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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BYRON EUGENE SCHERF,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

Honorable Thomas J. Wynne and Honorable George F.B. Appel, Judges

OPENING BRIEF OF APPELLANT ON
SUPPLEMENTAL ASSIGNMENT OF ERROR

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The prosecutor's misconduct in making statements which precluded the jury from giving full effect to mitigating evidence violated Mr. Scherf's rights under the Eighth and Fourteenth Amendments of the United States Constitution and Article 1, section 14 of the Washington Constitution.

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

Did the prosecutor's misconduct in telling the jurors that virtually nothing presented at either the trial or penalty phase trial was mitigation – not the facts or circumstances of the crime; not Mr. Scherf's criminal history, his intelligence or educational efforts; not the fact that he confessed; not the mistakes made by the Department of Corrections which made the crime possible – deny him his state and federal constitutional rights to have the jury consider *any* aspect of the crime or his character as mitigation?

C. STATEMENT OF THE CASE RELATED TO SUPPLEMENTAL ASSIGNMENT OF ERROR

In the opening statement for the penalty phase of Mr. Scherf's capital trial, the Prosecutor Edward Stemler properly told the jurors that their decision to impose the death sentence or life without parole was dictated by their determination of the question: "Having in mind the crime

of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" RP 7003-7004. He told the jurors that a mitigating circumstance is: "A fact about the offense or about the defendant that in fairness or in mercy may be considered as extenuating or reducing the degree of moral culpability, or which justifies a sentence of less than death." RP 7004.

Mr. Stemler then outlined three types of evidence the state would present in its penalty phase case-in-chief: the facts and circumstances of the crime, a victim impact statement, and Mr. Scherf's criminal history. RP 7003-7004. After describing each type of evidence, he told the jurors what was not mitigation:

--"The circumstances of this crime do not merit leniency for this defendant." RAP 7004.

-- "So you will hear a Victim Impact Statement, and there's nothing mitigating or meriting leniency for the defendant about that." RP 7004.

--"That's the defendant's criminal history. You will find nothing mitigating about that." RP 7007.

In the penalty phase closing argument, Prosecutor Paul Stern told the jury that none of the penalty phase evidence, presented either by the

state or the defense, constituted mitigation:

-- "[W]hat mitigating factors are there? Well, he's a smart . . . That's not mitigation. It made him dangerous." RP 7137.

--"Maybe you will conclude that these classes are mitigation. Maybe not." RP 7140. "And after all of his study, and these document they suggested to you *as if* they're mitigation, learning about the Bible, that's what we get: killing a 34-year-old woman in the sanctuary." RP 7141.

In the rebuttal closing argument, Prosecutor Stemler again argued that the defense evidence was not mitigation:

--He told the jurors that Mr. Scherf's confession was not mitigation: "It's not a mitigating factor for you to consider in this case." RP 7164,

--"When you're talking about the crime and the evidence you have already heard, there is nothing mitigating about what the defendant did, and there's certainly nothing deserving of lenience in the way that this crime was carried out and committed. " RP 7164.

--"You know there's nothing mitigating about what took place in the crime." RP 7165.

--He discounted the testimony given by Scott Frakes of the Department of Corrections which included admissions that the DOC had

made mistake: “The testimony you heard about Scott Frakes yesterday. It really wasn’t about mitigating circumstances that support the defendant.” RP 7165.

The only things that Mr. Stemler suggested might be considered as mitigation were, (1) “His study? He should have known better,” and (2) “He’s a good worker. . . .Is that really sufficient to justify leniency in this case. The State suggests to you it’s not.” RP 7165-7166.

The defense argued that the facts of the crime and his character and life – his desire to improve himself, his good prison record, his confession and remorse were mitigation. RP 7009-7014; 7144-7160.

D. ARGUMENT

THE PROSECUTOR’S MISCONDUCT IN TELLING THE JURORS THAT VIRTUALLY NONE OF THE EVIDENCE PRESENTED AT TRIAL OR THE PENALTY PHASE WAS MITIGATION DENIED MR. SCHERF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS UNDER THE 8TH AND 14TH AMENDMENTS AND ARTICLE 1, SECTION 14.

The prosecutors, in opening statement and both closing arguments of the penalty phase, flatly told the jurors that nothing about the crime was mitigation and that most of what they had heard about Mr. Scherf either at trial or from the defense was not mitigation. RP 7004, 7007, 7137, 7140-7141, 716407165. These categorical statements were underlined by the prosecutor’s telling them that only the two facts that Mr. Scherf studied

and was a good worker were potentially, but insignificantly, mitigating. RP 7165-7166. This denied Mr. Scherf his constitutional rights to have the jury consider any fact about the crime or his character as mitigation and as a reason for imposing a sentence of less than death.

Although defense counsel did not object, it was the pervasive, cumulative and categorical nature of the statements by both prosecutors in opening, closing and rebuttal arguments which resulted in the constitutional violation. Moreover, as a manifest error affecting a constitutional right, the issue can be raised for the first time on appeal. RAP 2.5(a)(3).

It is well established by the United States Supreme Court that “in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978) (quoting Woodson v. North Carolina, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed 2d 944 (1976)). For this reason, “the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the

defendant proffers as a basis for a sentence less than death.” Id.

Only the full consideration of mitigation by the jury can guarantee that it makes the individualized determination of whether a defendant should be sentenced to death required by the United States Constitution. Tuilaepa v. California, 512 U.S. 967, 971-973, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994); Zant v. Stephens, 462 U.S. 862, 878-879, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983). The Supreme Court’s “consistent concern has been that restrictions on the jury’s sentencing determination not preclude the jury from being able to give effect to mitigating evidence.” Buchanan v. Angelone, 522 U.S. 269, 118 S. Ct. 757, 139 L. Ed. 2d 792 (1998).

“Presentation of mitigating evidence alone . . . does not guarantee that a jury will feel entitled to consider that evidence.” Boyde v. California, 494 U.S. 370, 384, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). Jurors may feel precluded from fully considering mitigation not only because of the court’s instructions, “but also as a result of prosecutorial argument dictating that such consideration is forbidden.” Abdul-Kahir v. Quarterman, 550 U.S. 233, 259 n.21, 127 S. Ct. 1654, 167 L. Ed. 2d 585 (2007).

When a prosecutor’s actions are so egregious that they effectively “foreclose the jury’s consideration of ... mitigating evidence,” the jury is

unable to make a fair, individualized determination as required by the Eighth Amendment. Buchanan, 552 U.S. at 277. As a result, a prosecutor's comments violate the Eighth Amendment when they are so prejudicial as to "constrain the manner in which the jury was able to give effect" to mitigating evidence. Id. Accordingly, "[a] prosecutor errs by directing the jury to ignore a proposed mitigating factor." United States v. Rodriguez, 581 F.3d 775, 800-801 (8th Cir. 2009). "To ensure the reliability of the determination that death was the appropriate punishment, a prosecutor may not argue that [meaningful] consideration [of potentially mitigating evidence] is forbidden." Sinisterra v. United States, 600 F.3d 900, 909 (8th Cir. 2010) (citations omitted).

In Depew v. Anderson, 311 F.3d 742 (6th Cir. 2002), cert. denied, 540 U.S. 888 (2003), the Court of Appeals reversed a death sentence because the prosecutor's misconduct in falsely implying that the defendant had been violent in the past precluded the jury from fully considering his proffered mitigating evidence of past peaceful and law-abiding conduct. In another Sixth Circuit decision, Bates v. Bell, 402 F.3d 635 (6th Cir. 2004), the Court of Appeals reversed a death sentence because the prosecutor's improper comment to the jurors that if they failed to impose a death sentence they would be accomplices to murder and even an accomplice to future crimes prevented them from fully considering

mitigation evidence. In Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), the United States Supreme Court held that a prosecutor's leading the jury to believe that an appellate court had the ultimate responsibility for determining the appropriateness of a death sentence, violated the Eighth Amendment by diminishing the jury's responsibility for the decision. See also Le v. Mullin, 311 F.3d 1002, 1018 (10th Cir. 2002) (prosecutor may not imply that "the jury had the ability to ignore the legal requirement that it must consider mitigating evidence.")

While a prosecutor may argue what weight the jury should give mitigating evidence, as explained in Eddings v. Oklahoma, 455 U.S. 105, 113-114, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982), "[T]he sentencer may not give it no weight by excluding such evidence from . . . consideration."

Here the prosecutors were direct; they simply told the jurors that the things that the jurors were constitutionally required to consider as mitigation were not mitigation, in essence excluding them from consideration. As a consequence, the jurors were likely precluded from considering the lack of significant premeditation and other factors about the crime as weighing against a death sentence. The jurors' consideration of Mr. Scherf's confession or remorse as mitigation – or his positive accomplishments and good behavior in prison – was also

unconstitutionally diminished. They were not likely to have considered the actions of the DOC as mitigating. The State told them that none of this was mitigation.

And as quoted by the Court of Appeals in Bates v. Bell:

The [prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such. . . [h]e may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Bates v. Bell, 402 F.3d at 644 (quoting Justice Sutherland in Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935) (emphases added in Bates)).

The prosecutor's comments and arguments denied Mr. Scherf his rights under the state and federal constitutions to have the jury fully consider and give effect to mitigation.

E. CONCLUSION

Appellant respectfully submits that his conviction and death sentence should be reversed and remanded for retrial on the aggravated

murder charge and dismissal of the death sentence based on the supplemental assignment of error as well as the assignments of error set forth in his Opening Brief of Appellant .

Respectfully submitted,

DATED this 3rd day of November, 2015

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CERTIFICATE OF SERVICE

I certify that on the 3rd day of November, 2015, I caused a true and correct copy of the Opening Brief of Appellant on Supplemental Assignment of Error to be served on the following via e-mail

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Please find attached Appellant's Motion to Permit Filing of Supplemental Assignment of Error and Supplemental Brief in Support; and Appellant's Supplemental Assignment of Error.

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