OA 10-4-94

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

McARTHUR BREEDLOVE,

Appellee.

CASE NO. 82,731

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

Appellant continues to rely upon the Statement of the Case and Facts set forth in the Initial Brief, and would note that the lengthy presentation in the Answer Brief (Answer Brief at 1-33) contains no specific disagreement with that set forth by Appellant. Cf. Fla.R.App.P. 9.210(c). Because Appellee has, however, elsewhere disputed certain factual averments in the Initial Brief, Appellant would clarify such at this time.

In the Initial Brief, Appellant represented that Dr. Center, a defense psychologist, had stated on cross-examination that he "had found no evidence that Breedlove suffered from brain damage." (Initial Brief at 8). Appellant also represented, in the Argument Section of the brief, "None of the defense experts expressly testified that the statutory mitigating circumstances pertaining to mental state applied", although "there was mitigation presented." (Initial Brief at 31). In the Answer Brief, collateral counsel accuse the state of "grossly mischaracteriz[ing] the penalty phase testimony" (Answer Brief at 67), and maintain that the defense experts "testified that the statutory mental health mitigating factors did apply." (Answer Brief at 69); Breedlove also maintains that one of the state experts, Dr. Mutter, "testified favorably regarding the statutory mental health mitigators." (Answer Brief at 74). Counsel for Appellee argue that they "must" correct the State's misrepresentation of Dr. Center's testimony, and aver that it "could not have been more clear" that Dr. Center testified that test results established that Breedlove suffered from organic brain damage (Answer Brief at 70-1 n.10).

While this factual dispute is unlikely to play any significant part in this court's resolution of the instant appeal, Appellant would nevertheless re-affirm the positions advanced in the Initial Brief. When the overall testimony of the defense experts definitely can be said to relate to the statutory mitigating circumstances at issue, it remains the state's position that none of the three witnesses - Drs. Center, Levy, or Miller - ever expressly stated that §§921.141(6)(b) or (f) applied. Specifically, Dr. Center, the initial expert, stated only that he had an opinion as to whether Breedlove suffered from an extreme mental or emotional disturbance, and that such opinion was that he could infer from the information that he had that Breedlove had "emotional problems" (3PCR 61); likewise, the expert stated that his opinion, as to whether Breedlove's capacity to conform his conduct to the requirements of the law was substantially impaired, was that Breedlove had "definite impairment" (3PCR 62).

Drs. Levy and Miller similarly offered testimony that could be used to support an argument that the statutory mitigating factors applied, but, again, in the state's view, did not expressly advise the judge or jury that they did (3PCR 79-81; 105-6); Dr. Miller did state, at one point, that it was "impossible" for him to tell the defendant's mental condition at the time of the offense "with respect to extreme disturbance or substantial impairment." (3PCR 118). As to Dr. Mutter, the state expert, collateral counsel's view that his testimony was "favorable" in regard to the application of these statutory

factors would seem fanciful in the extreme; the direct examination of this witness concluded with the following:

> Q. Let me ask you this: Again, referring to what is marked as State's Exhibit No. 1 for purposes of this hearing, did you find that the crime for which the defendant is to be sentenced -- that being murder in the first degree -- that the act was committed under the influence of extreme mental or emotional disturbance, in your evaluation from your examination in this case?
>
> A. No, I think he always had difficulty, but I wouldn't call it extreme.
>
> Q. What would be your opinion as to the capacity of the defendant to appreciate the criminality of his acts, or if his ability to conform his conduct to the requirement of the law was substantially impaired?
>
> A. No. I do not feel it was substantially impaired. (3PCR 144).

Finally, as to the matter of Dr. Center and his test results, it "could not be more clear" that it is counsel for Breedlove who has misstated the record. Although opposing counsel maintain that Center's test results established that Appellee "suffered from organic brain damage" (Initial Brief at 71 n. 10), the following exchange, which has been omitted from the Answer Brief, sheds a different light on the subject:

> Q. You are not in a position, is it correct, to offer a medical opinion as to whether McArthur Breedlove has any sort of brain damage, are you?
>
> A. No, sir.
>
> Q. You mentioned something about brain dysfunctions.
>
> A. Yeah. Brain dysfunction.
>
> Q. Can you tell us what you mean by that in layman's terms.

A. Right. The test is measuring the behaviors that a person has; behavior like the insight concept and motor skills.

Q. It does not measure whether or not he has any organic brain problem. Is that true?

A. That inference would not be made -- The test has validity in making that inference, but I would not make that inference. (3PCR 63) (emphasis supplied).

SUMMARY OF ARGUMENT

For the reasons set forth in the Initial Brief and the instant Reply Brief, the circuit court's granting of Breedlove's third motion for post-conviction relief, such holding premised upon a perceived violation of Espinosa v. Florida, ___ U.S. __, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), was error. The jury instruction claim was not cognizable for collateral review and, as this court's prior opinion in Breedlove's direct appeal makes plain, any jury instruction error in this case was harmless beyond a reasonable doubt. This brief constitutes a reply to the primary arguments advanced by Breedlove in the Answer Brief.

ARGUMENT

THE CIRCUIT COURT'S GRANTING OF BREEDLOVE'S SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF, BASED UPON AN ALLEGED VIOLATION OF ESPINOSA v. FLORIDA ___ U.S. ___, 112 S.CT. 2926, 120 L.ED.2D 854 (1992), WAS ERROR; NO ERROR WAS PRESERVED AT TRIAL, AND ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

In the Initial Brief, Appellant contended that the circuit court had erred in three respects in granting Breedlove's third motion for post-conviction relief; the state maintains that Breedlove's jury instruction claim was not preserved at trial (and, accordingly, was not cognizable on collateral attack), that any error was harmless beyond a reasonable doubt, and that, in the 1992 direct appeal, this court in fact, "cured" any jury instruction error. Appellee disputes each of these contentions, on procedural and substantive grounds, and Appellant will reply to Breedlove's arguments in the same order as set forth in the Initial Brief.

(A) Breedlove's Claim For Relief, Under Espinosa v. Florida, Was Not Cognizable On Collateral Attack, Because No Jury Instruction Error Was Preserved At Trial

Appellee contends that Breedlove properly preserved the jury instruction claim, under James v. State, 615 So.2d 668 (Fla. 1993), by virtue of the fact that defense counsel: (1) filed a pretrial motion attacking the constitutionality of the statute; (2) stated during the charge conference that he "renewed all our prior motions"; (3) objected to certain testimony at the penalty phase, and cited to Cooper v. State, 336 So.2d 1133 (Fla. 1976) and (4) submitted an alternative jury instruction on the heinous, atrocious or cruel aggravating circumstance (Answer Brief at 41-

53). The state continues to maintain that, even when considering all of these actions in combination, Breedlove still failed to accomplish the purpose of the contemporaneous objection rule - to put the trial court on notice of a claim of constitutional error and to afford the court an early opportunity to correct such. Cf. Castor v. State, 365 So.2d 701 (Fla. 1978); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594, (1977). Accordingly, it was error for the circuit court to have granted relief on Breedlove's claim based upon Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992).

As to the pretrial motion, Appellee has failed to discuss, or distinguish, such precedents as Ferguson v. Singletary, 632 So.2d 53, 56 (Fla. 1993) or Espinosa v. State, 626 So.2d 165, 167 (Fla. 1993) (cited in the Initial Brief at 23), in which this court held that pretrial motions of this type are insufficient to preserve claims of jury instruction error; in Espinosa, the defendant's pretrial motion sought to exclude consideration of the aggravating circumstance by the jury, on the grounds of vagueness. It is highly questionable the extent to which the motion sub judice can be said to relate to anything other than the statute, and it should be noted that, at most, the motion alleged, "Almost any capital felony would appear especially cruel, heinous and atrocious to the layman, particularly any felony murder." (OR 49-55) (emphasis supplied); this last reference to felony murder, which has been omitted from the quotations in the Answer Brief, suggests that defense counsel's position was that the aggravating circumstance at issue was

applied overbroadly, to every felony murder, as opposed to one too vaguely defined, to be understood by anyone.

Inasmuch as the pretrial motion says nothing about the vagueness of the jury instruction on this aggravating factor, counsel's "renewal" of such at the charge conference has no relevance to this proceeding. Counsel's reference to allegedly unconstitutional jury instructions at that time, no doubt related, as his next statement clearly indicates, to those jury instructions in regard to the mitigating circumstances; in light of Breedlove's specific objection, inter alia, the trial court modified the standard jury instructions on mitigation, to encompass the holding of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (OR 51-3; 3PCR 17-21, 3PCR 120-2). As to defense counsel's citation to Cooper during an unrelated evidentiary objection, the state cannot see how such fact could preserve a jury instruction claim; if this case involved a claim of ineffective assistance of counsel, it is highly doubtful that collateral counsel would be taking their present position in regard to preservation.

Accordingly, as represented in the Initial Brief, the only conceivable way in which Breedlove's jury instruction claim could be regarded as preserved would be through his submission of an alternative jury instruction on this aggravating factor; contrary to any misrepresentation in the Answer Brief (Answer Brief at 47), this statement, as should be readily apparent, was simply a recognition that, in the absence of any contemporaneous objection to the instruction given, Breedlove's action in this

regard would constitute his only hope for falling within the holding of James. Despite the earnest arguments of Appellee, this matter remains unpreserved. The alternate instruction submitted by Breedlove is one sentence long, contains no definition of any of the statutory terms, and comprises only the last sentence of what has been regarded as the "Dixon" instruction (3PCR 543); this court's opinion in Atwater v. State, 626 So.2d 1325, 1328 n.3 (Fla. 1993), sets forth the full instruction based upon State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Appellee has cited no legal authority for the proposition that this instruction, standing alone, would have been sufficient, and the record contains no request by Breedlove's counsel that the proposed instruction be added to the instruction actually given. Cf. Street v. State, 19 Fla. L. Weekly S.159, 161 (Fla. March 31, 1994) (defendant failed to preserve Espinosa issue, where his requested instruction on aggravating circumstance was deficient).

The State respectfully suggests that, before a defendant such as Breedlove, whose conviction and sentence have been final since 1982, can be eligible for collateral relief more than a decade later, the preservation of his claim should be unambiguous and beyond dispute. Here, the best that collateral counsel can do is to perform something of a treasure hunt, and to string together various words and actions of trial counsel so that, years later, a contemporaneous objection can be inferred. This is simply insufficient. How difficult would it have been for defense counsel, in 1979, to have simply said, "Judge, the

standard instruction on this aggravating circumstance is unconstitutionally vague"? Had counsel done so, the court might well have revised the instructions, as it did in regard to that involving the mitigating circumstances, following defense counsel's argument; the fact that defense counsel may prefer another instruction to that contained in the standard instructions hardly constitutes an objection that the standard instruction is per se deficient. Cf. Griffin v. State, 372 So.2d 991 (Fla. 1st DCA 1979). Because the trial court in 1979 was never placed on notice that any constitutional infirmity lay with this jury instruction, it was error for Judge Levenson to have awarded Breedlove relief on this claim, and such ruling be reversed.[1]

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[1] Collateral counsel also argue that the fact that the issue was raised on appeal "must be taken as a concession that the issue was raised at trial, given the fact that issues may not be properly raised on appeal unless they have been preserved at trial." (Answer Brief at 55). In a perfect world, this argument might have some validity, but, of course, appellants often present unpreserved issues on appeal, and, as a result, this court has promulgated a substantial body of caselaw on the issue of procedural bar. See, e.g., Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982); Bertolotti v. State, 565 So.2d 1343, 1345 (Fla. 1990). Appellee also suggests that because the state did not assert procedural bar during Breedlove's 1980 direct appeal, it is now somehow precluded from doing so, under Cannady v. State, 620 So.2d 165 (Fla. 1993) (Answer Brief at 55). This argument is fallacious for a number of reasons. First of all, as the state has previously maintained, Breedlove's presentation of the jury instruction issue on appeal was essentially ancillary to his ultimate view that the finding of the aggravating circumstance itself had been erroneous (T 37-8); accordingly, counsel for the state in 1980 could reasonably have confined himself to answering the primary issue presented, and, in light of the lack of trial objection, could have perceived the subsidiary jury instruction issue as one not deserving of his attention. Furthermore, it should be noted that, the state was not the only party who did not address Breedlove's jury instruction claim in 1980; this court's opinion, Breedlove v. State, 413 So.2d 1 (Fla. 1982), makes no mention of it, a

(B) Any Espinosa Error In This Case Was Harmless Beyond A Reasonable Doubt, Under The Precedents Of This Court

In the Answer Brief, collateral counsel contend that the trial court's granting of relief was correct, under such precedents as Hitchcock v. State, 614 So.2d 483 (Fla. 1993), James v. State, supra, and Jackson v. State, 19 Fla. L. Weekly S.215 (Fla. April 21, 1994), the latter case involving the jury instruction on the cold, calculated and premeditated aggravating factor. Appellee also maintains that the state "does not once mention the proper harmless error standard itself", and has, in fact, "grossly misrepresented the record and the arguments presented below." (Answer Brief at 57). Appellee criticizes the State for noting the existence of other aggravation, and restates his position that, under Hall v. State, 541 So.2d 1125 (Fla. 1989), the question of harmlessness of constitutional error is whether a properly instructed jury "could have recommended life" (Answer Brief at 66-7). As in the prior section, Appellant respectfully maintains the positions advanced in the Initial Brief, and further maintains that Judge Levenson failed to properly follow the law in granting relief to Breedlove.

This court has, as of the composition of this pleading, previously decided over fifty (50) cases in which a claim based upon Espinosa has been presented; this court has granted relief in two such cases involving the heinous, atrocious or cruel jury

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surprising result, if, in fact, the claim had been properly presented. Using Breedlove's logic, one could argue that this court's failure to discuss Breedlove's claim on the merits in 1982 should have precluded the circuit court from doing so in 1993. This claim is procedurally barred.

instruction - James and Hitchcock. While it is understandable that Breedlove would rely upon these two precedents, it cannot be said that such cases enunciate the definitive harmless error analysis in regard to Espinosa error. Rather, in each case, this court held that relief was appropriate, because it "could not tell" the effect of the jury instruction error, Hitchcock, or "could not say beyond a reasonable doubt" that the error was harmless, James. These are conclusions of law, and not exponations of legal analysis. As noted in the Initial Brief, and undisputed (and unacknowledged) in the Answer Brief, the harmless error analysis must often employed by this court in regard to Espinosa error, is whether the homicide "was heinous, atrocious or cruel under any definition of the terms." See, e.g., Henderson v. Singletary, 617 So.2d 313 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct. 1891, 123 L.Ed.2d 507 (1993); Thompson v. State, 619 So.2d 261, 267 (Fla.), cert. denied, ___ U.S. ___, 114 S.Ct. 445, 126 L.Ed.2d 378 (1993); Davis v. State, 620 So.2d 152, 153 (Fla. 1993); Stewart v. State, 632 So.2d 59, 61 (Fla. 1993). If this court determines, based upon the facts and all other circumstances in the case, that the above criterion has been met, then any jury instruction error is deemed to be harmless beyond a reasonable doubt.

For the reasons set forth in the Initial Brief, application of this legal standard dictates that relief should have been denied to Breedlove, inasmuch as this homicide, was, "heinous, atrocious or cruel under any definition of the terms"; as noted earlier, this court has relied upon its approval of the heinous,

atrocious or cruel aggravating circumstance in Breedlove's case in affirming other sentences of death. See e.g., Bundy v. State, 455 So.2d 330, 350 (Fla. 1984); Davis v. State, 461 So.2d 67, 72 (Fla. 1984); Perry v. State, 522 So.2d 817, 820-1 (Fla. 1988). Although opposing counsel continues to describe this offense as one involving a "single stab wound" (Answer Brief at 64), the record, of course, indicates that it involved a great deal more. Given the presence of defensive wounds on the victim's hands, it is clear that he struggled for his life; the surviving victim also had defensive wounds, as well as a wound above her eye (OR 731, 764, 772-3). The fatal blow, administered with an eight and three quarter inch knife was struck with such force that it broke the victim's collarbone, and drove the knife completely through the victim's body, resulting in great pain, and causing him to literally drown in his own blood. This was not a garden variety stabbing, and, as this court found in Breedlove's direct appeal, this crime, which occurred in the victim's home at the dead of night, is "far different from the norm of capital felonies", and is "set apart" from other crimes. Breedlove, 413 So.2d at 9. The facts of this case clearly demonstrate the applicability of this aggravating factor under any correct definition, see State v. Salmon, 19 Fla. L. Weekly S.226 (Fla. April 18, 1994), and the court below erred in finding that any jury instruction error was not harmless. Further, to the extent relevant, the State would suggest that the only reasonable view of the evidence which the jury could have taken was that Breedlove intended that the victim

suffer great pain (which, of course, is exactly what he did), given the force of the blow.[2]

As to the other contentions raised in the Answer Brief, this court's decision, Ragsdale v. State, 609 So.2d 10, 14 (Fla. 1992), cited in the Initial Brief at 28, does in fact reflect a harmless error analysis, in regard to a claim under Espinosa, which involved consideration of the other findings in aggravation and the relative lack of mitigation; application of this harmless error analysis likewise highlights the error committed

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[2] Appellee argues that Breedlove cannot have intended to torture the victim, because, in this court's prior collateral opinion, Breedlove v. Singletary, 595 So.2d 8, 12 (Fla. 1992), this court stated, "The State conceded at the trial that this was a case of felony murder rather than premeditated murder." (Answer Brief at 64). Appellant does not agree. Regardless of the primary theory of prosecution at trial, it cannot be said that the victim's murder, or the means by which such was accomplished, was "unintentional". Further, an election by the prosecution to proceed upon one theory, as opposed to two, does not necessarily mean that insufficient evidence exists as to the one not chosen. To the extent that the State's "concession" is derived from a reading of the prosecutor's closing argument at the guilt phase (OR 1154-1207), Appellant cannot agree with such characterization. While it is true that the prosecutor focused almost exclusively upon felony murder as the theory of the case, he never, "conceded" any absence of premeditation; at most, he said, "Whether he premeditated the killing or not, he killed someone, and therefor it is first-degree murder." (OR 1159). The prosecutor's prior statement, to the effect that the state was not alleging that Breedlove "had premeditation to kill before he went in the house" (OR 1158) does not mean that such premeditation could not have been formed once he was inside the house; the prosecutor later argued that Breedlove, once he was in the bedroom, had a "conscious intent" to kill both victims (OR 1199). The judge instructed the jury on premeditated murder (OR 1229-1231), and, during the penalty phase, specifically rejected a defense instruction, to the effect that it was "stipulated" that Breedlove did not intend to kill the victim (3PCR 18-19). Further, even the cases cited by Appellee - Bonifay v. State, 626 So.2d 1310 (Fla. 1993), Cheshire v. State, 568 So.2d 908 (1990) - do not expressly hold the heinous, atrocious or cruel aggravating circumstance cannot be found in prosecutions based upon felony murder.

below. Conversely, the harmless error analysis advanced by collateral counsel, both in the circuit court and on appeal (T 60; Answer Brief at 67), which involves Hall v. State, 541 So.2d 1125 (Fla. 1989), is completely inapplicable, and, for good reason, has never been applied by this court to claims of error under Espinosa.

The Hall case involved a jury instruction on mitigation which was deficient, under Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1321, 95 L.Ed.2d 346 (1987). This court concluded that the defendant was entitled to a new sentencing proceeding, because it could not say that the error was harmless. In the course of so holding, this court rejected any reliance upon the judge's statement that he would have imposed the death sentence any way, observing that the proper standard was whether a jury recommending life "would have a reasonable basis for that recommendation." Hall, 541 So.2d at 1128 (emphasis supplied); in the Answer Brief, collateral counsel expands this standard to one involving whether a properly instructed jury "could have recommended life" (Answer Brief at 67) (emphasis supplied). Because a violation of Hitchcock v. Dugger impacts directly upon a jury's ability to consider and weigh mitigation, it is certainly reasonable that any harmless error analysis focus upon mitigation and the probability (as opposed to possibility) of a life sentence, but for the error. Espinosa error, of course, focuses upon error in the jury instructions on an aggravating circumstance, and this court has never utilized a Hitchcock, or Hall, analysis in any claim involving this type of error. While

application of the Hall standard would seem to have much to recommend itself from the defense point of view, any reliance by the circuit court below upon this inapposite legal argument would have been error, and, for all the reasons previously asserted, the circuit court's granting of relief as to Appellee's claim under Espinosa v. Florida should be reversed in all respects.

(C) This Court, In Breedlove's 1982 Direct Appeal, Already Cured Any Jury Instruction Error

Finally, in the Answer Brief, Breedlove contends that the state's argument that this court cured any jury instruction error during the course of the 1982 direct appeal is both erroneous and procedurally barred; Appellee maintains that the state's position that a state appellate court may cure jury instruction error "by simply affirming the finding of an aggravating factor" is incorrect (Answer Brief at 76-78). As will be demonstrated below, Breedlove has misstated Appellant's arguments; as to preservation, the arguments contained herein are essentially a complement to the state's harmless error argument.

It is not the state's position that this court cured any jury instruction error in this cause by "simply affirming" the heinous, atrocious and cruel aggravating circumstance. Rather, it is Appellant's position that any jury instruction error in this case cannot possibly serve as a basis for relief for Breedlove, because this court's 1982 opinion makes clear that this aggravating circumstance has been applied in the constitutionally narrow manner proscribed by Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). When this court approved the finding of this factor in 1982, it

specifically described this crime as "far different from the norm of capital felonies" and "set apart" from other crimes, Breedlove, 413 So.2d at 9; this is, in essence, the "missing" language from Dixon which the jury did not hear. The Constitution does not demand that Breedlove receive a completely new sentencing proceeding, after fifteen years, so that a second jury can reach the same conclusion that this court did in the original appeal, and, to the extent that Espinosa can be read to dictate such result, this court should utilize this case to clarify the true workings of Florida's capital sentencing structure. Cf. Combs v. State, 525 So.2d 853, 857 (Fla. 1988) ("Clearly under our process, the court is the final decision-maker and sentencer - not the jury."). The order on appeal should be reversed in all respects.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the order granting Breedlove's third motion for post-conviction relief should be reversed in all respects, and the sentence of death in this cause reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Gail E. Anderson, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 21 day of June, 1994.

RICHARD B. MARTELL
Chief, Capital Appeals