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 1, 1992]

THE CHIEF JUSTICE, with whom JUSTICE WHITE and JUSTICE THOMAS join, concurring in part and dissenting in part.

I join in all that the Court has to say in rejecting Sochor's claim that the application of Florida's "heinousness" factor in this case violated his constitutional rights. I also agree with the majority that Eighth Amendment error occurred when the trial judge weighed the invalid "coldness" factor in imposing Sochor's death sentence. Accordingly, I join Parts I, II, III-A, and III-B(1) of the Court's opinion. I dissent from Parts III-B(2) and IV of the opinion, however, for I believe that the Supreme Court of Florida cured this sentencing error by finding it harmless. I would thus affirm the judgment below and uphold the sentence.

When a reviewing court invalidates one or more of the aggravating factors upon which the sentencer relied in imposing a death sentence, the court may uphold the sentence by reweighing the remaining evidence or by conducting harmless-error analysis. *Clemons* v. *Mississippi*, 494 U. S. 738 (1990). As the majority observes, the Supreme Court of Florida does not in practice independently reweigh aggravating and mitigating evidence, and it did not do so in this case. *Ante*, at 14. In order to sustain Sochor's sentence, the court thus had to find any error harmless. In other words, it had to find beyond a reasonable doubt that the trial judge would still have imposed the death sentence if he had not considered the "coldness" factor when performing the weighing function required by Florida law. *Clemons* v. *Mississippi*, *supra*, at 753; *Chapman* v. *California*, 386

U. S. 18, 24 (1967). It seems clear to me that the court reached this conclusion, and that the conclusion is certainly justified by the facts of this case.

After finding that the trial judge erred in relying on the coldness factor in determining Sochor's sentence, the Supreme Court of Florida stated:

> "The trial court carefully weighed the aggravating factors against the lack of any mitigating factors and concluded that death was warranted. Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing. *Robinson v. State*, 574 So. 2d 108 (Fla. 1991); *Holton v. State*, 573 So. 2d 284 (Fla. 1990); *James v. State*, 453 So. 2d 786 (Fla.), *cert. denied*, 469 U. S. 1098 . . . (1984); *Francois v. State*, 407 So. 2d 885 (Fla. 1981), *cert. denied*, 458 U. S. 1122 . . . (1982)." 580 So. 2d 595, 604 (1991).

The Court now holds that this passage fails to indicate that the error in this case was viewed as harmless. It is true that the passage does not mention the words "harmless error." But we have never held that a court must necessarily recite those words in determining whether an error had an effect on a certain result. In deciding whether the Supreme Court of Florida conducted adequate harmless-error analysis in this case, our focus should not be solely on the particular words and phrases it used to convey its thoughts. Whatever words it used, if they show that it concluded beyond a reasonable doubt that elimination of the "coldness" aggravating factor would have made no difference to Sochor's sentence, then it conducted adequate harmless error analysis. See *Parker* v. *Dugger*, 498 U. S. ___, ___ (1991) (slip op., at 10–11).

I am convinced by the passage quoted above that the Supreme Court of Florida believed, beyond a reasonable doubt, that the elimination of the

"coldness" factor would have made no difference at all in this case. A review of the aggravating and mitigating evidence presented in this case demonstrates why. In making his sentencing determination, the trial judge found four aggravating circumstances, including the "coldness" aggravator. He found absolutely *no* mitigating evidence. After weighing the four aggravating circumstances against zero mitigating circumstances, the trial judge imposed the death penalty. The Supreme Court of Florida later found the "coldness" aggravating circumstance invalid. It observed, however, that three valid aggravators were left to be balanced against the complete lack of mitigating evidence. On that basis, the court concluded that resentencing was unnecessary. After reaching that conclusion, the court cited four cases in which it had invalidated aggravating factors but had upheld the death sentences, having found that the inclusion of those aggravators made no difference to the weighing process. One of the cases cited in fact made explicit mention of harmless-error analysis. *Holton* v. *State*, 573 So. 2d 284, 293 (Fla. 1990) ("Under the circumstances of this case, we cannot say there is any reasonable likelihood the trial court would have concluded that the three valid aggravating circumstances were outweighed by the mitigating factors. We find the error was harmless beyond a reasonable doubt") (citation omitted). See *supra*, at 2.

In my mind, it is no stretch to conclude that the court saw this case for what it is — a paradigmatic example of the situation where the invalidation of an aggravator makes absolutely no difference in the sentencing calculus. We have previously observed that the invalidation of an aggravating circumstance results in the removal of a "thumb . . . from death's side of the scale." *Stringer* v. *Black*, 503 U. S. ___, ___ (1992) (slip op., at 8). Precisely for this reason, we

require appellate courts to either reweigh the evidence or perform harmless-error analysis if they seek to affirm a death sentence after invalidating an aggravator. In a case such as this, however, where there is not so much as a thumbnail on the scale in favor of mitigation, I would not require appellate courts to adhere to any particular form of words to demonstrate that which is evident. If the trial judge in this case had eliminated the "coldness" aggravator from the weighing process, and had balanced the three valid aggravators against the complete absence of mitigating evidence, the absent mitigating evidence would still have failed to outweigh the aggravating evidence, and the sentence would still have been death. Although it did so cursorily, I am convinced that the Supreme Court of Florida found the inclusion of the invalid "coldness" factor harmless beyond a reasonable doubt.

It seems that the omission of the words "harmless error" from the opinion below is the root of this Court's dissatisfaction with it. In all likelihood, the Supreme Court of Florida will reimpose Sochor's death sentence on remand, perhaps by appending a sentence using the talismanic phrase "harmless error." Form will then correspond to substance, but this marginal benefit does not justify our effort to supervise the opinion-writing of state courts. I would therefore affirm the judgment below.