

IN THE SUPREME COURT OF FLORIDA

CASE NO. 08-1812

BRYAN FREDRICK JENNINGS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. The “*Ex Post Facto*” Claim.

In addressing the *ex post facto* claim, the State argues that this Court’s rejection of the claim on the merits on direct appeal should erect a procedural bar that precludes this Court from considering the determination by a federal district court that the analysis that this Court employed in rejecting the claim as meritless was contrary to or an unreasonable application of federal law. Jennings v. Crosby, 392 F. Supp. 2d 1312 (N.D. Fla. 2005). In making this argument, the State overlooks several salient points.

First, the State seems to be suggesting that this Court’s jurisprudence that only changes in law within the meaning of Witt v. State, 387 So. 2d 922 (Fla. 1980), permits revisiting a previously addressed legal issue. This ignores that at the time of the decision in Witt federal district courts were free to grant habeas relief simply because they disagreed with this Court’s legal conclusion. That is no longer the case. There is a significant distinction between a federal district court conducting *de novo* review in a federal habeas proceeding under the old scheme involving federal habeas petitions filed before the Anti-Terrorism and Effective Death Penalty Act (hereinafter AEDPA) went into effect in 1996, and a federal district court considering a habeas petition now under the

AEDPA. Under the AEDPA, the federal district court is required to give some deference to the legal ruling. And in Mr. Jennings' federal habeas proceeding, the district court reviewed this Court's analysis of the *ex post facto* claim through the required lens and gave deference to this Court's ruling. However, the federal district court concluded that this Court's analysis was not just erroneous, it was too far afield and was either contrary to or an unreasonable application of well-established federal law.

This is the first case that undersigned counsel is aware of since the adoption of AEDPA that this Court is forced to grapple with the effect of its adoption and the significance of a federal district court's ruling that this Court's ruling on the merits was more than just a federal court's disagreement with a state court's decision regarding a constitutional principle. Here, because of the AEDPA's requirement that deference be extended to this Court's legal conclusion, the federal district court concluded that this Court's analysis of Mr. Jennings' *ex post facto* claim was not just in error, but was obviously and unreasonably wrong. Jennings v. Crosby.

In considering the significance of the federal court's finding that this Court's rejection of the claim as meritless was contrary to or an unreasonable application of well-established federal law, Mr. Jennings suggests that this Court's inherent powers must be

invoked. This Court has repeatedly stated:

“All courts in Florida possess the inherent powers to do all things that are reasonable and necessary for the administration of justice within the scope of their jurisdiction, subject to valid existing laws and constitutional provisions.” Roger A. Silver, *The Inherent Power of the Florida Courts*, 39 U.Miami L.Rev. 257, 263 (1985).

Basse v. State, 740 So. 2d 518, 519 (Fla. 1999); State v. Ford, 626 So. 2d 1338, 1345 (Fla. 1993). See also In re Petition of Jacksonville Bar Ass'n, 169 So. 674 (Fla. 1936). Thus where necessary to insure the administration of justice and to instill confidence the outcome of judicial proceedings is maintained, this Court has inherent power to do whatever is reasonable and necessary to insure that the United States Constitution is followed. This must include revisiting a previously rejected constitutional claim when a federal district court has ruled that this Court's ruling was contrary to and an unreasonable application of well-established federal law.

Second, the State in arguing that the claim is procedurally barred does not address this Court's action in Johnston v. Singletary, 640 So. 2d 1102 (Fla. 1994). There, this Court invoked its inherent power to reconsider a claim that it had previously addressed and rejected after a federal district court ruled that this Court's analysis of the merits of the constitutional claim was erroneous:

David Eugene Johnston is a prisoner under sentence of death. Recently, the United States District Court for the Middle District of Florida in reviewing a petition for habeas corpus found error at Johnston's original sentencing. Johnston v. Singletary, No. 91-797-CIV-ORL-22 (M.D.Fla. Sept. 16, 1993). The court held that the heinous, atrocious, or cruel jury instruction was constitutionally infirm under Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). With regard to this issue, the district court stated:

Accordingly, because only the Florida courts can determine the proper approach to [Johnston's] sentencing, the writ of habeas corpus will be conditionally granted, within sixty (60) days from the date of this Order, unless the State of Florida initiates appropriate proceedings in state court. Because a new sentencing hearing before a jury is not constitutionally required, the State of Florida may initiate whatever state court proceedings it finds appropriate, including seeking a life sentence or the performance of a reweighing or harmless error analysis by the Florida Supreme Court.

Johnston, slip op. at 28. The State filed a timely motion asking this Court to review the application of the heinous, atrocious, or cruel aggravating factor in this case. In view of the federal district court's order, we concluded to do so. We have jurisdiction under article V, section 3(b)(1) and (7) of the Florida Constitution.

Johnston v. Singletary, 640 So. 2d at 1103-04. In Johnston, the federal district court had reviewed Mr. Johnston's federal habeas petition under pre-AEDPA law. Under the standards then in effect, the federal district court gave no deference to this Court's ruling, but reviewed Mr. Johnston's claim *de novo*. In Johnston, the federal proceedings were held in abeyance while the State asked this Court

to accept jurisdiction in order to conduct a harmless error analysis of the Eighth Amendment error identified by the federal court. The basis for this Court's jurisdiction was simply that the federal district court concluded that this Court's analysis had been in error. After accepting jurisdiction, this Court proceeded to conduct a harmless error analysis under the "harmless beyond a reasonable doubt" standard and concluded that the constitutional error identified by the federal district court was harmless beyond a reasonable doubt. Clearly, this Court set aside any procedural bar premised upon its previous rejection of Mr. Johnston's claim in light of the federal district court's ruling that this Court's rejection of the claim was erroneous.

Another case not mentioned by the State when arguing that Mr. Jennings' claim is procedurally barred is Hill v. State, 643 So. 2d 107 (Fla. 1994). There too, this Court invoked its inherent power to reconsider a claim that this Court had previously found meritless. In Hill, after this Court accepted jurisdiction in Johnston, counsel for Mr. Hill asked the Court to reopen a capital decision when a federal district court found that this Court's legal analysis of Mr. Hill's Eighth Amendment claim was in error. After finding Eighth Amendment error infected the death sentence imposed upon Mr. Hill, the federal district court held that this Court should be given an

opportunity to determine what remedy was warranted given the presence of Eighth Amendment error. This Court then using its inherent power to reconsider a claim previously found meritless accepted jurisdiction explaining:

In granting Hill's motion to reopen his direct appeal, we accepted jurisdiction for the limited purpose of considering the federal district court's partial grant of his habeas petition.

Hill v. State, 643 So. 2d at 1073. This Court accepted the federal district court's finding of error as controlling and proceeded to conduct a harmless error analysis. Ultimately, this Court concluded that the error identified by the federal court in Mr. Hill's case was harmless beyond a reasonable doubt and affirmed the death sentence.

Given Johnston and Hill, it is clear that this Court has determined that it has inherent power to entertain Mr. Jennings' claim and determine whether the error was harmless beyond a reasonable doubt in light of the federal district's finding that this Court's merits ruling was contrary to or an unreasonable application of well-established federal law. Moreover, in the situation here the equities are more titled in Mr. Jennings' favor because the federal district court did not merely disagree with this Court's analysis of the claim's merit. Unlike Johnston and Hill, the habeas proceedings in Mr. Jennings' case were governed by the AEDPA and the federal court

district was required to defer to this Court's legal ruling even if it believed it was erroneous as long as it was neither unreasonable nor clearly contrary to well-established federal law. Jennings v. Crosby, 392 F. Supp. 2d 1312 (N.D. Fla. 2005). Further, there has been no determination under the controlling standard set by this Court that constitutional error infecting a capital sentencing proceeding must be found to be harmless beyond a reasonable doubt before the death sentence can be left intact.

In light of the federal district court's conclusion, within the meaning of the AEDPA that this Court's analysis of the merits of Mr. Jennings' claim was clearly wrong and/or unreasonable, this Court must reconsider the merits Mr. Jennings' *ex post facto*/Eighth Amendment claim.¹ This is particularly so given the fact that this Court entertained the merits in Johnston and Hill. To treat Mr. Jennings' differently than this Court treated Mr. Johnston and Mr. Hill would be arbitrary and capricious and itself a violation of the Eighth Amendment.

¹The federal district court found that an aggravating circumstance was applied in Mr. Jennings' case in violation of the *ex post facto* prohibition in the United States Constitution. The district court also concluded that the consideration and reliance upon an invalid aggravating factor when imposing a death sentence violated the Eighth Amendment. The district court also found the jury instruction on heinous, atrocious or cruel violated the Eighth Amendment. Thus the *ex post facto* error also becomes Eighth Amendment error.

The State does note in its answer brief that it did appeal the federal district court's ruling to the Eleventh Circuit in Mr. Jennings' case. Though this is a distinction from the circumstances in both Johnston and Hill, it is not a distinction that justifies different treatment in Mr. Jennings' case where the Eleventh Circuit did not overturn the federal district court's determination. In Johnston, while the habeas petition was held in abeyance and before any appeal to the Eleventh Circuit, the State asked this Court to reconsider the claim and find the Eighth Amendment error identified by the federal district court was harmless beyond a reasonable doubt. In Hill, the State chose not to appeal the ruling to the Eleventh Circuit. When the State did not appeal, Mr. Hill asked, as directed by the federal district court, this Court to accept jurisdiction. After accepting jurisdiction, this Court conducted a harmless error analysis. This then accomplished what the federal district court sought, an opportunity for the state courts to have the first opportunity to address the harmlessness of the constitutional error.

While the fact that the State appealed to the Eleventh Circuit in Mr. Jennings' case is a distinction, it is a distinction without significance. In Mr. Jennings' case, the Eleventh Circuit did not address the State's appeal finding it unnecessary to do so in light of its determination that federal habeas relief could not issue under

Brecht v. Abrahamson, 507 U.S. 619 (1993).² Jennings v. McDonough, 490 F.3d 1230 (11th Cri. 2007). The Eleventh Circuit did not overturn or vacate the federal district court's determination that this Court's analysis of the claimed constitutional error was unreasonable and/or clearly wrong and that improper aggravating factors were considered by the jury and the judge during the penalty phase and sentencing proceedings. When the issue was presented to the Eleventh Circuit, it specifically said that "[f]or purposes of this decision, we will assume, without deciding, that an *ex post facto* violation has occurred." Jennings v. McDonough, 490 F.3d at 1252. Clearly, the federal district court's decision that this Court's analysis of the claim was clearly wrong and/or unreasonable has neither been vacated nor overturned. In fact, the Eleventh Circuit assumed without deciding that it was true. Thus, the federal district court's decision in Mr. Jennings' case is just as weighty and legally significant as the federal district court decisions in Johnston and

²Brecht which issued in 1993 and applied to the habeas petitions at issue in Johnston and Hill, provides that the harmless error standard is not the appropriate standard for determining whether federal habeas relief is warranted for a constitutional deprivation by the state courts when upholding a conviction or sentence of death. Because Brecht was the law in 1993, the State could have asked the Eleventh Circuit to apply it in Johnston and Hill and conclude that federal habeas relief could not issue. Despite that possibility, this Court instead chose to accept the federal district court's ruling that constitutional error had occurred and consider whether the error was harmless beyond a reasonable doubt.

Hill. Accordingly, the federal district court's decision in Mr. Jennings' case should receive the same respect as the federal district court decisions in Johnston and Hill.

Given that specific constitutional error was identified by the federal district court as present in Mr. Jennings' case, the claim cannot nor should not be found to be not any more procedurally barred than the claims at issue in Johnston and Hill. This Court should do as it did in Johnston and Hill and determine whether the identified constitutional error is harmless beyond a reasonable doubt and whether a new penalty phase must be ordered. This course of action is necessary in order for this Court to demonstrate that identified constitutional error in a death sentence will not be tolerated and the death sentence will not be carried out unless and until the error has been determined by the courts of this state to be harmless beyond a reasonable doubt. The State's contention that "[b]ecause this claim has already been raised and decided, it cannot be relitigated in a subsequent postconviction motion" is contrary to the action this Court took in Johnston and Hill.

Perhaps sensing the weakness of its position that this Court should ignored the federal district court's decision, the State presents an alternative argument. It suggests that the standard in Brecht v. Abrahamson should be the standard to be employed by this

Court when analyzing whether the constitutional error infecting Mr. Jennings' sentence of death should provide a basis for relief in collateral proceedings when the constitutional error was not identified during the proceedings on direct appeal. Once again, the State ignores the decisions in Johnston and Hill which are right on point. In both of those cases, this Court ruled that the harmless beyond a reasonable doubt standard was the proper standard to apply in determining whether a sentence of death previously affirmed on direct appeal and even in prior collateral proceedings can stand in light of the presence of constitutional error that has been identified by a federal district court in federal habeas proceedings.³

³The State cites two cases for its proposition that Brecht should not just be applied in federal habeas proceedings, but also in state collateral proceedings in Florida. However, both of the cited cases at their core involved error under state law, not under the U.S. Constitution. Specifically, both cases involved questions of whether state law error occurred at the defendant's trial. See Carratelli v. State, 961 So. 2d 312, 318 (Fla. 2007)(the error at issue concerned the erroneous denial of a challenge for cause); Sanders v. State, 946 So. 2d 953, 959 (Fla. 2006)(the error at issue was whether trial counsel's failure to request an instruction on a lesser included was ineffective assistance of counsel; but through the prism of the ineffective assistance analysis, the prejudice standard relieves the State of the any obligation to prove harmless beyond a reasonable doubt).

Under well-established law, the erroneous consideration of and reliance upon an invalid aggravating factor in Florida warrants a new penalty phase unless the error is found to be harmless beyond a reasonable doubt. In Sochor v. Florida, 504 U.S. 527, 540 (1992), the United States Supreme Court found a capital sentencer's erroneous consideration of an invalid aggravating aggravating circumstance when imposing a death sentence required the application of the harmless beyond a reasonable doubt standard before the constitutional error could be found to be harmless and the death allowed to stand:

In sum, Eighth Amendment error occurred when the trial judge weighed the coldness factor. Since the Supreme Court of Florida did not explain or even 'declare a belief that' this error 'was harmless beyond a reasonable doubt' in that 'it did not contribute to the [sentence] obtained,' Chapman, supra, at 24, the error cannot be taken as cured by the State Supreme Court's consideration of the case. It follows that Sochor's sentence cannot stand on the existing record of appellate review.

The harmless beyond a reasonable standard has been applied repeatedly by this Court when Eighth Amendment error has been identified during collateral proceedings and an invalid or overbroad aggravating circumstance was considered during the penalty and sentencing phases of a capital trial. Jackson v. State, 648 So. 2d 85 (1994); James v. State, 615 So. 2d 668 (Fla. 1993); Hitchcock v. State, 614 So. 2d 483 (Fla. 1993); Marek v. Dugger, 547 So. 2d 109

(Fla. 1989). See also Johnston v. Singletary; Hill v. State.

In its answer brief, the State never addresses this Court's longstanding jurisprudence on this issue, nor does it address the numerous cases in which this Court has held that the harmless beyond a reasonable doubt standard applies when Eighth Amendment error has been identified during collateral proceedings as infecting a death sentence. Instead without any citation to a single capital collateral proceeding involving the improper consideration of a vague or invalid aggravating circumstance, the State in one brief paragraph simply suggests that Brecht, a case involving the statutory construction of federal statutes providing for habeas corpus review of state court convictions, should govern in collateral proceedings in Florida state court when constitutional error is reviewed for harmlessness. The State's position should be rejected. No basis was or has been provided for why Brecht should be the standard in light of this Court's consistent insistence that Eighth Amendment error in the penalty phase of a capital trial must be harmless beyond a reasonable doubt before a sentence of death infected by the constitutional error may be left intact and the sentence of death carried out.

It is very telling that the State never argues in its brief that the identified constitutional error was harmless beyond a reasonable

doubt. The State's arguments all focus on convincing this Court that it find some other way to reject Mr. Jennings' claim. This suggests that the State recognizes that it simply cannot demonstrate that the constitutional error was harmless beyond a reasonable doubt.

There was a wealth of mitigating evidence presented by Mr. Jennings during the penalty phase which could have provided a reasonable basis for a life recommendation and preclude a judicial override. At the penalty phase, the defense presented two mental health experts, Michael Gutman, a psychiatrist, and Elizabeth McMahon, a clinical psychologist who both testified to the presence of statutory mental health mitigation. Gutman diagnosed Jennings with passive aggressive and antisocial personality disorders (R3.1348).⁴ According to Gutman, these disorders were a product of environmental factors (R3.1351). Gutman explained, "it isn't a matter of chance that people grow up to have good characters. Characters are usually molded . . . by their family, church, religion, God, and school teaching" (R3.1351). People who do not receive

⁴Such character and personality disorders are "long-term personality pattern[s] in which certain traits and patterns repeat themselves and become the way a person relates with, and is seen by other people" (R3.1348). A person with passive aggressive personality disorder is "an individual who will sabotage their own efforts to succeed" by doing "certain self destructive things" (R3.1349). This person does not face his problems but "act[s] in an immature way" (R3.1349). A person with antisocial personality disorder "is inclined toward the use of drugs, alcohol" (R3.1349).

positive molding "grow up unmodified in mother nature and have a lot of inadequacies" (R3.1351).⁵

Based upon the combination of Jennings' intoxication and his personality disorders, Gutman testified that at the time of the crime, Jennings' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (R3.1365-66). Gutman also explained that at the time of the crime, Jennings was suffering from an extreme mental or emotional disturbance resulting from his personality disorders, his inclination to drink to excess, and his drug use (R3.1367-68).⁶

⁵Defense counsel asked about a hypothetical patient which relied upon the facts of Jennings' chaotic and neglectful upbringing (R3.1351-52). Gutman testified that such a history played a role in developing antisocial and passive aggressive personality disorders (R3.1352). A child growing up in such an unstable social environment would exhibit difficulties in social development, such as having trouble making friends or trouble in school, but the child would not be aware of this process and "wouldn't necessarily verbalize what they are going through" (R3.1354-55). A child with these difficulties would be amenable to treatment (R3.1355-58).

⁶Gutman testified that treatments are available for adults with disorders such as Jennings had (R3.1370-71). Gutman believed that Jennings had characteristics which "could be worked with, with individual psychotherapy or group therapy" (R3.1372). Gutman had examined Jennings in 1979 and in 1986 (R3.1371). In the 1986 examination, Gutman had observed a change in "the shallowness of his conscience. . . . It was very shallow when I first met him seven years ago. It has expanded some" (R3.1362). In the 1986 examination, Jennings talked about sometimes experiencing a "wave" of feeling which made him want to cry and that the feeling made him very uncomfortable (R3.1371-72). Gutman explained, "The fact that

In Gutman's opinion, "but for the intoxication, I don't think he would have done what he did" (R3.1384).

McMahon diagnosed Jennings with a "character disorder," "probably a mixed type, both the immaturity and somewhat in acting out antisocial personality disorder" (R3.1441). This diagnosis is consistent with Jennings' upbringing (R3.1441). Jennings' background probably led to the development of his personality disorder (R3.1442). Jennings' history of alcohol and drug abuse is also consistent with this diagnosis (R3.1459-60).

McMahon said that in 1979, Jennings' "ability to maintain emotional control was lost somewhere in very early childhood" (R3.1445). As a child, Jennings' way of showing emotion was "he just immediately reacted, and whatever the consequences were, that's okay" (R3.1446-47). Jennings' lack of emotional control was consistent with the circumstances of the crime (R3.1447). If on the night of the crime Jennings had consumed a large amount of alcohol and possibly drugs, "[a]ny external controls [that he had] would have been weakened . . . even as any internal inhibitions would have been weakened" (R3.1447). The effect of alcohol and drugs relates directly to Jennings' ability to conform his conduct to the requirements of the

he could even feel the wave is unusual for an antisocial personality" (R3.1372).

law (R3.1447).

In McMahon's opinion, the combination of Jennings' personality disorder and his consumption of drugs and a large amount of alcohol would have substantially impaired Jennings' ability to conform his conduct to the requirements of the law (R3.1448). McMahon also testified that Jennings' personality disorder was an emotional disturbance (R3.1452).⁷

Family members and friends also testified concerning Mr. Jennings dysfunctional family background and his tumultuous childhood. This testimony also constituted mitigating evidence to be weighed against the aggravating circumstances presented by the State when the jury weighed what sentence to recommend.

Given the wealth of mitigation presented by Mr. Jennings, the jury's consideration of a constitutionally invalid aggravating circumstance (CCP) and the receipt of constitutionally deficient instruction regarding another aggravating circumstance (HAC), the error cannot be proven harmless beyond a reasonable doubt by the

⁷When she evaluated Jennings in 1986, McMahon was surprised to see that he was "somewhat more mature, much less anger" and "a young man who now is modulating, now is tempering his emotions, and they are not the impulsive kind that are just out there, that they were in 1979" (R3.1455). What surprised McMahon was that these changes had occurred "at a deeper level" and were not superficial (R3.1455). Jennings had bright normal intelligence, which "gives him a head start" in any kind of rehabilitation effort (R3.1459).

State. The mitigating evidence was of the type that could reasonably produce a life recommendation by the jury. Certainly, it was the type of mitigating evidence that has produced life recommendations in other cases which precluded a judicial override.⁸ Thus, the removal of an improper weight that had been placed on the death side of the scale could quite reasonably have caused the scale to tip in favor a life sentence. See Stringer v. Black, 503 U.S. 222 (1992). Thus as a matter of law, the constitutional identified by the federal district court cannot be found to be harmless beyond a reasonable doubt. Rule 3.851 relief is warranted because Mr. Jennings' sentence of death is constitutionally defective and cannot be allowed to stand.

CONCLUSION

In light of the foregoing arguments and those set forth in the initial brief, Mr. Jennings requests that this Court reverse the lower court, vacate Mr. Jennings' death sentence and grant other relief as set forth in this brief and the initial brief.

⁸In addition to the mitigating evidence presented during the penalty phase proceedings, there was mitigating evidence which the State withheld from Mr. Jennings. The tape of Judy Slocum's statement in which graphically described Mr. Jennings' extreme intoxication would have only strengthened the trial counsel's case for a life recommendation even more.

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 Kenneth Nunnelley, Senior Assistant Attorney General, Office of Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, Florida 332114, on September 25, 2009.

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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