IN THE SUPREME COURT OF FLORIDA

TIMOTHY CURTIS HUDSON, :

Appellant, :

vs. : Case No. 70,093

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONTINUED

PRELIMINARY STATEMENT

The state's brief will be referred to by use of the symbol "S". Other references will be as denoted in appellant's initial brief.

This reply brief is directed to Issues I and II only. As to the remaining issues, appellant will rely on his initial brief.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENTS (AND ALL EVIDENCE DISCOVERED AS A DIRECT RESULT THEREOF), AS THE STATEMENTS WERE NOT VOLUNTARILY MADE, BUT INSTEAD WERE PROCURED BY MEANS OF IMPERMISSIBLE AND PSYCHOLOGICALLY COERCIVE INTERROGATION TECHNIQUES, AND BY DELIBERATE EXPLOITATION OF APPELLANT'S EMOTIONAL CONDITION.

Contrary to the state's argument, the constitutional ground asserted in the trial court in moving to suppress appellant's statements, and the ground asserted on appeal, are one and the same - the statements were involuntarily made. The question of voluntariness is determined under the totality of the circumstances. See e.g. Frazier v. Cupp, 394 U.S. 731, 739 (1969); Roman v. State, 475 So.2d 1228, 1232 (Fla. 1985). Accordingly, at the hearing, the state called Det. Noblitt and Sgt. Price, and the defense called appellant, to establish the circumstances surrounding appellant's confession. The testimony of all three witnesses showed that on two separate occasions, Sgt. Price took appellant outside of the presence and hearing of the other officers, and had a private discussion with him. As to the question of whether Price threatened appellant with harm if he did not take them to where the body was, the evidence was in conflict. Consequently, undersigned counsel did not press that aspect of the involuntariness argument on appeal, since the

law is well settled that resolution of such factual conflict is for the trial court. See e.g. Stone v. State, 378 So.2d 765, 770 (Fla. 1979). However, as to another aspect of the involuntariness claim - i.e. Sgt. Price's intentional exploitation of appellant's emotional state (by means, inter alia, of the "Christian burial technique" condemned in Roman v. State, supra)- the evidence was not in conflict. Price's use of this "blatantly coercive and deceptive ploy" [Roman] to overcome appellant's will by manipulating his emotions (and, on the second occasion, to administer a "booster shot" when, in Price's words, appellant appeared to be "reconsidering his cooperation") was clearly established by the officer's own testimony. For this obvious reason, in presenting the argument on appeal that appellant's statements were involuntarily made, undersigned counsel chose to emphasize the evidence which was uncontradicted - which, indeed, was elicited from the state's own witnesses. The constitutional ground for the suppression of the statements remains what it has always been; that the statements were involuntary and therefore violative of the Fourteenth Amendment. See appellant's initial brief, p.33, n.10. Cf. Jackson v. State, 451 So.2d 458, 461 (Fla. 1984)(objection on ground of relevancy was sufficiently specific to preserve for appeal the issue of the admissibility of "Williams-rule" collateral crime evidence).

The purposes of the contemporaneous objection rule are to apprise the trial judge of the putative error, and to preserve the issue for intelligent review on appeal. Castor v. State, 365 So.2d 701, 703 (Fla. 1978). These purposes were

clearly satisfied in the instant motion to suppress, where the admissibility of the statements (and their evidentiary fruits) were challenged on the constitutional ground of involuntariness, and where the totality of the circumstances surrounding the making of the statements was established by the testimony of the witnesses.

Turning briefly to the merits, this Court has recognized that techniques calculated to exert improper influence, or to trick or delude the suspect as to his true position, "will ... result in the exclusion of self-incriminating statements thereby obtained." Thomas v. State, 456 So.2d 454, 458 (Fla. 1984); see also State v. Charon, 482 So.2d 392 (Fla. 3d DCA 1985). Consistent with Colorado v. Connelly, 479 U.S. __, 107 S.Ct. __, 93 L.Ed.2d 473 (1986), the Court went on to note in Thomas that the coercive influence "must be visited upon the suspect by his interrogators; if it originates from the suspect's own apprehension, mental state, or lack of factual knowledge, it will not require suppression". In the present case, Sgt. Price acknowledged that he removed appellant from the presence of the other officers for the express purpose of getting an emotional response from him. On each occasion, Price employed the "Christian burial technique" to overcome appellant's reluctance to incriminate himself by leading police to the victim's body. As previously noted, in Roman v. State, supra, at 1232, this Court stated emphatically that "The use of the 'Christian burial technique' by law enforcement personnel is unquestionably a blatantly coercive and deceptive ploy." In the present case (in contrast to the factual situation in Roman) Sgt. Price's repeated use of this coercive technique

led directly to the discovery of the victim's automobile, the green blanket (at which point the "booster shot" was administered), the body, and appellant's confession. This, of course, is exactly what Price intended when he exerted the improper influence. Appellant's statements were involuntary within the meaning of the Fourteenth Amendment, and the physical evidence obtained in conjunction therewith was likewise constitutionally tainted. The trial court erred in denying the motion to suppress.

ISSUE II

IMPOSITION OF THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED IN THIS CASE.

The state's basic approach, in contending that appellant should be put to death, is to rely heavily on an aggravating circumstance ("especially heinous, atrocious, or cruel") which the trial court did not find (S.12, see S.10-15). Apparently the state, which (in Issue III) has argued that the trial court's rejection of a mitigating circumstance is within his virtually unlimited discretion (see S.22), is not willing to accord the same deference to the trial court's rejection of an aggravating circumstance.[1/] In any event, as Brown v. Wainwright, 392 So.2d 1327, 1331-32 (Fla. 1981) makes abundantly clear, this Court is a reviewing court, not a sentencing court. It would be completely inappropriate, for the reasons explained in Brown, for this Court on appeal to re-weigh or reevaluate the evidence to find an aggravating circumstance which the trial judge did not find.

Secondly, the trial court's decision not to find that this homicide was "especially heinous, atrocious, or cruel" was supportable under the evidence, and was well within his discretion. In the penalty phase charge conference, defense counsel

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1/ This double standard is particularly strange in light of the fact that the trial court may not find an aggravating factor unless he is satisfied that it has been proven beyond a reasonable doubt [see State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Clark v. State, 443 So.2d 973, 976 (Fla. 1983)], while, in contrast, a mitigating circumstance may be considered even if the evidence does not meet this high standard. See also the standard jury instruction, given at p. 620 of the record.

pointed out that, under the leading case of State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), this aggravating factor was designed to apply to those capital crimes where the homicide "was accompanied by such additional acts as to set [it] apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." (R508) Indeed, without such a narrowing construction, the "h.a.c." circumstance would be unconstitutionally overbroad. See Maynard v. Cartwright, __ U.S. __ (1988)(case no. 87-519, decided June 6, 1988)(43 Cr.L. 3053)(striking down Oklahoma's "espeically heinous, atrocious, or cruel" circumstance on this ground). The fact that a murder is committed by stabbing does not automatically make the "especially heinous, atrocious, or cruel" circumstance applicable. For example, in Demps v. State, 395 So.2d 501, 505-06 (Fla. 1981), a prison murder in which the victim died of multiple stab wounds, in which (unlike the present case) the trial judge found the "h.a.c." circumstance, this Court struck it down, saying "We do not believe this murder to have been so 'conscienceless or pitiless' and thus set 'apart from the norm of capital felonies' as to render it 'especially heinous, atrocious, or cruel'." In the present case, defense counsel pointed out to the court that Dr. Diggs (the associate medical examiner) had testified that the four stab wounds could have been made in rapid succession (see R.508,304-05). The rapidity of the wounds would have hastened the process by which shock sets in and unconsciousness results (see R.307-08,309-10). Dr. Diggs testified that "in an average stabbing of this sort right here" (R307), it generally takes between seventeen and

twenty-four seconds before the brain starts to lose consciousness (R307-08). While Dr. Diggs could not tell in this particular case how long Ms. Ewings remained conscious, it could have been anywhere from a few seconds to a minute or a couple of minutes (R306-08). Dr. Diggs could say, to a reasonable medical certainty that death occurred within a few minutes (R305). In the charge conference, defense counsel cited Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983), in which the victim was killed by a sudden shot from a shotgun. In Teffeteller, this Court struck down on appeal the trial court's finding of the "h.a.c." aggravating factor. Emphasizing that the killing must be especially heinous, atrocious, or cruel to fall with the category denominated by the legislature, the Court went on to hold: "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." Teffeteller v. State, supra, at 846. The state, in response, cited three decisions, all of them remarkably inapposite (R510-11). Two, Doyle v. State, 460 So.2d 353, 355, 357 (Fla. 1984) and Adams v. State, 412 So.2d 850, 856 (Fla. 1984) involved strangulation murders preceded by sexual battery or attempted sexual battery of the victim. Clark v. State, 443 So.2d 973, 977 (Fla. 1983), was quoted by the prosecutor as follows: "The helpless anticipation of impending death may serve as a basis for this aggravating factor" (R510). What Clark actually says is "Although the helpless anticipation of impending death may serve as a basis for this

aggravating factor, there is no evidence to prove that Mrs. Satey knew for more than an instant before she was shot what was about to happen to her." Consequently, the "h.a.c." aggravating circumstance in Clark was held invalid by this Court. In the present case, as found by the trial court (R884), Ms. Ewings surprised appellant while he was burglarizing her residence; when she started screaming, he reacted "in [a] mental state of panic", and began stabbing her. As in Clark, there is no evidence that Ms. Ewings knew for more than a fraction of a second what was about to happen. Thus, even the case authority cited by the state in urging the trial court to find the "h.a.c." circumstance, actually supports his decision to decline to find it. As in Clark (and as in Demps and Teffeteller), this homicide was not accompanied by additional acts of depravity as to set it apart from the norm of capital felonies. See also Lloyd v. State, __ So.2d __ (Fla. 1988) (case no. 65,631, opinion filed March 17, 1988)(13 FLW 211, 214).

Thus, the state's description of the set of circumstances here - "two aggravating circumstances with abundant evidence of a third factor [meaning h.a.c.] and one mitigating circumstance with some little weight given to another" (S13) - is neither meaningful nor entirely accurate. Appellant submits that the real question here is whether the death penalty is proportionally warranted in a case where (1) the only aggravating circumstances are that the homicide was committed in the course of a burglary, and that appellant has previously been convicted of a felony involving the use or threat of violence; (2) the trial court found as a

mitigating factor (based on "[t]he extensive testing done by Dr. Berland ... together with the circumstances of the surprise of the defendant during the burglary when confronted by the victim" (R844)) that appellant's ability to conform his conduct to the requirements of law was substantially impaired, and that the killing occurred while appellant was "in [a] mental state of panic" (R884); (3) the uncontradicted testimony of Dr. Berland established that appellant suffers from a major mental illness (paranoid schizophrenia), and at the time of the offense he was under the influence of a serious psychotic disturbance [2/] (R396-99,407-08,410-15,428-29,529-33,544,549-50); (4) Dr. Berland's examination also indicated that appellant suffers from organic brain tissue damage (R399-403;408-09,411, 529,532); (5) appellant was 22 years old at the time of the

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2/ It is important to note that the trial court did not disbelieve Dr. Berland's testimony [contrast, e.g., Bates v. State, 506 So.2d 1033 (Fla. 1977)]. Indeed, the trial court relied on "[t]he extensive testing done by Dr. Berland on the defendant", along with the circumstances of the killing, to establish the other statutory "mental mitigating circumstance" - that of appellant's impaired capacity to conform his conduct to the requirements of law. The same testing conducted by Dr. Berland established that appellant suffers from paranoid schizophrenia, and, in addition, from organic brain damage. In rejecting (or denigrating) the "under the influence of extreme mental or emotional disturbance" mitigating factor, the trial court did not indicate any disagreement with the results of Dr. Berland's testing. [Had he done so, it would have been inconsistent with his finding as to "impaired capacity"]. Rather, the trial court merely focused on the manner of entry into the residence, and appellant's attempt to dispose of the body and bed clothing. Neither of these circumstances is inconsistent with paranoid schizophrenia or brain damage. Therefore, in determining the proportionality question, this evidence should be considered.

crime[3]; (6) substantial non-statutory mitigating evidence was presented which demonstrated, in different contexts of appellant's life, his willingness to work hard, his eagerness to learn, and his cooperative attitude (all of which tend to show that there is a realistic possibility of rehabilitation, see e.g. Cooper v. Dugger, __ So.2d __ (Fla. 1988)(case no. 71,139, opinion filed May 12, 1988)(13 FLW 312); (7) Dr. Berland testified that appellant's mental illness, while incurable, is treatable with proper medication (another factor in favor of rehabilitation)[4]; and (8) the killing, if premeditated at all, was upon reflection of very short duration.[5]

In his initial brief, appellant pointed out that there has only been one capital appeal decided by this Court where aggravating factors (b) and (d) were the only ones found by the trial court.[6] Since this combination of circumstances (felony murder and prior conviction of a violent felony) is not an unusual one, it is reasonable to presume that most such cases have resulted in life sentences after a plea or a trial, and

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3/ The trial court found appellant's age as a mitigating factor, though he accorded it slight weight (R884).

4/ Asked whether there was a strong likelihood that this crime would not have occurred had appellant's disorder been diagnosed and treated at an earlier age, Dr. Berland replied that, while response to medication varies with the individual, the greatest number of people respond favorably to some degree, "and in my opinion, a reduction in the severity of his psychosis would have probably made it a lot less likely that he would have committed an act like this particularly under these circumstances" (R550).

5/ See Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985).

6/ In that case, Smith v. State, 492 So.2d 1063 (Fla. 1986), a new trial was granted, so there was no need for proportionality review of the death sentence.

have therefore not come before this Court on appeal. As of the time the initial brief was written, there had been eight decisions affirming death sentences when the trial court found three or more aggravating factors, but (b) and (d) were the only ones upheld by this Court [see Initial brief, p.45-47]. However, in seven of those cases there were no mitigating circumstances, and therefore death was presumptively proportional.[7/] See State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)(where there are aggravating factors counterbalanced by no mitigating factors, death is presumed to be the proper sentence); Maxwell v. State, 443 So.2d 967, 971 (Fla. 1983)("The commission of murder in the course of a robbery by one who has previously been convicted of a felony involving violence to the person of another, when there are no mitigating circumstances, warrants a sentence of death."); White v. State, 446 So.2d 1031, 1037 (Fla. 1984); Blanco v. State, 452 So.2d 520, 526 (Fla. 1984).

The day before appellant's initial brief was filed, this Court decided Livingston v. State, __ So.2d __ (Fla. 1988) (case no. 68,323, opinion filed March 10, 1988)(13 FLW 187). The only valid aggravating factors in Livingston were that the homicide was committed in the course of an armed robbery, and that Livingston had previously been convicted of a violent felony. However (as in the instant case, and unlike each of the cases where the death sentence was affirmed based on only these aggravating factors) there was substantial evidence in mitigation. The trial court found Livingston's age (17) and his unfortunate home life and rearing (he had been physically

7/ In the eighth case, Rogers v. State, 511 So.2d 526,535 (Fla. 1987), the only mitigating factor was that Rogers was "a good husband, father, and provider".

abused as a child by his mother's boyfriend) as mitigating factors. This Court considered Livingston's "youth, inexperience, and immaturity" and his marginal intelligence, and concluded that the death penalty was not proportionally warranted.

While the mitigating evidence in the instant case is different in kind from that in Livingston, it is equally substantial. Here, the trial court found as a mitigating factor that appellant's capacity to conform his conduct to the requirements of law was substantially impaired, and that he committed the homicide while he was in a state of panic. The record contains uncontroverted evidence that appellant suffers, and suffered at the time of the offense, from a serious psychotic disturbance (paranoid schizophrenia), and also from organic brain damage which impairs his ability to control his impulses. His youthful age of 22, while less compelling than Livingston's 17, is certainly of some importance, especially when considered in conjunction with all of the other mitigating evidence in the case. Dr. Berland's testimony that appellant's mental illness is treatable with proper medication, coupled with the testimony of appellant's parents, employer, teacher, and coach that he possesses worthwhile and redeeming character traits, strongly suggests the possibility of rehabilitation. See Holsworth v. State, 522 So.2d 348, 354-55 (Fla. 1988)(quoting State v. Dixon, supra, to the effect that the death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied "to only the most aggravated and unmitigated of most serious crimes"); see also

Cooper v. Dugger, supra (13 FLW at 313). Imposition of the death penalty is not proportionally warranted in this case; appellant's sentence should be reduced to life imprisonment without possibility of parole for twenty-five years.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests the following relief:

As to Issue I: Reverse the convictions and death sentence and remand for a new trial.

As to Issue II: Reverse the death sentence, and remand for imposition of a life sentence, without possibility of parole for twenty-five years.

As to Issue III: Reverse the death sentence and remand for a new penalty hearing.

As to Issues IV and V: Reverse the death sentence and remand for a new penalty trial before a newly impaneled jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy here of has been furnished to Peggy A. Quince, Assistant Attorney General, Park Trammell Building, 8th Floor, 1313 Tampa Street, Tampa, Florida 33602; and Timothy C. Hudson, Inmate No. 085756, Florida State Prison, Post Office Box 747, Starke, Florida 32091, by mail this 17th day of June, 1988.

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STEVEN L. BOLOTIN