IN THE SUPREME COURT OF FLORIDA

JASON DEATON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO: 65,437

SUPPLEMENT TO INITIAL
BRIEF OF APPELLANT

Appeal from the Circuit
Court, 17th Judicial
Circuit, in and for
Broward County, Florida
Judge Leroy Moe

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SUPPLEMENTAL STATEMENT OF THE CASE

Although the trial court announced and imposed the death sentence upon the Appellant during the reported and transcribed sentencing hearing (Tr. vol. 8, p. 1424) the report did not comply with Section 921.141(3) which requires the trial court, when imposing the death sentence, to set forth the facts that are sufficient to support aggravating circumstances and to specifically enumerate such aggravating circumstances. Further, Section 921.141(3) requires the court to set forth its written findings enumerating such aggravating circumstances supporting the death penalty and specifically finding that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. No written Order imposing the death sentence was filed with the Clerk of Courts of Broward County, Florida, no such written Order included in the record on appeal in the instant matter. A personal search of the complete file by the undersigned attorney failed to produce a written Order, as did personal requests with the trial court's secretary and the deputy Clerk handling the case. Finally, a Supplemental Directions to the Clerk was filed, with results being the continued unavailability of a written sentencing Order.

Appellant's initial brief was completed and filed on October 16, 1984, after the undersigned was again assured by the deputy Clerk of the Broward County Courts that there

was no written Order of sentence in existence and that a statement to that regard would be filed with the Supreme Court. After the filing of such brief, the written Order of Sentence was finally located, with said Order being filed with the Clerk of Courts on October 17, 1984 and supplied to the undersigned attorney at a later date. As a result, Appellant was forced to file a Motion for Extension of Time to allow the issue of sentence to be researched and briefed, to be submitted as a supplement to his initially filed brief.

POINT IV

THE TRIAL COURT ERRED BY IMPOSING THE DEATH PENALTY.

The review of death sentence by this court has two discreet facets:

> First, we determine if the jury and the judge acted with procedural rectitude in applying Section 921.141 to our case law ..... The second aspect of our review process is to insure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and the jury have acted with procedural regularity, we compare the case under review with all the past capital cases to determine whether or not the punishment is too great. Profitt v. Florida, 428 U.S. 242 (1976); see State v. Dixon, 283 So.2d. 1 (Fla. 1973); cert. denied 416 U.S. 943 (1974). In those cases where we found death to be comparatively inappropriate, we have reduced the sentence to life in prison. See Malloy v. State, 382 So.2d. 1190 (Fla. 1979); Adams v. State, 412 So.2d. 850 (Fla. 1982), p. 855.

According to these two discreet functions of this court in reviewing the instant death penalty, it becomes clear that not only was the court's sentencing flawed procedurally (reliance upon improper aggravating circumstances and failure to consider mitigating circumstances), but the death sentence also creates an unconstitutional disparity between this sentence and that of the co-defendant

Kerry Dean Hall, and, finally, the death sentence is disproportionate of the death sentences which have been approved statewide.

A. In the written Order of Sentence, the trial court found that there were three aggravating circumstances present in the instant matter: that the murder was committed during the course of a robbery, that the murder was particularly heinous, atrocious or cruel, and that the murder was committed in a cold and calculated manner. (Supplemental Record). It is well established that aggravating circumstances enumerated in Florida Statute 921.144(g) must be proven beyond a reasonable doubt before being considered by the judge or the jury. State v. Dixon, 283 So.2d. 1(Fla. 1973). In the instant matter, when the facts in the record on appeal are considered, it becomes clear that only the aggravating circumstance of the murder being committed during the course of a robbery was properly considered by the jury and the trial court with the remaining two aggravating circumstances being inadequately supported in the record. Although the aggravating circumstance of during the commission of the robbery was arguably proper under the facts in the record, this aggravating circumstance was improperly and prejudicially argued to the jury by the prosecutor in the case, when the prosecutor also argued that the aggravating circumstance of murder committed for pecuniary gain existed (Tr. vol. 8, p. 1393), and when he argued that

four aggravating circumstances applied (including the improperly doubled pecuniary gain) (Tr. vol. 8, p. 1396). Although this court has consistently held that it is improper for a court and jury to separately consider a murder committed for pecuniary gain and a murder during the course of a robbery Oats v. State, __So.2d.__, F.L.W. vol.. 9, p. 67 (Fla. 1984), the prosecutor argued and the trial court condoned this misleading statement during the advisory stage of the jury's deliberation. Therefore, any consideration of the aggravating circumstance of murder during commission of a robbery was tainted by this misconduct.

Regarding the appropriateness of the aggravating circumstance of heinous, atrocious and cruel, it must be recalled that this aggravating circumstance has been reserved for killings which are accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the consciousless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So.2d. 1 (Fla. 1973), p. 9. Although the jury and trial court were faced with the spectacle of a video taping of the recovery of the decomposed body of the victim from a cistern (Tr. vol. 4, p. 702), as well as various descriptions and photographs of the bloated face of the decedent, it must be remembered that once the victim dies, the murder is completed, and the method of disposal of the body is not sufficient for the aggravating circumstance of cruel and heinous murder. Blair v. State, 406 So.2d. 1103, see also Halliwell v. State,

323 So.2d. 525 (Fla. 1975) and Herzog v. State, 439 So.2d. 1372 (Fla. 1983).

It is well established in the State of Florida that a quick death through gunshot wounds is generally not sufficient for finding of a heinous and atrocious murder. See Oats v. State, supra, Gorham v. State, __So.2d.__, F.L.W. vol. 9, p. 310 (Fla. 1984); Blanco v. State, __So.2d.__F.L.W. vol. 9, p. 215 (Fla. 1984). There is no reason to believe nor is there logic to support a conclusion that a quick death by other means than gunshot wound, such as that in the instant case, would not be considered in the same manner. The testimony of the Medical Examiner presented by the State in the instant case supports the conclusion that the victim would have been unconscious in ten to fifteen seconds (Tr. vol. 2, p. 260), thereby making any further actions against the body repugnant yet not torturous to the unconscious decedent. Further, there was no evidence of a struggle according to the Medical Examiner (Tr. vol. 2, p. 249-50, p. 261), further supporting the conclusion that unconsciousness was nearly instantaneous. Further, in Pope v. State, 441 So.2d. 1073 (Fla. 1983), this court specifically held that a lack of remorse on the part of the defendant was no longer a proper factor to be considered in the equation of what constitutes a heinous and atrocious crime. In the instant case, to support a finding of heinous and atrocious, this court should consider the improper argument by the prosecutor to the jury

regarding the lack of remorse (Tr. vol. 8, p. 1395), a similar argument made by the prosecutor to the sentencing judge during the hearing on sentencing (Tr. vol. 8, p. 1421), and by the apparent consideration of the lack of remorse by the sentencing judge as evidenced by his reading of a letter regarding lack of remorse at the time of sentence. (Tr. vol. 8, p. 1423).

Finally, regarding the finding of heinous and atrocious, although the Appellant recognizes those cases in which this court has held that strangulation consistently is found to be heinous, Doyle v. State, __So.2d.__ F.L.W. vol. 9, p. 453 (Fla. 1984), the facts in the instant matter don't fit the usual pattern of a strangulation murder with its accompanying anticipation of death. In the best light of the State, by Appellant's alleged confession, an electrical cord was put around the victim's neck while he drove, quite suddenly and unexpectedly, without prior confrontation, threat or agonizing by the victim. (Tr. vol. 5, p. 775). When these factors are considered with the Medical Examiner's testimony that there was no evidence of a struggle (Tr. vol. 2, p. 249-50, 261) and that the victim was unconscious within ten to fifteen seconds (Tr. vol. 2, p. 260), it becomes clear that the instant strangulation death is not and should not be considered automatically heinous. See Herzog v. State, 439 So.2d. 1372 (Fla. 1983), where a finding of heinous was overturned by

this court despite the fact that a female victim was given pills, attempted to be suffocated with a pillow, and finally strangled to death by Herzog and a co-defendant with a telephone cord looped around the victim's neck. Therefore, the aggravating circumstance of heinous and atrocious was improperly found and considered by the jury and trial court.

The aggravating circumstance of cold and calculated was also improperly considered by the court and jury when sentencing the defendant to death. This aggravating circumstance contemplates a planned and calculated execution-style murder, Magill v. State, 386 So.2d. 1188 (Fla. 1979) or a contract murder. McCray v. State, 416 So.2d. 804 (Fla. 1982). Although the robbery of the victim was previously discussed, the testimony of one of the star State witnesses, Tammy Lambert, indicates that the prior discussion dealt with the robbery and the fact that the victim was not going to be killed, just beaten up (Tr. vol. 3, p. 525, 534, 555). While this is arguably sufficient for a proof of premeditation, it is insufficient for the heightened measure of premeditation necessary for a finding of cold and calculated killing. Gorham v. State, __So.2d.__ F.L.W. vol. 9, p. 310 (Fla. 1984). Similarly, Lambert testified that the statements after the killing were that the victim was just being beaten and inadvertantly died. (Tr. vol. 3, p. 554). This spontaneous and unintentional killing is consistent with Appellant's

testimony brought out through the testimony of Officer Foust, that the Appellant stated that he was not trying to kill the victim, but he was just holding him (Tr. vol. 3, p. 422-423). Therefore, this aggravating circumstance also was not proven beyond a reasonable doubt and was improperly considered by the trial court.

Regarding mitigating circumstances, the trial court found only one to be applicable, that being that the Appellant had no significant history of prior criminal activity. Although the trial court mentioned that Appellant was nearly 18 years of age at the time of the killing, the trial court refused to consider this factor, reasoning that the Appellant had been living on his own for years, and that his background was that of an adult. Clearly, the trial court erred in failing to find Appellant's age at the time of the crime to be a mitigating factor. As the Appellant testified, (without rebuttal) he was told to leave his home by his mother, at the age of 16, at which time he worked in labor pools to support himself. (Tr. vol. 7, p. 1073) Consequently, Appellant had been living on his own for two years, at the most, as opposed to the several alluded to by the trial court. It has been held that mitigating circumstances must in some way ameliorate the enormity of the defendant's guilt, and, for that reason, age is a mitigating factor when it is relevant to the defendant's mental and emotional maturity and

and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them. Eutzy v. State, __So.2d.__F.L.W., vol. 9, p. 397 (Fla. 1984). Page 398; Barclay v. State, 347 So.2d. 1266 (Fla. 1977) cert. denied 439 U.S. 892 (Fla. 1978). Clearly, an 18 year old boy with no significant history of prior criminal activity is the type of person contemplated in the statutory mitigating circumstance of the age of the offender. Therefore, the trial court erred in failing to consider this mitigating circumstance.

Similarly, and more importantly, is the cumulative effect of Appellant's tender age, his lack of significant criminal activity, and his troubled childhood and various emotional factors which should have been, but were not, considered by the trial court, in derogation of the teachings of Eddings v. Oklahoma, __U.S.__, 102 S.Ct.869 (1982), wherein the Supreme Court held that justice requires that not only the circumstances of the offense be considered, but the character and propensities of the offender be taken into account. Page 875.

> Just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background, and mental and emotional development of the youthful defendant be duly considered in sentencing. P. 877.

The trial court erred when it summarily rejected any consideration of the age of the Appellant and of his troubled background. The trial court recognized that the Appellant had some psychiatric problems in the past (Supplemental

Record, p. 3), was confronted with testimony of Appellant's mother throwing him out of the house at the age of 16 (Tr. vol. 7, p. 1073), as well as testimony regarding the fact that the Appellant was very remorseful after the killing and was contemplating suicide (Tr. vol. 4, p. 635, 637), yet the trial court failed to even consider these factors as either a statutory or non-statutory mitigating factor (cumulative). See Copeland v. State, __So.2d.__ F.L.W. vol. 9, p. 38 (Fla. 1984), where the trial court considered the age of the defendant, but limited the weight of such consideration since Copeland had been in prison previously; Thomas v. State, __So.2d. F.L.W. vol. 9, p. 392 (Fla. 1984), where the age of 20 was considered to be a mitigating factor.

B. Through the testimony adduced at trial, it was shown that Appellant, along with Kerry Dean Hall, the co-defendant, worked, in the best light of the State, in concert, to carry out the killing of the victim Campanella. When the discussion about leaving Fort Lauderdale arose, it was the co-defendant Hall who suggested that he had a homosexual client/customer who had a car and money that could be used to facilitate the trip. (Tr. vol. 2, p. 292, vol. 3, p. 447), it was co-defendant Hall who suggested Campanella and first suggested killing him for his property, (Tr. vol. 2, p. 292) and it was co-defendant Hall, along with Appellant, who planned the robbery and (in some versions of the testimony) the killing of the victim. (Tr. vol. 2, p. 293, vol. 4, p. 573). It was the co-defendant

Hall who actually brought the victim into the picture and brought the victim physically to the hotel where both the co-defendant Hall and Appellant got into the car with the victim. (Tr. vol. 2, p. 296, vol. 4, p. 574). Both the co-defendant Hall and the Appellant left together with the victim (Tr. vol. 3, p. 451), and both returned together to the hotel, with both persons telling the girls/witnesses to get a towel and clean out the car. (Tr. vol. 2, p. 297, vol. 3, p. 459, vol. 4, p. 579).

Similarly, it was co-defendant Hall who suggested fleeing to Tennessee, a place that he was very familiar with, and it was also Hall who suggested various hiding places for the body, finally deciding on the cistern. (Tr. vol. 2, p. 303, vol. 4, 660). Also, co-defendant Hall seemed to be the primary user of the stolen credit cards (Tr. vol. 1, p.105, 107), and it was co-defendant Hall who was arrested driving the victim's car in Tennessee and was trying to use a false name. (Tr. vol. 1 p. 119). Also, co-defendant Hall was the one who tried to sell the stolen camera (Tr. vol. 1, p. 149, 150).

Regarding the actual killing, the testimony of Officer Foust related that Appellant confessed that he was not trying to kill the victim, but just hold him with some wire when co-defendant Hall started hitting the victim in the face, throat and head (Tr. vol. 3, p. 422, 423), and this version was corroberated by the testimony of star witness Marjorie Shannon

relating her version of Appellant's confession (Tr. vol. 4, p. 584). In the testimony of Detective Rice relating to Appellant's confessions, it was co-defendant Hall who told the victim he was going to die as he hit the victim 16 or 17 times while Appellant was holding the victim with the cord. (Tr. vol. 5, p. 775, 778). After the killing, Appellant and co-defendant Hall carried the body and hid the body (Tr. vol. 2, p. 305, vol. 3, p. 462-463), and both discussed their role in the killing as they were driving to Tennessee with the State's witnesses (Tr. vol. 3, p. 454). Although there is a legitimate question as to whether or not the killing was intentional or accidental, based upon repeated statements by the Appellant and co-defendant that they were just going to beat up the victim (Tr. vol. 3, p. 555, 525, 534), there can be no reasonable doubt whatsoever that both Appellant and co-defendant equally participated in the killing of the victim. However, the same judge who imposed death in the instant case, Leroy Moe, sentenced the co-defendant Hall, after trial, to life in prison. (Tr. vol. 11, p. 1786-1787). This disparity in results under virtually identical facts is unconstitutional and cannot be permitted by this court.

If such disparities among co-defendants under similar facts, as those in the instant matter, are ignored, the death penalty statute in Florida cannot be upheld under the requirements of Profitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976).

McCaskill v. State, 344 So.2d. 1276 (Fla. 1977). Page 1280. It was held by this court in Meeks v. State, 339 So.2d. 186 (Fla. 1976), that when dealing with different sentences for equally guilty co-defendants:

> We are extremely sensitive to the demands of equality before the law in cases in which we must consider whether the sentence of death should be upheld. Our reading of Furman v. Georgia, 408 U.S. 283, 92 S.Ct. 2726 (1972), convinced us that identical crimes committed by people with similar criminal histories require identical sentences. It is this uniformity and predictability of result which Section 921.141 Florida Statutes (1975) seeks to accomplish. P/ 192.

In the leading case of Slater v. State, 316 So.2d. 539 (Fla. 1975), Slater was one of three co-defendants involved in a motel robbery in which the manager was shot and killed. The"trigger man" was given a life sentence, the "wheel man" was given a five-year sentence, and Slater received the death penalty. In vacating the death sentence, this court looked to the sentences of the two co-defendants:

> We pride ourselves in a system of justice which requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law. Page 542.

In the instant case, the participation of the co-defendant Hall and the Appellant was nearly identical, with a very strong indication that co-defendant Hall was the more culpable of the two parties. However, the same judge refused to treat the two persons equally under the law, whereby giving an unconstitutional application of the death penalty to the instant matter. In Messer v. State, 330 So. 2d. 137 (Fla. 1976), this court dealt with very similar facts as are presented in the case at bar, when Messer and co-defendant Brown were driving around and drinking and eventually found the victim in a rest area asleep in his car. Both Messer and Brown decided to rob the victim, got into his car, held him up and drove him to several locations. Ultimately, co-defendant Brown hit the victim and Messer shot him one time in the head, but only after co-defendant Brown took the wallet and watch from the victim. As in the instant case, there were many confessions by Messer, and Messer in fact took police to the body after his arrest out of state. In reversing the death sentence and remanding the case to allow the jury to hear the fact that co-defendant Brown got a deal and was allowed to plead to second degree murder for a thirty year sentence, this court cited Slater, supra, holding that:

> Defendants should not be treated differently upon the same or similar facts. In the instant case, if the Appellant did fire the shot into the head of the victim, the shooting occurred after Brown took a wallet containing $120 and a watch from the victim, then struck him

on the back of the head. There is little to separate out the joint conduct of the co-defendants which culminated in the death of the decedent. Page 142.

Where the actual incident of death, the gunshot wound to the head, was clear in Messer, supra, there is no such ease of identification of the actual death blow in the instant case. Both co-defendant Hall and Appellant were acting together, and during the course of this concert, the death of Campanella occurred. There can be no distinction in law or in fact or in logic to treat the co-defendant Hall and Appellant differently in sentencing. This was not a situation as was found in Bassett v. State, __So.2d.__F.L.W. vol. 9, p. 90 (Fla. 1984), where a death sentence was upheld for Bassett despite an equally culpable co-defendant getting a life sentence, as Bassett had the opportunity for the same plea bargain, yet backed out at the last minute and chose to go to trial. This case is more similar to Slater, supra, and Messer, supra, and also Herzog v. State, 439 So.2d. 1372 (Fla. 1983), where the telephone cord strangulation of a girl by Herzog and co-defendant Alongi resulted in this court reversing the death sentence of Herzog in light of the fact that Alongi was given a deal for five years probation on the manslaughter charge. Although the disparity in Herzog is much more drastic, the similarities remain the same, as do the requirements, under fundamental fairness and due process, to reverse the sentence of death in the instant matter to be

consistent with the life sentence given to co-defendant Hall. See also Thompson v. State, __So.2d. __, F.L.W. vol. 9, p. 349 (Fla. 1984), wherein the death sentence was reversed in a shotgun killing/robbery of the gas station attendant, where two co-defendants received plea bargains to reduce charges.

C. Under the second facet of this court's review procedure of the death sentence in the instant matter, the facts and circumstances of the instant case do not warrant the death penalty when this case is reviewed to insure the relative proportionality of death sentences which have been approved statewide. Regarding a statewide comparison of cases where the death sentence has been reversed, this court is referred to the following cases: Oats v. State, __So.2d.__, F.L.W. vol. 9, p. 67 (Fla. 1984), death sentence reversed although convenience store clerk was shot during the course of a robbery. It should be noted that mitigating factor of Oats being 22 years old was considered and approved; Rembert v. State, __So.2d.__F.L.W. vol. 8, p. 58 (Fla. 1984), death sentence reversed although an elderly bait store owner was beaten with a club during the robbery and died hours later; Drake v. State, 441 So. 2d. 1079 (Fla. 1983), sentence reversed although the victim was found with her hands tied and eight stab wounds; Herzog v. State, 439 So.2d. 1372 (Fla. 1983), death sentence reversed although the victim was forced to take pills, beaten, suffocated with a pillow, and eventually strangled with a phone wire, with her body

being burned afterwards; McKennon v. State, 403 So.2d. 389 (Fla. 1981), death sentence reversed although the boss was killed by having her head beaten against the wall and floor, being strangled, having her throat slit, and having ten ribs broken before eventually being stabbed to death; Chambers v. State, 339 So.2d. 204 (Fla. 1976), death sentence was reversed although a series of arguments and physical fights led to the ultimate beating of the female victim so severe that she died five days later as a result of a cerebral and brain stem contusion. The victim was bruised all over the head and legs and had a gash under the left ear and her face was unrecognizable as well as receiving internal injuries; Neary v. State, 384 So.2d. 881 (Fla. 1980), death sentence reversed although Neary and co-defendant burglarized the home of a 56-year old neighbor, committed a robbery and rape of the neighbor and eventually strangled the victim, all leading to full confessions; see also Tedder v. State, 322 So.2d. 908 (Fla. 1975); Swan v. State, 322 So.2d. 485 (Fla. 1975).

For further comparison, to show the death sentence to be inappropriate in the instant matter, the following cases have been affirmed by this court: Doyle v. State, __So.2d.__ F.L.W. vol. 9, p. 453 (Fla. 1984), death sentence appropriate where, as a second murder in a short period of time, Doyle kidnapped, raped, beat and strangled his cousin in a wooded area, taking up to five minutes before the cousin lost consciousness; Davis v. State, __So.2d.__F.L.W. vol. 9, p. 430

(Fla. 1984), death sentence affirmed where a mother and her 10-year old and 5 year-old children were killed in their home, the mother being beaten beyond recognition with a gun, one child being beaten and shot in the back, and one child being tied up and shot two times; Kennedy v. State, So.2d. F.L.W. vol. 9, p. 291 (Fla. 1981), death sentence affirmed where Kennedy escaped from prison while he was doing a life sentence and went into a home where the owner of the home was shot as well as a police officer, then went into a second home, took a mother and baby as hostage; Jennings v. State, So.2d. F.L.W. vol. 9, p. 297 (Fla. 1984), death sentence affirmed for the kidnap/rape and murder of the 6-year old victim, where Jennings went into the victim's house, knocked her out, drove her to a canal where she was raped, thrown into a canal suffering a skull fracture and death by drowning; Bundy v. State, So.2d. F.L.W. vol. 9, p. 257 (Fla. 1984), death sentence affirmed for two counts of first degree murder where there were three other attempted murders, and Bundy burglarized a sorority house, launching into a savage attack beating four victims, one to death, and then going to a second sorority house and doing the same; see also Bassett v. State, So.2d. F.L.W. vol. 9, p. 90 (Fla. 1984); Preston v. State, So.2d. F.L.W. vol. 9, p. 26 (Fla. 1984); Bollenger v. State,422 So.2d. 833 (Fla. 1982); Francois v. State, 407 So.2d. 85 (Fla. 1982).

Therefore, due to the errors in sentencing procedure, the improper consideration of aggravating circumstances and the failure to consider mitigating circumstances (both statutory and non-statutory), as well as the improper disparity of sentences between the Appellant and co-defendant Hall, and, based upon a statewide comparison of other death sentence cases, the trial court erred in imposing the death sentence, and this court must remand the case for the imposition of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 9th day of November, 1984, to the Attorney General's Office, 111 Georgia Avenue, West Palm Beach, Florida, 33401.

Michael D. Gelety

MICHAEL D. GELETY