IN THE SUPREME COURT OF FLORIDA

DONALD ROBERT KRITZMAN,

Appellant,

v. CASE NO. 69,058

STATE OF FLORIDA,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This Supplemental Brief contains two issues to be added to Appellant's Initial Brief. References to the record will be designated by the prefix "R." The Appellant, Donald Robert Kritzman, will be referred to by name throughout this brief.

STATEMENT OF THE CASE AND FACTS

A complete statement of the case and facts is set forth in the Initial Brief. For purposes of this Supplemental Brief, Kritzman presents the following additional facts:

Just prior to the trial court's imposition of sentence in this case, the State was allowed to introduce the testimony of the victim's mother, sister and brother-in-law for the court's consideration. (R 2794-2796) Each expressed anger about the offense, related its emotional impact on the family and asked the judge to impose a death sentence.

SUMMARY OF ARGUMENT

1. The trial judge improperly concluded that death was the appropriate penalty in this case. Although the judge's findings regarding the aggravating and mitigating circumstances were legally correct, his weighing process was flawed. He failed to assign the proper qualitative weight to the aggravating and mitigating circumstances. When properly weighted, the mitigating circumstances outweighed the aggravating ones. Consequently, the judge was compelled to override the jury's recommendation of death and impose a life sentence.

2. Before imposing the death sentence, the trial court heard and considered testimony from the victim's relatives concerning the crime's impact on their lives and the their desire to see a death sentence imposed. This evidence was irrelevant to the capital sentencing process, since it did not focus on the character of the defendant or the circumstances of the crime. Consideration of such information in a capital sentencing proceeding violates the Eighth and Fourteenth Amendments to the United States Constitution. Booth v. Maryland, 482 U.S.___, 96 L.Ed.2d 440, 107 S.Ct.___ (1987).

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN SENTENCING KRITZMAN TO DEATH SINCE THE MITIGATING CIRCUMSTANCES OUTWEIGHED THE AGGRAVATING CIRCUMSTANCES THEREBY MAKING LIFE THE ONLY APPROPRIATE AND PROPORTIONATE SENTENCE.

In support of his imposition of a death sentence, the trial judge found three aggravating circumstances and three mitigating ones. (R 122-131, 2806-2820) Kritzman does not contest these findings regarding the specific circumstances, but he does contest the weight given the respective circumstances and the judge's conclusion that the aggravating factors outweighed the mitigating factors. When properly weighted, the mitigating outweigh the aggravating, and life is the only legal sentence. The jury's recommendation of death was incorrect, and the court erred in following it. Kritzman's death sentence violates Sections 921.141 Florida Statutes, see, State v. Dixon, 283 So.2d 1 (Fla. 1973), and the Eighth and Fourteenth Amendments.

As the trial court acknowledged, Kritzman presented a substantial amount of significant mitigating evidence. (R 122-131, 2806-2820) This mitigation falls into seven areas: (1) Kritzman's retarded intellectual capacity; (2) his personality disorder which manifests itself in poor impulse control; (3) his age of 19 coupled with his retarded emotional development; (4) his economically and emotionally deprived personal and family background; (5) his alcohol consumption at the time

of the crime; (6) the impulsive nature of the actual shooting; and (7) the disparate sentence given his codefendant who was equally culpable. The court found three mitigating circumstances: (1) Kritzman's capacity to appreciate the criminality of his acts or to conform his conduct was substantially impaired, Sec. 921.141(6)(f) Fla. Stat.; (2) Kritzman's age of 19 at the time of the crime when considered with his intellectual and emotional age of 11 or 12, Ibid. at sec. (6)(g).; and (3) nonstatutory mitigating factors which included Kritzman's mental disorders, his deprived background and the disparity in treatment of his codefendants. (R 126-129) A qualitative examination finds this mitigation compelling.

Donald Kritzman was emotionally abandoned from the moment of his birth. He was born out of wedlock as his alcoholic mother's thirteenth child (R 2656); the second one by Donald's father.(R 2649-2651) The first child of that relationship had been removed from the home and adopted.(R 2651) A third child was born within two years of Donald's birth and his father, Thomas Hendricks, left. (R 2650-2651) Donald's mother gave him no emotional support. In addition to her alcoholism, she also suffered from cancer and its disabling effects during Donald's childhood. (R 2652-2653) He had no role model or adult supervision. (R 2650-2654) At twelve years old, Donald was selling drugs out of his mother's home with her approval and splitting the money with her. (R 2655-2656) From that time until his mother's death from heart failure, Donald spent more time in

custody as a juvenile than at home.(R 2655) During this time, he attempted suicide several times. (R 2654)

This emotional deprivation exacerbated Kritzman's impaired mental capacity and personality disorders. Dr. Richard Goldberg and Dr. Dan Overlade, clinical psychologists, examined and tested Kritzman.(R 2674-2676) They concluded that Kritzman functioned in the borderline retarded range with an IQ of 72. (R 2642-2648, 2679, 2816) This placed Kritzman in the lowest four percent of the population intellectually. (R 2645) Moreover, Goldberg also described Kritzman as suffering a classic example of sociopathic personality disorder with an extremely low level of impulse control. (R 2678) In view of his background, Goldberg concluded that the ability to control impulses simply never developed. (R 2678) Consumption of alcohol would further impair the ability to control impulses with the degree of impairment directly related to the the amount of alcohol ingested.(R 2678-2679) Dr. Lewis Perillo, a psychiatrist, testified that if Kritzman consumed the number of beers mentioned in his codefendant's testimony, he would have been under the influence of alcohol, if not legally intoxicated, at the time of the crime.(R 2637-2639) Furthermore, Perillo stated that the alcohol would have a greater impact on the functioning of someone at Kritzman's intelligence level than on an individual of normal mental capacity. (R 2639)

The nature of the shooting itself is consistent with Kritzman's mental problems and his alcohol impairment. While Kritzman and his codefendant may have premeditated the robbery,

the shooting was not planned. The shooting was an impulse during the stress of the moment--a product of Kritzman's underdeveloped and alcohol impaired impulse control. Mailhes testified that the victim initially resisted the robbery and said he had no money when Kritzman demanded money from him. (R 1907) According to Mailhes, Kritzman then fired four shots.(R 1907-1910) Mailhes admitted that he was inside the car at the the time of the shooting.(R 1907-1908) Johnny Davis freely admitted that he was present and actively assisting in the robbery at the time of the shooting.(R 2277-2279) He related the events as follows:

> The boy got down on the ground and Don got his wallet and shoes off of him. I got over the boy's body like this (INDICATING). I was straddling his body. At the time, he hadn't been shot or nothing. He had a watch, a watch that was his, and I was bent over him like this (INDICATING). He is face down on the ground and I am bent over like this (INDICATING), and I am taking the man's watch off, and in the process of taking his watch off, Don just--I don't know what happened. He just started firing on him, started shooting him. Well, I more or less swung it up, swung the gun up, you know, from Don, like that (INDICATING), and the fourth shot rained off. I say it was the fourth. It could have been the fifth. I don't know. I don't know exactly how many times the boy was shot or anything, but when it happened, it just hap--everything went down so fast. I threw it up and he shot off the fourth or fifth shot and he liked to have shot me. He said, "Oh, I'm sorry." He just more or less freaked out.

(R 2278-2279) Kritzman's mental impairment was a causal factor in the shooting--he "freaked out." He acted impulsively and lost control.

This Court has recognized the mitigating quality of crimes committed impulsively while the perpetrator suffers from a mental disorder rendering him temporarily out of control. E.g., Amazon v. State, 487 So.2d 8 (Fla. 1986); Miller v. State, 373 So.2d 882 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976). In Amazon, the defendant's mental condition was remarkably similar to Kritzman's. Amazon was nineteen years old with the emotional development of a thirteen-year-old, he was raised in a negative family setting and had a history of drug abuse. There was inconclusive evidence that Amazon had ingested drugs on the night of the murders. During a burglary, robbery and sexual battery, Amazon lost control and, in a frenzied attack, administered multiple stab wounds to his robbery and sexual battery victim and her eleven-year-old daughter. Reversing the death sentence, this Court said, "In light of these mitigating circumstances, one may see how the aggravating circumstances carry less weight and could be outweighed by the mitigating factors." 487 So.2d at 13. Kritzman is likewise deserving of a life sentence. In fact, the mitigating circumstances in his case are even stronger than the ones in Amazon. Unlike Amazon, Kritzman was intellectually as well as emotionally retarded. Unlike Amazon, Kritzman's negative family background involved complete emotional abandonment and even encouraged drug use and criminal behavior. Furthermore, the evidence conclusively established that Kritzman was under the influence of alcohol and that alcohol further impaired his lack of impulse control.

This alcohol impairment, alone, mitigates the crime. See, Buchrem v. State, 355 So.2d 111 (Fla. 1978); Chambers v. State, 339 So.2d 204 (Fla. 1976). Impulsive killings during the course of other felonies, even where the defendant was not suffering from an impaired mental capacity, have also been found unworthy of a death sentence. See, Proffitt v. State, 510 So.2d 896 (Fla. 1987)(defendant stabbed victim as he awoke during a burglary of his residence); Caruthers v. State, 465 So.496 (Fla. 1985)(defendant shot a convenience store clerk three times during an armed robbery); Rembert v. State, 445 So.2d 337 (Fla. 1984)(defendant bludgeoned store owner during a robbery); Richardson v. State, 437 So.2d 1091 (Fla. 1983)(defendant beat victim to death during a residential burglary in order to avoid arrest). Certainly, with the added mitigation of mental impairment contributing to the crime, Kritzman's life must also be spared.

Finally, the fact that Kritzman's codefendants received life sentences is mitigating and requires that Kritzman's death sentence be reduced to life. This court has never countenanced the unequal treatment of codefendants whose participation in the killing was the same. Brookings v. State, 495 So.2d 135 (Fla. 1986); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Slater v. State, 316 So.2d 539 (Fla. 1975). The State's evidence established that Johnny Davis was equally culpable with Kritzman in the actual killing. While Kritzman did fire the shots first during a time when he lost control, Davis, noting that the victim was still breathing, consciously and

methodically bludgeoned the victim with the tire tool.(R 1907-1910) Kritzman acted impulsively because his mental impairment caused him to lose control. Davis acted intentionally as an executioner. Furthermore, the evidence demonstrated that Davis was the leader of the group. (R 2298-2310) At the time the group escaped from prison, Davis took charge and lead them through the woods to a road.(R 2298) Davis also took the lead in committing the robbery of the elderly man which netted them a car, money and a firearm.(R 2300-2301) Davis took control of the car and drove most of the time during the group's travels.(R 2301-2303) Davis made the decision to give the hitchhiker a ride.(R 2303) Davis stopped the car in the secluded area under the guise of finding a place to go to the bathroom. (R 2303-2305) Davis was the first to push the victim to the ground.(R 1907) Davis took charge of Kritzman when he lost control and started shooting. (R 2278-2279) He had also taken charge of Kritzman earlier when Kritzman "freaked" and ran into the woods before the robbery of the elderly man.(R 2303) Davis directed Mailhes to bring him the tire tool to bludgeon the victim.(R 1907-1908) Davis struck the victim and drug the body off the roadway to in an attempt to conceal it.(R 1911) Finally, Davis again took control of the automobile to flee the scene. (R 1911) Davis was a primary actor in this crime. Kritzman's participation was no greater than Davis's, and his sentence can be no greater. This Court must reverse this case for a life sentence to insure consistent treatment of those equally culpable.

The three mitigating circumstances the trial court found, coupled with the life sentence given to Davis, who was at least equally involved in the murder, outweighs the aggravating circumstances. Kritzman was under sentence for a prior robbery at the time he committed the robbery and murder in this case. Beyond those facts, nothing further aggravating exists. The court found that he was under sentence of imprisonment (R 123-124), had a prior conviction for robbery (R 124) and that the murder was committed during a robbery.(R 124-125) An impulsive killing during a robbery, alone, is not a crime justifying a death sentence. The addition of a prior robbery conviction and sentence in this case does not change that result in view of the relationship between Kritzman's criminal behavior and his mental impairment and emotionally deprived background. Judge Lowery simply failed to give the aggravating and mitigating circumstances the proper weight. He likewise failed to to properly evaluate the effect of the life sentence given Davis. This Court must reverse Kritzman's death sentence.

ISSUE II

THE TRIAL COURT ERRED IN CONSIDERING TESTIMONY FROM RELATIVES OF THE VICTIM CONCERNING THE IMPACT OF THE CRIME ON THEM AND THEIR DESIRES REGARDING SENTENCING.

In Booth v. Maryland, 482 U.S. ___ , 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987), the United States Supreme Court addressed the propriety of the sentencing authority in a capital case receiving and considering information about the impact of the crime on the victims. Maryland's practice was to present the sentencing jury with a presentence investigation which included a victim impact statement. The statement included information about the character of the victim, the emotional impact of the crime on relatives and family members' views about the crime and the defendants. Concluding that this information was irrelevant to the capital sentencing decision and likely to improperly shift the focus of the sentencer to arbitrary considerations, the Court held that the introduction of these statements violated the Eighth Amendment.

A similar constitutional violation occurred in the instant case when the trial court considered testimony from relatives of the victim prior to imposing sentence. Patterson v. State, No. 67,830 (Fla. Oct. 15, 1987). The victim's mother, sister and brother-in-law testified to the emotional impact the crime had on them and their feeling concerning the proper sentence.(R 2794-2796) While not as detailed as the victim impact statements considered in Booth, the information was the same type and was just as irrelevant to the sentencing decision. As

this Court recently held in Patterson, the fact that the testimony in this case was presented to the judge and not the jury does not distinguish this case from Booth. In Florida, the judge is the sentencing authority, Sec. 921.141 Fla. Stat.; State v. Dixon, 283 So.2d 1 (Fla. 1973), just as the jury had that power in Booth. Such irrelevant evidence tends to taint the sentencer whether it be judge or jury. Although judges often hear evidence which is irrelevant to decision of the issues before them and are presumed capable of disregarding it, judges are human and subject to the inflaming influences of victim impact information. See, Jackson v. State, 498 So.2d 906, 910 (Fla. 1986)(trial court improperly relied on victim's character and standing in the community to find the homicide heinous, atrocious or cruel). Enough irrelevant information unavoidably comes to a trial judge's ears in a capital case without enhancing the problem with the formal presentation of obviously irrelevant and inflammatory material. The practice of allowing family members of the victim to testify before the court, as the sentencer in a capital case, regarding the crime's impact and their views as to punishment simply cannot be condoned in light of the decision in Booth. The judge in this case should not have considered the testimony. This Court must reverse Kritzman's death sentence.

CONCLUSION

For the reasons presented in this Supplemental Brief, Donald Kritzman asks this Court to reverse his death sentence with directions to the circuit court to impose a life sentence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Supplemental Brief has been furnished by hand delivery to Assistant Attorney General John M. Koening, Jr., The Capitol, Tallahassee, Florida on this 16th day of October, 1987.

W. C. MC LAIN