IN THE SUPREME COURT OF FLORIDA

GREGORY SCOTT LAYMAN, :

Appellant, :

vs. : Case No. 81,173

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

SUPPLEMENTAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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ARGUMENT

ISSUE XII

APPELLANT'S DEATH SENTENCE DOES NOT MEET THE REQUIREMENTS OF FLORIDA'S DEATH PENALTY LAW, OR THE EIGHTH AMENDMENT'S STANDARDS OF RELIABILITY, WHERE THE JURY WAS GIVEN AN UNCONSTITUTIONALLY VAGUE INSTRUCTION ON THE ONLY AGGRAVATING CIRCUMSTANCE WHICH WAS ARGUABLY APPLICABLE.

In Jackson v. State, __So. 2d__ (Fla. 1994) [19 FLW S 215], decided on April 21, 1994, this Court held that the standard jury instruction on the "cold, calculated, and premeditated" aggravating circumstance was unconstitutionally vague. In Jackson, as in the instant case, the jury was instructed that it could consider, if established by the evidence, that "[t]he crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any [pretense] of moral or legal justification" (T965). As this Court wrote in Jackson:

> This standard instruction simply mirrors the words of the statute. Yet, this Court has found it necessary to explain that the CCP statutory aggravator applies to "murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first degree murder" (citation omitted) and where the killing involves "calm and cool reflection" (citation omitted). . . . These explications . . . make it clear that CCP encompasses something more than premeditated first-degree murder.

19 FLW at S 216.

The Court explained:

> A vagueness challenge to an aggravating circumstance will be upheld if the provision

> fails to adequately inform juries what they must find to recommend the death penalty and as a result leaves the jury and the appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)

and noted that "[w]ithout the benefit of an explanation that some 'heightened' form of premeditation is required to find CCP, a jury may automatically characterize every premeditated murder as involving the CCP aggravator." 19 FLW S 216. Also, the standard instruction contains nothing to illuminate the meanings of the terms "cold", "calculated", or "premeditated". "The meaning of each of these terms is particularly important because the CCP factor is not applicable unless the crime was cold, calculated, and premeditated." 19 FLW at S 216 (emphasis in opinion). The Court recognized that these requirements call for a more expansive instruction[1] "to give content to the CCP statutory factor":

> Otherwise, the jury is likely to apply CCP in an arbitrary manner, which is the defect cited by the United States Supreme Court in striking down HAC instructions. See, e.g., Godfrey, 446 U.S. at 428-29. We do not suggest that every court construction of an aggravating factor must be incorporated into a jury instruction defining that aggravator. However, because the CCP factor is so susceptible of misinterpretation and has been the subject of so many explanatory decisions, we cannot say that the current instruction sufficiently informs the jury of the nature of this aggravator.
>
> For all of these reasons, Florida's standard CCP jury instruction suffers the same constitutional infirmity as the HAC-type

[1] An interim instruction fully defining the elements of the aggravating circumstance is contained in footnote 8 of the Jackson opinion.

> instructions which the United States Supreme Court found lacking in Espinosa, Maynard, and Godfrey -- the description of the CCP aggravator is "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928.

Plainly, appellant's jury was given an unconstitutionally vague instruction. Just as plainly, he failed to object to the instruction, and ordinarily this would constitute an insurmountable procedural bar. Jackson, at S 217. However, under the unusual circumstances of the instant case, the procedural bar does not apply. CCP was the only aggravating circumstance that was even arguably applicable to appellant, and the only one which was relied on by the state or submitted to the jury. Since, under Florida law (as well as the U.S. Constitution), death is not a legally permissible sentence in the absence of any valid aggravating factor,[2] the jury could not lawfully have returned a death recommendation unless it found the CCP aggravating circumstance.

Since this Court recognized in Jackson that, after hearing the instruction which was given in this case, a jury was "likely to apply CCP in an arbitrary manner" and could "automatically characterize every premeditated murder as involving the CCP aggravator," then it follows that appellant's very eligibility for a death sentence may have been determined arbitrarily, in violation

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[2] Banda v. State, 536 So. 2d 221, 225 (Fla. 1988); Thompson v. State, 565 So. 2d 1311, 1318 (Fla. 1990); Richardson v. State, 607 So. 2d 1107, 1109 (Fla. 1992); Elam v. State, __So. 2d __ (Fla. 1994)[19 FLW S 175, 176]; Tuilaepa v. California, __U.S.__ (1994) [55 CrL 2244, 2245].

of Furman. As the U.S. Supreme Court recently recapitulated in Tuilaepa v. California, __U.S.__ (1994) [55 CrL 2244, 2245]:

> Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. Coker v. Georgia, 433 U.S. 584 (1977). To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. See, e.g., Lowenfield v. Phelps, 484 U.S. 231, 244-246 (1988); Zant v. Stephens, 462 U.S. 862, 878 (1983). The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both). Lowenfield, supra, at 244-264. As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. See Arave v. Creech, 507 U.S. ___, ___ (1983) (slip op., at 10) ("If the sentencer fairly could conclude that an aggravating circumstance applies to **every** defendant eligible for the death penalty, the circumstance is constitutionally infirm"). Second, the aggravating circumstance may not be unconstitutionally vague. Godfrey v. Georgia, 446 U.S. 420, 428 (1980); see Arave, supra, at ___ (slip op., at 7) (court "must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer") (quoting Walton v. Arizona, 497 U.S. 639, 654 (1990)).

The Tuilaepa Court went on to explain that the eligibility decision fits the crime within a defined classification, while the selection decision requires individualized sentencing broad enough to accommodate relevant mitigating evidence.

In the instant case, CCP was the only "eligibility" factor; without it, no death sentence would have been possible. Yet the jury was given an instruction which failed to satisfy either of the requirements noted in Tuilaepa; it was unconstitutionally vague, and it could have been understood by the jury as applying to every premeditated murder. Jackson, at S 216. As a result, the jury's discretion was not guided by objective factors as required by Furman[3] and countless other Eighth Amendment decisions; rather, the instruction given was so open-ended as to allow an arbitrary and unguided death verdict.[4] Therefore, appellant's death sentence does not meet the Eighth Amendment's standards of reliability,[5] and it cannot constitutionally be carried out.

"'Fundamental error', which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970). The

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[3] Furman v. Georgia, 408 U.S. 238 (1972).

[4] If the jury's death recommendation was constitutionally invalid, then so was the ultimate sentence. Under Florida's hybrid capital sentencing scheme, the jury and the judge are co-sentencers. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); see Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. ___, 120 L. Ed. 2d (1992). "If the jury's recommendation, upon which the trial judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987). See Espinosa, 120 L. Ed. 2d at 859 (. . . "[I]f a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances").

[5] See e.g. Lockett v. Ohio, 438 U.S. 586, 604 (1978); Zant v. Stephens, 462 U.S. 862, 884-85 (1983); Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985); Sumner v. Shuman, 483 U.S. 66, 72 (1987).

error must be "basic to the judicial decision under review and equivalent to a denial of due process." State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993); Mordenti v. State, 630 So. 2d 1080, 1084 (Fla. 1994). In regard to jury instructions, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982); State v. Delva, 575 So. 2d 643, 645 (Fla. 1991). Cf. Sochor v. State, 619 So. 2d 285, 290 (Fla. 1993) ("Failure to give an instruction unnecessary to prove an essential element of the crime charged is not fundamental error").

Under the circumstances of the instant case, appellant's eligibility for a death sentence, and the legality of the sentence itself, turned on the very issue upon which the constitutionally defective instruction was given: CCP. As was acknowledged in Jackson, the instruction was so vague that the jury was likely to apply it in an arbitrary manner, or to find the aggravator automatically, based solely on its earlier finding of the simple premeditation needed to support a conviction of first degree murder.[6] It is therefore entirely likely, under the instruction given, that the jury did not find any valid aggravating factor, yet recommended death based on an invalid finding of CCP. Such a death sentence is not only disproportionate and unreliable, it is illegal under the statute itself. Fla. Stat. §921.141(2)(a), (3)(a), and

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[6] Appellant's conviction was based solely on the element of premeditation. No alternative "felony murder" theory was charged, argued, or instructed upon; nor was there any evidentiary predicate for such a theory.

(5); Banda v. State, 536 So. 2d 221, 225 (Fla. 1988). See also State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973) (the fact that defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation; instead jury must consider "from the facts presented to them -- facts in addition to those necessary to prove the commission of the crime -- whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty).

A death sentence based on a jury recommendation tainted by an unconstitutionally vague instruction on the only arguably applicable aggravating factor is absolutely basic to the decision under review, and amounts to a denial of due process. Hence, the error is fundamental, and can be remedied on appeal even without an objection below. Sanford v. Rubin. Moreover, since without the CCP finding appellant would be ineligible for a death sentence, the error involves a claim of "actual innocence" of the death penalty as delineated in Sawyer v. Whitley, 505 U.S. ___, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992). Imposition of a procedural bar to block consideration of the constitutional issue is inappropriate for this reason as well. As stated in Sawyer, the "actual innocence" exception (which permits review on the merits of procedurally defaulted federal constitutional claims, even without the otherwise required showing of "cause and prejudice"):

> must focus on those elements which render a defendant eligible for the death penalty, and not on additional mitigating evidence which

> was prevented from being introduced as a result of a claimed constitutional error.

120 L. Ed. 2d at 285.[7]

The state may argue that this is not merely a case of failure to object; it is a case where the defendant got what he wanted. Such an argument, if made, will fly in the face of the state's own assertion that "[w]hether Mr. Layman agrees with the state that death is appropriate is irrelevant to the state" (SB47, n.12). It will also run counter to this Court's emphatic statement that the fact that a competent defendant has the right to control his own destiny:

> . . . does not mean that courts of this state can administer the death penalty by default. The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence. A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law.

Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988).

This Court, where appropriate, has not hesitated to reduce death sentences to life imprisonment or to order new sentencing proceedings contrary to the wishes of the defendant. See Klokoc v. State, 589 So. 2d 219 (Fla. 1991); Elam v. State, ___So. 2d___

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[7] The Sawyer Court also noted with approval the Eleventh Circuit's statement in Johnson v. Singletary, 938 So. 2d 1166, 1183 (11th Cir. 1991) that "a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates all of the aggravating factors found to be present by the sentencing body." 120 L. Ed. 2d at 285, n. 15 (emphasis in Johnson opinion). Under Florida's procedure, the jury is a co-sentencer. Johnson v. Singletary, 612 So. 2d at 576; see Espinosa.

(Fla. 1994)[19 FLW S 175]; Farr v. State, 621 So. 2d 1368 (Fla. 1993). It should do so here.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial and reply briefs, appellant respectfully requests that his death sentence be reduced to life imprisonment, or, in the alternative, that the sentence be vacated and the case remanded for a new penalty proceeding before a properly instructed jury.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 27th day of July, 1994.

Respectfully submitted,

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