IN THE SUPREME COURT OF FLORIDA

JAMES PHILLIP BARNES,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC08-63
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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POINT I

IN REPLY AND IN SUPPORT THAT THE TRAIL TRIAL COURT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO REPRESENTATION WHEN IT APPOINTED COUNSEL TO DEVELOP PENALTY PHASE EVIDENCE OVER APPELLANT'S OBJECTION.

The appellant's argument is that the accused has a fundamental right to representation. The trial court conducted numerous ***Amendment VIII, United States ConstitutionFaretta v. California*** 422 U.S. 806 (1975)***Amendment VI, United States Constitution Id.*** at 820-21, 833-34 (citations omitted) (footnotes omitted).

The state argues that the Eighth Amendment requirement for individualized sentencing allows the state to strip the appellant of his fundamental right to counsel

and self-representation. This is not true. The Eighth Amendment notion of individualized sentencing means that the states capital sentencing scheme must narrow the class of defendant's eligible for the death penalty and that the state must be prohibited from limiting a broad inquiry into relevant mitigation:

> Petitioner initially recognizes, as he must, that our cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. ***Tuilaepa v. California***, 512 U.S. 967 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. ***Ibid***. In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant. ***Id.***, at 972. Petitioner concedes that it is only the selection phase that is at stake in his case. He argues, however, that our decisions indicate that the jury at the selection phase must both have discretion to make an individualized determination and have that discretion limited and channeled. ***See***, *e.g.*, ***Gregg v. Georgia***, 428 U.S. 153 (1976). He further argues that the Eighth Amendment therefore requires the court to instruct the jury on its obligation and authority to consider mitigating evidence, and on particular mitigating factors deemed relevant by the State.
>
> ***No such rule has ever been adopted by this Court***. (Emphasis added) While petitioner appropriately recognizes the distinction between the eligibility and selection phases, he fails to distinguish the differing constitutional treatment we have accorded those two aspects of capital sentencing. It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition. In contrast, in the selection

> phase, we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination. ***Tuilaepa, supra***, at 971-973; ***Romano v. Oklahoma***, 512 U.S. 1 (1994); ***McCleskey v. Kemp***, 481 U.S. 279 (1987); ***Stephens, supra***, at 878-879.

Buchanan v. Angelone, 522 U.S. 269, 276 (1998) The appellant, as self-appointed counsel, has a constitutional right to craft his legal strategy, and to determine what was relevant mitigation. The state can not limit the inquiry into relevant mitigating evidence, but the appellant "as the Captain of his legal ship" and master of his fate can limit the mitigation presented to the trial court.

The state relies upon the ***Klokoc*** and ***Muhammad*** line of cases. These cases are distinguished from the instant case. In ***Klokoc v. State*** 589 So.2d 219 (Fla.1991) Sixth Amendment right to representation and the ***Hamblen v. State*** 527 So.2d 800 (Fla. 1988) ("In the field of criminal law, there is no doubt that `death is different,' but, in the final analysis, all competent defendants have a right to control their own destinies.") The error in this case requires a new penalty phase trial. The right of self-representation is fundamental, and not subject to harmless error analysis.

"Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis." Wherefore, the judgement and

sentence against the appellant should be reversed, and a new penalty phase ordered without the appointment of ***Muhammad*** counsel.

POINT II

IN REPLY AND IN SUPPORT THAT IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED IN PERMITTING HEARSAY EVIDENCE TO BE CONSIDERED OVER APPELLANT'S OBJECTION.

The appellant relies upon the initial brief in reply to the appellee.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to order a new penalty phase trial as to Point I and II.

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 Bill McCollum, 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. James Barnes, DC#071551, Florida State Prison, 7819 NW 228th St., Raiford, FL 32026, this 16th day of March, 2009.

_____
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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
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