IN THE SUPREME COURT OF FLORIDA

JAMES ROBERTSON, :

Appellant, :

vs. : Case No. SC13-0443

STATE OF FLORIDA, :

Appellee. :

:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR CHARLOTTE COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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THE SEQUENCE OF EVENTS RESULTING IN JAMES ROBERTSON'S DEATH SENTENCE DOES NOT COMPLY WITH THE PROCEDURAL AND SUBSTANTIVE STANDARDS SET BY THE UNITED STATES AND FLORIDA CONSTITUTIONS, THE LEGISLATURE, THE U.S. SUPREME COURT, AND THIS COURT, AND – - IF THE SENTENCE IS CARRIED OUT - - WOULD RESULT IN STATE ASSISTED SUICIDE.

Procedures have been put in place to ensure that the death penalty sentence is not administered by default, as was done in this case. It cannot be harmless error when procedural safeguards established to ensure that the death penalty is not applied in an arbitrary and capricious manner are not followed. The trial court's failure to follow the established procedure makes it impossible to determine beyond a reasonable doubt that Robertson would not have received a life sentence. Even though this Court made it clear in Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988) that the death penalty cannot be administered by default, that is exactly what happened in the present case. Defense counsel's performance was so deficient it was as if Robertson had no counsel. This failure is not subject to harmless error review. "When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." Hamilton v. Alabama, 368 U.S. 52, 54 (1961).

Certain procedural safeguards have been established to ensure that the death penalty is not imposed in an arbitrary and

capricious manner. A meaningful harmless error review cannot be conducted because of the numerous procedural errors leading up to and including the plea and sentencing in this case. The result was the unconstitutional imposition of the death penalty that violated the Eight Amendment prohibition of cruel and unusual punishment. The United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972) held the death penalty unconstitutional when administered by a "sentencer" that has unguided discretion on whether or not to impose a sentence of death. Florida's subsequently enacted death penalty statute which required the judge to consider specific aggravating and mitigating factors, set forth written findings when the death penalty is imposed, and called for review by the Florida Supreme Court was found to be constitutional in Proffit v. Florida, 96 S.Ct. 2960 (1976).

The procedures were further refined in Spencer v. State 615 So. 2d 688 (Fla. 1993) because this Court found that a trial judge must give a defendant an opportunity to be heard prior to making its sentencing decision. The following procedure should be used in sentencing phase proceedings: 1) the trial judge should hold a hearing providing the defendant, counsel, and the State an opportunity to be heard; allow both the State and the defendant an opportunity to present additional evidence; allow both sides to comment on or rebut information provided in presentence or medical reports; and provide the defendant an opportunity to be heard in person. 2) Then after hearing the evidence and argument, the trial judge should recess to consider the proper sentence. If the judge

determines to impose the death sentence, the judge must set forth written reasons for imposing the death sentence. 3) The judge should set a hearing to impose the sentence and contemporaneously file the sentencing order. Id. at 690, 91. The sentencing procedure in the present case did not comply with the steps set forth in Spencer.

Failure to follow the proper sentencing procedures set forth by the constitution, statute, and case law, resulted in the imposition of the death penalty in this case which was unconstitutional. The proper sentencing procedures in death penalty cases are fundamental to ensuring that the death penalty is not imposed in an arbitrary and capricious manner. The death penalty was found to be constitutional in Proffit because certain procedures were instituted so that the death penalty would not be imposed in an arbitrary and capricious manner. It follows that when those proper procedures are not followed, the result is the unconstitutional imposition of the death penalty. In the present case, since proper procedures were not followed it is impossible for the State to prove beyond a reasonable doubt that the error was harmless as required under State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). Each of Appellee's points will be addressed individually.

A. Whether the trial court failed to comply with the procedural requirements of Koon v. Dugger, 619 So. 2d 246 (Fla. 1993)? (As stated by Appellee)

Appellee recognized that there was no detailed Koon inquiry but suggests that nevertheless the record establishes that Robertson knowingly, intelligently, and voluntarily waived his right to present mitigating evidence. The state contends it was harmless error because both Robertson and his counsel (DeSisto) were aware of all available mitigation evidence. If by "all available mitigation evidence" Appellee is referring to what was in the record that may be an accurate statement. However, since defense counsel did no mitigation investigation, it is simply unknown what mitigation evidence exists.

At a minimum, defense counsel should have done what standby counsel in Barnes suggested when asked by the trial court what mitigation investigation he would do if he were representing Barnes. Standby counsel said "he would gather all school records and medical records, as well as records of every mental health expert who had seen Barnes, and would interview anyone he could locate who had substantial contact with Barnes during his life." Barnes v. State, 29 So. 3d 1010, 1019 (Fla. 2010). In the present case, defense counsel made no mention to the trial court that he conducted any mitigation investigation nor did defense counsel advise the trial court of any potential mitigation. As a result, the trial court did not have the necessary information to engage in the constitutionally required weighing process.

Appellee asserts that defense counsel was aware of his obligation under Koon and provided the case to the trial court. However, other than advising the trial court that his client was

waiving mitigation, DeSisto did nothing to comply with the requirements of Koon. Nor did the trial court make inquiry as delineated in Koon. DeSisto did not indicate whether, based on his investigation, he reasonably believed there was mitigation evidence that could be presented and what that evidence would be. The trial court did not confirm with Robertson that DeSisto discussed potential mitigation with him, and despite counsel's recommendation, he still wished to waive presentation of penalty phase evidence.

Koon uses language: "despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence," because it was not contemplated a defendant would have counsel recommending that he waive mitigation. It is expected that a defendant would have an advocate representing him trying to avoid imposition of the death penalty. In fact DeSisto acted more like a prosecutor as acknowledged by DeSisto's statement at the plea and sentencing hearing when he adopted and concurred with all the State's aggravators: "I understand, obviously, I'm making a record more like my brother's on the Bar, like I'm the prosecutor. Nonetheless, at the request of the defendant, which I'm sure he – make sure is clear on the record, but we do adopt their aggravators." (2T/68) DeSisto did not hire a mitigation specialist at the defendant's request and made no indication that any mitigation investigation was done in this case. DeSisto never suggested any potential mitigation as required by Koon.

Appellee suggests Robertson was aware of available mitigation

in the multiple reports of Drs. Silver and Schaerf and the PSI. The PSI was simply a rehashing of all the old PSIs done in Robertson's prior non-capital cases. There was nothing about this particular PSI that was a comprehensive PSI designed to uncover mitigation as required by Muhammad v. State, 782 So. 2d 343, 363 (Fla. 2001). The probation officer preparing the PSI made no mention of any attempt to obtain mitigation evidence. No records were obtained. The PSI does not even reveal what schools Robertson attended or why he was placed in special education classes.

The problem with Silver's and Schaerf's reports is that they only evaluated Robertson for sanity and competency and no evaluation or testing was done with an eye toward mitigation. Neither mental health professional did anything to determine if either of the two statutory mental health mitigators were applicable to Robertson. No witnesses were interviewed regarding Robertson's upbringing and background. Nothing could be considered normal about wanting the death penalty. If defense counsel had sought out and discovered why Robertson was seeking the death penalty, Robertson may very well have changed his mind on wanting the death penalty and cooperated with having mitigation presented. If Robertson had an advocate on his side, it may not have been necessary to present mitigation because Robertson was initially only charged with second-degree murder. Clearly the trial court did not comply with the procedural requirements of Koon. The procedural deficiencies resulted in such a flawed plea and sentencing proceeding that it is impossible to for the State to

prove beyond a reasonable doubt it was harmless error.

Chandler v. State, 702 So. 2d 186 (Fla. 1997) is distinguishable from the instant case because Chandler's defense attorney did investigate and find mitigation witnesses and advised the trial court of what they would say. Chandler acknowledged that he discussed the mitigation evidence with his attorney and did not want mitigation evidence presented. This court rejected Chandler's "hypertechnical interpretation" of Koon because the trial court and defense counsel did comply with the general requirements of Koon. In the present case, the trial court and defense counsel only generally acknowledged that Koon existed, but did nothing to comply with the procedural requirements of Koon.

Appellee stated: "Obviously, trial counsel had investigated and obtained mitigation evidence, because if Robertson had not waived the presentation of this evidence, trial counsel could have easily presented the two mental health experts to testify regarding the mitigation information contained in their reports." (Appellee's Answer Brief P. 28, 29) The two mental health experts were court-appointed to determine sanity and competency. Nowhere in their reports do they indicate they were hired to determine if there were any mitigating circumstances. Any background was obtained only from defendant, as no other witnesses were consulted. If Robertson had not waived mitigation, the mental health experts would have had to do more work to develop mental mitigation.

There is no indication anywhere in the record that DeSisto

did any independent mitigation investigation, but he did follow his client's dictates not to hire a mitigation specialist. Without knowing what mitigation could have been discovered, it is inaccurate for Appellee to say failure to follow Koon's procedural requirements was harmless beyond a reasonable doubt. Robertson's waiver to present mitigation evidence was meaningless because he had no idea what mitigation evidence could have been presented. If a proper evaluation and investigation revealed an explanation for Robertson's abnormal desire to be put to death, this information may have provided Robertson with a reason to live and to choose life over death. Life was a choice readily available to Robertson until DeSisto acquiesced to his client's desires and was able to obtain an indictment for first-degree murder.

B. Alleged Deficiencies with the PSI (As stated by Appellee)

Preservation is not an issue in this case where Robertson is waiving mitigation and he is represented by counsel who acquiesced to his client's wishes. Nothing is preserved in this case where Robertson is seeking state assisted suicide. Preservation is irrelevant in this situation where issues are being presented so this Court can determine if the plea and sentencing were procedurally accurate and comply with the Florida and United States Constitutions. Appellee seems to indicate that trial counsel's failure to raise an objection to an inadequate PSI bars review because trial counsel did point out inaccuracies in the PSI and informed the trial court of procedures to follow. Trial

counsel was not making objections but simply following his client's wishes of trying to ensure that his death penalty would be affirmed on appeal.

Appellee cites to McKenzie v. State, 2014 WL 1491501 (Fla. Apr. 17, 2014) for the proposition that the defendant waived any deficiencies with the PSI when he failed to inform the trial court that information was missing from the report. McKenzie is distinguishable from the present case because he did present mitigation and he was acting as his own counsel. McKenzie was offered an opportunity to present additional mitigation during the Spencer hearing and he opted not to. In addition, McKenzie was an appeal from a post-conviction hearing, not a direct appeal. Barnes 29 So. 3d at 1026 (finding that defendant's complaints regarding the PSI were not preserved by objection) is distinguishable from the present case because the complaint was regarding what was contained in the PSI, not what was missing from the PSI. It was determined to be harmless error because the information in the PSI also came in through police investigative reports and Dr. Riebsame's written reports. No objection was needed in the present case because this was a court-ordered PSI which was supposed to be comprehensive but was not.

The PSI in this situation, where a defendant is seeking the death penalty, must be comprehensive and neutral. Appellee contends Gottfried conducted extensive investigation into Robertson's background. In reality, Gottfried conducted no independent investigation. Gottfried did not seek out school or

medical records, or talk to teachers, family, or friends of Robertson to develop a comprehensive PSI. Gottfried certainly did not maintain his neutrality in preparing the PSI as indicated by his recommendation that Robertson be put to death. Because of the unique circumstances of this case involving the Department of Corrections, the trial court should have appointed independent counsel to do a comprehensive mitigation report if a comprehensive and neutral PSI could not be completed.

The PSI was lacking because it presents only generalities and not specifics. Robertson dropped out of school in the eighth grade, but there is no indication how old he was. There is no indication as to why Robertson was in special education classes. Robertson could not sit still and got in trouble from first to third grade, but we do not know if he was diagnosed with attention deficit hyperactivity disorder (ADHD). His father was physically abusive but we do not know how Robertson was abused or what abuse he witnessed. We do not know how growing up in an economically disadvantaged home affected Robertson. We do not know how the family history of alcohol and substance abuse affected Robertson. We do not know how his father's death and his mother's cancer affected Robertson. Robertson's two brothers were not interviewed. Robertson was treated for depression in prison in the late 80's to early 90's, but we do not have the reports from that treatment. There are no reports regarding the anger management therapy Robertson received in 2000. We do not know how alcohol and drugs that Robertson started using at an early age affected him. Failure

to provide a comprehensive PSI was not harmless error because there was so much mitigation not presented there is no way to determine how that would have impacted Robertson's sentence.

C. Whether the trial judge had a precommitment to impose a death sentence and whether the court improperly considered Robertson's wishes in imposing the sentence? (As stated by Appellee)

The very fact the trial judge reviewed documentation, discovery, and the PSI prior to Robertson entering a plea established a pre-committed bias. The trial judge was aware that Robertson intended to enter a plea and waive all mitigation. Robertson's affidavit indicated he was entering a plea with the intention of receiving the death penalty at the conclusion of the matter. The trial court simply followed Robertson's wishes and reviewed the PSI prior to the plea in preparation of imposing the death penalty. The trial court assumed but did not know the plea actually would happen. Any preparation for sentencing should not have occurred until after the plea to ensure neutrality of an impartial judge.

The whole purpose of the guidelines set forth in Spencer, 615 So. 2d at 691 was to ensure that the trial court would not pre-judge the sentence before all parties had an opportunity to be heard and their presentations were carefully considered by the trial court. In the present case, the trial court totally disregarded the procedures set forth in Spencer and apparently formulated the sentence prior to Robertson even entering a plea.

It would be absurd to require defense counsel to object to a plea and sentencing procedure he orchestrated pursuant to the wishes of his client. If such a need for preservation exists, it was clearly ineffective assistance of counsel on the face of the record for defense counsel not to object and request that the judge follow the directives of Spencer.

Appellee suggests the trial court was not pre-committed to imposing the death penalty because she received all the pertinent documents before the hearing and had ample time to consider all the relevant circumstances. The glaring error is apparently this judge determined to impose the death penalty prior to entry of the plea. This is the definition of pre-committed when the trial court determines to impose the death penalty on a presumed innocent person before even witnessing his demeanor and behavior while entering the plea.

The trial court's pre-commitment to impose the death penalty was error and violates the procedure established in Spencer. Appellee quotes from Happ v. Moore, 784 So. 2d 1091, 1103 n.12 (Fla. 2001): "[t]he obvious import of our decisions in Grossman and Spencer was to ensure that trial judges take the time to consider all relevant circumstances and arrive at an informed decision uninfluenced by haste and initial impressions." The very next sentence states: "While Spencer had not yet been decided, we are troubled by the fact that the trial court here had prepared a sentencing order before the jury had even issued its recommendation." Id.

The trial court's actions in the present case are much more egregious than in Happ, because Spencer had been decided nearly twenty years before this case and was common knowledge to death penalty practitioners. The trial court's apparent decision to impose the death penalty prior to entry of the plea, while Appellant was still presumed innocent, was controlled by haste and initial impressions as warned against in Happ.

Although it may have been reasonable for the trial court to discuss Robertson's wish and intent to be put to death, it was error to actually assign great weight to this factor, treating it identically as an aggravating factor. The only matters that may be considered in aggravation are those set out in the death penalty statute. Zack v. State, 911 So. 2d 1190, 1208 (Fla. 2005).

The present case is much different from Eaglin v. State, 19 So. 3d 935, 946 (Fla. 2009) where the trial judge's reference to defendant's lack of remorse was found to be harmless error. In the sentencing order the judge in Eaglin stated: "Finally, the Court recalls that the Defendant testified during the penalty phase and again in the Spencer hearing. At neither time did he express anything like genuine remorse. His attitude bordered on arrogance." The trial court made a passing reference to lack of remorse and did not treat it as an aggravating circumstance by assigning it weight. In contrast, the trial court in the present case dwelled on Robertson's wishes and intent, devoting section (A) and nearly a page of the sentencing order to Defendant's wishes and intent, and assigning great weight to the Defendant's

wishes and intent.

Appellee asserts that there is no question the trial judge would have sentenced Robertson to death even without giving weight to his wishes. Let's not forget that this case was originally charged as second-degree murder and remained at second-degree murder for over three years and through six prior defense attorneys who would not assist Robertson in his goal of obtaining a state assisted suicide. It was only because of Robertson's wishes and intent, along with his seventh attorney acceding to his request, that Robertson was successful in obtaining an indictment for first-degree murder. This was not harmless error. It cannot be proven beyond a reasonable doubt that the trial court's improper consideration of Defendant's wishes and intent did not influence the trial court to impose the death sentence.

D. The court did not abuse its discretion by failing to appoint special counsel to investigate and present mitigation evidence. (As stated by Appellee)

Appellee asserts that trial counsel did not abuse its discretion in failing to appoint special counsel to investigate mitigation because Robertson had counsel representing him. Contrary to Appellee's claim, the record does support Appellant's counsel's assertion that defense counsel blindly complied with Robertson's request. Robertson was represented by six different attorneys all while his pending charge was second-degree murder. The information charging second-degree murder was filed on May 27,

2009. It was not until more than three years after the second degree-murder information was filed that DeSisto, not a qualified death attorney, managed to get his client charged with first-degree murder. It was only after DeSisto drafted a damaging affidavit and engaged in a video presentation followed by questioning from State Attorney investigators on October 19, 2012, that Robertson was charged with first-degree murder. The indictment for first-degree murder was returned on October 26, 2012.

Since DeSisto is not a death qualified attorney, he probably was unaware of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Penalty Cases which states it is ineffective assistance of counsel to acquiesce to a client's desires to be executed. The only logical explanation for DeSisto's actions was his acquiescence to his client's desire to be executed. Otherwise why would Desisto: seek to have a second-degree murder charge changed to a first-degree murder charge, draft and submit his client's condemning affidavit to the State Attorney, not investigate mitigation, not hire a mental health professional to develop mitigation, not obtain school and mental health records, or not talk to any mitigation witnesses. DeSisto never hired a neuropsychologist to discover why Robertson thought it was not dignified to commit suicide but it was alright to kill another human being in order to get the State to kill him. Simply put, DeSisto never did any of the things required of a death qualified attorney representing his client.

The trial court, who was death qualified, should have been aware that DeSisto was not fulfilling his duties of representing his client. The trial court should have appointed special counsel to perform a mitigation investigation because appointed defense counsel actively sought the death penalty on a case originally charged as second-degree murder and then failed to investigate and identify any mitigation. DeSisto's failure to perform his duties essentially resulted in Appellant pleading to a capital charge without benefit of counsel. Error of not providing counsel to a defendant entering a plea on a capital charge is not subject to harmless error analysis. See Hamilton, 368 U.S. at 54. The trial court's failure to appoint special counsel for mitigation investigation was reversible error.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 12th day of January, 2015.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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