IN THE SUPREME COURT OF FLORIDA

CONNIE RAY ISRAEL,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC95-873
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PUTNAM COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

POINT I

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED IN CONDUCTING PORTIONS OF THE TRIAL WHERE ISRAEL WAS INVOLUNTARILY EXCLUDED.

The state argues that this issue is without merit because "At no point in the record did Israel complain of such a wrongful exclusion, and, consequently, there is no basis for relief because this claim has no basis in fact." Answer brief page 20. The following exchange occurred during the trial wherein Israel had informed the trial court that he was wrongfully excluded from jury selection:

> The Defendant: Okay. Okay. Like this is between like Monday and the jury selection and Wednesday when I came

> here yesterday to participate in jury selection. Okay. On Wednesday, the 24th of February, 1998, I chose to return back to the courtroom to participate in jury selection..... At noon-time Tuesday, the 23rd of February, 1998, I made a statement to Mr. Wolfe asking him, are you still interviewing jury selection? His reply was, yes. I also asked him, did you or the State pick any people **in which I was to participate** ? (Emphasis added) And Wolfe said, no.... After the end of the day, on the 23rd of February 1998, I was not informed by Mr. Wolfe or Mr. Aguero that nine people was chosen until the bailiff told me as I was leaving the courthouse. (R3333-34)

The appellant asserts that the foregoing exchange establishes that Israel complained of being wrongfully excluded from jury selection at the very first opportunity the following morning.

This court should reverse appellant's convictions and sentences and remand for a new trial. Israel was involuntarily excluded from jury selection. Defendants have a right to be present at all stages of their capital trials.

POINT II

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE.

The State characterizes this claim as baseless because it has no legal or factual basis. Answer brief page 21-22 When the trial began, Defense counsel moved for a continuance in the trial because Israel was having vision problems and dizziness. (V XIV p2525) Israel stated that he had not received his medications from the Department of Corrections. (V XIV p2525) The records indicate that Israel was prescribed Remeron and Pepto Bismol. (V XIV p2525) Israel was also given a two week supply of Mildrin by a Department of Corrections doctor. (V XIV p2525) Over Israel's complaints of illness, the trial court denied the request for continuance. (V XIV p2525)

The state claims that Israel was not ill (Answer Brief 21), because the trial court observed that Israel was "doing alright", and a nurse stating that Israel was not in distress. The state misunderstands appellant's argument. The argument concerns Israel's claim that he had depleted prescribed medication by medical doctors and was ill because he did not have his medication. Another words the issue is whether it is an abuse of discretion of the trial court to go forward with a trial where the state has withheld medication to treat the accused's anxiety and

headaches. The State's argument by implication is stating that a capital trial is not a stressfull; and that if a defendant complains of obvious stress-related illness and demands prescribed medication they are being an unlawful courtroom obstructionist.

The trial court's ruling on a motion for continuance is addressed to the sound discretion of the trial court. Magill v. State, 386 So.2d 1188 (Fla. 1980). Moreover, the trial court's ruling will not be disturbed unless a palpable abuse of discretion is demonstrated to the reviewing court. Jent v. State, 408 So.2d 1024, 1028 (Fla. 1981). In the instant case, the denial of the motion for continuance was a palpable abuse of discretion because Israel was involuntarily deprived of his medication and as a result was too ill to proceed and participate in his trial.

POINT III

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED IN IGNORING NON-STATUTORY MITIGATING CIRCUMSTANCES THAT WERE PROVEN BY COMPETENT UNCONTROVERTED EVIDENCE.

The state argues in their answer brief that this point has no merit because the proven non-statutory mitigating circumstances were not argued to the advisor jury, or the trial court considered such evidence when weighing the statutory mitigating circumstances. See Answer Brief page 23,24. The state's assertions are incorrect.

During the penalty phase argument Israel's counsel argued the following:

> Was he substantially impaired? Again, the answer is yes. Not only through testimony from the State's witness during the main part of the case of cocaine use that impaired his ability, but also the longstanding mental problems and psychological problems that have been testified to today.

Notwithstanding the state's argument, the jury was instructed to weigh drug abuse and "the longstanding mental problems and psychological problems that have been testified to today" which referred to the expert testimony concerning brain damage and low intellectual functioning.

The state further argues that the trial court had to contemplate the non-statutory mitigating evidence when finding the statutory mental mitigating factors. The state ignores the dictates of this Court in Campbell:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See Rogers v. State, 511 So.2d 526 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla.Std.Jury Instr. (Crim.) at 81.
>
> Campbell v. State, 571 So.2d 415,419 (Fla. 1990)

The appellant provided substantial competent evidence of non-statutory mitigation factors, and the trial court simply ignored it:

> Other evidence the Court has considered in mitigation are aspects of the Mr. Israel's character, his record and other circumstances of the surrounding offense. In the Court's opinion nothing about this catch-all mitigating factor applies to Mr. Israel. His record is bad, his character worse, and the offense itself is horrible. The Court assigns no weight to this mitigating factor. (V XIII p2441)

This court should find that the trial court erred in failing to give Israel's uncontroverted history of drug abuse, brain damage and low intellectual functioning appropriate weight as non-statutory mitigating circumstances. This case should be reversed and remanded for resentencing.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief and Reply Brief, Appellant respectfully requests this Honorable Court to:

As to Point I, II, IV and VII reverse and remand for a new trial;

As to Point III reverse and remand for a new sentencing;

As to Point V and VI vacate Connie Ray Israel's death sentence and remand for the imposition of a sentence of life in prison without possibility of parole

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Connie Ray Israel, #707742 (43-2137-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 2nd day of March, 2001.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER