IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-467

MICHAEL GEORGE BRUNO, SR.,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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CLAIM I

THIS COURT FAILED TO CONDUCT A CONSTITUTIONALLY ADEQUATE HARMLESS ERROR ANALYSIS ON DIRECT APPEAL, THEREBY RENDERING THE DIRECT APPEAL PROCESS UNRELIABLE AND A RESENTENCING MUST BE ORDERED.

The State argues that because direct appeal counsel advanced an argument in his motion for rehearing that this Court's harmless error analysis was flawed, this claim is procedurally barred (Response at 5). The State's argument is incorrect. Indeed, that appellate counsel saw fit to bring to the attention of the Court its error[1] is stronger support for Mr. Bruno's position at this time. Significantly, many cases from the United States Supreme Court explaining the proper application of the harmless error doctrine of Chapman v. California, 386 U.S. 18 (1967), were not decided until after Mr. Bruno's direct appeal. See, e.g. Sochor v. Florida, 112 S.Ct. 2114 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Richmond v. Lewis, 113 S. Ct. 528 (1992).[2] Thus, this claim is not procedurally barred, but rather

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[1]Indeed, Clemons v. Mississippi, 110 S. Ct. 1441 (1990), another Supreme Court case discussing harmless error analysis, was decided while Mr. Bruno's case was pending on direct appeal, but never mentioned by the Court in deciding Mr. Bruno's direct appeal despite the fact that Mr. Bruno's appellate counsel brought that decision to the Court's attention both in a notice of supplemental authority and in his motion for rehearing.

[2]Later in its argument, the State does recognize that Sochor was not decided until after Mr. Bruno's direct appeal (Response at 10). Nonetheless, the State argues that Sochor was not made retroactive to existing cases (Response at 10). This position presumes that Sochor announced new law, which it did not. Mills v. Singletary, 606 So. 2d 622 (Fla. 1992). What the Supreme Court did acknowledge in Sochor was that this Court's application of the harmless error doctrine when striking aggravating circumstances was constitutionally flawed. This is precisely Mr.

is based on subsequent decisions by the Supreme Court which demonstrate the error made by this Court in failing to assess the harmfulness of the error it found to exist at Mr. Bruno's penalty phase.

The State also makes the argument that a habeas petition can only raise claims of ineffective assistance of counsel and nothing else (Response at 6). While habeas corpus petitions are the appropriate vehicle for raising appellate ineffectiveness claims, they are not the exclusive type of claim that can be cognizable in habeas. Indeed, when developments in the law which favor the State have come to light, the State has not hesitated to avail itself of this Court's jurisdiction to re-visit a direct appeal decision. See, e.g. State v. Owen, 696 So. 2d 715 (Fla. 1997).

The State argues that this Court is "well versed in conducting harmless error analysis review upon the striking of an improper aggravator" (Response at 11). However, the reality is that no constitutionally sufficient harmless error analysis was conducted by the Court on Mr. Bruno's direct appeal. Mr. Bruno is not suggesting that the Court must "entitle its analysis as a harmless error review" (Response at 11). Sochor does not stand for the proposition that "an appellate court can fulfill its obligations of meaningful review by simply reciting the formula

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Bruno's argument at this time. Direct appeal counsel did not have the benefit of Sochor to persuade this Court of its error because Sochor had not yet been decided. This is why Mr. Bruno now raised this issue, and appropriately so.

for harmless error." Sochor, 112 S. Ct. at 2123 (O'Connor, J., concurring). Justice O'Connor recognized, however, that the Chapman test "is a justifiably high standard, and while it can be met without uttering the magic words `harmless error,' . . . the reverse is not true." Id. It is thus clear that what Justice O'Connor was saying was that this Court, whether it uses the words "harmless error" or not, has not been complying with Chapman. While it is true that the Sochor Court did not announce "a particular formulaic indication" for state courts to follow, id. at 2123, the Court did indicate that a "detailed explanation based on the record" would be required "when the lower court failed to undertake an explicit analysis supporting its `cryptic,' one-sentence conclusion of harmless error." Id. at 2123-24 (O'Connor, J., concurring). No such analysis was conducted in Mr. Bruno's direct appeal.

The State argues that this Court "understands its duty to reweigh the aggravating and mitigating circumstances in order to determine whether death remains the appropriate sentence when an aggravating factor is struck," and concludes that the Court "fulfilled its duty in the instant case" (Response at 11). This argument warrants some discussion.

This Court has "made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances." Parker v. Dugger, 498 U.S. 308, 319 (1991). See, e.g. Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989) ("It is not within this Court's province to reweigh or reevaluate the

evidence presented as to aggravating or mitigating circumstances"); Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981) ("Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances"). Thus, the State is espousing a "reweighing" function that this Court has stated it does not do.

Moreover, this Court did not "reweigh" the existence of statutory mitigating circumstances, but rather but rather simply deferred to the trial court's discretion in discounting it. Bruno, 574 So. 2d at 82-83. Finding no abuse of discretion in the lower court's "discounting" of the statutory mitigation is hardly the same thing as *de novo* "reweighing." Moreover, on the face of the opinion, the Court limited its consideration to only "statutory mitigating circumstances." Id. If this Court did conduct a proper harmless error analysis and "reweigh" the aggravation and mitigation, as suggested by the State, it clearly did not take into account in this "reweighing" the nonstatutory mitigation that was in the record, in violation of Hitchcock v. Dugger, 481 U.S. 393 (1987). Curiously, as to the Hitchcock problem, the State contends that Hitchcock is not even implicated because *the trial court* found no mitigation (Response at 12). This argument is totally contradictory to its argument that this Court "reweighed" the aggravation and mitigation on appeal. As noted above, "reweighing" means that this Court independently examined the record for evidence that was presented in

mitigation, both statutory and nonstatutory. By arguing that the trial court found no mitigation, the State is suggesting that this Court did not have to "reweigh" the nonstatutory mitigation or even "reference it" at all (Response at 12). This violates established standards for harmless error review: "[M]erely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of `the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.'" Sochor, 112 S. Ct. at 2119 (citing Clemons; Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Parker v. Dugger, 498 U.S. 308 (1991)).

Finally, nothing in the Court's analysis on direct appeal addressed the affect of the invalid aggravating circumstance on the *jury's weighing process*. There was evidence of mitigation before the jury, and the jury's death recommendation was a narrow 8-4. Moreover, the jury deliberated at the guilt phase for nearly two (2) days, a factor indicating a less-than-conclusive case of guilt. In light of the above, Mr. Bruno submits that his death sentence should be vacated, and this matter remanded for a new penalty phase.

CLAIM II

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS ISSUES WHICH WARRANT REVERSAL THAT WERE PRESERVED BY OBJECTIONS ENTERED BY COUNSEL AT THE 1987 TRIAL PROCEEDINGS.

A. The trial court erred in failing to order competency evaluations pursuant to Fla. R. Crim. P. 3.210 and in failing to order a competency hearing both prior to trial and prior to sentencing.

Mr. Bruno relies on his habeas petition in reply to the State's arguments.

B. The trial court erred in admitting into evidence various photographs which were gruesome, unduly prejudicial, and irrelevant.

The State argues that appellate counsel "apparently came to realize" that the argument about the introduction of photographs, set forth in his initial brief but omitted from the amended brief, "was a non-meritorious argument" (Response at 25). This is inaccurate. In fact, when appellate counsel's original brief was stricken and he was ordered to file a shorter version, the issue of the court-imposed page limitations was briefed to this Court, and joined by several *amici curiae*. It was appellate counsel's position that he did not want to excise any arguments lest he waive or diminish any potential arguments on behalf of Mr. Bruno. There is certainly nothing in the record to suggest that appellate counsel made a strategic decision to not raise the issue in his amended brief. Rather, the only thing that can be inferred from the record is that the page limitation issue was the cause for this issue not being included, not a decision by Mr. Bruno's appellate counsel. Thus, to the extent that state

action precluded this meritorious issue from being raised, this action caused appellate counsel to render deficient performance. Mr. Bruno relies on his habeas petition to rebut the arguments of the State as to the merits of the claim itself.

C. Remaining arguments.

As to the remaining arguments, Mr. Bruno relies on his habeas petition in reply to the State's assertions.

CLAIM III

THE CONSTITUTIONALITY OF THE FIRST-DEGREE MURDER INDICTMENT AND THE TRIAL COURT'S FINDINGS AND SENTENCE OF DEATH MUST BE REVISITED IN LIGHT OF APPRENDI V. NEW JERSEY.

The State argues that Mr. Bruno's claim "is not cognizable and is procedurally barred" (Response at 39). However, the State acknowledges that Mr. Bruno's claims were preserved below and raised and rejected on appeal, and are being re-raised in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). This is perfectly appropriate, as the State has availed itself of seeking this Court's review of an issue that was already determined adversely to the State when intervening case law is decided. State v. Owen, 696 So. 2d 715 (Fla. 1997).

The State suggests that Mr. Bruno should seek relief in a Rule 3.850 motion (Response at 39). If this is the case, then Mr. Bruno will seek Rule 3.850 relief, although Mr. Bruno would note that certainly, the State is going to argue in response to a Rule 3.850 motion that the circuit court cannot overrule this Court, only this Court can. Mr. Bruno believes habeas is the appropriate forum for asking this Court to revisit its prior decision. If this Court rules otherwise, Mr. Bruno will then file a Rule 3.850 motion.

Next, the State argues that Mr. Bruno's claim as to the trial court's rejection of his motion to declare the death penalty unconstitutional due to defects in the indictment is procedurally barred because he did not challenge this issue on

appeal (Response at 40). However, this Court has never applied a procedural bar to this issue, and to do so now would be arbitrary as to Mr. Bruno. In the State's response, it cites a number of cases from this Court rejecting this argument, but in none of these cases has a procedural bar been applied (Response at 40-41). Moreover, given the State action in requiring appellate counsel to file a shortened brief, the State cannot now claim that Mr. Bruno is entitled to no relief when appellate counsel did not include this issue in his brief. This, of course, is the very compelling reason why Mr. Bruno's appellate counsel, along with *amici curiae*, urged the Court on appeal to reject page limitations for Mr. Bruno's capital appellate brief.

CONCLUSION

For all of the reasons discussed herein, Mr. Bruno respectfully urges the Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Leslie Campbell, Office of Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida, 33401-3432, on April 29, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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