IN THE SUPREME COURT OF FLORIDA

LEONARD LEE SMALLEY,

Appellant,

v.

CASE NO. 72,789

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR SUMTER COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The appellee, State of Florida, accepts without restating appellant's statement of the case as set forth on pages 1 through 3 of his initial brief.

STATEMENT OF THE FACTS

The appellee, State of Florida, accepts the accuracy of the facts stated by the appellant at page 4 through 16 of appellant's initial brief. The appellant, however, naturally emphasizes the facts most favorable to his position. The appellee submits that an unbiased statement of the facts are set forth in the trial court's specific findings of fact contained within the written FINDINGS IN SUPPORT OF DEATH SENTENCE (R 165-170). The trial court's specific findings of fact are adopted as appellee's version of the statement of facts and are as follows:

> As to the sole Aggravating Circumstance; namely, "The crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel" was established beyond a reasonable doubt; and such level of proof is supported by the following:
>
> The Defendant, LEONARD LEE SMALLEY, JR., was living in the home of Cecelia Cook, along with Cecelia's three children, Kim, 6 yrs. old, Chris, 4 yrs. old, and Julie Anne Cook, 28 months old, the victim in this case. A voluntary confession by Smalley, marked as State's Exhibit #27, reveals the following scenario:

On October 23, 1987, Smalley, was babysitting 28 month old Julie Anne Cook, who had been previously ill with a stomach virus and upper respiratory infection.

He began smacking Julie Anne Cook, in the face and head, with his hands, from approximately 9:30 in the morning on October 23, 1987, and continued smacking her throughout the course of the day, because she was continuously whining and crying. He stated that he wanted her to "hush up" and that "all he wanted was peace and quiet to think about his own problems".

Sometime during the morning, Smalley turned on the stereo, but Julie's crying got louder than the stereo. He went out in the backyard, dragged a large blue plastic rain barrel over by the back of the house, where it could not be seen by the neighbors, and filled it with water to within 6 or 8 inches from the top. He then dunked Julie, holding her by the feet, into the barrel several times, up to a point she was grasping for breath and spewing out water, to the point where she became unconscious. He then brought her back into the house, changed her soaking-wet diaper, and Julie recovered consciousness and continued to cry. Then he punched Julie in the stomach two or three times and water came out. Julie then apparently fell asleep for a short while, but woke up crying and whining.

Thereafter he filled up the kitchen sink with dish water and repeatedly dunked Julie's head in the sink

water, yelling "shut up, shut up", until Julie coughed up water and didn't cry any more, evidently once again losing consciousness.

He then laid her on the floor on a blanket while Julie was excreting watery liquid and water was coming out of her nose.

Subsequently he put a diaper on Julie and took her in his car to Leesburg to the Rix Construction Company, where he filled out an application for a job. On the way there, Julie continued to whine and cry and Smalley smacked her on the back of the head, causing Julie to fall down on the seat.

When Smalley returned home from the interview, Julie began to cry. By this time it was after 4:00 in the afternoon, and he took her into the bathroom and held her head under the tub faucet until Julie was gasping for breath and water was running out of her nose and mouth. During the entire time, he kept yelling for Julie to "hush". Julie continued to cry and Smalley continued to hold her under the running water. Smalley then picked Julie up by the feet, and hit her head on the carpeted living room floor several times. The medical examiner, Dr. William Shutze, testified that Julie Cook could have survived had Smalley sought medical attention for Julie at this time. Julie started shaking and moaning and Smalley then rolled her up tightly in a blanket and laid her on the bed, then he

left the house for an hour or so. Upon returning to the house he found the child was not breathing and couldn't get a heartbeat.

Testimony by the Pathologist, Dr. William Shutze, was corroborated by Exhibits #10, #11, #12, #13, #14, and #15, depicting multiple contusions and abrasions to the body of Julie Anne Cook, along with evidence in her lungs that she had aspirated food. Exhibits #16 and #17, depicted the massive hemorrhage to the brain from Julie's head being rammed into the floor, and the swelling of brain tissues, which gradually cut off nerve endings to the heart and lung functions, which is consistent with Dr. Shutze's findings of death by blunt trauma.

It was established beyond and to the exclusion of every reasonable doubt that Defendant Smalley tortured, beat and punished the victim, Julie Anne Cook, for approximately eight hours, in an especially heinous, atrocious and cruel manner.

The above findings were not rebutted by Smalley, (see Exhibit #27) and were corroborated by the testimony of Michael E. Hord, Cecelia Cook, Lt. William O. Farmer, Dr. William Shutze and the Defendant, Leonard Lee Smalley, Jr., who testified as to the torture inflicted upon Julie Anne Cook by him, in support of the aggravating circumstance of being especially heinous, atrocious or cruel.

As to Mitigating Circumstance No. 1; namely, "The Defendant has no significant history of prior criminal activity" was reasonably established, that is, by a preponderance of evidence, and such level of proof is supported by the following:

The Defendant offered his lack of prior criminal history in mitigation which is unrebutted by the State. Some testimony was produced indicating that there was marijuana use by the Defendant while in the military service, but not to any significant degree.

As to Mitigating Circumstance No. 2; namely, "The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental and emotional disturbance" was reasonably established, that is, by a preponderance of evidence and such level of proof is supported by the following:

Unrebutted testimony of the Defendant was that he was under extreme pressure at the time of the offense due to financial hardships, familial conflict, job stress, and the further distress caused by the children's illnesses and the defendant's being forced to be the primary caretaker of the children. Opinions of Dr. Kropp and Dr. Poetter were that these facts created severe depression in the Defendant and influenced his ability to properly respond to emotional stimuli.

As to Mitigating Circumstance No. 3; namely, "The Defendant acted under extreme duress or under the

substantial domination of another person" was reasonably established, that is, by a preponderance of evidence, and such level of proof is supported by the following:

This mitigating factor is substantially coupled with factor number two (2), above. The testimony of the Defendant, Dr. Kropp, Dr. Poetter, and of a co-worker, Katherine Gibbons, showed that all the Defendant's actions were subject to his interpretation of what would please the victim's mother, Cecelia Cook. The constant pressure imposed by the relationship and the other factors combined to lessen his free will and aggravated the depression and reliance upon Cecelia Cook.

As to Mitigating Circumstance No. 4; namely, "The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired" was reasonably established, that is by a preponderance of evidence, and such level of proof is supported by the following:

In addition to emotional pressure which the Defendant was undergoing, testimony was brought out that at the time of the offense the Defendant had recently (within 20 minutes) smoked marijuana. Drs. Poetter, Kropp and Fisher testified that although the Defendant met the criteria for competence at the time of the offense, his mental ability to appreciate the result of his conduct was substantially impaired. All testified

that they believed the Defendant had no intent to kill the child, but the drug abuse, emotional distress, and depression combined to impair the Defendant's mental processes at the time of the offense.

As to Mitigating Circumstance No. 5; namely, "Any other aspect of the Defendant's character or record, and any other circumstance of the offense" was reasonably established, that is, by a preponderance of evidence, and such level of proof is supported by the following:

a) The defendant was himself an abused child. This non-statutory mitigating factor was proven by testimony of Gracie Nelson, Defendant's mother, and Kimberly Smith, Defendant's sister. Testimony of Drs. Barnard and Poetter tended to show that this background could increase the type of inappropriate behavior which resulted in the death of the victim.

b) The defendant expressed substantial remorse at the time of the offense and constantly since.

The Defendant expressed grief and remorse for the death of the child which was manifest to everyone who came into contact with the Defendant since the offense. Every police officer who testified, every doctor or psychologist who testified, and even the mother of the victim stated that the Defendant was extremely emotionally upset and remorseful for the death. Dr. Kropp testified that the Defendant's remorse and truthfulness in admitting his culpability is completely

unlike the standard death-row inmate. The Defendant's testimony and demeanor on the stand was clear evidence of the Defendant's remorse and is indicative of the possibility for rehabilitation.

c) The Defendant was a good employee and co-workers thought very highly of him.

The testimony of Katherine Gibbons was that the Defendant was a hard worker with problems only arising from his responsibilities to care for the children of Cecelia Cook. His work record and relationships with fellow employees tend to show the personable and non-violent nature of the Defendant which should be considered in mitigation of his sentence. (R 166-170).

SUMMARY OF ARGUMENT

POINT I: The appellant, Leonard Smalley, was tried and convicted of first-degree murder of a child. The jury, by a majority of ten-two, recommended that a sentence of death be imposed. Following the jury's recommendation, the trial judge sentenced Smalley to death.

Smalley argues that Florida's application of the "especially heinous, atrocious, or cruel" aggravating circumstance in his case was vague and overbroad in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States. In support of this argument Smalley relies on the recent United States Supreme Court opinion in Maynard v. Cartwright, 486 U.S. ____, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), which held that Oklahoma's identical statutory aggravating circumstance did not sufficiently guide the jury's discretion whether to impose the death penalty. This issue was not timely raised before the trial court and thus has not been preserved for appellate review.

In any event, the holding in Cartwright is not a change in the law as it relates to vagueness challenges to statutes and in no way implies that Florida's identical statutory aggravating circumstance as applied in this state's capital sentencing procedure fails to meet Eighth Amendment standards. Cartwright was decided in light of the Oklahoma practice in which the jury is the sentencing authority, whereas in Florida the jury makes only an advisory recommendation to the judge who passes the ultimate sentence. Further, unlike the Criminal Appeals Court of Oklahoma in Cartwright, the Florida Supreme Court has

consistently applied a constitutional construction to the phrase "especially heinous, atrocious, or cruel". The court in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913 (1976), while recognizing that all murders are arguably "especially heinous, atrocious, or cruel" stated that these words "...[M]ust be considered as they have been construed by the Supreme Court of Florida".

A review of capital cases considered by the Florida Supreme Court, since the Proffitt opinion was rendered in 1976, confirms that Florida continues to follow the capital sentencing procedure previously upheld in Proffitt. As previously stated, in Florida the trial court, based upon the advisory opinion of the jury, is the sentencer. The sentence imposed by the trial court is then reviewed by the Florida Supreme Court which considers its function to be to guarantee that similar results will be reached in similar cases; thereby eliminating arbitrary and capricious impositions of the death penalty.

POINT II: Smalley's primary argument under this point is that his death sentence is excessive and disproportionate in comparison with other similar cases. He bases his argument on the fact that the trial court found but one statutory aggravating circumstance as opposed to five specifically enumerated mitigating circumstances.

The fact that the mitigating circumstances out-number the aggravating circumstances does not render the death sentence invalid, in that the sentencing statute requires a weighing rather than a mere counting of factors in aggravation and

mitigation. The overwhelming aggravating circumstance in this case clearly overwhelms the marginally mitigating circumstances.

The killing of a child is especially despicable. The fact that the child victim was tortured for almost an entire day, much of the worst torment occurring in her own home, in a manner set forth in the trial court's specific written findings of fact, can be characterized as one of the most aggravated of serious crimes suffered by a single individual. It is difficult to conceive of any mitigating circumstances which could offset this heinous, atrocious and cruel murder. For these reasons the death penalty is not excessive punishment in this case and is proportionately appropriate.

ARGUMENT

POINT I

AS APPLIED IN THE STATE OF FLORIDA, THE AGGRAVATING CIRCUMSTANCE OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER IS CONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Leonard Smalley was tried and convicted of first-degree murder of a child (R 1, 160). The jury, by a majority of ten-two, recommended that a sentence of death be imposed (R 164, 1065). Following the jury's recommendation, the court sentenced Smalley to death (R 172, 1072). In his sentencing findings of fact, the trial judge, as sentencer, found as the aggravating circumstance that "[t]he crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel".

The appellant Smalley was living in the home of Cecelia Cook, along with her three young children, Kim, 6 years-old, Chris, 4 years old, and Julie Anne Cook, 28 months old. On October 23, 1987, Smalley was baby-sitting 28 month old Julie Anne Cook, the victim in this case (R 580). The trial court's finding of the aggravating circumstance of "especially heinous, atrocious, or cruel" was supported primarily by a voluntary confession by Smalley, marked as State's Exhibit No. 27 (R 166). Based upon his own confession Smalley began smacking Julie Anne Cook in the face and head, with his hands, from approximately 9:30 a.m., throughout the course of the day, because he wanted her to "hush up". Sometime during the morning, Smalley filled a large rain barrel with water. He then dunked Julie into the barrel several

times, holding her by the feet, up to a point where she was gasping for breath and spewing out water. She finally became unconscious. When she regained consciousness Smalley punched her in the stomach two or three times and water came out of her nose and mouth. Julie apparently fell asleep for a short while but woke up crying. Thereafter, Smalley filled up the kitchen sink with dishwater and repeatedly dunked her head in the sink yelling, "shut up, shut up". This continued until Julie coughed up water and didn't cry anymore, evidently once again losing consciousness. Smalley then laid Julie on the floor on a blanket; meanwhile she was excreting a watery liquid. (R 166-167).

Smalley later put Julie in his truck and took her to Leesburg, where he applied for a job. On the way there Julie continued to whine and cry, and Smalley smacked her on the back of the head, causing her to fall down on the seat. (R 167).

When Smalley returned home from the job interview sometime after 4:00 in the afternoon, Julie began to cry again. Smalley took her into the bathroom and held her head under the tub faucet until Julie was gasping for breath and water was running out of her nose and mouth. Smalley then picked Julie up by the feet and hit her head on the carpeted living room floor several times. Julie started shaking and moaning and Smalley then rolled her up tight in a blanket. He then laid her on the bed and left the house for an hour or so. Upon returning to the house Smalley found the child was not breathing, and he could not get a heartbeat (R 166-168). The pathologist concluded that the cause

of death was by blunt trauma. (R 638-641). In his detailed specific written findings of fact the trial court concluded:

> It was established beyond and to the exclusion of every reasonable doubt that defendant Smalley tortured, beat and punished the victim, Julie Anne Cook, for approximately eight hours, in an especially heinous, atrocious and cruel manner. (R 168).

Smalley argues that Florida's application of the "especially heinous, atrocious, or cruel" aggravating circumstance in his case was vague and overbroad in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States. To support this argument Smalley relies on the recent United States Supreme Court opinion in Maynard v. Cartwright, 486 U.S. ____, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), which held that Oklahoma's identical statutory aggravating circumstance did not sufficiently guide the jury's discretion whether to impose the death penalty. 108 S.Ct. at 1859.

This issue was not timely raised before the trial court and thus has not been preserved for appellate review. Trushin v. State, 425 So.2d 1126 (Fla. 1982). In Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984), cert. denied, 471 U.S. 1975 (1985), this court stated:

> Appellant argues that the statutory authority granted a trial judge to override a jury's recommendation of life is unconstitutional as applied. This issue was not timely raised before the trial court and thus was not preserved for appeal. (emphasis added).

In any event, the Supreme Court's holding in Cartwright is not a change in the law as it relates to vagueness challenges to statutes and in no way implies that Florida's identical statutory aggravating circumstance as applied in this state's capital sentencing procedure fails to meet Eighth Amendment standards. This is because, unlike the Criminal Appeals Court of Oklahoma in Cartwright, the Florida Supreme Court has consistently applied a constitutional construction to the phrase "especially heinous, atrocious, or cruel." "Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." Cartwright, 108 S.Ct. at 1858. Further, Cartwright was decided in light of the Oklahoma practice in which a jury is the sentencing authority, where as in Florida the jury makes only an advisory recommendation to the judge who passes the ultimate sentence. Section 921.141, Florida Statutes (1987).

As applied to the facts of a particular case, the Florida Supreme Court construes "especially heinous, atrocious, and cruel" to be a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). See also, Alford v. State, 307 So.2d 433, 455 (Fla. 1975); Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975).

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the petitioner attacked Florida's statutory aggravating circumstance, which allows the death penalty to be imposed if the crime is especially "heinous, atrocious, or cruel"

as vague and overbroad. The Court, while recognizing that all murders are arguably "especially heinous, atrocious, or cruel", stated that these words "...[M]ust be considered as they have been construed by the Supreme Court of Florida." 96 S.Ct. 2968. Further, after analyzing the Florida Supreme Court's prior narrowing construction of the statutory aggravating circumstance, the Court stated, "[We] cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." Id. As previously stated, in Florida the trial court, based upon the advisory opinion of the jury, is the sentencer. The sentence imposed by the trial court is then reviewed by the Florida Supreme Court which considers its function to be to guarantee that similar results will be reached in similar cases; thereby eliminating arbitrary and capricious impositions of the death penalty. 96 S.Ct. 2966.

A review of capital cases considered by the Florida Supreme Court, since the Proffitt opinion was rendered in 1976, confirms that Florida continues to follow the capital sentencing procedure previously upheld by the United States Supreme Court in Proffitt. For example, in the recent case of Jackson v. State, 522 So.2d 802, 809, 810 (Fla. 1988), this court stated its prior narrow definition of the aggravating circumstance of "especially heinous, atrocious or cruel" as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to

> inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 284 So.2d 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

In Dobbert v. State, 409 So.2d 1053 (Fla. 1982), this court rejected a contention that the aggravating circumstance of heinous, atrocious, and cruel had been rendered void for vagueness by its application. In this respect the court stated "...[a]s recently as 1979, we have reaffirmed the trial court's finding that Dobbert's "shockingly evil and unnecessarily torturous" murder of his nine-year old daughter was especially heinous, atrocious, or cruel. Dobbert v. State, 375 So.2d at 1071."

A murder committed through strangulation has been held to be especially heinous, atrocious and cruel. Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). "A frightened eight-year-old girl being strangled by an adult man should certainly be described as heinous, atrocious , and cruel." Adams v. State, 412 So.2d 850, 857 (Fla.), cert. denied, 459 U.S. 882 (1982). The severe beating, wounding, raping, and manual strangulation of an eighty-two year old frail woman is heinous. Quince v. State, 414 So.2d 185, 187 (Fla.), cert. denied, 459

U.S. 895 (1982). In the instant case the child was tortured within the supposed safety of her own home, a factor previously held to add to the atrocity of the crime. Troedel v. State, 462 So.2d 392, 398 (Fla. 1984); Breedlove v. State, 413 So.2d 1 (Fla.), cert. denied, 459 U.S. 882 (1982). Fear and emotional strain endured by victims awaiting their fate has been held as heinous, atrocious and cruel. Garcia v. State, 492 So.2d 360, 367 (Fla. 1986); Francois v. State, 407 So.2d 885 (Fla. 1981), cert. denied, 458 U.S. 1122 (1982). Also, the subject aggravating factor includes the death of a child by asphyxiation as the result of being buried alive. Roman v. State, 475 So.2d 1228, 1235 (Fla. 1985). Alternatively choking and reviving a victim prior to the actual murder is heinous, atrocious and cruel. Stano v. State, 473 So.2d 1282, 1289 (Fla. 1985).

In rejecting an argument that the term "heinous, atrocious and cruel" had since Proffitt, supra, become unconstitutionally vague and overbroad because of the wide variety of situations in which it had been applied, this court in Magill v. State, 428 So.2d 649, 651 (Fla. 1983) stated:

> Appellant's argument ignores that there are discernible distinctions in the facts of the cases which he cites. It is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious, and cruel; rather it is the entire set of circumstances surrounding the killing.
>
> * * *
>
> There can be no mechanical litmus test established for determining

> whether this or any aggravating factor is applicable. Instead, the facts must be considered in light of prior cases addressing the issue and must be compared and contrasted therewith and weighed in light thereof. Then, if the killing and its attendant circumstances do not warrant the finding of heinousness, atrociousness, and cruelty, it will be stricken. Otherwise, assuming that it is warranted in light of earlier cases and that the trial judge used the reasoned judgment which is so necessary, the finding will not be disturbed.

This court has further narrowed the definition of especially heinous, atrocious and cruel by refusing to allow the factor to be applied to crimes which are within the norm of capital felonies. See, e.g. Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983)("The criminal act that ultimately caused death was a single sudden shot from a shotgun. 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"), cert. denied, 465 U.S. 1074 (1984).

Contrary to Florida's strictly construed narrow definition of the subject aggravating circumstance, the Oklahoma Court's position "...[a]ppears to be that it can simply review the circumstances of the murder and divine [sic] whether the murder was especially heinous, atrocious, or cruel." Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir. 1987). For example:

> ...In numerous cases the court has affirmed a finding that a murder was "especially heinous, atrocious, or cruel" with no more than a statement

> that "the facts adequately support" the aggravating circumstance. Ake v. State, 663 P.2d 1, 11 (Okla.Crim. App. 1983), rev'd on other grounds, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). See also, e.g., Coleman v. State, 668 P.2d 1126, 1138 (Okla.Crim.App. 1983), cert. denied, 464 U.S. 1073, 104 S.Ct. 986, 79 L.Ed.2d 222 (1984); Hays v. State, 617 P.2d 223, 231-32 (Okla. Crim.App. 1980).

Id.

In describing the events surrounding the murder in Cartwright, the Oklahoma court held that these events "adequately supported the jury's finding." Cartwright v. State, 695 P.2d 548, 554 (Okla.Crim.App. 1985). The Court of Appeals for the Tenth Circuit noted that Oklahoma had "...no provision for curing on appeal a sentencer's consideration of an invalid aggravating circumstance." 822 F.2d at 1482."

The Court of Appeals, based upon the holding of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), also concluded that the Oklahoma courts had not adopted a limiting construction that cured the inadequate and overbroad definition of the aggravating circumstance of "especially heinous, atrocious, or cruel." 822 F.2d at 1497.

In affirming the judgment of the Court of Appeals, the United States Supreme Court stated:

> We think the Court of Appeals was quite right in holding that Godfrey controls this case. First, the language of the Oklahoma aggravating circumstance at issue- "especially heinous, atrocious, or cruel" -gave no more guidance than the "outrageously or wantonly vile,

horrible or inhumane" language that the jury returned in its verdict in Godfrey. The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous" does not, is untenable. To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous." Godfrey, supra, at 428-429, 100 S.Ct. at 1764-1765. Likewise, in Godfrey the addition of "outrageously or wantonly" to the term "vile" did not limit the overbreadth of the aggravating factor.

Second, the conclusion of the Oklahoma court that the events recited by it "adequately supported the jury's finding" was indistinguishable from the action of the Georgia court in Godfrey, which failed to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment. The Oklahoma court relied on the facts that Cartwright had a motive of getting even with the victims, that he lay in wait for them, that the murder victim heard the blast that wounded his wife, that he again brutally attacked the surviving wife, that he attempted to conceal his deeds, and that he attempted to steal the victims' belongings. 695 P.2d, at 554. Its conclusion that on these facts the jury's verdict that the murder was especially heinous, atrocious, or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance.

108 S.Ct. at 1859.

As a result of Florida's consistent application of the constitutionally required narrowing construction of "especially heinous, atrocious, or cruel" as a capital aggravating circumstance, Smalley's death sentence was not the result of a vague open-ended sentence held invalid in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2756, 33 L.Ed.2d 346 (1972). Florida's narrowing construction of this aggravating factor limits the sentencer's discretion in imposing the death penalty minimizing the arbitrary and capricious actions condemned in Furman.

Also, contrary to Oklahoma's capital sentencing procedure disapproved in Cartwright, the Florida Supreme Court analyzes the facts of each case to determine if they fall within the court imposed narrowed definition of the aggravating circumstance of "extremely heinous, atrocious or cruel." Cartwright, 108 S.Ct. 1853; Proffitt, 96 S.Ct. at 2970.

POINT II

SMALLEY'S DEATH SENTENCE IS NOT EXCESSIVE UNDER FLORIDA LAW AND IS NOT CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Smalley's primary argument under this point is that his death sentence is excessive and disproportionate in comparison with other similar cases. He bases his argument on the fact that the trial court found but one statutory aggravating circumstance as opposed to five specifically enumerated mitigating circumstances. For reasons to be subsequently explained, the fact that the mitigating circumstances out-number the aggravating circumstances does not render the death sentence invalid, in that the sentencing statute requires a weighing rather than a mere counting of factors in aggravation and mitigation.

The trial court's finding of the aggravating circumstance of "especially heinous, atrocious, or cruel" was supported by the following specific written findings of fact:

> The Defendant, LEONARD LEE SMALLEY, JR., was living in the home of Cecelia Cook, along with Cecelia's three children, Kim, 6 yrs. old, Chris, 4 yrs. old, and Julie Anne Cook, 28 months old, the victim in this case. A voluntary confession by Smalley, marked as State's Exhibit #27, reveals the following scenario:
>
> On October 23, 1987, Smalley, was babysitting 28 month old Julie Anne Cook, who had been previously ill with a stomach virus and upper respiratory infection.

He began smacking Julie Anne Cook, in the face and head, with his hands, from approximately 9:30 in the morning on October 23, 1987, and continued smacking her throughout the course of the day, because she was continuously whining and crying. He stated that he wanted her to "hush up" and that "all he wanted was peace and quiet to think about his own problems".

Sometime during the morning, Smalley turned on the stereo, but Julie's crying got louder than the stereo. He went out in the backyard, dragged a large blue plastic rain barrel over by the back of the house, where it could not be seen by the neighbors, and filled it with water to within 6 to 8 inches from the top. He then dunked Julie, holding her by the feet, into the barrel several times, up to a point she was gasping for breath and spewing out water, to the point where she became unconscious. He then brought her back into the house, changed her soaking-wet diaper, and Julie recovered consciousness and continued to cry. Then he punched Julie in the stomach two or three times and water came out. Julie then apparently fell asleep for a short while, but woke up crying and whining.

Thereafter he filled up the kitchen sink with dish water and repeatedly dunked Julie's head in the sink water, yelling "shut up, shut up", until Julie coughed up water and didn't cry any more, evidently once again losing consciousness.

He then laid her on the floor on a blanket while Julie was excreting watery liquid and water was coming out of her nose.

Subsequently he put a diaper on Julie and took her in his car to Leesburg to a Rix Construction

Company, where he filled out an application for a job. On the way there, Julie continued to whine and cry and Smalley smacked her on the back of the head, causing Julie to fall down on the seat.

When Smalley returned home from the interview, Julie began to cry. By this time it was after 4:00 in the afternoon, and he took her into the bathroom and held her head under the tub faucet until Julie was gasping for breath and water was running out of her nose and mouth. During the entire time, he kept yelling for Julie to "hush". Julie continued to cry and Smalley continued to hold her under the running water. Smalley then picked Julie up by the feet, and hit her head on the carpeted living room floor several times. The medical examiner, Dr. William Shutze, testified that Julie Cook could have survived had Smalley sought medical attention for Julie at this time. Julie started shaking and moaning and Smalley then rolled her up tightly in a blanket and laid her on the bed. Then he left the house for an hour or so. Upon returning to the house he found the child was not breathing and couldn't get a heartbeat.

Testimony by the Pathologist, Dr. William Shutze, was corroborated by Exhibits #10, #11, #12, #13, #14 and #15, depicting multiple contusions and abrasions to the body of Julie Anne Cook, along with evidence in her lungs that she had aspirated food. Exhibits #16 and #17, depicted the massive hemorrhage to the brain from Julie's head being rammed into the floor, and the swelling of brain tissues, which gradually cut off nerve endings to the heart and lung functions, which is consistent with Dr. Shutze's findings of death by blunt trauma.

> It was established beyond and to the exclusion of every reasonable doubt that Defendant Smalley tortured, beat and punished the victim, Julie Anne Cook, for approximately eight hours, in an especially heinous, atrocious and cruel manner.
>
> The above findings were not rebutted by Smalley, (see Exhibit #27) and were corroborated by the testimony of Michael E. Hord, Cecelia Cook, Lt. William O. Farmer, Dr. William Shutze and the Defendant, Leonard Lee Smalley, Jr., who testified as to the torture inflicted upon Julie Anne Cook by him, in support of the aggravating circumstance of being especially heinous, atrocious or cruel. (R 166-168).

The importance of the jury's role in a capital sentencing scheme was pointed out in Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976), cert. denied, 431 U.S. 925 (1977) as:

> The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted.

"The jury must be instructed either by the applicable standard jury instructions or by specifically formulated instructions, that their role is to make a recommendation based on the circumstances of the offense and the character and background of the defendant." Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986).

The jury's recommendation that this especially heinous, atrocious and cruel crime committed on a child warranted the death penalty was based upon complete and proper jury instructions concerning the seriousness with which the jury should attach to its recommendation (R 1059). They were instructed that the single aggravating circumstance of especially heinous, atrocious or cruel "must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision" (R 1060).

On the other hand, the court instructed the jury that "a mitigating circumstance need not be proved beyond a reasonable doubt by the defendant" and that "if you are reasonably convinced that a mitigating circumstance exists, you may consider it as established" (R 1060). The jury was also instructed that it should "weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence should be based on these considerations" (R 1061). Notwithstanding numerous defense witnesses called during the penalty phase concerning Smalley's character, the jury by its 10-2 recommendation of death obviously concluded that the extreme aggravating circumstance of this crime outweighed the marginal mitigating circumstances and warranted the death penalty.

The mitigating circumstances set forth in the trial court's findings in support of death sentence were:

1. The Defendant has no significant history of prior criminal activity.

2. The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental and emotional disturbance.

3. The Defendant acted under extreme duress or under the substantial domination of another person.

4. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

5. Any other aspect of the Defendant's character or record, and any other circumstance of the offense. (aspects of the defendant's character found by the trial court to support this mitigating circumstance were: a) the defendant himself was an abused child, b) the defendant expressed substantial remorse at the time of the offense and constantly since, and c) the defendant was a good employee and co-workers thought very highly of him).

(R 169, 170).

The fact that the mitigating circumstances out-number the aggravating circumstances does not render the death sentence invalid, in that the sentencing statute requires a weighing rather than a mere counting of factors in aggravation and mitigation. Jackson v. State, 489 So.2d 406, 411 (Fla. 1986); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, (1974); see also, Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979).

Smalley's argument that the death sentence is excessive here because of the mitigating factors cannot be sustained where the facts and circumstances supporting the aggravating circumstance are weighed against the mitigating circumstances, which, although greater in number, are uncompelling. The trial court has the duty to determine whether a mitigating circumstance has been proven and how much weight it should carry in the sentencing decision. Smith v. State, 404 So.2d 894 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). The overwhelming aggravating circumstance in this case clearly overwhelms the marginally mitigating circumstances.

Smalley also argues that the very "fact that this is a felony murder, as opposed to a premeditated murder, is itself mitigating". (Initial Brief of Appellant, p.25) Smalley's insinuation that this is a felony murder is a mere assumption on his part. This is because the jury found Smalley guilty of first-degree murder without specifying the basis for the verdict (R 160, 924-925). Further, felony murder and premeditated murder are not mutually exclusive. Garcia v. State, 492 So.2d 360, 366 (Fla. 1986). As the evidence in this case demonstrates, it is entirely possible to plan or premeditate both child abuse and murder. This is particularly true where, as here, the crime(s) lasted almost an entire day.

"The killing of a child is especially despicable". Wasko v. State, 505 So.2d 1314, 1318 (Fla. 1987). At the time of the crime Smalley was a twenty-seven year old adult (R 2). The fact that the child victim was tortured for almost an entire day, much

of the worst torment occurring in her own home, in a manner set forth in the trial court's specific written findings of fact, can be characterized as one of the most aggravated of serious crimes suffered by a single individual. It is difficult to conceive of any mitigating circumstances which could offset this heinous, atrocious and cruel murder. For this reason the death penalty is not excessive punishment in this case and is proportionally appropriate. In State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, sub. nom., 416 U.S. 943 (1974), upholding Florida's amended capital punishment statute, this court stated that "[t]he Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." The murder of this child under the facts and circumstances of this case is one of the most atrocious of crimes possible.

For the reasons expressed, concerning the atrocity of the murder, and comparing the sentence of death in this case with previous cases, there is no basis for reversal of the appellant's death sentence. See, Arango v. State, 411 So.2d 172, (Fla. 1982), cert. denied, 457 U.S. 1140 (1982).

THE JURY RECOMMENDATION IS RELIABLE

Smalley again argues as set forth in Point I, that the "jury was not provided sufficient guidance to apply the statutory aggravating factor of an especially heinous, atrocious or cruel murder". This argument is without merit. Proffitt, supra. This issue having been addressed fully under Point I and previously under this point will not be addressed further by the appellee.

Smalley next maintains that the standard jury instructions given during the sentencing phase (R 934, 1058-1062) violate the Eighth and Fourteenth Amendments to the United States Constitution "by informing the jury that the mitigating circumstances must 'out weigh' the aggravating circumstances". In this respect he argues that the weighing process is distorted under the Eighth Amendment and the burden of persuasion is then shifted to the defendant in violation of the Sixth and Fourteenth Amendment. Since the appellant did not object to the standard instructions given, he has waived this objection for appellate review. Bottoson v. State, 443 So.2d 962 (Fla. 1983), cert. denied, 469 U.S. 873 (1984); Demps v. State, 395 So.2d 501 (Fla. 1981), cert. denied, 454 U.S. 933 (1981).

Notwithstanding Smalley's failure to object, his argument that the instructions given to the jury impermissibly allocated the constitutionally prescribed burden of proof is without merit. This issue has previously been addressed by this court in Arango, supra, where the court stated:

> A careful reading of the transcript, however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances out-weighed the mitigating circumstances. These standard jury instructions taken as a whole show that no reversible error was committed.

Id. at 174.

In Kennedy v. State, 455 So.2d 351, 354 (Fla. 1984) this court held that during the penalty phase of prosecution for first-degree murder the standard jury instructions were properly given. In the present case, the standard instructions were also given.

The jury in this case was told that they should consider whether there were sufficient aggravating circumstances to justify imposition of the death penalty, and whether sufficient mitigating circumstances existed to outweigh the aggravating circumstances (R 934, 1058, 1059). After being advised that the potentially aggravating circumstance was especially heinous, atrocious or cruel, the jury was instructed that if they found it did not justify the death penalty, "your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years" (R 1059). They were told that the aggravating circumstance had to be established beyond a reasonable doubt. If the aggravating circumstance was found, they should consider all of the evidence tending to establish one or more mitigating circumstances, which did not need to be proven beyond a reasonable doubt. They were also told to give such evidence such weight as they felt it deserved in reaching their conclusion as to an appropriate sentence (R 1059, 1060). The jury was finally told that they should weigh the aggravating circumstances against the mitigating, and that their advisory sentence should be based upon those considerations (R 1061).

While the jury instructions did include a direction that the jury consider whether the mitigating circumstances outweigh those in aggravation, it is clear that such provision cannot be considered in isolation; the instruction must be considered as a whole, and the focus must be upon the manner in which a reasonable juror could have interpreted the instructions. See, Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); California v. Brown, _____ U.S. _____, 107 S.Ct. 837, 93 L.Ed.2d 809 (1987). It cannot be said that the jurors hearing the instruction would have failed to understand the meaning and function of mitigating circumstances, cf. Peak v. Kemp, 784 F.2d 1479 (11th Cir. 1986); Zant v. Stevens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), or what the appropriate burden of proof was. A reasonable juror would quite clearly have understood that in the absence of any finding in aggravation, a sentence of life imprisonment was to be recommended; if nothing was found in aggravation, there would be nothing to weigh the mitigating circumstances against. It cannot be said that any error in these instructions deprived Smalley of due process at sentencing. See, Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977), Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1986).

It must also be noted that in Rose v. Clark, ____ U.S. ____, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), the United States Supreme Court expressly held that the harmless error doctrine should be applied to an error involving a "burden-shifting" jury instruction, which, in such case, had apparently shifted the

burden onto the defense to demonstrate that the homicide at issue had not been malicious. The Court noted that, even assuming that the instruction had violated Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and Francis, supra, any error therein could still be deemed harmless, in that such error would not have been "basic to a fair trial". The Court found that even if the presumption was incorrect, before the jury would have reached the point where it would have applied such presumption, they would have already had to have found the predicate facts sufficient to establish guilt beyond a reasonable doubt. Clark is of value here for a number of reasons.

Clark obviously stands for the proposition that the giving of a "burden-shifting" jury instruction can be harmless error. The Court's analysis, as far as the "finding of predicate facts" is concerned, is also relevant. In Florida's capital sentencing structure, the finding of at least one aggravating circumstance is obviously a "predicate" for any eventual sentence of death. The jury instruction in this case adequately advised the jury that a determination of an aggravating factor was their first step. Further, should such search prove fruitless, life was to be the recommended sentence. Accordingly, as in Clark, by the time that any allegedly "erroneous" burden-shifting instruction was given, the jury would already have had to have found, at least one statutory aggravating circumstance. As in Clark, Smalley was fully provided the opportunity to present all evidence in support of his proposition, i.e., that a life sentence was appropriate, and the jury was properly instructed as

to the weighing of aggravating and mitigating circumstances and the role and function of mitigating circumstances in capital sentencing.

In view of the foregoing analysis concerning the jury instructions given during the penalty phase and the evidence presented by both the state and Smalley during the penalty phase, if there was any error in the jury instructions it was harmless beyond a reasonable doubt as required by State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Smalley also argues that Booth v. Maryland, ____ U.S. ____, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), mandates relief. In this respect he argues that the jury's recommendation was unconstitutionally tainted by improper prosecutorial argument concerning victim impact. However, because Smalley did not object to the prosecutor's argument, he cannot prevail on this issue. Grossman v. State, 525 So.2d 833 (Fla. 1988); Daughtery v. State, 13 F.L.W. 638 (Fla. November 4, 1988). Moreover, a careful review of the prosecutor's argument during the penalty phase (R 1039-1050) contains no reference to victim impact evidence. During the penalty phase focus must be on the accused as a "uniquely individual human being". Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976). Booth holds that the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence. 107 S.Ct. at 2532. The penalty phase in the instant case focused primarily on mitigating evidence presented by Smalley. The appellant has made no reference to any victim impact evidence

presented during the penalty phase of the trial. Therefore, no violation of Booth occurred during the penalty phase either by prosecutorial comment or the evidence presented.

The alleged improper prosecutorial argument occurred during the guilt phase of the trial during the prosecutor's closing argument, and the record reflects that there was no objection to any of the alleged improper argument. (R 861, 881-882, 888-889). The only prosecutorial comments referred to by Smalley which even remotely relates to victim impact information condemned in Booth consisted of a reference to the victim and her relationship to her family and friends (R 888, 889). See, Preston v. State, 531 So.2d 154, 160 (Fla. 1988). Further, since there was no objection to any of these comments the point is procedurally barred. Id. at 160. Further, the prosecutorial comments made in Garron v. State, 13 F.L.W. 325 (Fla. May 19, 1988), relied upon by the appellant, occurred during the penalty phase as opposed to the guilt phase of the trial. In the instant case, the prosecutor's statements made during the guilt phase when viewed in the context of the entire trial, did not divert the jury's attention from its proper function during the penalty phase.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail to Larry B. Henderson, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida, 32014, this 27nd day of January, 1989.

Colin Campbell

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