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SEP 14 1992

CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

TIMOTHY CURTIS HUDSON,

Appellant,

v.

Case No. 78,462

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF THE CROSS APPELLANT

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ISSUE V

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE RESENTENCING PHASE OF HIS CAPITAL TRIAL.

As to this issue, Cross-appellant will rely on the arguments as set forth in the initial brief of cross-appellant.

ISSUE VI

WHETHER THE TRIAL COURT REFUSED TO EXCUSE ANY JURORS FOR CAUSE **WHO** INDICATED THEY WOULD AUTOMATICALLY VOTE FOR DEATH, DENYING MR. HUDSON HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL JURY.

To the extent that Hudson is raising the merits of this claim, the claim is procedurally barred as an issue that could have been and should have been raised on direct appeal. **As** for the claim that counsel was ineffective for failing to peremptorily strike juror Fowler, it is the state's position that Hudson has failed to show that counsel's performance was deficient and that Hudson **was** prejudiced by the alleged deficiency.

Hudson contends that trial counsel inexplicably failed to challenge juror Fowler who expressed strong feelings in favor of the death penalty. He claims that after Ms. Fowler stated that **she** believed in the death penalty and that she felt more strongly about carrying out the sentence than she did the sentence itself, trial counsel unreasonably failed to follow **up** that exchange in any way whatsoever. This argument is completely unfounded. The record clearly shows that defense counsel questioned Ms. Fowler extensively regarding her feelings on the death penalty. In addition to the limited excerpt as set forth by counsel for Hudson, the entire exchange occurred as follows:

Q. Can you look at Mr. Hudson now and say you presume him to be innocent of **the** charges.

A. [Mr. Wofford] Yes, sir.

A. [Ms. Fowler] Yes.

Q. Do either of you have any strong feelings about the death penalty? Mr. Wofford?

A. No, I have no strong feelings about it.

Q. Ms. Fowler?

A. I believe in it. I feel more strongly about carrying out the sentence than I do the sentence itself.

Q. Okay. You feel that, do you have any strong feelings about when the death penalty is appropriate and when it is inappropriate?

A. You mean, as far as the sentence is concerned?

Q. As far as when it should be, when someone should be sentenced to the death penalty?

A. Well, based on the evidence of the case that's --

Q. Do you believe that in **every** premeditated intentional killing, the person should get the death penalty?

A. No, sir.

Q. It's a facts-and-circumstances situation?

A. Yes, sir.

Q. Now, when you are deciding guilty or not guilty, it's unanimaus, a unanimous verdict that is called for. In order to reach a verdict, it has to be unanimous.

Do you understand that?

A. [Nods head affirmatively.]

Q. If it gets to the penalty phase, it's not a unanimous verdict. It can be any Combination, including a unanimous verdict. It can be any combination, including 6 - 6.

Do you understand that?

A. [Nods head affirmatively.]

A. Yes, sir.

Q. I believe the Judge will instruct you that a 6 - 6 is a tantamount to a life recommendation.

Do you have any problem with anything I have talked about so far?

A. No?

A. No.

(R 177, 178)

The record also shows that Ms. Fowler was a home economics professor with the University of Florida, that she was a widow and had two college aged daughters (R 173 - 175). Additionally, Ms. Fowler stated that **she** had a weekly television series on the local Public Broadcasting Station. (R 167). Based upon the foregoing, Hudson has failed to show that counsel's decision to not exercise a peremptory challenge against Ms. Fowler was unreasonable. Ms. Fowler's statements clearly show that she felt the death penalty should only be imposed when the **facts** and circumstances of the case called for it and that she did not feel that it should be imposed in every case. Given her personal and educational background, counsel could have clearly felt that any views that she may have about the death penalty were outweighed by her responses to other questions. Hudson has failed to show that counsel's performance was deficient and that he was prejudiced by the failure to exclude Ms. Fowler.

ISSUE VII

WHETHER HUDSON'S DEATH SENTENCE WAS THE PRODUCT OF CONSTITUTIONALLY INVALID JURY INSTRUCTIONS AND THE IMPROPER APPLICATION OF STATUTORY AGGRAVATING CIRCUMSTANCES IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENTS RIGHTS.

This issue should be summarily denied as it could have been and should have been raised on direct appeal. Accordingly, the claim is procedurally barred.

ISSUE VIII

WHETHER THE TRIAL COURT'S INSTRUCTIONS AT SENTENCING SHIFTED THE BURDEN OF PROOF TO MR. HUDSON, DEPRIVING MR. HUDSON OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Again, collateral counsel is asserting a claim that is procedurally barred, as it could have been and should have been raised on direct appeal. Atkins v. State, 451 So.2d 1165, fn. 3 (1988). See, also, Eutsey v. State, 541 So.2d 1143 (Fla. 1989) Therefore, this Honorable Court should summarily deny this claim.

CONCLUSION

Based upon the foregoing arguments and citation to authority, the state respectfully urges this court to affirm **he** lower court with regard to it's findings concerning the conviction, but reverse the order of the court granting Hudson a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe **Street**, Tallahassee, Florida 32301, this ~~10~~th day of September, 1992.

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LANT.