

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1540

JOHN C. MARQUARD,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary,

Florida Department of Corrections,

Respondent,

and

ROBERT BUTTERWORTH,

Attorney General,

Additional Respondent.

REPLY PETITION FOR WRIT OF HABEAS CORPUS

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CLAIM II

THE PROSECUTOR'S IMPROPER INTRODUCTION OF NONSTATUTORY AGGRAVATORS DURING THE PENALTY PHASE RENDERED JOHN MARQUARD'S SENTENCE UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

Respondent claims that these issues are not properly plead in a petition for writ of habeas corpus (Response, 11). Despite Respondent's assertion, this Court has repeatedly held that ineffective assistance of appellate counsel claims are appropriately raised in a petition for writ of habeas corpus. Freeman v. State, 761 So.2d 1055, 1069 (Fla.2000).

Appellate counsel performed deficiently in John Marquard's case by not raising the fundamental error caused by prosecutor's penalty phase misconduct and the trial court's errors in introducing and considering nonstatutory aggravators as a basis for John Marquard's death sentence. Had appellate counsel raised these errors on appeal, this Court probably would have determined that the errors were fundamental because they "reach[ed] down into the validity of the trial itself to the extent that a verdict could

not have been obtained without the assistance of the alleged error” and remand the case for a new penalty phase. Cochran v. State, 711 So.2d 1159, 1162 (Fla. 1998) quoting Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996).

Respondent also claims that these issues are procedurally barred because trial counsel did not preserve them (Response, 10-11). Generally, a contemporaneous objection is required to preserve an improper comment for appellate review. Urbin v. State, 714 So. 2d 411, 418 n. 8 (Fla. 1998). However:

The exception to the general rule is where the allegedly improper comments constitute fundamental error. We have defined fundamental error as being error that “reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.”

State v. Delva, 575 So.2d 643, 644-45 (Fla.1991) (*quoting* Brown v. State, 124 So.2d 481, 484 (Fla.1960). The prosecutor’s improper introduction of nonstatutory aggravating circumstances in this case was fundamental error and therefore, should have been raised on direct appeal.

Both the jury’s and the court’s consideration of these non-statutory aggravating circumstances entitle John Marquard to a new penalty phase because the error cannot be found harmless beyond a reasonable doubt. Elledge v. State, 346 So.2d 998 (1977); Teffeteller v. State, 439 So.2d 840, 844-45 (Fla.1983). Thus, counsel’s failure

to raise these fundamental errors on direct appeal was ineffective assistance of appellate counsel.

CLAIM III

MR. MARQUARD'S JURY WEIGHED INVALID AND UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE SENTENCING PROCEEDING, AS IS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

A. During The Commission Of A Felony/Pecuniary Gain Instruction

Respondent wrongly asserts that trial counsel did not object to this instruction (Response, 13). However, as addressed in the initial habeas petition, after the trial court pointed out probable problems having the jury consider both aggravating circumstances:

THE COURT: Well, I'm afraid to do that because I'm really afraid they will miss one or the other – I agree with you, because if they find – I don't know how – I don't know how they could not find aggravating circumstance 5.

MR. PEARL: Five?

THE COURT: No, 4. I don't know how they could not find that – having found him guilty of first degree murder, having found him guilty of armed robbery, I don't know how they could not now find that it wasn't committed during the commission of an armed robbery.

MR. PEARL: I make an objection to giving of the charge.

MR. ALEXANDER: That's fine. We're not going to ask for it.

(M V10, 1500-01). After the court instructed the jury, counsel renewed all prior objections (M V11, 1778). Thus, this error was preserved for appellate review.

B. Under A Sentence Of Imprisonment

Respondent asserts that this claim is procedurally barred because appellate counsel raised on appeal the issue that the evidence was not sufficient to find this aggravator. Marquard v. State, 641 So.2d 54, 57 (Fla.1992). However, this claim is plead in light of the Florida legislature's 1996 amendment to this aggravator, as new law which supports appellate counsel's argument. In 1996, the Florida Legislature changed the aggravator from "The capital felony was committed by a person under sentence of imprisonment or placed on community control" to "The capital felony was committed by a person **previously convicted of a felony** and under sentence of imprisonment or placed on community control or on **felony probation**" Fla.Stat. §

921.141(5)(a) (1993)(amended 1996); Fla.Stat. § 921.141(5)(a)(1996)(emphasis added). In light of the legislature's amendment to 921.141 (5)(a) and the facts of the misdemeanor which served as a basis for this aggravator, this Court must again consider the validity of that aggravator. This amendment clearly shows that the Florida Legislature did not intend for an aggravating circumstance-reason to impose the death penalty- to result from an offense which would be punishable in Florida by sixty days in jail.

This new law shows that the aggravating circumstances as they were applied in John Marquard's case rendered the Florida death penalty sentencing scheme unconstitutional.

CLAIM IV

MR. MARQUARD'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO MR. MARQUARD THAT DEATH WAS NOT THE APPROPRIATE SENTENCE.

The burden shifting instructions John Marquard's jury received not only violated Florida law which requires that aggravating circumstances outweigh mitigating circumstances, they also violated the United States Supreme Court mandate in

Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000).

In Jones v. United States, the United States Supreme Court held, “under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. Apprendi, 120 S.Ct. 2348, 2355 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. Apprendi, 120 S.Ct. at 2365. “[T]he relevant inquiry here is not one of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” Apprendi 120 S.Ct. at 2365. Applying this test, it is clear that aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

The burden-shifting instructions violated Florida law and the Eighth and

Fourteenth Amendments. Because aggravators are elements of a death penalty eligible capital offense, the state was required to prove them beyond a reasonable doubt to a unanimous jury. As a result of the burden-shifting instructions, this did not occur in John Marquard's case, the Florida death penalty sentencing scheme was unconstitutional as applied. But see Mills v. Moore, 2001 WL 360893 *3-4 (Fla.2001).

ARGUMENT AS TO REMAINING CLAIMS

John Marquard relies on argument presented in his initial Petition for Writ of Habeas Corpus regarding these issues.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, John Marquard respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Petition has been
has been furnished by United States Mail, first class postage prepaid, to all counsel of
record on this _____ day of _____, 2001.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus, was generated in a Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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