IN THE SUPREME COURT OF FLORIDA

WALTER DANIEL CZUBAK,

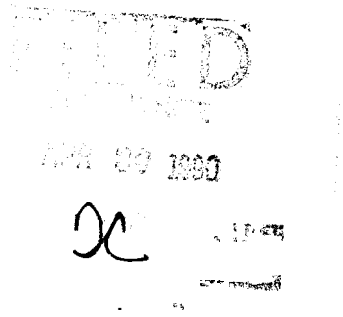
Appellant,

vs.

Case No. 72,363

STATE OF FLORIDA,

Appellee.



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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

A. ANNE OWENS
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

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ISSUE I

THE COURT ERRED BY FAILING TO GRANT DEFENSE COUNSEL'S MOTION FOR MISTRIAL WHEN STATE WITNESS DOROTHY SCHULTZ BLURTED OUT THAT DANNY CZUBAK WAS AN ESCAPED CONVICT, IN VIOLATION OF SECTION 90.404, FLORIDA STATUTES.

The cases cited by Appellee, wherein comments concerning the defendant's prior criminal record did not require the granting of a mistrial, are clearly distinguishable from the case at hand because they did not involve defendants who were "escaped convicts" at the time of the offenses for which they were on trial. See Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Johnston v. State, 497 So.2d 863 (Fla. 1986); Ferauson v. State, 417 So.2d 639 (Fla. 1982). Public opinion of an "escaped convict" is that the escapee is a desperate and dangerous felon. This is far different from a comment indicating that the defendant was incarcerated at some time in the past.

There is no requirement that defense counsel request a curative instruction when it would not alleviate the error.' When the comment is of such nature that it might affect the defendant's right to a fair trial, a motion for curative instruction would just

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[1] Only an objection and motion for mistrial are required to preserve an objection for appeal. Clark v. State, 363 So.2d 331, 335 (Fla. 1978); see also Simpson v. State, 418 So.2d 984, 987 (Fla. 1982) (where timely objection is made to an improper comment and objection is overruled, thus rendering futile a motion for mistrial, the issue is properly preserved for appeal).

be superfluous. Millett v. State, 460 So.2d 489, 492 (Fla. 3d DCA 1984); cf. Rhodes v. State, 547 So.2d 1201, 1206 (Fla. 1989) (motion for curative instruction not required); State v. Murray, 443 So.2d 955, 956 (Fla. 1984) (prosecutorial remarks require reversal only when errors are so basic to fair trial that they cannot be treated as harmless). In the case at hand, once the jurors learned that Czubak was an escaped convict, no instruction would have erased the comment from their minds. In fact, an instruction would only have drawn further attention to it.

Appellee argues further that the trial court's finding that the comment was invited and responsive was not an abuse of discretion.[2] (Brief of Appellee at 8) The trial judge said that Schulte was "trying to answer" defense counsel's question. A review of the relevant testimony (R. 572-73; quoted in Initial Brief of Appellant at 21-22), however, reveals that Schultz was defensively trying to avoid answering defense counsel's questions. She attempted to justify her lack of suspicion that Czubak had robbed or killed Peterson by explaining that she should have had Czubak investigated and "opened her eyes" so that she would have suspected something. She did not want to admit that she suspected

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[2] The cases cited by Appellee for this proposition are all clearly distinguishable from the instant case. For example, in Sullivan v. State, 303 So.2d 632, 635 (Fla.), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1224 (1974), the judge offered to give a curative instruction and defense counsel declined. In Ellison v. State, 349 So.2d 731, 732 (Fla. 3d DCA 1977), the defendant opened the door to comment on his right to remain silent by testifying in his own behalf as to why he did not tell the police that his gun went off accidentally. In Meek v. State, 474 So.2d 340, 343 (Fla. 4th DCA 1985), the defendant's counsel elicited the objectionable comment and failed to object or request a mistrial.

nothing or discarded the possibility that something was amiss. Perhaps, like the juror who was quoted in the newspaper article,[3] Dorothy Schultz would have suspected that Ceubak murdered Peterson if she had known that he was an "escaped convict."

Appellee compared this case to Castro v. State, 547 So.2d 111 (Fla. 1989), in which this Court noted that the improper admission of irrelevant collateral crime evidence is presumptively harmful. The presumption was rebutted in Castro because of the totality of the evidence against Castro, including Castro's own confessions. Id. at 115. This is far different from our case in which the only confession was made by Ernest Ragsdale who was not even charged with the crime. Czubak's defense was that he did not commit the crime. The evidence against him was all circumstantial.

Appellee suggests that the juror who told the court reporter he started "putting two and two together" when he heard that Czubak was an "escapee" heard it during penalty phase. (See Brief of Appellee at 10) This is highly unlikely. The juror's terminology -- putting two and two together -- implies that he was solving a mystery. In other words, once he learned that Czubak had escaped from prison, he started to believe he was guilty.[4]

We also disagree with Appellee's construction of the judge's question, "She said escaped?", as indicating that Schultz's

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[3] See Initial Brief of Appellant at 23.

[4] Unfortunately, defense counsel did not put the article in the record so that we could see exactly what the juror said. The article must have implied that the juror meant the guilty phase revelation, however, or the prosecutor would have objected to the inference when defense counsel brought it to the court's attention.

comment had little impact upon him. A more likely construction is that the judge was incredulous and was expressing his disbelief. He asked the question to be sure that he heard correctly -- that the witness actually said "escaped." The judge admitted at the motion for new trial that if the comment were error, it was definitely not harmless (R. 1072), thus refuting Appellee's contention that it had little impact on him.

Defense counsel clearly heard Schultz say "escaped." We must assume that the jurors were also listening and heard the evidence. To assume that they disregarded it or that it had little impact would be failing to "open our eyes."

ISSUE II

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO INTRODUCE INTO EVIDENCE PHOTOGRAPHS OF THE VICTIM'S PARTIALLY DECOMPOSED AND DOG-EATEN BODY BECAUSE THE PHOTOGRAPHS WERE NOT RELEVANT AND ANY PROBATIVE VALUE WAS OUTWEIGHED BY UNFAIR PREJUDICE.

Appellee's opening statement totally misconstrues Appellant's argument. Appellant does not contend that, "even though photographs of the victim were relevant to prove identity and cause of death they should not have been admitted because each of these factors was susceptible of proof by other means." (See Brief of Appellee at 12) Appellant contends the opposite. As stated throughout the Appellant's initial brief, we contend that "[t]he photographs were not relevant to any material issue" (Initial Brief of Appellant at 34); "the gruesome photographs of the decedent were

not relevant to prove any issue in the case"; Mrs. Peterson's identity was proved "by the number on her pacemaker";[5] and the "medical examiner determined the cause of death at the autopsy." (Initial Brief of Appellant at 35)

Appellee cited the case of Williams v. State, 228 So.2d 377 (Fla. 1969), in which the court found that the photographs depicted a view which was "neither gory nor inflammatory beyond the simple fact that no photograph of a dead body is pleasant." Unlike the photographs in this case, the photo in Williams depicted the death scene immediately after the crime occurred.[6] Id. at 378-79. One look at the photographs introduced in the instant case (R. 1272-82) will convince the viewer that this was not the case here. Peterson's decomposed and dog-eaten body was gory beyond imagination and did not resemble "any dead body." Her decomposed body in no way resembled her body as it would have appeared at the time of the homicide. She was not recognizable. Officer Counsel1 testified that he could not even tell whether the body was male or female. (R. 398)

Appellee's assertion that the photographs were relevant to establish the manner in which the murder was committed is clearly erroneous. (See Brief of Appellee at 14) Appellee's characterization of Peterson's body as "draped over the sofa, her legs spread

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[5] She was not even recognizable in the photographs. (See photographs at R. 1272-82)

[6] Similarly, in Gore v. State, 475 So.2d 1205 (Fla.), cert. denied, 475 U.S. 1031, 106 S.Ct. 1240, 88 L.Ed.2d 349 (1985), also cited by Appellee, the photographs showed the location and condition of the body right after the homicide. 475 U.S. at 1206, 1208.

wide, her clothing torn from her, a wine bottle smashed over her head," is misstated and misleading. Although Peterson was naked, there was no evidence that her clothes were "torn from her." The medical examiner could not determine whether she was hit over the head with the wine bottle. (R. 440, 444) It may have been broken during the struggle. It is unlikely that Peterson's body was in the same position at the time of her death because two small dogs had eaten her hand and part of her leg. The dogs probably pulled the leg and part of the body from the couch. Thus, the photographs were not probative of the cause or manner of death, nor even of the location and condition of the body at the time of death.

ISSUE III

THE ERRONEOUS ADMISSION OF HEARSAY EVIDENCE ON THREE SEPARATE OCCASIONS REQUIRES A NEW TRIAL.

Appellee correctly points out that when a statement is not offered to prove the truth of the matter it is not hearsay. From there, however, Appellee illogically proceeded to argue the relevancy (to show motive) of Dorothy Schulte's hearsay statement that Peterson told her, when she called, that Danny didn't live there anymore. The problem with Appellee's jump is that Schultz's statement **was** offered to prove the truth of the matter.[7]

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[7] In Koon v. State, 513 So.2d 1253 (Fla.), cert. denied, 485 U.S. 943, 108 S.Ct. 1124, 99 L.Ed.2d 284 (1987), cited by Appellee, the declarant's statement was **not** offered to prove the truth of the matter. The court found that, having heard the statement, the defendant could have formed a motive to eliminate a witness. That case is not relevant here because Czubak did not hear Peterson's

The state of mind exception to the hearsay rule, was not applicable. That exception allows extrajudicial statements only if the declarant's state of mind is at issue in the case or to prove or explain the declarant's subsequent conduct. State v. Correll, 523 So.2d 562, 565 (Fla. 1968); § 90.803(3)(a), Fla. Stat. (1987). If it is intended to explain or prove subsequent conduct, that conduct must be relevant to the issues in the case. Morris v. State, 487 So.2d 291, 292-93 (Fla. 1986). The hearsay did not prove or explain any subsequent conduct of Peterson. See e.g., Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892) (statements of intent admissible to prove the person did the act which he said he did).

Appellee's suggestion that Peterson's statement may have indicated that she did not want Dorothy Schulte to talk with Danny would show only Peterson's state of mind, which was not at issue.[8] Whether she was unhappy because Schulte calledwas irrelevant. Any disagreement between Peterson and Ceubak was pure speculation --not evidence that Czubak committed the murder.

The cases cited by Appellee to support this argument are clearly distinguishable. (See Brief of Appellee at 16-17) In Peede v. State, 474 So.2d 808 (Fla.), cert. denied, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1987), the victim's state of mind

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statement -- Schultz did.

[8] Although Appellee refers to Dorothy Schultz as Ceubak's "girlfriend," the record indicates that they were barely acquainted when Ceubak moved in with Schulte and had not seen each other for some time. (R. 535-37, 563-64)

was at issue to prove elements of the kidnapping charge -- that the victim did not go with the defendant voluntarily. In our case, the existence of a conflict was not an element of the offense, nor did Peterson's statement prove that a conflict existed. In Jenkins v. State, 422 So.2d 1007 (Fla. 1st DCA 1982), the statement was admissible as an exception to the hearsay rule under § 90.803(3)(a)(2), Florida Statutes (1987), because it was a statement of intent offered to prove or explain the declarant's acts or subsequent conduct. Peterson's statement was not a statement of intent.

Speculation aside, the most likely meaning of Peterson's statement was exactly what she said -- that Danny no longer lived there, in which case the statement was offered for no reason other than to prove the truth of the matter. It was inadmissible.

ISSUE IV

THE COURT COMMITTED PER SE REVERSIBLE ERROR BY ALLOWING DETECTIVE MCNULTY TO TESTIFY ON REBUTTAL, OVER DEFENSE OBJECTION AND WITHOUT A RICHARDSON HEARING, BECAUSE THE STATE DID NOT PROVIDE HIS NAME IN DISCOVERY.

Appellee's chief argument is that the state had no duty to disclose Detective McNulty's name to defense counsel pursuant to Florida Rule of Criminal Procedure 3.220 and, therefore, no discovery violation occurred. Appellee contends that McNulty had no "information relevant to the offense or the defense . . . ." Appellee stated further that McNulty's involvement with Czubak's prosecution was tangential because he was investigating another

murder allegedly comnitted by Ernest Ragsdale, whom the defense alleged was also responsible for the murder in this case. (See Brief of Appellee at 19-20)

Although his involvement was perhaps tangential, McNulty had information relevant to the instant crime. The rule does not except persons with tangential information. McNulty's investigation of Ragsdale was relevant to the Appellant's theory of defense. Although Detectives Wilber and Pierce denied that Cindy told them Ragsdale killed Peterson, the prosecutor knew about Ragsdale's confession. He reminded the jury in closing that Cindy LaFlamboy testified in a deposition in July of 1986, nearly two years prior to the trial, that she told either Detective Wilber or Detective Pierce that Ragsdale committed the murder. (R. 845-46)

It was the prosecutor who was responsible for complying with discovery requirements. The prosecutor knew that Ragsdale had confessed to LaFlamboy that he murdered Peterson and that defense counsel planned to call LaFlamboy as a defense witness. Thus, he knew that McNulty had information concerning Czubak's defense.

Appellee argues that the discovery rules were not meant to protect defendants from all surprise. (Brief of Appellee at 21) In this case, however, it was not the defense but the state that was surprised. When Cindy LaFlamboy mentioned McNulty's name, the prosecutor hurriedly ushered McNulty from the courtroom, explaining to the judge that he had "never heard this and [McNulty] may be a witness now." (R. 744) As Appellee noted, neither side is required to alert opposing counsel to the content of a witness's testimony.

That the prosecutor did not anticipate LaFlamboy's testimony does not excuse his failure to list McNulty during discovery.

Appellee seems to infer that the error was harmless because the evidence "coupled with the fact that death by manual strangulation is a slow, deliberate method of killing,"[9] was sufficient to support the jury's verdict. (Brief of Appellee at 24) Although failure to conduct a Richardson hearing is never harmless, Smith V. State, 500 So.2d 125, 126 (Fla. 1986), the potential harm to Czubak from McNulty's testimony was aptly described by Appellee:

> LaFlamboy's entire testimony made it appear that Ragsdale had committed the murder, that Detectives Wilbur, Pierce and McNulty were aware that Ragsdale had committed the murder and that the detectives had failed to investigate Ragsdale's part in the murder. . .
>
> If left standing unchallenged, LaFlamboy's testimony could have left the jury to speculate that there was at least sloppy police work and at worst a police cover-up.

Brief of Appellee at 23-24.

The purpose of a Richardson hearing is to determine whether a violation of the rule is harmless and whether the witness should be permitted to testify. A reviewing court cannot determine whether the error was harmless unless the trial court has conducted a Richardson hearing. It is for this reason that failure to hold the hearing is per se reversible error. Smith, 500 So.2d at 126.

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[9] We fail to see how Appellee's characterization of manual strangulation as a "slow, deliberate method of killing" has any bearing on the issue of whether the Appellant was the perpetrator.

ISSUE V

THE TRIAL COURT ERRED BY DENYING DEFENSE COUNSEL'S MOTION FOR JUDGMENT OF ACQUITTAL OF FIRST DEGREE MURDER BECAUSE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE OF PREMEDITATION.

Contrary to Appellee's description of Thelma Peterson, the 81 year old victim in this case, there is no evidence that she was "infirmed" or "palsied." "Infirm" is defined as "not firm or sound physically; weak, especially from age; feeble." "Palsy" is defined as "paralysis." Webster's Collegiate Dictionary 515, 715 (5th ed. 1946). There was no evidence that Thelma Peterson was feeble or paralyzed. Although she had worn a pacemaker for about ten years (R. 485), she drove a car (R. 492), drank in four or five different taverns regularly, starting early in the morning (R. 496-97, 527, 530-31), and dated several much younger men, including Danny Czubak who lived with her, for sex. (R. 498-99, 525, 533) Lenny Gooselin, who owned a tavern frequented by Thelma Peterson, thought that she was in her sixties. (R. 498-99, 503)

Furthermore, the evidence does not show that she "fought for her life," that "her clothes were ripped violently from her body," or that her "body was covered in blood." There was no evidence that there was any blood found on the body. Manual strangulation would not cause external bleeding. The medical examiner testified that he could not determine whether there had been any internal bleeding because of the decomposition. Thus, he could not determine whether Peterson was hit on the head with the

bottle. (R. 435)

Nor does the evidence show that "it was a violent death and that the victim suffered at the hands of the defendant." (Brief of Appellee at 26) If, as Appellee suggests, Peterson was hit over the head with a bottle, she may have been unconscious when she was strangled. (R. 446) The evidence showed nothing more than that Peterson died of manual strangulation. (R. 441) Even if Appellee's "facts" were accurate, they would not evidence premeditation.

Ceubak's telephone conversations with and statements to Dorothy Schultz do not prove premeditation. In fact, they do not even prove that Czubak committed the murder. He may have returned to the house where he had been living, found Peterson dead, and seized on the opportunity to take her possessions. Even if he strangled her, there is no conclusive evidence that he intended to kill her or, if he did, that it was premeditated.

ISSUE VI

THE TRIAL COURT ERRED BY REFUSING TO GIVE THE LONG FORM INSTRUCTION ON EXCUSABLE HOMICIDE BECAUSE THE DEFENSE WAS SUPPORTED BY THE EVIDENCE.

Contrary to Appellee's argument, defense counsel did request the long form excusable homicide instruction to support an excusable homicide theory of defense. As noted by Appellee, he requested the instruction because the state introduced evidence that there had been a struggle, the cause thereof had not been established, and Czubak and Peterson had been living together as

lovers so that there could be a heat of passion argument. (R. 785) (See Brief of Appellee at 28-29) Defense counsel is not required to say the magic words that he was requesting the instruction "to support a theory of defense." His description of the defense theory for which he requested the instruction was sufficient.

Defense counsel did not request the instruction as part of the manslaughter instruction until the motion for new trial. (R. 1060-1063) The fact that he later changed his theory does not nullify the theory under which he requested the instruction at trial. When denying the request at charge conference, the judge based his denial on reasons given by defense counsel at trial -- not at the later motion hearing. Although counsel may not have preserved his objection to the court's failure to give the long form instruction as part of the manslaughter instruction, he clearly preserved his objection to the court's failure to give the instruction to support a theory of defense.

ISSUE VII

THE TRIAL COURT ERRED BY REFUSING TO APPOINT SEPARATE COUNSEL TO REPRESENT APPELLANT DURING THE PENALTY PEASE.

Appellant relies on the argument in his Initial Brief in this issue.

ISSUE VIII

THE TRIAL COURT ERRED BY INSTRUCTING THE JURORS ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR.

Although, as Appellee noted, the trial court is required to instruct on all aggravating and mitigating circumstances "for which evidence has been presented," Stewart v. State, 15 F.L.W. S138, S139 (Fla. Mar. 15, 1990), the evidence must be sufficient to support the instruction. In the case at hand, the only evidence is that Peterson died from manual strangulation. She may have been unconscious, if she was hit with the wine bottle, or inebriated, if she had been drinking the wine.

In Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989), this Court rejected the trial court's finding that the murder was especially heinous, atrocious, or cruel because of manual strangulation. This Court noted that the defendant's conflicting stories suggested that the victim may have been semiconscious, possibly because she was drunk. On the night she disappeared, she was last seen drinking at a bar.

Thelma Peterson died from manual strangulation. She may have been semiconscious, unconscious, and/or drunk. The evidence showed that she and the Appellant drank on a daily basis and a broken wine bottle was found by Peterson's head.

As discussed above, there is no evidence that Thelma Peterson was "infirmed" and she was definitely not "palsied." (See Issue V, supra at 12) She was living with Ceubak who was her

lover. The fact that she was much older than Czubak, or that he was stronger, does not make the crime heinous, atrocious, or cruel.

The evidence did **not** show that she "fought for her life," or that "her clothes were ripped violently from her body." Her body was clearly **not** covered in blood. The evidence fails to show that "it was a violent death and that the victim suffered at the hands of the defendant." (See Brief of Appellee at 38; Issue V, supra at 12-13)

Appellee compared this case to Brown v. State, 473 So.2d 1260 (Fla.), cert. denied, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985). The victim in Brown, also an 81 year old woman, was a semi-invalid. Unlike Thelma Peterson, she was not living with or involved in a romantic or sexual relationship with the defendant. He was an unknown man who, with accomplices, broke into her house to rob her. The woman was beaten, bound, gagged, raped and strangled. She was not unconscious or drunk. Id. at 1268.

For a crime to be especially heinous, atrocious or cruel, there must be "such additional acts as to set the crime apart from the norm of capital felonies -- the consciousless or pitiless crime which is unnecessarily tortuous to the victim." Hallman v. State, 15 F.L.W. S207 (Fla. Apr. 12, 1990) (quoting from Dixon v. State, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). In Brown, there were numerous additional acts that set the crime apart. In our case, there were no such additional acts. Thus, there was **no** evidence sufficient to support the court's instruction on this aggravating factor.

ISSUE IX

THE TRIAL COURT ERRED BY FAILING TO CONSIDER THE MITIGATION EVIDENCE.

Contrary to Appellee's assertion, there was evidence that Appellant had an alcohol problem in addition to Young's statement. (R. 510) (See Brief of Appellee at 40) Various other witnesses testified that Czubak was in the bars drinking with Thelma Peterson every day. (R. 502-03, 527-28, 535-37) Lenny Gooselin testified that Czubak and Thelma Peterson had already consumed a few beers by the time they arrived at his bar at 10:00 in the morning. (R. 503) A broken wine bottle was found at the crime scene, with wine spattered on the wall, suggesting that Czubak and Peterson were drinking on the night of the homicide. (R. 415-17)

In Stewart v. State, 15 F.L.W. S138, S139 (Fla. Mar. 15, 1990), this Court held that the trial judge erred by failing to instruct the jury on substantial impairment because of the uncontroverted evidence concerning Stewart's drinking habits. See ~~also~~ Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988) (evidence of drug or alcohol impairment must be considered in mitigation).

Appellee appears to have misconstrued Appellant's argument. (See Brief of Appellee at 41) We are not arguing that the judge erred by failing to find mitigation. Instead, the judge's written findings show that he failed to even consider the mitigation, giving it no weight at all. This, he cannot do. Lamb v. State, 532 So.2d 1051, 1054 (Fla. 1988).

ISSUE X

A SENTENCE OF DEATH IS DISPROPORTIONATE IN THIS CASE WHEN COMPARED TO OTHER CAPITAL CASES WHERE THE COURT REDUCED THE PENALTY TO LIFE.

Appellee incorrectly states that "[t]here is no evidence that Mr. Czubak was in a love-relationship with Thelma Peterson and that the homicide resulted from a disruption of that relationship." (Brief of Appellee at 42) Czubak had been living with Thelma Peterson for two months. (R. 474) Peterson told her friend, Janet Armstead, that she took men home "for sex." (R. 531) When Dorothy Schultz called Peterson the day of the homicide, she said that Danny did not live there anymore. (R. 538-39) This indicates a disruption of the love relationship.

Although Appellee argues that Czubak and Dorothy Schultz were maintaining a "love-relationship,'' the record indicates that they were barely acquainted when Ceubak moved in with Schultz. Czubak had seen her once about two weeks after they met, at a trailer with six other persons. Thereafter, they ran into each other on the street and Czubak gave her his phone number. They had not seen each other for four months. Schultz just happened to call Czubak on the day of the homicide when he apparently needed a place to go. (R. 535-38, 563-64) His statements to Schultz upon his arrival at her house indicate anger resulting from the termination of a relationship. Because Thelma Peterson's death resulted from a domestic dispute, imposition of the death penalty would be disproportionate.

CONCLUSION

For the above reasons and those in our Initial Brief, the Appellant respectfully requests this Court to grant the relief requested in his Initial Brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sunderland, Office of the Attorney General, Park Trammell Building, Room 804, 1313 Tampa St., Tampa, Florida, 33602, this 26th day of April, 1990.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NUMBER 0143265

A. ANNE OWENS
Assistant Public Defender
P. O. Box 9000 - Drawer PD
Bartow, FL 33830
(813) 534-4200

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