SUPREME COURT OF THE UNITED STATES

No. 91–5843

DENNIS SOCHOR, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

[June 8, 1992]

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring in part and dissenting in part.

We granted certiorari to consider two questions.[1] The Court answers the first question in Parts III-B and IV of its opinion, see *ante*, at 10–12, which I join. I do not, however, agree with the Court's treatment of the plain error that occurred when the trial judge instructed the jury at the penalty phase of the trial. See *ante*, at 4–10. Florida argues that this error was harmless because the death sentence was imposed by the judge rather than the jury. The Court today does not address this argument because it concludes that petitioner waived the error by failing to object to the instruction. I disagree with this Court in its effort to avoid the issue and with the Florida Supreme Court

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[1]Petitioner included four questions in his petition for writ of certiorari; however, the Court limited its grant to a consideration of questions two and four, which petitioner framed as follows:

"2. Did the Florida Supreme Court's review of petitioner's death sentence violate the Eighth and Fourteenth Amendments where that court upheld the sentence even though the trial court had instructed the jury on, and had applied, an improper aggravating circumstance, where the Florida Supreme Court did not reweigh the evidence or conduct a harmless error analysis as to the effect of improper use of the circumstance on the jury's penalty verdict?"

"4. Did the application of Florida's `especially heinous, atrocious, or cruel' aggravating circumstance at bar violate the Eighth and Fourteenth Amendments?" Pet. for Cert. ii.

in its appraisal of the error.

There is no dispute that the instruction prescribing the so-called heinous, atrocious or cruel aggravating circumstance (or heinousness factor, according to the Court's nomenclature)[2] was unconstitutionally vague under our decision in *Maynard* v. *Cartwright*, 486 U. S. 356 (1988).[3] In *Cartwright*, the Court explained that "[t]o say that something is `especially heinous' merely suggests that the individual jurors should determine that the murder is more than just `heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is `especially heinous.'" *Id.*, at 364 (citation omitted). Although a state court may adopt a limiting construction of a vague capital sentencing aggravating circumstance to give meaningful guidance to the sentencer, see *id.*, at 360, 365; *Walton* v. *Arizona*, 497 U. S. 639, 653 (1990); *Lewis* v. *Jeffers*, 497 U. S. 764, 778–779 (1990); *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion), or a state appellate court might apply a limiting definition of the aggravating

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[2]The trial judge gave the following instruction with respect to the heinous, atrocious or cruel aggravating circumstance: "The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. . . . [N]umber three, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." App. 326–327.

[3]See *Walton* v. *Arizona*, 497 U. S. 639, 653 (1990) ("It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face"); *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) ("There is nothing in these few words, [`outrageously or wantonly vile, horrible and inhuman,'] standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence").

circumstance to the facts presented, see *Cartwright*, 486 U. S., at 364; *Walton*, 497 U. S., at 653; *Jeffers*, 497 U. S., at 778–779; *Godfrey*, 446 U. S., at 429, the Florida Supreme Court has failed to do so here. In *Proffitt* v. *Florida*, 428 U. S. 242, 255–256 (1976), this Court approved the limiting construction adopted by the Florida Supreme Court for the heinousness factor;[4] however, the guidance given in *Dixon* v. *State*, 283 So.2d 1 (Fla. 1973) was certainly not provided in the bare bones of the instruction given by the trial court in this case. See n. 2, *supra*.

Petitioner's failure to object to the instruction at trial did not deprive the Florida Supreme Court or this Court of the power to correct the obvious constitutional error. First, petitioner did object to the vagueness of this aggravating circumstance in a Motion To Declare Section 921.141, Florida Statutes Unconstitutional Re: Aggravating and Mitigating Circumstances at the start of trial, see App. 8, 10;[5] however, that motion was denied. See 1 Tr. 9. Second, the Florida Supreme Court, though noting that petitioner had failed to make a contemporaneous objection to the instruction at the time of trial, never-

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[4]In *Dixon* v. *State*, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U. S. 943 (1974), the Florida courts had construed the heinousness factor to apply only to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." 283 So.2d, at 9.

[5]In particular, petitioner alleged:
"Almost any capital felony would appear especially cruel, heinous and atrocious to the layman, particularly any felony murder. Examination of the widespread application of this circumstance indicates that reasonable and consistent application is impossible. This standard is vague and overbroad and provides no basis for distinguishing one factual situation from another. *Godfrey* v. *Georgia*, 446 U. S. 420 (1980)." App. 10.

theless went on to reach the merits of petitioner's claim. See 580 So.2d 595, 603 (1991). Thus, the Florida Supreme Court, far from providing us with a plain statement that petitioner's claim was procedurally barred, see *Michigan* v. *Long*, 463 U. S. 1032, 1042 (1983), has merely said that the claim was "not preserved for appeal," 580 So.2d, at 602, and has given even further indication that petitioner's claim was not procedurally barred by proceeding to the merits, albeit in the alternative. Third, and most important, the State Court may review a fundamental error despite a party's failure to make a contemporaneous objection in the trial court,[6] and it unquestionably has the power to review this error even though the error may not have been properly preserved for appeal.[7] As the Florida Supreme Court explained, "[f]undamental error has been defined as `error which goes to the foundation of the case or goes to the merits of the cause of action,'" and although it is to be applied "`very guardedly,'" it nevertheless is to be applied in those "rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." *Ray* v. *State*, 403 So.2d 956, 960

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[6]See, *e.g.*, *Ray* v. *State*, 403 So.2d 956, 960 (Fla. 1981) ("This Court has indicated that for error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process"); *Castor* v. *State*, 365 So.2d 701, 704, n. 7 (Fla. 1978) (same); *State* v. *Smith*, 240 So.2d 807, 810 (Fla. 1970) (same).

[7]The Florida Supreme Court's statement that none of the alleged errors in the jury instructions had been "preserved for appeal," 580 So.2d 595, 602 (1991), merely raised the question whether they should nevertheless be reviewed under the "fundamental error" exception. That question was answered by the court's statement that petitioner's claims "have no merit." *Id*., at 603.

(1981) (citations omitted).[8] Presumably because the state court reviews for fundamental error, but did not find such error here, the State did not oppose the petition for certiorari by arguing procedural default. See Brief in Opposition 11 (State argued heinousness factor was not unconstitutionally vague). Under these circumstances, the State has waived any possible procedural objection to our consideration of the erroneous jury instruction,[9] and this Court,

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[8]The Court clearly misconstrues my point about fundamental error if it understands me to be saying that all errors concerning an improper instruction on the heinous, atrocious, or cruel aggravating circumstance "would automatically be `fundamental.'" *Ante*, at 7, n. * . Quite simply, my point is *not* that such error necessarily constitutes fundamental error, but rather, that such error can be the subject of fundamental error review. In other words, the Florida Supreme Court is not without power, even when the defendant has failed to raise an objection at trial, to consider whether such error constitutes fundamental error. Although the Florida Supreme Court may not necessarily find fundamental error in the particular instance, it is, nevertheless, willing and able to consider whether fundamental error has occurred. See, *e.g.*, *Walton* v. *State*, 547 So.2d 622, 625–626 (Fla. 1989) ("Absent fundamental error, failure to object to the jury instructions at trial precludes appellate review. . . . We find no fundamental error in the instructions"), cert. denied, 493 U. S. 1036 (1990); *Smalley* v. *State*, 546 So.2d 720, 722 (Fla. 1989).

[9]See *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 816 (1985) ("Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition. Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition

contrary to its protestation, is not “without authority” to address petitioner's claim. *Ante*, at 6.

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for certiorari; if not, we consider it within our discretion to deem the defect waived”).

Contrary to the Court's suggestion that I have forgotten that the “defense” is jurisdictional, see *ante* at 7, n. * , I believe the Court has forgotten that we have ample power to review a State Court's disposition of a federal question on its merits. If the Florida Supreme Court has jurisdiction to consider petitioner's claim, as I believe it does when it engages in fundamental error review and reaches the merits of the claim, then this Court also has jurisdiction to reach the merits.

We should reject unequivocally Florida's submission that erroneous jury instructions at the penalty phase of a capital case are harmless because the trial judge is the actual sentencer and the jury's role is purely advisory. That submission is unsound as a matter of law, see, *e.g.*, *Riley* v. *Wainwright*, 517 So.2d 656, 659 (Fla. 1987); *Hall* v. *State*, 541 So.2d 1125, 1129 (Fla. 1989), and as a matter of fact.

As a matter of law, the jury plays an essential role in the Florida sentencing scheme. Under *Tedder* v. *State*, 322 So.2d 908 (Fla. 1975), and its progeny,[10] a jury's recommendation must be given "great weight." *Id*., at 910. The Florida Supreme Court explained that a jury recommendation of a life sentence can be overturned only if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Ibid*.[11]

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[10]See, *e.g.*, *Thompson* v. *State*, 328 So.2d 1 (Fla. 1976).

[11]As the Eleventh Circuit observed about the Florida Supreme Court:

"That the court meant what it said in *Tedder* is amply demonstrated by the dozens of cases in which it has applied the *Tedder* standard to reverse a trial judge's attempt to override a jury recommendation of life. *See, e.g., Wasko v. State*, 505 So.2d 1314, 1318 (Fla. 1987); *Brookings v. State*, 495 So.2d 135, 142–43 (Fla. 1986); *McCampbell v. State*, 421 So.2d 1072, 1075–76 (Fla. 1982); *Goodwin v. State*, 405 So.2d 170, 172 (Fla. 1981); *Odom v. State*, 403 So.2d 936, 942–43 (Fla. 1981), *cert. denied*, 456 U. S. 925 . . . (1982); *Neary v. State*, 384 So.2d 881, 885–88 (Fla. 1980); *Malloy v. State*, 382 So.2d 1190, 1193 (Fla. 1979); *Shue* v. *State*, 366 So.2d 387, 390–391 (Fla. 1978); *McCaskill v. State*, 344 So.2d 1276, 1280 (Fla. 1977); *Thompson v. State*, 328 So.2d 1, 5 (Fla. 1976)." *Mann* v. *Dugger*, 844 F. 2d 1446, 1451 (1988)

Similarly, a jury's recommendation of a death sentence must also be given great weight.[12] For example, in *Stone* v. *State*, 378 So.2d 765 (Fla.), cert. denied, 449 U. S. 986 (1980), the Florida Supreme Court discussed a challenge to a death sentence imposed after a jury had recommended a sentence of death. The petitioner had based his challenge on a similar case, *Swan* v. *State*, 322 So.2d 485 (Fla. 1975), in which the court had reversed the death sentence. In affirming Stone's sentence, however, the court pointed out that the critical difference between Stone's case and Swan's case was that "Swan's jury recommended mercy while Stone's recommended death and the jury recommendation is entitled to great weight. *Tedder* v. *State*, 322 So.2d

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(en banc), cert. denied, 489 U. S. 1071 (1989).

[12]*Smith* v. *State*, 515 So.2d 182, 185 (Fla. 1987) ("[W]e approve the death sentence on the basis that a jury recommendation of death is entitled to great weight"), cert. denied, 485 U. S. 971 (1988); see also *LeDuc* v. *State*, 365 So.2d 149, 151 (Fla. 1978) ("The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data w[ere] considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation"), cert. denied, 444 U. S. 885 (1979); *Ross* v. *State*, 386 So.2d 1191, 1197 (Fla. 1980) (same); *Middleton* v. *State*, 426 So.2d 548, 552–553 (Fla. 1982) (approving trial court's imposition of death sentence and reiterating that jury had recommended death), cert. denied, 463 U. S. 1230 (1983); *Francois* v. *State*, 407 So.2d 885, 891 (Fla. 1981) (same), cert. denied, 458 U. S. 1122 (1982); cf. *Grossman* v. *State*, 525 So.2d, at 839, n. 1 ("We have . . . held that a jury recommendation of death should be given great weight").

908 (Fla. 1975)." *Stone*, 378 So.2d, at 772.[13]

As a matter of fact, the jury sentence is the sentence that is usually imposed by the Florida Supreme Court. The State has attached an appendix to its brief, see App. to Brief for Respondent A1–A70, setting forth data concerning 469 capital cases that were reviewed by the Florida Supreme Court between 1980 and 1991. In 341 of those cases (73%), the jury recommended the death penalty; in none of those cases did the trial judge impose a lesser sentence. In 91 cases (19%), the jury recommended a life sentence; in all but one of those cases, the trial judge overrode the jury's recommended life sentence and imposed a death sentence. In 69 of those overrides (77%), however, the Florida Supreme Court vacated the trial judge's sentence and either imposed a life sentence itself or remanded for a new sentencing hearing.[14]

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[13]The Florida courts have long recognized the integral role that the jury plays in their capital sentencing scheme. See, *e.g.*, *Messer* v. *State*, 330 So.2d 137, 142 (Fla. 1976) ("[T]he legislative intent that can be gleaned from Section 921.141 . . . [indicates that the legislature] sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part"); see also *Riley* v. *Wainwright*, 517 So.2d 656, 657 (Fla. 1988) ("This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process"); *Lamadline* v. *State*, 303 So.2d 17, 20 (Fla. 1974) (right to sentencing jury is "an essential right of the defendant under our death penalty legislation").

[14]In 37 out of the 469 cases, there was no jury recommendation either because the defendant had waived the right to a jury trial or had offered a plea, or because the jury selection or trial had to be redone.

Two conclusions are evident. First, when the jury recommends a death sentence, the trial judge will almost certainly impose that sentence. Second, when the jury recommends a life sentence, although overrides have been sustained occasionally, the Florida Supreme Court will normally uphold the jury rather than the judge. It is therefore clear that in practice, erroneous instructions to the jury at the sentencing phase of the trial may make the difference between life or death.

When a jury has been mistakenly instructed on the heinous, atrocious, or cruel aggravating circumstance, the Florida Supreme Court, acknowledging the important role that the jury plays in the sentencing scheme, has held that the error was reversible. For example, in *Jones* v. *State*, 569 So.2d 1234 (Fla. 1990), in which the jury was instructed on the heinousness factor, but the body had been sexually abused *after* death, and the death had occurred quickly as the result of a gunshot wound, the Florida Supreme Court concluded that the heinousness factor was inapplicable and that its inclusion in the instructions constituted reversible error. Similarly, in *Omelus* v. *State*, 584 So.2d 563 (Fla. 1991), when the trial court had instructed the jury on the heinousness factor even though the defendant had contracted with a third party to perform the killing, and had no knowledge of how the murder was accomplished, the Florida Supreme Court remanded the case for resentencing. Thus, the Florida Supreme Court recognized that when the jury's deliberative process is infected by consideration of an inapplicable aggravating factor, the sentence must be vacated unless the error is harmless beyond a reasonable doubt.[15] Similarly, the

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[15]As the Eleventh Circuit observed:

The Florida Supreme Court "will vacate the [death] sentence and order resentencing before a new jury if

court has recognized that when the jury is given an instruction that is unconstitutionally vague, the jury's deliberative process is also tainted,[16] and a remand is appropriate so that the jury can reach a sentence that is not influenced by the unconstitutional factor unless the error is harmless beyond a reasonable doubt.

The harmless error inquiry to be conducted by the Florida Supreme Court on remand should, therefore, encompass the erroneous jury instruction on the heinousness factor and the error in submitting an instruction on the cold, calculated, and premeditated aggravating circumstance to the jury when the evidence did not support such an instruction, as well as the error committed by the trial judge in relying on that factor.

For the reasons given above, I concur in Parts I, III-B, and IV, and respectfully disagree with Parts II-A, II-B, and III-A.

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it concludes that the proceedings before the original jury were tainted by error. . . . In those cases, the supreme court frequently focuses on how the error may have affected the jury's recommendation. . . . Such a focus would be illogical unless the supreme court began with the premise that the jury's recommendation must be given significant weight by the trial judge. Once that premise is established, a focus on how the error may have affected the jury's recommendation makes sense: if the jury's recommendation is tainted, then the trial court's sentencing decision, which took into account that recommendation, is also tainted." *Mann* v. *Dugger*, 844 F. 2d, at 1452–1453 (footnote omitted).

[16]As the court explained in *Riley* v. *Wainwright*, 517 So.2d, at 659: "If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure."