IN THE SUPREME COURT OF FLORIDA

MATTHEW DALE BOYETT, :

Appellant, :

v. : CASE NO. 81,971

STATE OF FLORIDA, :

Appellee. :

_____/

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, Matthew Dale Boyett, relies on his initial brief to reply to the arguments presented in the State's answer brief, except for the following additions concerning Issue I, II, III, and IV:

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN NOT INSURING BOYETT'S CONSTITUTIONAL AND RULE RIGHTS TO BE PRESENT AT THE SITE WHERE PEREMPTORY CHALLENGES TO PROSPECTIVE JURORS WERE EXERCISED.

On page 5 of the answer brief, the State contends that the record is not clear that Boyett was not at the bench conference where peremptory challenges were exercised. A review of the record sufficiently demonstrates that only counsel for the State and the defense were at the bench. (Tr 185-198) If this Court concludes that the record does not adequately demonstrate that Boyett was not present, Boyett asks that he be afforded the opportunity to clarify and supplement the record before a decision on this issue is made. Fla. R. App. P 9.200(f)(2).[1]

The State should be estopped from arguing that Boyett's absence from the bench conference where challenges to prospective jurors were made was not error. In Coney v. State, 653 So.2d 1009 (Fla. 1995), when faced with the same facts, the State of Florida conceded error. Ibid. at 1013. The State cannot assert otherwise in this case without offending Boyett's right to equal protection of the laws. See, State v. Pitts, 249 So.2d 47, 48-50 (Fla. 1st DCA 1971). This Court noted the State's concession of error in its opinion:

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[1] Fla. R. App. P. 9.200(f)(2) reads:
(2) If the court finds the record is incomplete, it shall direct a party to supply the omitted parts of the record. No proceeding shall be determined, because of an incomplete record, until an opportunity to supplement the record has been given.

> Coney was not present at the sidebar where the initial challenges were made, and the record fails to show that he waived his presence or ratified the strikes. The State concedes that this rule violation was error, but claims that it was harmless.

Ibid. The case was then decided adversely to Coney on the basis of harmless error because only cause challenges were made in his absence. Ibid. Boyett is merely asking this Court to apply the same analysis in his case that this Court used in deciding Coney.

A dispute exists as to what portion of the Coney decision is prospective. Boyett's position is that the entire Coney decision should apply to him since his case was on appeal at the time Coney was decided. Art. I, Secs. 9, 16 Fla. Const.; Amends. V, XIV U.S. Const.; Smith v. State, 598 So.2d 1063 (Fla. 1992). However, the only prospective part of Coney is the requirement that the trial judge certify on the record a waiver of a defendant's right to be present at the bench or a ratification of counsel's action in the defendant's absence. The State contends that the holding that a defendant's right to be present at bench conferences where peremptory challenges are exercised is also a prospective rule. This Court's opinion in Coney supports Boyett's position on this point, not the State's. On the question of whether the defendant had the right to be at a bench conference where peremptory challenges were made, this Court said Fla. R. Crim. P. 3.180(a) meant what it says, and has always said, that a defendant has the right to be present at the immediate location where juror challenges are made. See, Francis v. State, 413 So.2d 1175 (Fla. 1982).

Again, the State conceded error in Coney because the defendant was not present at a bench conference where juror challenges were made and the record was silent as to waiver or ratification. Coney, 653 So.2d at 1013. Surely, the State did not concede error based on a rule yet to be announced.

The decision in Coney was controlled by precedent existing before Coney came to court. Boyett is entitled to a new trial on that same law applied in Coney without regard to the prospective certification requirement announced in the Coney decision. In other cases where this Court has established new procedural rules to be applied prospectively, the error in the case was evaluated in accordance with the pre-existing law. E.g., Valentine v. State, 616 So.2d 971 (Fla. 1993); State v. Johans, 613 So.2d 1319 (Fla. 1993); Elam v. State, 636 So.2d 1312 (Fla. 1994); Koon v. Dugger, 619 So.2d 246 (Fla. 1993); Jackson v. Dugger, 633 So.2d 1051 (Fla. 1993); Huff v. State, 622 So.2d 982 (Fla. 1993). Boyett is asking this Court to apply the law which was in existence before Coney decision.

The prospective rule established in Coney concerning certification on the record of a waiver or ratification of counsel's actions was not applied in Coney. This Court need not apply that rule here in order to reverse Boyett's conviction.

ISSUE II

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The State incorrectly contends that Boyett did not argue that the homicide was not committed in a "cold" manner. State's brief, at 16, n. 8. Boyett did, indeed, argue that this element was not established in his Initial brief at pages 36-37. Due to his mental impairments and acute distress at the time, Boyett was not capable of formulating a plan to kill after "cool, calm reflection." See, Initial brief, at 36-37. As argued in the initial brief, the evidence failed to establish any of the four elements required for the CCP aggravating circumstance.

ISSUE III

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN FAILING TO FIND, CONSIDER AND PROPERLY WEIGH STATUTORY AND NON-STATUTORY MITIGATING CIRCUMSTANCES ESTABLISHED BY THE EVIDENCE.

Boyett relies on the Initial brief to reply to the State's arguments on this issue. However, on page 33 of the answer brief, the State has quoted the trial court's sentencing order with a paragraph omitted. In the Initial brief, page 1, footnote 1, Boyett points out that two sentencing orders were filed in this case. The first one omitted paragraph 10 under the section dealing with nonstatutory mitigating circumstances. (R 253-259) On the same day, the trial court filed an amended order which corrected this clerical error. (R 260-267) The State incorrectly quoted from the first sentencing order with the missing paragraph. Paragraph 10 of the amended order reads:

> 10. Defendant had an unstable, broken family life. This factor has been established and will be given due weight by the Court.

(R 265).

ISSUE IV

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF A SENTENCE OF LIFE IN PRISON AND IN IMPOSING A DEATH SENTENCE SINCE VALID MITIGATING CIRCUMSTANCES WERE ESTABLISHED WHICH FORMED A REASONABLE BASIS FOR THE JURY'S SENTENCING DECISION.

Boyett relies on the initial brief to respond to the State's arguments on this point along with the following additions:

On pages 47-48 of the answer brief, the State contends that the jury's life recommendation may have been improperly influenced by improper argument by defense counsel. Initially, the Assistant State Attorney trying this case did not find counsel's argument improper because he did not object. (Tr 597) He did not object for a good reason, defense counsel's argument was entirely proper and truthful. Now, on appeal, the State suggests the argument was improper because,

> The State of Florida does not kill defendant's lawfully sentenced to death, and any suggestion to the contrary was highly improper.

Answer brief, at 48. The premise of this argument is incorrect since death sentenced individuals in this state are, indeed, killed by the State of Florida.[2]

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[2] Since 1976, the State of Florida has killed 36 death sentenced individuals: John Spinkellink; Robert Sullivan; Anthony Antone; Arthur Goode; James Adams; Carl Shriner; David Washington; Ernest Dobbert; James Henry; Timothy Palmes; James Raulerson; Johnny Witt; Marvin Francois; Daniel Thomas; David Funchess; Ronald Straight; Beauford White; Willie Darden; Jeffrey Daugherty; Ted Bundy; Aubry Adams; Jessie Tafero;

(continued...)

On pages 48-49 of the answer brief, the State argues four cases as comparable to Boyett's which demonstrate that a death sentence is proportionally warranted. Cook v. State, 581 So.2d 141 (Fla. 1991); Brown v. State, 565 So.2d 304 (Fla. 1990); Freeman v. State, 563 So.2d 73 (Fla. 1990); Hudson v. State, 538 So.2d 829 (Fla. 1989). However, each of these cases have major distinguishing factors. First, each of these cases had a jury recommendation of a death sentence. Second, each of these cases had as an aggravating circumstance a previous conviction for violent felony. Cook, (previous conviction for murder); Brown, (previous conviction for attempted murder); Freeman, (previous conviction for murder); Hudson, (previous conviction for sexual battery). Noteworthy is the fact that in a least one of these cases, the previous murder conviction was the determining factor. In Freeman, the prior murder conviction was for a crime which was almost identical factually. However, in that case, there was no prior murder aggravator and the jury recommended life. On appeal this Court disapproved the judge's override of the life recommendation. Freeman v. State, 547 So.2d 125 (Fla. 1989). Finally, none of these cases involved a situation where the defendant and the victim had prior confrontations with one another. Cook; Brown; Freeman; Hudson.

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[2](...continued)
Anthony Bertolotti; James Hamblen; Raymond Clark; Roy Harich; Bobby Francis; Nollie Martin; Edward Kennedy; Robert Henderson; Larry Johnson; Michael Durocher; Roy Stewart; Bernard Bolender; Jerry White; and Phillip Atkins.

The trial court's decision to override the jury's recommendation cannot be sustained. Boyett urges this Court to reverse his death sentence.

CONCLUSION

For the reasons presented in the Initial Brief and this Reply Brief, Matthew Dale Boyett asks this Court reverse his conviction for a new trial, or alteratively, to reverse his death sentence and remand for imposition of a sentence of life imprisonment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by U.S. Mail ~~delivery~~ to Gypsy Bailey, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. Matthew Boyett, on this 2d day of February, 1996.

Respectfully submitted,

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