IN THE SUPREME COURT OF FLORIDA

ROBERT ALLEN TEFFETELLER, Appellant, vs. STATE OF FLORIDA, Appellee.	)	Docket No. 66,672

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The following abbreviations are contained in this brief:

"FS"	First Supplement to Transcript of Record on Appeal
"ST"	Supplemental Transcript of Proceedings

ARGUMENT

Point I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR DISQUALIFICATION OF JUDGE AND APPOINTMENT OF SPECIAL PROSECUTOR

At the hearing held on October 13, 1980, Appellant argued his Motion for Change of Venue. References were made to the existence of a reward offered by the Volusia County Bar Association for the apprehension and conviction of the murderer in the instant case. The Court correctly ruled that testimony regarding the reward was double hearsay (FS Vol. 6, Pg 17) The Court further stated that the reward offer and related matters were not subjects within the competency of the witness. (FS Vol. 6, Pg 18)

Yet, when independent proof was introduced (i.e. the resolution of the Volusia County Bar Association offering said reward) during the January 7, 1985, Motion to Disqualify the Court ruled said Motion untimely and ruled upon the contents of said Motion. (ST pg 896)

Rule 3.230(c) allows motions to disqualify to be filed late if good cause is shown. Certainly, good cause would be unavailability of evidence evincing the existence of the reward. Appellant could not get such proof on his own and defense counsel obviously did not produce or obtain said evidence. See Jackson v. Korda, 402 So.2d 1362 (Fla. 4th DCA 1981).

The cases cited by Appellee can be distinguished: Heiney v. State, 447 So.2d 210 (Fla. 1984) considered a Motion to Disqualify that was not in writing and had no accompanying affidavits; Guiliano v. Wainwright, 416 So.2d 1180 (Fla. 4th DCA 1982) dealt with disqualification of an appellate judge; State ex rel Brown v. Dewell, 131 Fla. 566, 179 So. 695 (1938) denied a Motion to Disqualify because it was based solely on adverse pre-trial rulings; Tafero v. State, 403 So.2d 355 (Fla. 1981) emphasized the fact that the judge had been a trooper in the distant past, which is a distinctly different set of facts than the case sub judice. This cause should be remanded for a new sentencing hearing before another circuit judge.

Point II

IT WAS ERROR TO ALLOW INTRODUCTION OF THE PRIOR SEXUAL BATTERY CHARGE AS AN AGGRAVATING CIRCUMSTANCE WHEN APPELLANT WAS ONLY CONVICTED OF AGGRAVATED ASSAULT

While no objection was lodged during the proceedings, the Court ruled during the Motion In Limine that "...objection is noted for any appropriate appellate review." (ST, Pg 15) Appellee relied upon this ruling in not making a purely formal objection during the sentencing hearing. All motions in limine were made the date of the commencement of the resentencing and were made for the purpose of ensuring a smooth sentencing hearing free of continued defense objections and argument. The case was scheduled to take an entire week and did so. There was real concern that the hearing would go into the weekend and provision would have to be made for sequestration of the jury.

All stipulations into evidence were for technical reasons relating to the truth or genuineness of facts presented. It was therefore not necessary to re-try the entire case. It was understood by defense counsel that contemporaneous objections were not necessary as the Motions In Limine provided sufficient grounds for appellate review.

Appellee has searched the record and cannot find where any such agreement was formally placed on the record. However, comments on pages 15, 16 and 28 of the Suppelemental Transcript tend to support such an understanding. Furthermore, it is clear that this error was fundamental as Appellant could not adequately rebut the evidence with witnesses of his own.

Point III

THE TRIAL COURT ERRED IN ALLOWING TESTIMONY AND EVIDENCE TO BE RECEIVED WHICH ADVISED THE JURY THAT APPELLANT HAD BEEN PREVIOUSLY SENTENCED TO DEATH BY THE TRIAL JURY

The testimony of Appellant concerning the statement by a corrections officer to the effect that "Graham's going to make hamburger meat out of you in that electric chair" (ST 755) did not inform the jury that a death penalty had been invoked. Appellant was unsentenced at the time and the jury was aware of that fact as the comment was made after remand. The comment was clearly supposition.

It was the State's witness, Dr. Barnard, who - as Appellee stated it - "let the cat out of the bag". Any objection to that comment and the prosecutor's closing statement regarding same would have emphasized the point. It is clear that Appellant's counsel was very concerned about this issue from the outset. (ST 18-23)

Appellee cites no precedent which allows the admission into evidence during a resentencing that Appellant was previously sentenced to death. To do so is clearly fundamental error in Appellant's view and this court has not ruled upon the matter.

No objection could be made that would not compound the error, Further, it is not necessary to cite any cases for the well-known proposition that the Florida Supreme Court reviews all facets of a death case for any impropriety. A ruling on this issue should be made in order to guide counsel in the future. In criminal cases, if a new trial is ordered the new jurors are not told what happened previously as that knowledge would taint their decision. Here was a new sentencing and the jurors should not be informed of what happened during the prior sentencing. The instant case should be remanded accordingly.

Point IV

APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE SYSTEMATIC EXCLUSION OF POTENTIAL JURORS WHO STEADFASTLY OPPOSE THE DEATH PENALTY

Appellee forgets the fact that peremptory challenges are available to counsel. Appellant simply argues that removal - for cause - of any juror committed for or against the death penalty denies the Appellant his right to a fair trial.

This argument is well presented in the dissent to the ruling in Wainwright v. Witt, __U.S.__, 105 S.Ct. 844, 83 L.Ed. 2d 841 (1985):

> "Broad death qualification threatens the requirement that juries be drawn from a fair cross-section of the community and thus undermines both the Defendant's interest in a representative body and society's interest in full community participation in capital sentencing." (83 L.Ed 2d at 875)

Feelings for or against capital punishment are no different than religious, philosophical, pragmatic, or political beliefs which affect the judgment of every reasonable man. If the predominant community standards oppose the death penalty, why is a defendant deprived of that benefit? Likewise, the reverse would also apply. If the predominent view is favoritism toward the death penalty, a Defendant is still entitled to nothing more than a fair representation of the community within the jury panel.

You cannot be challenged for cause based on race, creed, political affiliation, or sex. Are views on such hotly debated topics such as capital punishment, abortion, welfare, and war any different than religion or philosophy or politics?

The instant case should be remanded with instructions that challenges for cause not be based on a juror's opinion of capital punishment.

Point V

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ALLOWING PHOTOGRAPH OF VICTIM INTO EVIDENCE

Appellee sees no reason a sentencing jury should be denied a piece of evidence available to the jurors during the guilt phase. If there is a new sentencing jury, the reason should be obvious - only those items which tend to prove aggravating or mitigating circumstances are admissible during the sentencing phase. Further, the photograph was not even admitted during the original sentencing.

Certainly, photographs of the victim are relevant and admissible during the guilt phase. It is therefore ludicrous to contend, as Appellee apparently does, that the issue is waived because Appellant did not appeal its introduction during the original trial. The grounds for appeal relate only to the sentencing phase and therefore Henderson v. State, 463 So.2d 196 (Fla. 1985) is totally inapplicable to the case sub judice. Also, Appellee's reliance on Riley v. State, 413 So.2d 1173 (Fla. 1982) is mislaid as that case resulted from a failure to make argument during the original appeal and again on remand. Here, the first attempt to introduce this photograph during a sentencing hearing was properly objected to and is now being argued in this appeal. There is no waiver.

Any comparison between this sentencing and the prior one in this case is illogical because this court, in Teffeteller v. State, 439 So.2d 840 (Fla. 1983) ruled that the heinous, atrocious, and cruel aggravating factor did not exist. A photograph of the victim could have tended to prove such a factor during the original sentencing but is totally irrelevant if said factor does not exist.

The photograph by itself does not even prove that the victim was shot, or who shot him, or why he was shot. The jury was informed by the Court that Appellant had been convicted of the murder. Appellant did not contest identification of the victim or the cause of death. The question remains: What previously unknown fact did the photograph appraise the jury of? Why was "living" proof necessary?

The photograph was not remotely relevant. In any event, any possible relevancy was outweighed by definitive prejudice. It was fundamental error to allow the jury to consider such evidence. This error requires remand.

Point VI

APPELLANT WAS DENIED A FAIR HEARING WHEN A REQUEST FOR INDIVIDUAL VOIR DIRE WAS DENIED AND WHEN ONE JUROR WAS LESS THAN TRUTHFUL ON VOIR DIRE

Appellee concedes that Florida Rule of Criminal Procedure 3.300(b) was amended to remove the requirement that the parties consent prior to collective voir dire by the court. Therefore, the only issue remaining in this point is whether Appellant was denied a fair hearing when one juror was less than truthful on voir dire.

Although Appellee states that Appellant's reliance on Loftin v. Wilson, 67 So.2d 185 (Fla. 1953) is misplaced, no support for such a contention is made in Appellee's answer brief. Even the prosecutor asked jurors whether they considered life imprisonment a waste of taxpayer's money and none replied in the affirmative. (ST 221) When juror Rudderow made said statement during deliberations, proof of impropriety thereby existed. This requires a remand before a new jury.

Point VII

THE TRIAL COURT ERRED IN IGNORING THE EXISTENCE OF VALID MITIGATING CIRCUMSTANCES

There was evidence elicited from Appellant that Appellant and Overton were drinking and doing drugs up to and after the victim was killed. (ST 670,671)

Therefore, there was competent evidence to support such a mitigating factor. Said competent evidence becomes more reliable and substantial when coupled with the testimony that Appellant had approximately 250 "hits" of acid in his lifetime. (ST 707) This fact directly contributed to and corroborated his drug problems in the military. (ST 657-659) Dr. Krop did testify that Appellant suffered from a character disorder and that Appellant had been a substance abuser for many years from an early age. (ST 540) The expert witness also stated that Appellant was non-assertive and easily influenced. (ST 542)

The Court ignored this history of Appellant and prejudiced him thereby. It is difficult to win a reversal in a capital case when the trial court acknowledges and simply rejects evidence in mitigation. The harmless error rule then applies and protects the trial court from a reversal or remand. A better rule would be to require a trial judge to accept evidence in mitigation where one or more jurors recommend life. The trial judge would still be able to give all factors the proper weight.

There was competent substantial evidence which proved two mitigating circumstances and this cause should be remanded for clarification.

CONCLUSION

When all points argued herein are considered en toto, it is clear that the instant death sentence should be reversed with directions to hold a new sentencing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mail to The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida, and Mr. Robert A. Teffeteller, No. 075785, Florida State Prison, Post Office Box 747, Starke, Florida 32091, this 11th day of July, 1985.

CARMEN F. CORRENTE