IN THE SUPREME COURT OF FLORIDA

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JUL 11 1990
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CHARLES KENNETH FOSTER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

CASE NUMBER: 82, 335

APPEAL FROM SENTENCE OF DEATH, CIRCUIT COURT FOR THE 14TH JUDICIAL CIRCUIT BAY COUNTY, FLORIDA

SUPPLEMENTAL BRIEF FOR APPELLANT

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STATEMENT OF THE CASE

This supplemental brief is presented in accordance with this Court's order of June 15, 1994. The order permitted Mr. Foster to brief the issue decided in *Andrea Jackson v. State*, the unconstitutionality of the cold, calculated and premeditated (CCP) aggravator. The statement of the case and facts in Mr. Foster's initial brief filed in this case suffice for this brief.

SUMMARY OF THE ARGUMENT

At Mr. Foster's most recent penalty phase trial, he objected to the standard cold, calculated and premeditated instruction and offered the trial court a substitute. The trial court, at that time, rejected Mr. Foster's proposed instruction and gave the standard. In his appeal to this Court, the giving of the standard instruction was upheld. *Foster v. State*, 614 So.2d 455, 462 (Fla. 1992) This Court has now decided *Andrea Jackson v. State*. Mr. Foster is entitled to the benefits of this decision because his conviction is not yet final.

In addition, the giving of this instruction was harmful error. The CCP aggravator was one of three that the State presented evidence on and argued to the jury. The issue of premeditation was hotly disputed by the parties. While there

was evidence a robbery was planned, the evidence of a conscious decision to kill before the killing was controverted.

A properly instructed jury may have either not found this aggravator or given it little weight. This aggravator requires evidence of "heightened premeditation . . ., which must bear the indicia of 'calculation.'" "Calculation", defined as a "careful plan or prearranged design . . ." *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), was notably in dispute in Mr. Foster's case.

Given the closeness of the jury vote and the substantial amount of mitigation presented to the jury, this error cannot be considered harmless.

ARGUMENT

I.

THE CCP INSTRUCTION GIVEN AT THE PENALTY PHASE TRIAL WAS UNCONSTITUTIONAL

The trial judge gave the following instruction at trial.

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any presentence of moral or legal justification.
>
> I further instruct you that the defendant's conviction for first degree, premeditated murder is insufficient in and of itself to require a finding that the homicide was cold, calculated and premeditated for the purpose of this aggravating circumstance. (R-1523)

The first paragraph is the standard instruction found unconstitutional in *Andrea Jackson v. State,* 19 Fla. L. Weekly, S215 (Fla. 1994) The second paragraph adds nothing to adequately explain the real meaning of the CCP aggravator. It implies that there must be something more than premeditation, but it provides no guidance as to what that something more must be.

Mr. Foster objected to this instruction, arguing

> there has to be a distinction between what Mr. Paulk keeps referring to as premeditated murder for purposes of guilt and the heightened premeditation needed for this aggravating factor. (R-1431)

The distinction identified by Mr. Foster was in his proposed written jury instruction, offered during the charge conference. (R-1921, 1940) The written instruction

tracked the interpretive gloss placed on the CCP instruction by this Court in *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987) The trial court declined to give this instruction to the jury. (R-1940) This was error.

II.

THE ERRONEOUS CCP INSTRUCTION WAS NOT HARMLESS

This Court's standard to review a claim for harmless error is whether the state can show beyond a reasonable doubt that the error did not contribute to the verdict. *Hitchcock v. State,* 614 So.2d 483, 484 (Fla. 1993) The focus must be on the impact of the error on the jury. *Stringer v. Black,* 112 S.Ct. 1130, 1136 (1992)

The harmless error concept in Florida is the consequence of a marriage of due process and judicial economy. *State v. DiGuilio,* 491 So.2d 1129, 1135 (Fla. 1986) Permitting constitutional errors to be harmless requires a strict adherence to focusing "on the effect of the error on the trier-of-fact."

> The test is not a sufficiency of the evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or ever an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence.

State v. DiGuilio, 491 So.2d at 1139.

Any analysis must take into account that a penalty phase determination includes the imprecise weighing component by the jury. "Florida's capital sentencing scheme does not require that the jury make express findings in

aggravation . . ." *Ventura v. State*, 560 So.2d 217, 222 (Fla. 1990) While the jury's role is specifically delineated, in practice it is impossible to know how it went about reaching its decision. Moreover, determination of an appropriate penalty does not involve simply counting aggravators and mitigators. Accordingly, a jury's role in weighing aggravation against mitigation must involve accurate guidance with respect to these factors. *Floyd v. State*, 497 So.2d 1211, 1215 (Fla. 1986) Otherwise, as this Court said in Floyd, the process is "incomplete." There is no contemporaneous recordation of (1) whether the jury found the existence of this aggravator at all and if it did, (2) how much weight it assigned to it in arriving at the recommendation of death.

The jury's understanding and consideration of aggravating factors may lead to a life recommendation because the aggravators themselves are insufficient to justify a sentence of death.

The United States Supreme Court recognized that the use of an improper aggravating factor in a weighing state (like Florida's) has the potential for great harm.

> Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. 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 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 than he might otherwise be by relying upon the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in Zant that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Stringer, 112 S.Ct. at 1139.

In *Keen v. State*, 19 Fla.L.Weekly S243 (Fla. May 5, 1994), Keen was convicted of killing his wife and sentenced to death. During their deliberations, some jury members read a magazine article concerning the "tactics of defense attorneys who demeaned a victim's character and made personal attacks on the prosecutors." Parts of the article had been underlined and highlighted. Even though the record in Keen's case did not have in it comparable issues, this Court found that it could not "say beyond a reasonable doubt that the article did not influence jurors in some way."

The significance of this aggravator cannot be understated. It has been interpreted to apply to those

killings where there was a "careful plan or prearranged design" to kill someone. *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987)

This aggravator is "reserved primarily for those murders which are characterized as execution or contract murders or witness - elimination murders." *Floyd v. State*, 497 So.2d 1211, 1214 (Fla. 1986) It "is not to be used in every premeditated murder prosecution."

In *Rogers*, he and another person rented a car and got two .45 caliber semi-automatic handguns. The two went driving and looked over a couple of grocery stores to rob. They settled on a Winn-Dixie. Prior to the robbery, Rogers and the other person put on rubber gloves and nylon-stocking masks. Once inside the store, the other person told a cashier to open her register. When the cashier could not, the two left the store, Rogers trailing behind. The other person heard three shots. Rogers admitted that he shot someone.

This Court reversed the trial court's finding that the killing was cold, calculated and premeditated. "There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery." *Rogers*, 511 So.2d at 533.

The trial court found this aggravator, relying on the following facts:

1.

Mr. Lanier did not die an instantaneous death; was beaten badly before he died and told the victim he was going to kill him.

This Court has specifically rejected the CCP aggravator when "[the defendant's] actions took place over one continuous period of physical attack", *Campbell v. State,* 571 So.2d 415, 418 (1990), even if there are brief interludes between phases of the assault.

In *Farinas v. State,* 569 So.2d 425, 427 (Fla. 1990), Farinas shot the victim once from a distance. He walked over to her and tried to shoot her again but failed because the gun jammed. Farinas got the gun unjammed, fired two more shots, killing the victim. Despite the respite in the assault between the first and subsequent fatal shots, it did not give Farinas "time to contemplate his actions, thereby establishing heightened premeditation." *Farinas,* 567 at 431.

In *Jackson v. State,* 530 So.2d 269, 270 (Fla. 1988)

> Jackson grabbed Moody [the victim] and put a knife to his neck . . . [He] then forced Moody to the floor and directed [a third person] to remove his wallet and keys. As the sixty-four year old Moody begged for mercy, he was bound, gagged, and then choked with a belt until he was unconscious. After Moody regain consciousness, Jackson beat him in the face with a cast on his forearm and then straddled his

> body and repeatedly stabbed him in his chest.

The repeated efforts to kill the victim after Jackson discovered he was not dead, coupled with interludes during which Jackson thought the victim was dead, makes Jackson indistinguishable from Mr. Foster's case. A properly instructed jury could have reached the same conclusion as this court; that the aggravator did not apply. See also *Thompson v. State*, 565 So.2d 1311, 1318 (Fla. 1990)

2.

Mr. Foster said he was going to rob Mr. Lanier.

This factor has been expressly rejected by this Court as evidence to establish this aggravator. See *Harvey v. State*, 529 So.2d 1083, 1087 (Fla. 1988) (Harvey, planning a robbery, cut the phone lines before going into the victim's home but this was not sufficient to "demonstrate a prearranged plan to kill".) A jury could have made the same mistake without the proper instruction.

3.

Mr. Foster switched his ring, with a "K" on it, for another ring so as not to leave the "K" impression on Mr. Lanier's skin.

This is the only evidence which might establish this circumstance. The prosecutor argued this evidence as

> [Mr. Foster] goes to Juanita, says, hey, I got this ring with a "K" on it, let me borrow your big Notre Dame class ring. Why is he doing that?

> Because he is going to be beating somebody with that ring. He does not want to leave that "K" impression in the skin which will be a telltale sign as to who has done this.
>
> Now, if he has no intent at that time to kill Mr. Lanier after he robs him, what difference would it make if he left the "K" impression on Mr. Lanier's head, forehead or body. It would make none because Mr. Lanier would be alive today to testify that that man is the one.
>
> No, he took that branding iron off his hand so he would not leave a telltale sign or a clue on that dead body. He intended right at that point in time to kill this man.

(TR-1463)

The source of the prosecutor's argument was the testimony of Juanita Rogers. As it relates to this subject, her testimony was:

> Q. Now, then did Kenny have your ring on, this Notre Dame class ring at the time he was beating the old man?
> A. Yes.
> Q. Did you ask him anything about that?
> A. After he did it I said was that what you wanted my ring for and he said yes. I said, well, let me have it back.
> Q. Why didn't he use his own ring?
> A. I don't know. His ring, you know, was harder than mine.
> Q. Did you ask him about why he didn't use his own ring?
> A. Yes.
> Q. What did he say?
> A. He said because it would have left "K"'s all over him and they would have known it was me.

(R-969-70) (emphasis supplied)

The testimony contains a critical ambiguity. Asked the same question twice, Ms. Rogers gave two different answers. The first answer implied that the purpose for the exchange of the rings was to protect Mr. Foster's finger or hand during the beating of Mr. Lanier. This answer is consistent with Ms. Rogers out-of-court statements to Connie Thames that Mr. Foster exchanged rings with her during the assault, not before.

The second answer, the one argued to the jury by the prosecutor, implied that Mr. Foster did not want to be identified as the assailant. When crucial evidence of heightened premeditation is susceptible to "equally reasonable" inferences --one establishing heightened premeditation and another inconsistent with such a finding -- "the evidence does not support beyond a reasonable doubt a finding that this aggravating circumstance exists." *Thompson v. State,* 565 So.2d at 1318.

4.

Mr. Foster's prior trial testimony stated that the killing "was premeditated and I intended to kill him."

Mr. Foster's witness stand confession that the killing was "premeditated" and "I intended to kill him," establishes nothing more than simple premeditation. It does not in any way establish when Mr. Foster formed the intent to kill or that the intent to kill was formed in "a careful plan or

prearranged design." *Rogers*, 511 So.2d at 533.

Although last on the statutory list of three available aggravators to argue, the prosecutor chose to argue the cold, calculated one first. In his argument, he assigned this aggravator 50 points on his weighing scale. (TR-1457) This was 2 1/2 times the amount he assigned the robbery aggravator and 1/2 the amount assigned the heinous, atrocious aggravator. (TR-1458) Obviously, the prosecutor thought this aggravator was of major importance to the jury.

The prosecutor had an extremely difficult time articulating the correct legal standard. At one point he argued - "The judge will tell you just by virtue of the fact that when this defendant was found guilty of premeditated murder is not enough. It's got to be cold and calculated and extensively or not extensively premeditated but thought out." (TR-1462) His final words to the jury on this aggravator were "Is that premeditated? Is that cold and calculated? Is that reflective? You bet it is." (TR-1467)

"The burden to show the error was harmless must remain on the State. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict then the error is by definition harmful." *State v. Diguilo*, 491 So.2d at 1139.

On the prior appeal in this case, one member of this court found that the State had not proved this aggravator

beyond a reasonable doubt. *Foster v. State*, 614 So.2d 455, 468 (Fla. 1993) (Kogan, J. concurring in part and dissenting in part).

A review of the record shows that it is reasonably possible that the jury recommendation's was influenced by the unconstitutional aggravator. At the charge conference itself, defense counsel pointed out the failings of the standard language and how it would affect the jury.

Another factor this Court considers is the closeness of the jury vote. See *Morgan v. State*, 515 So.2d 975, 976 (Fla. 1987) (jury recommendation vote 7-5) *Way v. Dugger*, 568 So.2d 1263, 1266 (Fla. 1990) (7-5 vote) As Way says, "we cannot be certain that had the jury been properly instructed, one additional juror would not have voted for life."

A jury recommendation of life in Mr. Foster's case would have altered the landscape of any death sentence judgment imposed by the trial court. In Mr. Foster's case, only two votes would have had to change to have this result.

In Mr. Foster's case substantial mitigating evidence establishing statutory and nonstatutory mitigating factors was presented at the penalty phase. A life recommendation would not survive an override challenge in this court.

CONCLUSION

For the reasons expressed in this initial brief, Mr. Foster requests this Court to vacate his sentence of death and impose a sentence of life imprisonment with no possibility of release for 25 years.

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CERRTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by to **Mark Menser**, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 this 11th day of July, 1994.

_____
STEVEN L. SELIGER