

ORIGINAL

NO. 85-6964

Supreme Court U.S.

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JOSEPH F. SPANGLER, JR.  
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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1985

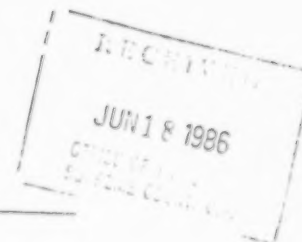
THEODORE ROBERT BUNDY,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.



RESPONSE TO  
PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

JIM SMITH  
ATTORNEY GENERAL

MARK C. MENSER  
ASSISTANT ATTORNEY GENERAL  
DEPARTMENT OF LEGAL AFFAIRS  
THE CAPITOL  
TALLAHASSEE, FLORIDA 32301  
(904) 488-0600

10/1/85

QUESTION PRESENTED

1. Whether certiorari should be granted to review a state court's determination of harmless error in the absence of any special or important reason therefore, or in the absence of any "constitutional" error.

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BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, State of Florida respectfully submits that certiorari review should be denied.

OPINION BELOW

The Petitioner's statement is accepted.

JURISDICTION

The Petitioner seeks review pursuant to 28 U.S.C. 1257 (3).

While not a jurisdictional defect, see Schact v. United States, 398 U.S. 58 (1970) the untimeliness of this petition should preclude review if the rules of this Honorable Court are to be deemed anything more than mere "suggestions" to criminal defendants.

The petition at bar comes to this Court by a different path than that taken by Mr. Bundy in case no. 85-6276. Unlike that case, in this action Mr. Bundy has been continuously represented by a fine lawyer, Mr. Victor Africano. It was Mr. Africano, not Ms. Nelson, who assembled the records for this petition. Her late entry into Mr. Africano's case cannot and should not serve as an excuse for any violation of the rules of this Honorable Court. Otherwise, any dereliction of counsel could be circumvented just by having a new attorney sign any (untimely) plea-

dings.

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

The Petitioner has failed to identify any statutory or constitutional provisions. The Respondents respectfully submit that the petition at bar argues nothing more than the interpretation of evidence and, in fact, fails to present a federal, constitutional, question.

STATEMENT OF THE CASE

The details of the murder of Kimberly Leach and the events at trial are adequately set forth in Bundy v. State, 471 So.2d 9 (Fla. 1985). To those facts the Respondent would add only the following:

(1) The testimony of Mr. Anderson (A-52, et. seq.) reflects a full and vigorous cross-examination, in the jury's presence, on the issue of hypnosis and any inconsistency in Anderson's testimony.

(2) As noted by the Supreme Court and Mr. Anderson himself, his basic story was unaltered by hypnosis. Only certain minute details were "enhanced" and, in fact, one "detail" (the victim's jersey number) was still incorrect as "enhanced", thus belying any claim that the prosecutors tried to tamper with or "improve" Anderson's testimony. (App. 80-83)

SUMMARY OF ARGUMENT

The petition at bar seeks nothing more than a rereading of the trial transcripts and a reweighing or reevaluation of the evidence by this Honorable Court. No bona fide federal or constitutional claim is presented. Instead, the petition at bar merely seeks to reargue the weight of the evidence in the hopes that this Court will arrive at a conclusion different from that of the Florida Supreme Court.



REASONS FOR NOT GRANTING THE WRIT

CERTIORARI SHOULD NOT BE  
GRANTED FOR THE SAKE OF  
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OF ANY PARTICULAR, SPECIAL OR  
IMPORTANT REASON THEREFORE

The Petitioner does nothing more than ask this Honorable Court to sit as a second state appellate court and reweigh the evidence adduced at his trial so as to assess the "sufficiency" of the admissible evidence and the "prejudicial impact" of the "inadmissible" evidence. In addressing this petition, the State of Florida will show that the "harmless constitutional error" test, even if it should have been applied, was competently utilized and thus need not be reviewed.

(A) Harmless Constitutional Error.

The Florida Supreme Court, if it erred at all, erred in applying the "harmless constitutional error" test of Schneble v. Florida, 405 U.S. 427 (1972) to a case which involved neither "error" nor "constitutional error".

As the decision in Bundy v. State, supra, points out, "hypnotically enhanced" testimony is admissible in some jurisdictions but not in all. This Honorable Court has not universally condemned its use as error of constitutional (or any other) magnitude. Thus, while Arizona found Sixth Amendment problems with the use of this testimony, Florida found the evidence "scientifically unreliable" and disallowed it as a matter of state, not constitutional, law.

Given this fact, there was no need to engage in a "harmless constitutional error" analysis. First, no "error" was committed since, during Bundy's trial, this evidence was admissible. Second (again) the "error" was not of constitutional magnitude since the decision to use or preclude hypnotic evidence is one open to the states and not constitutionally prohibited.

Thus, if any "error" was committed by the Florida Supreme Court, the error was in the misidentification of the so-called error and the unnecessary application of the Schneble test.

In United States v. Hastings, 461 U.S. 499 (1983) this

Honorable Court restated its inherent right to review findings of "harmless constitutional error". In doing so, however, this Court clearly stated that it is neither compelled nor obliged to sit as a reviewing court to reassess "harmless constitutional error" in every single case. Rather, this Court has held that review will be granted sparingly, if at all.

Naturally, the question arises as to the Court's ability, or desire, to review lesser claims of "non-constitutional harmless error". If "constitutional" errors are to be reviewed "sparingly", are "non-constitutional" errors to be reviewed at all? Apparently not, for in Lisbena v. California, 314 U.S. 219 (1941) this Court declared that it does not sit to review the propriety of state court decisions to admit evidence pursuant to state law. A claim of non-constitutional harmless error is nothing more than an evidentiary claim arising out of state, not federal, law.

(B) The Application of the Harmless Error Test.

The Florida Supreme Court applied the harmless error test to the actual courtroom testimony of the witness, Clarence Anderson.

In this petition, Bundy disagrees with the outcome of this analysis on the basis of his comparison of Anderson's pre-trial statements as well as his testimony in court. Absent, of course, from Bundy's analysis is his lawyer's excellent and scathing cross examination of Mr. Anderson, in the presence of the jury, in which he established that Anderson was confused if not wrong, on many of the details testified to on direct. (TR 4091-4181).

Any assessment of Anderson's direct testimony must be considered in part and parcel with the cross examination. Only then can any claim, even a Sixth Amendment "confrontation" claim, be fully considered. see Delaware v. Fensterer, 474 U.S. \_\_\_, 88 L.Ed.2d 15 (1985).

When the Florida Supreme Court decided that the "affected" portions of Anderson's testimony had no "reasonable possibility of contributing to the conviction", it clearly did so on the basis of the entire record, as mandated by Schneble v. Florida,

405 U.S. 427 (1972); Fahy v. Connecticut, 375 U.S. 85 (1963).

The "entire" record shows that Anderson's ability to remember minute details, such as colors or jersey numbers (or even dates), was thoroughly impeached over a ninety page cross examination, as well as counsel's argument. It is not reasonable to assume that the jury gave any special credence to Anderson's story above and beyond what he told the police prior to being hypnotized; to wit: that he saw a dark-haired man put a girl who looked like his niece into a white van parked outside the junior high school. That non-hypnotic testimony was the "crucial lynch pin".

Mr. Bundy's petition raises the issue of "arguable" impact in response to the record. Indeed, any testimony may "arguably" have been heard or considered, but speculative claims of influence are not enough to provoke review. Rather, speculative influence claims should be treated in a like manner to claims of "prejudice" in federal habeas corpus cases. There, this Court has held that any "error" or "omission" can arguably "prejudice" a case, but actual prejudice rather than hypothetical prejudice must be proven. Strickland v. Washington, U.S., 80 L.Ed.2d 674 (1984); United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).

Thus, we see that the allegedly improper evidence admitted during trial has been deemed "improper" due to a post trial change in state law. No error of constitutional dimensions was committed. Absent "constitutional" error--there is no question of "harmless constitutional error". Instead, the proper inquiry is "harmless error" under state law. Florida analyzed Bundy's claim under the federal standard even though it did not have to. The Florida Supreme Court's decision is supported by the entire record, so Bundy has not established any actual basis for review.

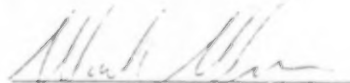
Given the fact that this Honorable Court is not obliged to review every "harmless constitutional error" case even when constitutional error "is" present, there is no reason for review of this case where, despite utilization of the test--no constitutional error was ever committed!

CONCLUSION

Even though the Florida Supreme Court applied the "harmless constitutional error" test to review the impact of an error of (non-constitutional) state law, certiorari should not be granted to reweigh the evidence and reevaluate the "harmless error" question. Even when federal constitutional error has been deemed "harmless" by a lower court, this Court has declared it will review the issue "sparingly". Here, no federal constitutional error exists at all, thus, this is not a proper case for certiorari review.

Respectfully submitted,

JIM SMITH  
ATTORNEY GENERAL

  
MARK C. MENSER  
ASSISTANT ATTORNEY GENERAL  
DEPARTMENT OF LEGAL AFFAIRS  
THE CAPITOL  
TALLAHASSEE, FLORIDA 32301  
(904) 488-0600

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CERTIFICATE OF SERVICE

I, MARK C. MENSER, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Response To Petition For Writ Of Certiorari To the Supreme Court of Florida, Brief For Respondent In Opposition, by depositing same in the United States mail, first class postage prepaid, as follows:

JAMES E. COLEMAN, JR.  
POLLY J. NELSON  
Wilmer, Cutler & Pickering  
1666 K Street N.W.  
Washington, D.C. 20006

VICTOR AFRICANO  
P.O. Box 1450  
Live Oak, Florida 32060

All parties required to be served have been served  
on this \_\_\_\_\_ day of June, 1986.

  
MARK C. MENSER  
ASSISTANT ATTORNEY GENERAL  
DEPARTMENT OF LEGAL AFFAIRS  
THE CAPITOL  
TALLAHASSEE, FLORIDA 32301  
(904) 488-0600