IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,112

RICKY BERNARD ROBERTS,

Petitioner,

vs.

HARRY K. SINGLETARY,

Respondent.

_____/

RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Respondent, **HARRY K. SINGLETARY**, by and through undersigned counsel, and hereby responds to the petition as follows:

Petitioner seeks to challenge the jury instruction for the aggravating factor of "heinous, atrocious or cruel," claiming the instruction is impermissibly vague, citing Espinosa v. Florida, 112 S.Ct. 2296 (1992). The instruction is the same here (R. 3497) as was held vague in Espinosa, i.e., Florida's then standard HAC instruction. As in Sochor v. Florida, 112 S.Ct. 2114 (1992), the issue is procedurally barred because there was no vagueness or other constitutional challenge to the instruction at trial. The record of the two charge conferences herein (R. 3217-3246, 3429-3438) reveals that defense counsel's only challenge to this factor was that it was inapplicable under the facts of the case. (R. 3225-29).

Petitioner argues that this Court should not apply Florida's procedural default rule because the Espinosa decision constitutes "new law", in the same way as this Court found Hitchcock v. Dugger, 481 U.S. 393 (1987), to constitute new law.

This Court has repeatedly, and in decisions involving State habeas corpus petitions, applied Florida's procedural bar rule to such arguments premised on Espinosa. See Turner v. Dugger, 18 Fla. L. Weekly S30, S32 (Fla. Dec. 24, 1992), where on petition for writ of habeas corpus, this Court held:

> Finally, we note that although the jury was given an instruction on the aggravating circumstances of heinous, atrocious, or cruel similar to that which was recently ruled unconstitutionally vague by the United States Supreme Court in Espinosa v. State, 112 S.Ct. 2926 (1992), Turner failed to object on constitutional or vagueness grounds and thus deprived the trial court of an opportunity to rule on the issue. Turner thus waived the claim. See Kennedy v. Singletary, 602 So. 2d 1285 (Fla. 1992).
>
> (emphasis added).

Similarly in Johnson v. Singletary, ___ So. 2d ___, 18 FLW S90, S91 (Fla. January 29, 1993), again on petition for writ of habeas corpus, this court held:

> Johnson contends that his penalty-phase jury was instructed contrary to the precepts of Espinosa and Sochor, in part because the trial court later found the heinous, atrocious, or cruel factor inapplicable here. We find that this claim is procedurally barred for

> Johnson's failure to object to the instruction based on vagueness or other constitutional defect. Kennedy v. Singletary, 602 So. 2d 1285 (Fla.), cert. denied, 113 S.Ct. 2, 120 L.Ed.2d 931 (1992).

See also Kennedy v. Singletary, 602 So. 2d 1285 (Fla. 1992), cert. denied, ___ U.S. ___, 120 L.Ed.2d 931 (1992) (claim based upon Espinosa procedurally barred, where only objection to jury instruction was to applicability, and not constitutionality; claim not presented on direct appeal); Melendez v. State, 17 Fla. L. Weekly S699 (Fla. November 12, 1992) (claim based upon Espinosa procedurally barred, where issue was waived on direct appeal due to lack of an objection at trial); Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 2119-2120, 119 L.Ed.2d 326 (1992) (pretrial motion attacking constitutionality of aggravating circumstance was insufficient to preserve claim as to constitutionality of jury instruction to which no contemporaneous objection interposed).

In the instant case there was no objection whatsoever to the HAC jury instruction at trial, nor was the issue raised on appeal. The issue is thus procedurally barred. Turner, Johnson, Kennedy, Melendez, Sochor v. Florida, supra.

The State most emphatically asserts that Petitioner's suggestion that Espinosa is as fundamental as the change wrought

by Hitchcock v. Dugger, supra, is without merit. It should first be noted that Hitchcock does not represent this Court's most recent retroactive application of a precedent on collateral attack. In Jackson v. Dugger, 547 So. 2d 1197, 1199 (Fla. 1989), this Court concluded that Booth v. Maryland, 482 U.S. 496 (1987), was entitled to such application, but limited the class of defendants who could secure relief based upon Booth to those who had interposed contemporaneous objections at the time of trial. The error in Booth and the alleged error in Espinosa are similar, i.e., the jury being allowed to consider an improper factor in aggravation, either extraneous to the statute or improperly defined. This similarity indicates that the two precedents be treated alike for retroactivity purposes on collateral attack.

The error in Hitchcock is of an entirely different sort, implicating the entire capital sentencing scheme due to "the sentencer [having been] precluded from even considering certain types of mitigating evidence." See Graham v. Collins, 52 Cr. L. Rptr. 2114, 2118 (U.S. S.Ct. January 27, 1993). Whereas Hitchcock error casts obvious doubt upon the reliability of any prior proceeding, Espinosa error, at most, impacts upon one of eleven statutory aggravating factors which, under the facts of a given case, may or may not have played a role of any importance. Indeed, as specifically noted by the United States Supreme Court, such instructional error is not "fundamental". See Sochor v. Florida, supra, at 119 L.Ed.2d 338, where the Court specifically stated:

> . . .In any event, we know of no Florida authority supporting Justice Steven's suggestion that all federal constitutional error (or even that kind claimed by Sochor) would be automatically 'fundamental'. Indeed where, as here, valid aggravating factors would remain, instructional error involving another factor is not 'fundamental'. [cites omitted]" (emphasis added).

In any given case the lack of a limiting definition for the terms "heinous, atrocious or cruel" may work to the defendant's disadvantage or to his advantage, depending on the definitions attached to these adjectives by the jurors. In virtually all cases, the arguments of both counsel as to HAC will focus on the manner of the killing, specifically whether it caused extensive physical or mental suffering to the victim.[1] The two sides obviously will reach a different conclusion, but the combination of the two arguments can and usually will narrow the jurors' focus to its proper object, i.e., whether the killing was committed in a manner so as to inflict unnecessary torture upon the victim.

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[1] The prosecutor herein argued that the HAC factor was established by testimony of the medical examiner, detailing the pain and suffering of the victim, victim's struggle and defensive wounds, period of consciousness, lingering death, etc. (R. 3453-3457). Defense counsel begins by explaining "That factor is designed for the torture kind of thing" (R. 3489), and argues that the victim went into a coma after initial blows and did not suffer. He gives examples of torture killings and concludes ". . . a torture killing. That's not what we have here." (R. 3490).

It is quite true that the propriety of the instruction must rise or fall on its own merits, however the issue here is not whether the instruction is impermissibly vague, but rather whether such vagueness automatically so infected the reliability of the jury's decision, that this Court will take the extraordinary step of waiving the most basic tenant of appellate review, the requirement of a contemporaneous objection. Such objections were hardly futile gestures, as at the time of the instant trial it was not at all unusual for a trial court to pack some Dixonesque[2] meat upon the bare bones HAC instruction upon the request of counsel, as the variety of nonstandard HAC instructions coming before this Court will attest.

In contrast, the pre-1981 instruction condemned in Hitchcock was not vague. Rather, it specifically limited the mitigating side to the statutory list, thereby tying every defendant's hand behind his back in every case. It may be that the defendant had nothing in his hand to begin with, and his inability to bare his empty palm can be deemed harmless (especially where the State's hand holds the names of two or three other murder victims, etc.). However the effect of the error on the defendant was uniformly negative, and its impact tangible and measurable.

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[2] State v. Dixon, 283 So. 2d 1 (1973).

The net effect of Espinosa error, on the other hand, is completely speculative. It is true that when confronted with this unknown, the Court in Espinosa declared the assumption that the jury relied on an invalid aggravating factor. This assumption is a legal one, made for the purpose of determining error. This assumption does not, as Petitioner suggests, lead to the conclusion that he was placed at a disadvantage, a disadvantage so palpable as to render fundamentally unreliable the jury's vote for death. Petitioner's position is in truth the same view expressed by counsel in Sochor, i.e., that error which potentially could have effected the juror's vote is automatically fundamental. In other words, because death is different, all constitutional errors[3] are fundamental, thus the requirement for a contemporaneous objection is an unjust impediment. The Supreme Court in Sochor rejected this completely unrealistic view, a view evolved from a combination of utopian perfectionism and outright antagonism to the death penalty. A defendant is no more entitled to a perfect sentencing than he is a perfect guilt phase, as perfection and the product of human endeavor are the rarest of bedfellows.

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[3] "Constitutional error", and "constitutional violation" have an imposing ring, but in the penalty phase any error can be termed an eighth amendment violation if it arguably had any possible effect on the decision to impose death.

CONCLUSION

The instant claim is procedurally barred and should be rejected on that basis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS** was furnished by mail to **MARTIN McCLAIN,** Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301 on this 19 day of February, 1993.

RALPH BARREIRA
Assistant Attorney General

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