IN THE FLORIDA SUPREME COURT.

GUY REGINALD COCHRAN

Appellant,

vs. Case No. 67,972

STATE OF FLORIDA,

Appellee.

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APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

# REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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## STATEMENT OF THE CASE

Appellant, GUY REGINALD COCNRAN, will rely upon the Statement of the Case as presented in his initial brief.

## STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his initial brief.

## SUMMARY OF THE ARGUMENT

Appellant agrees that a specific verdict of premeditated murder is not an acquittal of felony murder. Neither is it a finding of guilt to felony murder because the jury made no finding relative to an essential element of first degree felony murder. Appellee's further argument that there was sufficient evidence of premeditation is not supported by the record.

Although Appellee contends that the letters from the victim's next-of-kin were merely "read" by the sentencing judge and not "considered", the record indicates the importance given them by the sentencing judge. In any case, the State should not be permitted to submit evidence for the trial court's consideration, argue against the defendant's objection to it, and then contend on appeal that its admission was not error because the judge didn't really "consider" it.

Appellee has misread case law and ignored pertinent portions of the record when arguing that the homicide at bar was especially heinous, atrocious or cruel.

Finally, the case authority cited by Appellee actually tends to support Appellant's contention that the trial judge should not have overridden the jury's life recommendation.

## ARGUMENT

### ISSUE I.

THE JURY RETURNED A SPECIFIC VERDICT OF GUILT TO PREMEDITATED MURDER. BECAUSE THERE IS INSUFFICIENT EVIDENCE OF PREMEDITATION, COCHRAN'S CONVICTION MUST BE REDUCED TO SECOND-DEGREE MURDER.

Appellee has argued that this Court's holding in Bates v. State, *465 So.2d 490* (Fla.1985) controls disposition of the case at bar. The Bates jury was also presented with an extensive verdict form which required the jury to return a specific verdict choosing whether the first degree murder was premeditated or a felony murder. This Court held that the return of a premeditated murder verdict did not bar conviction for three contemporaneous felonies because the premeditated murder verdict was not an acquittal of felony murder.

Appellant's argument is entirely consistent with this Court's holding in Bates. What differentiates the case at bar is that Cochran was prosecuted on a one-count indictment which alternatively charged first degree premeditated or felony murder (R776). Appellant ~~does not~~ claim that the premeditated murder verdict was an acquittal of felony murder. However, the jury never returned any finding on an essential element of first-degree felony murder, commission of one of the specified underlying felonies. Hence, Cochran

cannot be adjudged guilty of first-degree felony murder regardless of whether the evidence is substantial. Fourteenth Amendment due process and the right to a jury trial guaranteed by the U.S. Constitution, Amend. VI and the Florida Constitution, Article I, Section 16 require a jury verdict of proof beyond a reasonable doubt as to each element of a crime.

Appellee has further argued that there was sufficient evidence of premeditation to support the jury verdict, pointing to the testimony of Darrell Shorter regarding an admission by Cochran. Brief of Appellee, p.6. The State has distorted the substance of Shorter's testimony. Shorter testified

> He told me that he got the car from a bar on 7th Avenue and that he took the girl somewhere and shot her and that is how he got the car.

(R181)

This cannot be fairly interpreted as an admission of "premeditative intent to kill the victim so as to gain the fruits of his crime." Brief of Appellee, p.6. Rather, Shorter's testimony simply repeats Cochran's account of events which led to his possession of the BMW.

Nothing in Shorter's testimony contradicts Cochran's confession to Detective Cribb where he said that robbery of the victim's money was his sole aim. (R1079) Cochran denied intending to steal the car or hurt Harris. (R1079) He said he intended to "come back over on the east side and jump out and leave her in the car." (R1079)

This Court, in Snipes v. State, 154 Fla. 262, 17 So.2d 93 at 97 (1944), stated the proof required for premeditated murder:

> An essential element of murder in the first degree is premeditated design and...it must be proven that before the commission of the act which results in death that the accused had formed in his mind a distinct and definite purpose to take the life of another human being and deliberated or meditated upon such purpose for a sufficient length of time to be conscious of a well defined purpose and intention to kill another human being....It is not necessary that such purpose and intent to kill another human being shall exist for any particular length of time; it is sufficient if between the formation of the purpose or intent to kill and the act of killing there elapses enough time that the slayer is fully conscious of a deliberate purpose and intent to kill another human being.

At bar, there is insufficient evidence to show that Cochran ever formed a conscious, deliberate purpose and intent to kill Carol Harris.

Appellee has also asserted that premeditation can be proved by physical evidence from the scene where the victim's body was found. Admittedly, Appellant's confession to Detective Cribb that he let the wounded victim out of the car on the highway (R1077, 1082) was inconsistent with the evidence that the body was found well away from the roadside with indications that it had been dragged there. Appellee's conclusion that Cochran "dragged her still-alive body away from the highway (obviously to avoid easy detection)"[1/] remains a mere speculation. Appellee has failed to show that the victim was alive when she was dragged away from the road, that Appellant did the dragging, or that "concealing" a homicide victim is relevant to premeditation.

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1/ Brief of Appellee, p.7.

## ISSUE 11.

Appellant will rely upon the argument presented in his initial brief.

## ISSUE III.

THE TRIAL COURT ERRED BY CONSIDERING LETTERS FROM TEE VICTIM'S NEXT-OF-KIN WHEN IMPOSING SENTENCE.

In his brief, Appellee urges this Court to reject Appellant's assertion that the letters received by the sentencing judge from the victim's next-of-kin prior to sentencing were in violation of both statutory provisions and Appellant's constitutional rights Appellee does not even contend that statutory provisions were followed or that the Sixth, Eighth and Fourteenth Amendments permit reception of such evidence in a capital sentencing proceeding. Rather, Appellee argues that although the Court read the letters, he did not "consider" them. Brief of Appellee, p.9-10.

It seems more than a little bit sinuous for the State to present the letters to the sentencing judge as an attachment to its sentencing memorandum (R980), argue against Appellant's objection to their consideration (R680), and then argue on appeal that "even though the lower court read both letters, there is no evidence that he considered said letters.'' Brief of Appellee, p.9.

Also, Appellee has accused Appellant of "a clear misstatement of the record.'' Brief of Appellee, p.9. Although Appellant agrees with Appellee that the victim letters were originally an

attachment to the State's sentencing memorandum, it is also clear from the record that the sentencing judge adopted the State's attachment and attached it to his own "Sentencing Memorandum". (R978-984) In particular, this Court should note that these documents are all attached in the record on appeal, and that they are described by the clerk in the "Index to Record on Appeal" as "Sentencing Memorandum with Aggravating Circumstances Signed by the Honorable Donald C. Evans on October 11, 1985 Together with Certain Instruments Attached Thereto," pages 978-984.

## ISSUE IV.

THE TRIAL COURT ERRED BY FINDING THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

Appellee's brief urges this Court to distinguish the case at bar from Teffeteller v. State, 439 So.2d *840* (Fla.1983) on the basis that "the victim in Teffeteller died shortly after being shot." Brief of Appellee, p.12. In fact, this Court wrote in Teffeteller:

> The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

439 So.2d at 846.

In the case at bar, the longest estimate of possible survival after the gunshot wound was "as much as an hour and possibly longer" according to Dr. Miller. (R205) However, Dr. Miller qualified this statement by saying that the victim could have lost consciousness within moments and it was not possible for him to state

within the bounds of reasonable medical probability how long the victim remained conscious. (R206) In fact, Dr. Miller put the range of reasonable medical probability for survival after the wound at "a few minutes to over an hour." (R207)

## ISSUE V.

THE TRIAL JUDGE ERRED BY OVER-RIDING THE JURY RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSING A SENTENCE OF DEATH.

The State has asserted that "the facts in the instant case are so clear and convincing, that any reasonable person (or jurist) would find death to be the appropriate punishment, Tedder not withstanding." Brief of Appellee, p.14. However, Appellee has not been able to cite any decisions of this Court which support such an assertion. Of the three decisions cited by the State in support of the contention that a sentence of death is proportional when the case at bar is compared to other capital cases, two are not comparable because there was no jury recommendation that a life sentence be imposed. See Brief of Appellee, p.17. The third decision cited, Eutzy v. State, 458 So.2d 755 (Fla.1984), cert.den., __U.S.__, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985) deserves further analysis.

In Eutzy, the accused directed a cab driver from the Pensacola airport to several out-of-town destinations. Upon the cab's return to Pensacola, the sister-in-law of the accused was dropped off and the accused rode off in the cab. The cab driver was found shot in the head under circumstances pointing to an execution-style

slaying. The evidence also included Eutzy's prior conviction for robbery. No mitigating evidence was presented, but the jury recommended a life sentence.

On appeal, this Court upheld the trial court's override of the jury life recommendation. In doing so, this Court examined every possible consideration which could have led to the jury's recommendation and rejected each of them as unreasonable. There simply were no mitigating circumstances either presented to the jury or which could be inferred from the evidence. It is this total lack of mitigation which accounts for this Court's decision to affirm the death sentence in Eutzy.

By contrast, in the case at bar, the trial court found two valid statutory mitigating circumstances. Another was argued to the jury and extensive non-statutory mitigating evidence was also presented. While Appellant's crime was comparable to that of Eutzy, the amount of mitigation applicable is totally dissimilar and requires a different result.

A comparable case where the trial court's override was reversed is Cannady v. State, 427 So.2d 723 (Fla.1983). In Cannady, the accused robbed the night manager at a Ramada Inn and kidnapped the victim. The victim was driven to a remote area and shot. The jury recommended a life sentence. While finding two mitigating circumstances applicable, the trial judge held that the aggravating factors outweighed them.

On appeal, this Court noted that there was psychological testimony from which the jury could have found additional mitigating circumstances applicable. Also, the jury recommendation of life

could also have been based upon the same statutory mitigating factors found by the trial court. This Court concluded that there was a reasonable basis for the jury's life recommendation and accordingly reduced Cannady's sentence to life.

Because of the extensive evidence in mitigation, the case at bar is more like Cannady than Eutzy. Cochran's sentence should also be reduced to life.

## CONCLUSION

Appellant will rely upon the Conclusion as presented in his initial brief.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida, 33602, by nail on this 24th day of April, 1987.

Douglas S. Connor
DOUGLAS S. CONNOR