IN THE SUPREME COURT OF FLORIDA

MARK A. DAVIS,

Appellant,

vs. Case No. 70,551

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE PINELLAS COUNTY CIRCUIT COURT

INITIAL BRIEF OF APPELLANT

BATTAGLIA, ROSS, HASTINGS & DICUS
A Professional Association
AUBREY O. DICUS, JR.
MARGIE E. IRIZARRY
Post Office Box 41100
St. Petersburg, Florida 33743
(813) 381-2300
Attorney for Appellant
SPN:00002562

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STATEMENT OF THE FACTS

On July 1 or July 2, 1985, Landis was murdered and robbed. (R-906) On September 18, 1985, Davis was indicted for murder in the first degree, robbery, and grand theft. (R-8) Davis proceeded to a jury trial from January 13, to January 20, 1987. On January 20, 1987, the jury found Davis guilty of all three charges. (R-893-894)

The penalty phase took place on January 23, 1987. The judge instructed the jury that it could consider the following aggravating circumstances:

(1) A capital felony was committed by a person under sentence of imprisonment;

(2) The Defendant was previously convicted of another capital felony or of a felony involving the use or threat or violence an a person;

(3) The capital felony was committed while the Defendant was engaged in the commission of a crime;

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(5) The capital felony was committed for pecuniary gain;

(6) The capital felony was especially heinous, atrocious, or cruel; and

(7) The capital felony was a homicide and was committed

in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R-1578-1579) Defense counsel objected to the introduction of instruction number 7, to the effect that the crime was committed in a cold, calculated, and premeditated manner. (R-1489) By a vote of 8 to 4, the jury advised and recommenced the death penalty. (R-1592)

The sentencing phase took place on January 30, 1987. Pursuant to Florida Statute 5921.143, the judge allowed Landis' daughter to read a victim impact statement. (R-1610) Defense counsel objected to introduction of the statement. (R-1609-1610 and 1633)

when addressing the Court at the sentencing phase, the prosecution argued that the aggravating factors that the crime was heinous, atrocious, or cruel as well as premeditated, were applicable. The judge subsequently imposed capital punishment for the murder. (R-1643) Moreover, he ordered that if any appellate court overturned the sentence, Davis would be automatically sentenced to life in prison with 25 minimum mandatory years. (R-1644) For the robbery with a weapon, the Court sentenced Davis to life in prison consecutive to the sentence for murder. (R-1643) For grand theft, Davis was to serve five years consecutive to the life sentence for the robbery. (R-1645)

On March 18, 1987, the judge filed written findings upon which he based the death sentence. (R-269-273) The Court

concluded that the following aggravating circumstances were present:

(a) The capital felony was committed while Defendant was under sentence of imprisonment;

(b) The Defendant has been previously convicted of another capital offense or felony;

(c) The capital felony was committed while the Defendant was engaged in the commission of the crime of robbery;

(d) The capital felony was committed for financial gain;

(e) The capital felony was especially heinous, atrocious, or cruel;

(f) The capital was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The judge also ruled that the mitigating circumstances did not outweigh the aggravating ones. (R-272)

SUMMARY OF THE ARGUMENT

Davis' penalty and sentencing phases were marred by three errors which require a resentencing. Firstly, the aggravating circumstance on whether a crime is "heinous, atrocious, or cruel" is unconstitutionally vague. Secondly, the evidence in the case clearly establishes that the state did not prove the aggravating factor of premeditation. Thirdly, the judge incorrectly allowed introduction of a victim impact statement during sentencing.

Florida Statute §921.141(5)(h), which states that the commission of an especially heinous, atrocious, or cruel murder is an aggravating factor in capital punishment cases, is unconstitutional. Instructing the jury on this factor is reversible error requiring resentencing. In the instant case, the judge impermissibly included the section as an aggravating circumstance during jury instructions at the penalty phase. (R-1579) In addition, he applied the factor when imposing the death penalty. (R-270)

Florida law clearly establishes that the State has the burden of proving aggravating factors beyond a reasonable doubt. In the matter at hand, the State failed to meet its burden of proving that the crime was cold, calculated, and premeditated under Florida Statute §921.141(5)(i). If anything, the State proved premeditation of the robbery and erroneously transferred that intent to the murder.

Finally, based on Florida Statute §921.143, the judge allowed Landis' daughter to read a victim impact statement. (R-1611-1615) Such statements are unconstitutional because they are inflammatory as well as irrelevant to the sentencing proceedings in capital punishment cases. Thus, Miss Landis' speech constitutes reversible error.

The Florida Supreme Court has stated it will not prognosticate the decisions the jury and judge would have reached if aggravating factors which were impermissibly introduced were excised from the deliberations. As a result, the Court will order a new sentencing free of the illegitimate aggravating circumstances. In Davis' case, the jury and judge should not have considered the aggravating factors of whether the crime was heinous, atrocious or cruel as well as the element of whether it was premeditated. Moreover, the judge's deliberation was further contaminated by introduction of Miss Landis' statement. The impossibility of vaticinating the jury and judge's decisions if they had participated in penalty and sentencing proceedings free of errors warrants a new sentencing.

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ARGUMENT

I. INTRODUCTION OF FLA. STAT. §921.141(5)(h) CONSTITUTES REVERSIBLE ERROR,

In Maynard v. Cartwright, 108 S.Ct. 1853 (1988), the Supreme Court of the United States ruled that an aggravating factor to the effect that the murder was "especially heinous, atrocious or cruel" was unconstitutionally vague because on their face, the words do not provide a jury sufficient guidance concerning the circumstances under which they may impose the death penalty. Florida Statute §921.141(5)(h) contains an aggravating factor identical to the one which the Court rejected. Thus, that section of the statute is similarly unconstitutional. As a result, instructing the jury in the instant case that Davis' crime was heinous, atrocious, or cruel was error.

In Maynard, the Defendant was found guilty of first degree murder. The jury concluded that defendant's crime was "especially heinous, atrocious, or cruel" under Oklahoma Statute, Title 21, §701.12(4). The Oklahoma Court of Criminal Appeals affirmed the sentence. Defendant sought habeas corpus on several grounds to the District Court, which rejected all of them. However, the Court of Appeals for the Tenth Circuit granted a rehearing to consider the constitutionality of the aggravating factor.

The Tenth Circuit concluded that the aggravating circumstance was unconstitutionally infirm for vagueness. The

Court reasoned that the words "heinous," "atrocious," and "cruel" did not offer on their face sufficient guidance to the jury on imposition of the death penalty. Due to the conflict between the Court of Appeals and Oklahoma's Court of Criminal Appeals, the Supreme Court of the united States granted certiorari.

In affirming the Tenth Circuit's holding, the Supreme Court emphasized that death penalty statutes must closely channel and limit the sentencer's discretion in imposing capital punishment to minimize the risk of arbitrary and capricious action. Maynard, **108** S.Ct. at **1858.** Oklahoma's aggravating circumstance failed to define the meaning of any of its terms. Such vagueness proved fatal because it does not provide jurors with guidance on the application and interpretation of the aggravating factor. As a result, the Supreme Court remanded the case to the State court for a redetermination of the appropriate sentence.

A. UNDER MAYNARD, FLA. STAT. §921.141(5)(h) IS UNCONSTITUTIONAL

Florida Statute, §921.141(5)(h) states that:

> (5) Aggravating circumstances. - Aggravating circumstances shall be limited to the following:
>
> (h) The capital felony was especially heinous, atrocious, or cruel.

This aggravating circumstance is identical to the one which the Supreme Court rejected in Maynard. In the penalty phase of

Davis' trial, the judge included in the jury instructions the aggravating factor of whether the crime was "especially wicked, evil, atrocious, or cruel," (R-1579), but did not offer any definition of the terms, leaving the construction to the unfettered discretion of the jury. Moreover, the judge applied the section as an aggravating circumstance in imposing the death penalty. (R-270)

Under Maynard, §921.141(5)(h), ~~Fla.~~ ~~Stat.~~ is invalid. As a result, Davis should be entitled to a new sentencing proceeding where the aggravating factor is adequately defined to pass constitutional muster or otherwise eliminated.

11. INTRODUCTION OF A VICTIM IMPACT STATEMENT IS UNCONSTITUTIONAL AS WELL AS REVERSIBLE ERROR REQUIRING RESENTENCING.

In Booth v. Maryland, 107 S.Ct. 2529 (1987), the Supreme Court of the United States ruled that introduction of an impact statement under which a victim's relatives could address the judge or jury at the sentencing phase of a capital murder trial violated the Eighth Amendment because such information is irrelevant to sentencing proceedings. At Davis' sentencing phase, the judge committed reversible error in allowing introduction of an impact statement in contravention of Booth. A new sentencing is in order to remedy the prejudicial effect of the statement.

In Booth, defendant was found guilty of two counts of first degree murder, two counts of robbery, and conspiracy to commit robbery. Pursuant to Maryland Annotated Code, Article 41, §4-609(c) (1986), a relative of the victim may read an impact statement during sentencing on the effect of the crime on the victim and family. In Booth, the statement emphasized the victims' outstanding personal qualities, the family's grief, and the relatives' opinion that the murderer was beyond rehabilitation. Booth, 107 S.Ct. at 2531.

Defense counsel moved to suppress the statement on the grounds that it was both irrelevant and unduly inflammatory. The trial court denied the motion, noting that the jury is entitled to consider any evidence bearing on the sentencing decision.

The jury sentenced Booth to death. The Maryland Court of Appeals affirmed the conviction and the sentence. The Supreme Court of the United States granted certiorari to assess whether the Eighth Amendment prohibits a jury in a death penalty case from considering victim impact evidence.

The Supreme Court based its analysis an the tenet that a jury must make an individualized determination of whether the defendant should be executed according to the character of the defendant and the circumstances of the crime. Booth, 107 S.Ct. at 2532. However, impact statements focus on the family's emotional trauma and the victim's personal characteristics. These two factors are usually wholly unrelated to the blame-

worthiness of the defendant, who the Court noted will often not know the victim. According to the Court:

> Allowing the jury to rely on a victim impact statement therefore could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill. This evidence thus could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime. Booth, 107 S.Ct. at 2534.

As in Maynard, supra, the Supreme Court underscored the principle that a jury's discretion to impose the death sentence must be closely monitored to minimize the risk of arbitrary and capricious action. Booth, 107 S.Ct. at 2532. Whereas some families might be articulate and persuasive in expressing their sorrow, others might not be, even though their sense of loss is equally severe. The Court noted that the ability with which a family may express its grief is irrelevant to the determination of whether a defendant receives the death penalty. Moreover, the differentials in such eloquence infects sentencing proceedings with arbitrariness, depending on a family's success in conveying grief. Finally, the Court ruled that introducing the relatives' opinion of the defendant and the crime was inflammatory. Booth, 107 S.Ct. at 2536. Consequently, the Court vacated the capital sentence and remanded for further proceedings.

A. UNDER BOOTH, INTRODUCTION OF A VICTIM IMPACT STATEMENT AT THE SENTENCING PHASE PURSUANT TO FLA. STAT. 5921.143 CONSTITUTES REVERSIBLE ERROR.

Florida Statute, 5921.143, provides in pertinent part that:

> (1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has been convicted of any felony or who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced, or the next of kin of the victim where the victim has died from causes related to the crime, to:
>
> a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or
>
> b) Submit a written statement under oath to the Office of the State Attorney, which statement shall be filed with the sentencing court.

In applying Booth's principles, the Florida Supreme Court ruled that Florida Statute 5921.143 is invalid insofar as it permits the introduction of victim impact evidence as an aggravating factor in death sentencing. Grossman v. State, 525 So.2d 833, 842 (Fla. 1988). Furthermore, in Patterson v. State, 513 So.2d 1257 (Fla. 1987), the court concluded that a victim impact statement at the sentencing phase before the judge alone concerning the effect of the victim's death on relatives and the appropriateness of the death sentence is reversible error.

Patterson, 513 So.2d at 1263.

In the Davis' case, Landis' daughter read a victim impact statement to the sentencing judge pursuant to Florida Statute 5921.143. (R-1611-1615)[1] Miss Landis' statement stresses numerous points which the Supreme Court found were irrelevant, and inflammatory in Booth. For instance, Miss Landis addresses the closeness to her father (R-1612); her opinion of the crime (R-1613); the effect on the family (R-1614); Davis' capability to be rehabilitated (R-1614); and the appropriateness of the death sentence. (R-1614-1615) Thus, under Booth, Miss Landis' statement constitutes reversible error.

111. THE STATE DID NOT PROVE THAT THE CRIME WAS PREMEDITATED SO THAT FLA. STAT. §921.141(5)(i) WAS NOT APPLICABLE AS AN AGGRAVATING FACTOR.

Florida Statute §921.141(5)(i), provides that:

> (5) Aggravating Circumstances. -
>
> Aggravating circumstances shall be limited to the following:
>
> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

In Davis' case, during the penalty phase, the judge included

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1 Defense counsel objected to the introduction of the victim impact statement. (R-1609-1610). The timely objection permits Davis to claim relief under Booth. See, Grossman v. State, 525 So.2d 833, 842 (Fla. 1988).

§921.141(5)(i) as an aggravating factor. (R-1579)[2] Moreover, at the sentencing phase, the judge found the premeditation aggravating factor to be applicable. (R-1642 and 271)

Section 921.141(5)(i) requires a degree of premeditation exceeding that necessary to support a finding of premeditated first-degree murder. Hardwick v. State, 461 So.2d 79, 81 (Fla. 1985). As a result, the premeditation factor was not intended by the legislature to apply to all premeditated-murder cases. Harris v. State, 438 So.2d 787, 798 (Fla. 1983). Section 921.141(5)(i) inures to the benefit of the defendant insofar as it requires proof beyond that necessary to prove premeditation. Washington v. State, 432 So.2d 44, 48 (Fla. 1983). As a corollary to these principles, the premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of §921.141(5)(i). Jackson v. State, 498 So.2d 906, 911 (Fla. 1986).

Judicial decisions interpreting §921.141(5)(i) establish that the State must meet a high threshhold to prove the requisite premeditation. In Hardwick, supra, the Supreme Court of Florida emphasized that the fact that a robbery may have been planned is irrelevant to the issue of premeditation on the murder. Hardwick, 461 So.2d at 81. In addition, the fact that a victim takes a matter of minutes to die once the process begins does not

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[2]Defense counsel timely objected to the applicability of §921.141(5)(i), Fla. Stat. (R-1489)

support premeditation, since the aggravating factor insists on cold calculation before the murder itself. Id. In Gorham v. State, 454 So.2d 556 (Fla. 1984), the court pointed out that a "killing [which] was a consummation of a robbery wherein there was no evidence of resistance by the victim" will not suffice to establish premeditation. Gorham, 454 So.2d at 559. Finally, in Harris, the court ruled that the premeditation factor was not applicable, because the State presented no evidence that the murder was planned. Harris, 438 So.2d at 798. Significantly, the court took into account the fact that all the instruments of the death were from the victim's premises in rejecting the aggravating factor. Id.

Mark Davis was convicted of robbery. (R-220) During his argument to the judge at the sentencing phase, defense counsel suggested that "the evidence in this case showed that the one thing above all, if any, which was cold and calculated was the theft of the victim's money." (R-1637) The State, for instance, introduced evidence of defendant's statements to the effect that he was going to steal money from Mr. Landis. (R-961)

During closing argument at the guilt phase, the State argued that:

> "The evidence clearly suggests he [Davis] went there, [Landis' apartment] alright, with intent to take money and while he was in the process of taking that money, Orville Landis resisted. He wasn't going to let that kid take his money and when he resisted in an effort to protect his own money for his own

> obligations, he was mercilessly beaten about the face. . . That wasn't good enough. At this point, that man [Davis] knew that Orville Landis would finger him for taking his money. ***So*** he had no choice at that point. He had to kill him". (R-1394-1395)

The record in Davis shows that the State did not prove beyond a reasonable doubt that Davis planned the murder. Instead, the prosecution seems to argue that Davis formed the design to kill in the course of the robbery. In fact, a State witness to whom Davis spoke about the crime testified that: "He (Davis) said he was hustling the man and the man woke up and caught him and a fight broke out and he killed him." **(R-1205)** Basically then, the State impermissibly transfers the premeditation of the theft to the murder.

Significantly, the prosecution's own reconstruction of the crime to the jury clearly establishes lack of premeditation:

> He [Davis] went back because he thought the victim was probably asleep, passed out. It was his opportunity now. The victim was drunk, to get his money. He went into the room just as he has told Shannon Stevens, and went to get the old man's money. Victim was asleep on the bed. He went to get the money but the victim caught him, the victim caught him and a fight broke out. (R-1406-1407)

In Blanco v. State, 452 So.2d **520** (Fla. 1984), the Supreme Court stated that if the evidence lent itself to the reasonable interpretation that a defendant entered a dwelling with the intent to steal and was surprised by the victim who was subsequently killed, there was no showing of heightened

premeditation, calculation, or planning. Blanco, 452 So.2d at 526. In Davis, not only is the evidence susceptible to the theory that defendant killed Landis because he was discovered in the course of a theft, but the State itself endorses this scenario during closing argument.

The prosecution has to prove a heightened premeditation beyond a reasonable doubt before §921.141(5)(i) is applicable. Gorham, 454 So.2d at 559. To satisfy its burden, the State should introduce evidence that the murder was planned. Harris, 438 So.2d at 798. Importantly, the murder weapons came from the victim's premises, which belies a finding of premeditation. (R-1528)[3] The origin of the weapons of the crime, the lack of evidence of a plan, and the State's own theory, plainly demonstrate that the prosecution did not establish premeditation beyond a reasonable doubt.

IV. THE COURT SHOULD ORDER A RESENTENCING SINCE IT CANNOT FORECAST THE JURY AND JUDGE'S FINDINGS IF THE PROCEEDINGS HAD BEEN FREE OF ERROR.

In Randolph v. State, 463 So.2d 186 (Fla. 1984), the Court ordered a resentencing because it could not prognosticate whether the penalty would have been different if the trial judge had considered only one instead of three aggravating circumstances before imposing capital punishment. Randolph,

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[3]The record is void of any evidence establishing that the knives did not come from Landis' premises.

463 So.2d at 193. See, also, Oats v. State, 446 So.2d 90, 95 (Fla. 1984).

Such precedent strongly suggests that in the instant case, the Court should order a resentencing if it finds that §921.141(5)(i) is unconstitutional and that the evidence does not support application of the aggravating factor of premeditation. In addition, resentencing appears particularly appropriate and equitable in view of the cumulative prejudicial effect of Ms. Landis' statement at the sentencing phase.

CONCLUSION

In the instant case, the judge instructed the jury during the penalty phase on two impermissible aggravating factors: The crime was heinous, cruel and atrocious as well as premeditated. Under Maynard, the premeditation element is unconstitutionally vague. Moreover, the record plainly establishes the State failed to satisfy its burden of establishing premeditation beyond a reasonable doubt. In addition, under Booth, Ms. Landis' statement to the judge during the sentencing phase constitutes reversible error. Since the Court has indicated it will not vaticinate the penalty a jury or judge would have imposed absent consideration of illegitimate aggravating factors, and in view of the prejudicial introduction of the victim impact statement, Appellant requests this Court order a new sentencing, or in the alternative, life in prison.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct coy of the foregoing has been furnished by U.S. Mail to ROBERT J. LANDRY, ESQUIRE, Assistant Attorney General, 1313 Tampa Street, Eighth Floor, Tampa, Florida 33602, this 15 day of November, 1988.

BATTAGLIA, ROSS, HASTINGS
AND DICUS,
A Professional Association

AUBREY O. DICUS, JR., ESQUIRE
SPN#00002562

MARGIE E. IRIZARRY, ESQUIRE
SPN# 00870391
980 Tyrone Boulevard
Post Office Box 41100
St. Petersburg, Florida 33743
(813) 381-2300

Attorneys for Appellant