language of the statute and the instruction.[1]

Certainly, Mr. Roberts did not do anything to waive his Eighth Amendment rights. He relied upon the State to provide him adequate counsel to protect his constitutional rights. According to the State's argument, due to circumstances completely out of

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[1]The State suggests that had Mr. Roberts' counsel been articulate and explained that the instruction was unconstitutional the trial judge may have corrected the error. The State's position is ludicrous. This Court, however, had erroneously ruled otherwise. Vaught v. State, 410 So. 2d 147, 150 (Fla. 1982); James v. State, 453 So. 2d 786 (Fla. 1984). The circuit court undoubtedly would have followed this Court's then binding precedent that the standard jury instruction was adequate.

The State also misrepresents the prosecutor's closing argument. The record shows that the prosecutor's principle argument was that "heinous, atrocious or cruel" was established because the victim, George Napoles, was attacked even if after he was immobile "Whether or not in a coma-like state" (R. 3454). However under this Court's case law, "heinous, atrocious or cruel" cannot be established by acts occurring after the victim is unconscious.

Mr. Roberts' control, the violation of his Eighth Amendment rights should be ignored while Mr. James receives redress. Such a result "would not be fair." James v. State, Slip Op at 3.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 11, 1993.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

THOMAS H. DUNN
Special Assistant CCR
Florida Bar No. 871753

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Fl 32301
(904) 487-4376

By: 
Counsel for Petitioner

Copies furnished to:

Ralph Barriera
Assistant Attorney General
Ruth Bryan Owen Rhode Building
Dade County Regional Service Center
401 NW Second Avenue, Suite 921N
Miami, FL 33128