7TH CIRCUIT DEATH PENALTY ISSUES

(1987 through May 2002)

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I. Aggravation

1. Sentencing jury consideration of defendant's false statements of participation in "Vietnam atrocities," did not violate the Eighth Amend. Silagy(F4)

2. Evidence that the defendant remained silent when questioned for preparation of a presentence report, and the probation officer's opinion that defendant did not seem remorseful did not violate the Fifth Amend. when defendant requested the interview and knew its purpose. Williams(F5)

3. Orders of supervision resulting from criminal conduct are permissible aggravation. Stewart(F6)

4. Hearsay aggravation is admissible at sentencing since the Confrontation Clause does not apply to sentencing. Davis(F9); For example, experts may testify to reports of other experts in aggravation. DelVecchio(F11); Todd(F42)

5. A defendant is not entitled to an evidentiary hearing on the voluntariness of a confession to a prior murder used in aggravation. DelVecchio(F11)

6. Testimony that defendant didn't use drugs, responding to mitigation that defendant was high on drugs at the time of his crimes, was not shown to be perjury just because there was conflicting evidence. DelVecchio(F11)

7. The exclusionary rule, a Miranda violation, does not bar testimony in aggravation. DelVecchio(F11)

8. Consideration of an invalid statutory aggravating factor as aggravation at the second, or weighing, stage of the death penalty hearing was harmless and the court may consider the underlying criminal conduct in the invalid statutory aggravating factor. Hampton(F22)

A. Victim Impact

1. Victim impact testimony did not violate due process of law. Williams(F5)

II. Appeal

1. Years of delay from sentencing did not violate 8th Amend. when delays were caused by defendant. Free(F8)

2. The Illinois Supreme Court did not violate equal protection by inconsistently applying a rule against prosecution arguments about possible parole. DelVecchio (F11)

3. The Illinois Supreme Court's failure to examine the merits of claims on direct appeal because trial counsel had failed to file a motion for new trial did not prejudice defendant. Enoch (F13)

4. The Illinois Supreme Court's prospective application of the need for an instruction that life in prison without parole is the only alternative to the death penalty does not violate equal protection. Stewart(F18)

III. Constitutionality of Death Penalty Statute

1. Prosecutor's post-conviction discretion as to whether to seek the death penalty does not violate the Eighth Amend. Silagy(F4), Williams(F5)

2. Lack of pretrial notice of intent to seek the death penalty does not violate the Sixth or Fourteenth Amends. Silagy(F4), Williams(F5)

3. The Illinois Death Penalty statute does not place an unconstitutional burden on defendants to prove the inappropriateness of the death penalty. Silagy(F4), Williams(F5), Holman(F25), Sanchez (F33)

4. The absence of comparative proportionality review of Illinois death sentences does not violate the Eighth Amend. Silagy(F4)

5. The Illinois Death Penalty statute's failure to provide a means of assuring that all aggravation is relevant and constitutionally permissible does not violate the Eighth Amend. Silagy(F4), Williams(F5)

6. The Illinois Death Penalty statute language, that mitigation must "preclude" the death penalty, does not unconstitutionally reduce individualized consideration of mitigation by compelling defendant to introduce far more mitigation than aggravation, as opposed to sufficient mitigation to "outweigh" aggravation. Williams(F5)

7. The Illinois Death Penalty statute is not unconstitutionally vague as to; a) the burden of persuasion placed on the defendant, b) the sufficient to preclude language, c) the jury instruction language on a nonunanimous verdict. Williams(F5)

8. The Illinois Death Penalty statute is not unconstitutionally applied in an arbitrary manner based on race. Davis(F9)

9. The Illinois Death Penalty statute exclusion of persons in need of special assistance as eligible for the death penalty does not render the death penalty arbitrary. Pitsonbarger(F21)

10. The Illinois Death Penalty statute is not unconstitutional because it fails to clearly assign the burden of persuasion to either side. Gosier (F30)

IV. Counsel

A. Ineffective Assistance

1. Counsel's agreement to stipulate, in aggravation, to his client's prior felony convictions, based on a "rap sheet," when the prosecution did not have proof of the felony convictions, and later investigation revealed the felony convictions did not exist, constituted ineffective assistance. Lewis(F1)

2. Failure to present any mitigation witnesses, when fifteen character witnesses were presented in post-conviction proceedings, together with a short, rambling, incoherent, sentencing argument to the jury, constituted ineffective assistance. Kubat(F3)

3. Counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigation. Kubat(F3), Stewart(F6), Hall(F23)

4. Counsel's failure to object to jury instructions which erroneously indicated that the

jury must unanimously find sufficient mitigation to preclude the death penalty constituted ineffective assistance. Kubat(F3)

5. Counsel's failure to talk to defendant's family prior to their testimony and failure to investigate history of drug use were not prejudicial, when later investigation revealed negative information such as defendant having committed other criminal acts and mitigation concerning lack of parental love and the evil influence of relatives on defendant. Stewart(F6)

6. Counsel was not ineffective for failing to present evidence of mental illness, retardation, and a troubled family background when the defendant prevented his counsel from presenting that mitigation. Davis(F9)

7. Counsel's complete failure to conduct any mitigation investigation was ineffective assistance of counsel, even though defendant told counsel and the Court that he didn't want any evidence or argument in mitigation, when investigation would have revealed defendant's low IQ, defendant being wounded as a bystander to a holdup at age 8, the death of defendant's child, and the shooting death of defendant's brother. Emerson (F12)

8. Counsel's failure to file a motion for new trial, thereby defaulting claims of error on appeal, was unreasonable performance of counsel, but not prejudicial, so not ineffective assistance. Enoch(F13)

9. Counsel should have prepared for death penalty hearing prior to trial, but failure to do so, and denial of continuance to prepare, did not deny effective assistance of counsel where proper preparation would not have revealed significant mitigation. Collins(F14)

10. Counsel's failure to use intoxication as mitigation was not deficient performance when defendant denied being intoxicated at time of crime. Jones(F15)

11. Counsel's failure to present substance abuse as mitigation was tactical choice when it may have been viewed as aggravation. Jones(F15)

12. Counsel's failure to call court psychologist to testify to defendant's low IQ was tactical when report also contained aggravation. Jones(F15)

13. Failure to call defendant's girlfriend in mitigation was tactical when she refused to remove jewelry spelling out "BITCH." Jones(F15)

14. Defendant's insistence that his grandmother not be a mitigation witness refuted ineffective assistance claim based on grandmother not testifying. Jones(F15)

15. Strategy of pleading guilty and arguing for mercy was not ineffective. Jones(F15); Plea to sentencing jury for mercy is a valid strategy. Mahaffey(F28)

16. Counsel's failure to present more evidence of defendant's psychiatric problems in mitigation, including a long pattern of sexual violence and dysfunction, did not prejudice defendant when his psychiatric history was presented, the omitted mitigation was also aggravating, and the crime was so aggravating. Eddmonds(F17)

17. Counsel's closing argument plea for mercy was a valid strategic decision and neither constitutionally deficient nor prejudicial. Eddmonds(F17)

18. Counsel's failure to present mitigation that defendant was a good person, a good worker, a good prisoner, and had been abused as a child did not establish ineffective assistance of counsel, when defendant was uncooperative with counsel, refused to testify, some mitigation was

presented, and the omitted mitigation also included additional aggravation. Neal(F19)

19. Counsel's failure to communicate with defendant in preparation for death penalty hearing, failure to investigate mitigation including good prison conduct and saving a life, and making a closing argument relying on disregarding the law was ineffective assistance of counsel, despite defendant's earlier uncooperativeness including attack on counsel. Hall(F23)

20. Counsel's failure to inform defendant that a single juror could spare his life was deficient performance when defendant waived jury for sentencing and defendant attempted to withdraw the waiver after learning that a nonunanimous jury would result in a prison term. Hall(F23); distinguished in Whitehead(F41)

21. Counsel's failure to investigate and present mitigation consisting of an 82 I.Q. and a childhood head injury, not related to the criminal conduct in question, did not constitute ineffective assistance of counsel when counsel investigated and presented other mitigation. Holman(F25)

22. Defense counsel's asking an aggravation witness if she favored the death penalty for defendant, to which the witness answered, yes, was not ineffective assistance of counsel. Holman(F25)

23. Counsel's use of "residual doubt" mitigation rather than diminished mental capacity or an undue influence defense in mitigation was a reasonable tactical decision when his client testified and denied participation in the crimes. Kokoraleis (F26)

24. Counsel's failure to obtain school records, which would have shown a 64 I.Q., or to investigate client's mental health, which would have shown a "borderline personality disorder," did not constitute insufficient investigation when counsel's conversations with the client and his family suggested no mental problems. Mahaffey (F28)

25. Counsel's failure to have a psychiatric evaluation of his client done was not ineffective assistance of counsel. Tenner (F31)

26. Counsel's failure to present evidence in mitigation of drug addiction at time of murders was not prejudicial. Ashford (F29)

27. Appellate counsel's failure to raise issues on direct appeal was not deficient performance when counsel raised many issues some of which were similar to the argument that counsel defaulted. Franklin (F32)

28. Trial counsel was not ineffective for failing to seek an accomplice witness instruction. Franklin (32)

29. Counsel was not ineffective for failure to investigate substance abuse as mitigation since the evidence showed defendant was sober at the time of the crime. Britz (F34)

30. Counsel's decision not to call a psychiatrist to offer testimony of extreme emotional distress was not ineffective when counsel had strategy reasons including avoiding aggravation in psychiatrist's report and defendant wasn't prejudiced in light of the other aggravating evidence. Foster (F36)

31. Counsel wasn't ineffective for conceding in trial closing argument that defendant "killed the woman he loved" when counsel was attacking the proof as to whether defendant intended to kill her, further the defendant wasn't prejudiced in light of the other evidence defendant killed his girlfriend. Foster (F36)

32. Counsel wasn't ineffective for failure to properly investigate hair transfer evidence. Todd (42)

33. Counsel wasn't ineffective for failing to investigate additional mitigation. Todd (42)

34. Counsel's failure to discover mitigation of low IQ, abuse of psychiatric medication, and mental health problems wasn't deficient performance where counsel did investigate for mitigation. Wright (F45)

B. Right to Counsel and Self-Representation

1. Self-representation at death penalty hearing does not violate the Eighth Amend. Silagy(F4)

2. Defendant's mistaken belief as to the method of execution does not invalidate waiver of counsel at death penalty hearing. Silagy(F4)

3. Defendant was competent to waive counsel. Coleman(F35)

V. Double Jeopardy

1. If a defendant has multiple murder convictions, a decision not to impose the death penalty in one case does not collaterally estopp a death sentence in the next case, even though both cases consider the same multiple murders in aggravation. Kokoraleis (F26)

VI. Eligibility

1. Illinois has a non-weighing statutory scheme for determining death penalty eligibility. Hampton(F22); Coleman(F35)

2. One invalid statutory aggravating factor does not negate eligibility when another valid statutory aggravating factor was proven. Hampton(F22); Coleman(F35)

3. In Illinois, one statutory aggravating circumstance is enough to establish death penalty eligibility. Kokoraleis(F26)

A. Evidence

1. Victim impact evidence heard at eligibility stage of death penalty hearing was not prejudicial in light of strong evidence of eligibility. Pitsonbarger(F21)

B. 9-1(b)6 Felony Murder

1. Illinois law requires that the felony murder defendant, rather than accomplice, either kill or injure the deceased to be eligible for death penalty. Gaines(F2)

2. Statute indicating that murder in course of a felony established death penalty eligibility was sufficient notice to defendant that death penalty eligibility could also be based on murder in course of the attempt to commit a felony, even though the statute was not so interpreted by the Illinois Supreme Court until after the crime. Free(F8)

3. Sufficient evidence to prove elements beyond a reasonable doubt. Todd(F42)

C. 9-1(b)8 Witness Murder

1. The Illinois Supreme Court reasonably applied this statutory aggravating factor when the victim was murdered after initially being released and defendant learned victim was going to report her abduction to police. Williams(F5)

D. 9-1(b)7 Child Murder

1. Although the court acknowledges that the vagueness of the language, “exceptionally brutal or heinous,” and “indicative of wanton cruelty,” raises a legitimate constitutional question, the court declines to reach the issue given the existence of another eligibility factor. Coleman(F35)

E. 9-1(b)3 Multiple Murder

1. Prosecuting murders out of chronological order does not deny fair notice of death penalty eligibility and due process of law. Coleman (F35)

VII. Experts

1. Denial of psychiatrist to examine for mitigating psychiatric conditions, prior to Ake, was not prejudicial when past psychiatric examinations did not include persuasive evidence of any mitigating psychiatric condition. Stewart(F6)

2. Denial of a mitigation specialist was harmless error. Lear (F39)

VIII. Judge

1. Sentencing Judge’s receipt of a memo concerning possible security problems at sentencing did not show that Judge was influenced by the memo in death sentencing . Ashford (F29)

2. Trial and sentencing Judge’s convictions for taking bribes to fix other criminal cases didn’t require new trial or sentencing hearing. Collins & Bracey (F14, F15) *En banc* remanded for new sentencing hearing because of Judge Maloney’s corruption and associated possible bias. Bracey & Collins (F43)

3. Judge’s rejection of mitigation as to defendant’s childhood as mere sympathy violated Eddings v. Oklahoma. Wright (F45)

IX. Jury

A. Deliberations

1. The rule against verdict impeachment precludes consideration of juror testimony concerning erroneous statements concerning duration of life prison term and whether death sentence would result in execution. Silagy(F4)

2. A claim raised for the first time in habeas that a juror would have voted against the death penalty had the juror recognized that a single juror could block the death penalty, "is simply forbidden." Gosier (F30)

B. Instructions

1. Instructions which erroneously indicated to the jury that it must unanimously find sufficient mitigating factors to preclude the death penalty violated the Eighth Amendment, although another instruction correctly indicated that if one juror concluded that death was inappropriate all jurors should sign the verdict indicating inability to reach a unanimous verdict. Kubat(F3)

2. The catch-all instruction on mitigation does not preclude consideration of mitigation. Silagy(F4),Davis(F9)

3. Evidence from surveys of potential jurors that jurors are confused by Illinois patterned death penalty instructions does not establish a violation of the Federal Constitution. Gacy(F7), Free(F8), DelVecchio(F11), Holman(F25)

4. The failure of instructions to state the standard of proof on aggravation and mitigation, and the possibility that jurors understand the instructions to place a burden of persuasion on defendant, do not violate the constitution. Davis(F9)

5. Jury instruction that only alternative to death sentence was life in prison without possibility of parole was not required, prior to Simmons v. South Carolina, despite prosecution argument on future dangerousness. Stewart(F18), Spreitzer(F20), Mahaffey(F28)

6. The Illinois Supreme Court's prospective application of the need for an instruction that life in prison without parole is the only alternative to the death penalty does not violate equal protection. Stewart(F18)

C. Selection

1. Excusing a prospective juror who stated that he "probably" would not vote for the death penalty was not constitutional error. Collins(F14), Pitsonbarger(F21)

2. Refusal to dismiss a pro death penalty juror for cause was not prejudicial when the juror was peremptorily challenged and the remaining jurors were impartial. Pitsonbarger(F21), Holman(F25)

3. State's use of peremptory challenges to excuse jurors opposed to the death penalty is not prohibited. Pitsonbarger(F21), Holman(F25), Goshier (F30)

D. Unanimity

1. If any one juror believes that there are mitigating factors sufficient to preclude the death penalty, the sentence of death cannot be imposed. Kubat(F3)

2. The second paragraph of 720 ILCS 5/9-1(g), "...means that a single juror's belief that the defendant has demonstrated the existence of a single mitigating factor precludes the death sentence." Gacy(F7)

3. An oral instruction to the jury that if it unanimously finds sufficient mitigation to preclude death it should sign the verdict directing imprisonment, was incorrect, but did not prejudice defendant when the written instructions given to the jury correctly instructed that the jury should sign that verdict if it was not unanimous, and the closing arguments correctly

informed jurors that they need not be unanimous. Gacy(F7)

4. The waiver of a sentencing jury was voluntary even though the court told defendant the jury must unanimously be in favor of the death penalty, but failed to inform defendant that a nonunanimous jury would avoid the death penalty. Enoch(F13)

5. Where defendant sought to withdraw jury waiver, before sentencing, after learning that a nonunanimous verdict would result in prison term, waiver of jury resulted from ineffective assistance of counsel when counsel failed to inform defendant that one juror could spare him from the death penalty. Hall(F23)

6. Jury waiver for sentencing valid despite failure to inform defendant a single juror could spare him from death penalty. Whitehead(F41)

X. Mitigation

1. Evidence on the lack of the deterrent value of the death penalty cannot be characterized as mitigation. Williams(F5)

2. Evidence on the value to society of a psychiatric study of defendant is not mitigating. Williams(F5)

3. A defendant's inability to attack women while in prison is not mitigating when the Court finds that his actions demonstrate that he will be a continuing danger to others in prison. Enoch(F13)

4. An alleged violation of the right to present evidence of good prison conduct was reasonably rejected by the Illinois Supreme Court when no offer of proof was made. Tenner (F31)

5. Judge's rejection of mitigation as to defendant's childhood as mere sympathy violated Eddings v. Oklahoma. Wright (F45)

XI. Prosecution

A. Sentencing Argument

1. Prosecution argument that the jury should send a message to the community that such behavior will not be tolerated, and references to the lack of psychiatric testimony, and references to defendant's possible release from prison if not sentenced to death, were not prejudicial. Williams(F5)

2. Prosecution argument that the jury should "recommend" the death penalty together with evidence that defendant had told police that he wanted the death penalty did not erode the moral responsibility that the jury felt in sentencing. Davis(F9)

3. Prosecution argument that defendant should be sentenced to death, or he would "fool the experts," was accurate and did not violate due process of law. DelVecchio(F11)

4. When defense counsel argued, "thou shalt not kill," the prosecutor's response that killing for the country in Viet Nam was not a violation of the Bible, was proper. Collins(F14)

5. Prosecution argument on future dangerousness did not require jury instruction that

only alternative to death penalty was life in prison without possibility of parole prior to Simmons v. South Carolina. Stewart(F18), Spreitzer(F20), Mahaffey(F28)

6. Argument that defendant might kill in prison may have been improper but was harmless. Pitsonbarger(F21)

7. Argument that defendant would will be let go from prison if not sentenced to death was justified by evidence of defendant's escape from jail and did not violate due process. Mahaffey, (F28)

B. Cross-examination

1. Cross of defendant at death penalty hearing as to whether he could think of any mitigation to preclude the death penalty wasn't prejudicial in light of the defendant's admission that the crimes were horrendous. Sanchez (F33)