IN THE SUPREME COURT OF FLORIDA

TERENCE VALENTINE,

Appellant,

vs.

Case No. 75,985

STATE OF FLORIDA,

Appellee.

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

SUPPLEMENTAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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THE TRIAL COURT ERRED BY GIVING IMPERMISSIBLY VAGUE INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES TO THE PENALTY JURY.

In Espinosa v. Florida, Case No. 91-7390, the United States Supreme Court recently held that when a Florida capital jury is instructed on aggravating circumstances, it cannot be given an instruction which is "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor.'' Specifically, the Espinosa court found invalid under the Eighth Amendment the jury penalty instruction of "'especially wicked, evil, atrocious or cruel" for the section 921.141(5)(h) aggravating circumstance.

At bar, Appellant filed a pretrial motion asking the court to declare the section 921.141(5)(h) aggravating circumstance unconstitutionally vague (R1452-8). The trial judge refused to hear argument on the motion when he denied it (R159). Before proceeding to the penalty phase, Appellant renewed his previously denied motions, specifically mentioning the "objections we previously filed to trial relating to the aggravating motions [sic]" (R1334-5,1336). The court stated that Appellant was "entitled to appeal any adverse ruling . . . that was raised by your attorneys or in any other fashion, shape or form" (R1336). The court instructed the jury that they could consider as an aggravating circumstance:

> 3. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel (R1356-7).

Espinosa is directly on point hers and a new penalty trial should be granted. Appellant's constitutional attack on this aggravating circumstance pretrial and renewal of his motion prior to the penalty phase was sufficient to preserve this error for review.

The rationale of Espinosa is equally applicable to the other aggravating circumstance which Appellant challenged as unconstitutionally vague, section 921.141(5)(i) (cold, calculated and premeditated). But see, Brown v. State, 565 So.2d 304 (Fla. 1990). Appellant attacked this aggravating factor in a pretrial motion (R1447-8) which was also denied by the trial judge without permitting argument (R159). The court instructed the jury:

> 4. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R1357).

This instruction is fully as bad as the instruction disapproved in Espinosa because it does not inform the jury of the "heightened premeditation" requirement of the aggravating circumstance. See generally, Porter v. State, 564 So.2d 1060 at 1063-4 (Fla. 1990).

Accordingly, Appellant should now be granted a new penalty proceeding before a new jury where the section 921.141(5 (h) and (i) aggravating circumstances are not considered by the jury unless constitutionally adequate jury instructions are given.

CONCLUSION

Appellant renews the conclusion of his initial brief and requests in addition that he be granted a new penalty trial on the basis of the argument in this supplemental brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance Sunderland, Suite 700, 2002 N. Lois Ave., Tampa, PL 33607, (813) 873-4730, on this 13th day of July, 1992.

Respectfully submitted,

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