IN THE SUPREME COURT OF FLORIDA

SAMUEL JASON DERRICK, :

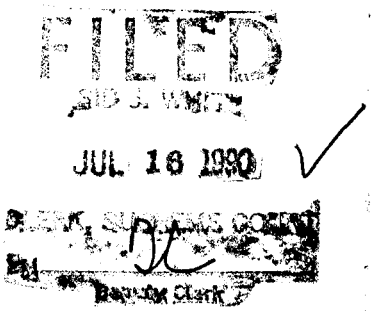
Appellant, :

vs. : Case No. 73,076

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

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ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

Appellant, Samuel Jason Derrick, will rely upon his initial brief in reply to the State's arguments as to Issues VI and IX.C.

STATEMENT OF THE CASE AND FACTS

At page one of its brief, Appellee says that on cross-examination of Randall James defense counsel elicited the fact that "James was treated at the medical wing, the day after Appellant's confession by Dr. Teaman and Dr. Young, who are psychiatrists." In fact, however, the record does not reflect what type of doctor Dr. Young was.

Appellee mentions at page two of its brief that other inmates were present when Appellant made his confession to James. However, James testified that he did not think these inmates were in a position to hear what Appellant said to him. (R708)

On page three of its brief Appellee says that the prosecutor told the trial court that Appellant had a charge of introducing contraband and that he had a razor blade in his shoe. The relevant exchange between the prosecutor and the trial judge went as follows (R1130):

> MR. HALKITIS [prosecutor]: He has a charge of introducing contraband. There is case law that says that this Court should really not interfere with the protective measures used by the sheriff.
>
> THE COURT: Halpin?
>
> MR. HALKITIS: He had a razor blade in his shoe, if you recall.

It is not at all clear from this discussion whether the prosecutor was claiming that Appellant had a razor blade in his shoe at some unspecified time and place, or whether someone named "Halpin" had a razor blade. The only record mention of a charge against Appellant for possessing contraband was that he was arrested for having a commercial screwdriver, not a razor blade. (R886)

At page six of its brief Appellee asserts that at his sentencing hearing Appellant "regaled the court with a detailed summary of the evidence offered in mitigation." This is inaccurate. At sentencing defense counsel primarily talked about the impact of Randall James' testimony, and the fact that the jury was permitted to give improper double consideration to the aggravating factors of robbery and pecuniary gain; no "detailed summary" of mitigating evidence was offered. (R845-847, 852-853)

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN ADEQUATE RICHARDSON HEARING AND IN FAILING TO TAKE APPROPRIATE REMEDIAL ACTION WHEN THE STATE REVEALED RANDALL JAMES AS A SURPRISE WITNESS IN THE MIDST OF APPELLANT'S TRIAL.

McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967), cited by Appellee at page 11 of its brief, is inapposite. The instant case has nothing to do with a trial court's refusal to allow defense counsel to question police officers as to an informant's name and address at a preliminary probable cause hearing.

Appellee asks at page 11 of its brief what right Appellant can claim was violated by the State's late disclosure of Randall James when James did not actually testify at the guilt phase. In general terms Appellant was deprived of his right pursuant to Florida's discovery provisions to know all matters pertaining to his case for a sufficient period of time to enable him adequately to prepare his defense and trial strategy, with the effective advice and assistance of counsel.

Furthermore, Appellant had a right to be represented by conflict-free counsel. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). See also Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Appellee purports not to understand how "any information concerning Randall James's crimes or confidences [could] affect Appellant" (Brief of Appellee, p. 15), but the problem was that the public defender's office owed a continuing ethical duty to James even after being relieved from further representing him which could have impaired defense counsel's effective cross-examination of James, as counsel attempted to explain to the trial judge. Counsel told the court (R526):

> ...[I]f we're placed in a posture involving cross-examination of one of our own clients [James], and we have the ability to show bias or prejudice or anything else that he may have told us in a confidential nature, we are inhibited in our ability to cross-examine him because of our obligation to him, and Mr. Derrick's defense is inhibited by our inhibition.

Counsel emphasized that the dilemma could not be resolved by the expedient of removing the public defender's office from representing James. (R516, 528) Counsel noted that Appellant was "extremely concerned" about the public defender's dual representation of Randall James and himself (R526), and suggested that, if the court was not going to grant a mistrial, the public defender's office should be allowed to withdraw from representing Appellant. (R523-524) In Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987) the court recognized the potential for conflict where a lawyer must cross-examine an ex-client. "An attorney who cross-examines a former client inherently encounters divided loyalties. [Citations omitted.]" 829 F.2d at 1023. Appellant's counsel here were not in

a position to provide him with his constitutional right to effective representation that was untrammeled and unimpaired by conflicting interests.

With regard to the violation of Appellant's right to remain silent, Appellee erroneously states that defense "counsel told the jury, during opening statement, that Appellant would testify at trial." (Brief of Appellee, p. 16) In fact, defense counsel made no opening statement. (R227, 468-469) What happened was that the defense called Appellant, Jason Derrick, as the third defense witness (R509), but was then forced to rest without presenting Appellant's testimony upon being hit with the State's surprise witness, Randall James. (R533)

At page 15 of its brief Appellee says that the fact that Appellant "was denied the opportunity to give first and last closing argument is of no moment."[1] This comment ignores the many Florida cases which have recognized that the defendant's right to the concluding argument to the jury when he presents no testimony in his own behalf, except his own (Florida Rule of Criminal Procedure 3.250) is an important procedural right, the denial of which is reversible error without regard to the harmless error doctrine. E.g., Birge v. State, 92 So.2d 819 (Fla. 1957); Wright v. State, 87 So.2d 104 (Fla. 1956); Andino v. State, 547 So.2d 1046 (Fla. 5th DCA 1989); Hart v. State, 526 So.2d 124 (Fla. 5th DCA

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[1] Appellant's counsel told the trial judge they probably would not have called Shannon Loyce and Senthia Hardesty to the stand, thus giving up the right to first and last closing argument, had they known that the appearance of a surprise witness would preclude them from also calling Appellant to testify. (R514-515, 522-523)

1988); Gari v. State, 364 So.2d 766 (Fla. 2d DCA 1978); Wyatt v. State, 270 So.2d 47 (Fla. 4th DCA 1972); Cagnina v. State, 175 So.2d 577 (Fla. 3d DCA 1965). In Raysor v. State, 272 So.2d 867 (Fla. 4th DCA 1973) the court explained:

> It is inherent in the procedure, as all acquainted with trial tactics know, that the right to address the jury finally is a fundamental advantage which simply speaks for itself.

272 So.2d at 869. It can hardly be truly said that Appellant's loss of this "fundamental advantage" due to his inability to plan his defense with knowledge that Randall James might be a witness against him is of "no moment."

Appellee suggests at page 12 of its brief that because Appellant did not specifically object to the adequacy of the alleged Richardson[2] hearing the trial court conducted, this issue has not been preserved for appellate review. However, the requirement that the court must hold an adequate Richardson hearing is self-executing, that is, once a discovery violation by the State is called to the trial court's attention, he must hold a Richardson hearing, whether or not specifically requested to do so by defense counsel. Ratcliff v. State, 15 F.L.W. D1439 (Fla. 2d DCA May 23, 1990).

Appellee also suggests that "a 'Richardson hearing' does not necessarily entail some kind of grand and probing inquest complete with sworn testimony and copious factual findings," and that any old hearing will do. (Brief of Appellee, p. 13) However,

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[2] Richardson v. State, 246 So.2d 771 (Fla. 1971).

as discussed in Appellant's initial brief at page 36, there are certain minimum requirements which must be met in order for the trial court's inquiry to pass muster under Richardson and its progeny. And in Lee v. State, 538 So.2d 63, 65 (Fla. 2d DCA 1989) the court pointedly noted that "[a] trial court's failure to hold an adequate Richardson inquiry constitutes per se reversible error [emphasis on "adequate" supplied]. Appellant does not read State v. Hall, 509 So.2d 1093 (Fla. 1987) to stand for the proposition that "[i]t is only the trial court's total failure to hold any sort of hearing that gives rise to 'per se' reversible error." (Brief of Appellee, p. 14) On the contrary, in Hall this Court repeated the minimum scope of inquiry which the trial court must conduct and concluded that "a trial court's failure to hold such an inquiry has been treated as per se reversible error [citations omitted.]" 509 So.2d at 1096.

Finally, with regard to the State's duty of immediate disclosure of witnesses whom it learned about during the course of Appellant's trial, in addition to the cases cited in his initial brief, Appellant would call the Court's attention to its recent opinion in Thompson v. State, 15 F.L.W. S347 (Fla. June 14, 1990), in which the Court wrote:

> Discovery regarding rebuttal witnesses is compelled by rule 3.220 [of the Florida Rules of Criminal Procedure], [citations omitted], and there is a continuing obligation under rule 3.220(f) to "promptly disclose or produce such witnesses" who fall within the rule. In Cooper v. State, 336 So.2d 1133, 1138 (Fla. 1976), cert. denied, 431 U.S. 925

> (1977), we observed that prompt disclosure means "immediate disclosure" where "a complex trial involving a human's life was scheduled to begin in one week." That "immediate disclosure" requirement is all the more compelling when, as here, the trial is underway and the defendant is about to be subjected to cross-examination.

15 F.L.W. at S349. Similarly, here there was a need for the prosecutor immediately to tell the defense of Randall James instead of waiting until Appellant's name was called as the next defense witness in the presence of the jury, which occurred about an hour after the prosecutor received the note regarding Randall James from one of his investigators. The defense case was well under way, Appellant was soon to testify, and the prosecutor therefore should have asked to approach the bench immediately upon receipt of the note.[3]

ISSUE II

THE PENALTY RECOMMENDATION OF THE JURY WAS TAINTED BY THE JURY'S RECEIPT OF IRRELEVANT, HIGHLY PREJUDICIAL TESTIMONY WHICH THE DEFENSE WAS NOT GIVEN THE OPPORTUNITY TO MEET.

At page 20 of its brief Appellee states that on cross-examination of Randall James defense counsel elicited that the day after Appellant's alleged confession to him, James was treated at

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[3] As discussed at page 37 of Appellant's initial brief, the State's duty of immediate disclosure actually arose earlier than when the prosecutor trying this case received the note. As soon as the first State operative became aware that Randall James had information concerning this case, whether that operative was Detective Vaughn, who interviewed James, or someone else, James' name should have been given to defense counsel.

the medical wing of the jail "by Dr. Teaman and Dr. Young, who are psychiatrists. (R698, 699, 701)." As mentioned in Appellant's reply to Appellee's Statement of the Case and Facts, there was no testimony before the jury as to what kind of doctor Dr. Young was.

Interestingly, nowhere in Appellee's argument is it claimed that Randall James' penalty phase testimony was relevant for any purpose; apparently, Appellee is conceding that it was not. Rather, even though it was primarily James' testimony that led Appellant's jurors to recommend the death penalty because they viewed it as demonstrating Appellant's lack of remorse, Appellee says the penalty recommendation is not tainted because "the court did not instruct the jury that lack of remorse was an aggravating factor and ... the prosecutor did not argue that James' testimony demonstrated Appellant's lack of remorse." (Brief of Appellee, pp. 21-22) What Appellee fails to recognize is that in relying upon an aggravator upon which they had not been instructed, the jurors failed to follow the law in accordance with their oath as jurors. They did not confine themselves to the statutory aggravating circumstances, which are exclusive (see authorities cited at page 44 of Appellant's initial brief), but went outside their instructions to consider an improper non-statutory aggravating circumstance, thus rendering their recommendation hopelessly unreliable.

Later in its brief in the context of another issue Appellee says that when juries have misapplied an instruction, courts have not hesitated to correct the wrongs that have occurred. (Brief of Appellee, p. 47) In this case Appellant's jury misap-

plied the court's instruction that the only aggravating factors the jury could consider were those the court enumerated for them. This Court must not hesitate to correct the wrong that was done to Appellant by the jury's misapplication of the court's instruction.

ISSUE III

APPELLANT WAS DENIED A FAIR TRIAL BECAUSE HE WAS IN SHACKLES THROUGHOUT THE PROCEEDINGS.

At page 24 of its brief Appellee says that Appellant is "grasping at desperate straws" in suggesting that it is not clear to whom the prosecutor was referring when the prosecutor told the trial judge that "he" had a razor blade in his shoe. However, as noted in Appellant's reply herein to Appellee's Statement of the Case and Facts, the colloquy on this matter is ambiguous at best.

Appellee asserts at page 24 of its brief that the trial court had a "reasonable basis for maintaining the shackles as a security measure," but fails to explain exactly what established facts formed the alleged "reasonable basis." The court itself made no factual findings to justify restraining Appellant; he merely uncritically accepted the assistant state attorney's representations that case law required the court to defer to the judgment of the sheriff's department as to what security measures were appropriate. (R1130-1131)

On page 25 of its brief Appellee mentions that the majority in Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987) recognized the existence of a view that seeing a convicted murderer

in chains might actually cause the jury to be more likely to return a life recommendation, thus benefiting the person who is to be sentenced. However, this is not the view that the majority adopted in Elledge, nor is Appellant aware of any other case in which this view has prevailed; Appellee cites none. Furthermore, Appellant was in restraints not only at penalty phase, but at guilt phase as well, and Appellee's quote from Elledge relates only to the sentence that the jury might recommend, not to the prejudice that can result when the defendant is in shackles throughout the proceedings.

Still on page 25 of its brief, Appellee goes on to include a quote from Judge Edmondson in Elledge that is not particularly relevant. Appellee fails to tell this Court that Judge Edmondson was concurring in part and dissenting in part, and that he disagreed with the majority's holding that the petitioner was entitled to a hearing before being shackled.

At page 26 of its brief Appellee quotes from Hildwin v. State, 531 So.2d 124 (Fla. 1988), but fails to note that it has omitted part of the text. What this Court actually wrote in Hildwin was as follows:

> A juror's catching inadvertent sight of a defendant in handcuffs, chains or other restraints (what the juror saw in this regard is not clear) is not so prejudicial as to require a new trial. [Citations omitted.]

531 So.2d at 126. Unlike Hildwin, the instant case does not involve a fleeting glimpse of Appellant in restraints by but a

single juror. Rather, Appellant was in chains throughout his trial, in the presence of all his jurors.

Appellee questions whether Appellant's jurors saw his shackles, but in a trial that lasted five days, it is difficult to believe they did not. Furthermore, in Spain v. Rushen, 883 F.2d 712 (9th Cir. 1989) the court identified several problems with shackling the defendant (in addition to possibly prejudicing the jury against him and reversing the presumption of innocence) which do not involve the jurors actually viewing the chains: (1) Shackles may impair the defendant's mental faculties. (2) Physical restraints may impede communications between the accused and his lawyer. See also Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353, 359 (1970). (3) Shackles may detract from the dignity and decorum of the judicial proceedings. See also Allen, 25 L.Ed.2d at 359. (4) Physical restraints may be painful to the defendant. 883 F.2d at 721.

Finally, Appellee refers to shackling the defendant as a "normal security measure." (Brief of Appellee, p. 26) This is an incorrect characterization of the practice, in view of the tiny percentage of cases in which the accused is physically restrained during trial. Rather, shackling is justified only as a last resort or in cases of extreme need. Hamilton v. Vasquez, 882 F.2d 1469 (9th Cir. 1989). See also Allen, 25 L.Ed.2d at 359 ("... no person should be tried while shackled and gagged except as a last resort.") Here the court failed to consider alternatives, such as posting additional bailiffs in the courtroom if he felt additional

security was needed, before resorting to the abnormal and extreme measure of binding the accused.

ISSUE IV

APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY WHEN THE TRIAL COURT REFUSED DEFENSE REQUESTS TO INQUIRE OF THE JURORS WHETHER THEY HAD SEEN OR READ A PREJUDICIAL NEWSPAPER ARTICLE CONCERNING APPELLANT'S CASE THAT APPEARED IN THE LOCAL PRESS AND DENIED APPELLANT'S MOTION TO SEQUESTER THE JURY DURING TRIAL.

United States v. Gaffney, 676 F.Supp. 1544 (M.D. Fla. 1987), cited by Appellee on page 30 of its brief, does not aid Appellee's position on this issue. In Gaffney the court reversed the appellant's convictions for a new trial, in part because at least some of the jurors had been exposed to media accounts during trial. As in the instant case, there was a media report concerning the prior criminal record of one of the defendants, which the Gaffney court recognized was "inherently prejudicial." 676 F.Supp. at 1554. (See also cases cited in Appellant's initial brief at pp. 54-55.)

Appellee claims that under Gaffney Appellant has the "burden of persuading this Court that the jury saw, read, and was prejudiced by the news articles." (Brief of Appellee, p. 31) However, the Gaffney court also spoke to the obligation of the trial court in such a situation:

> When there is an issue with regard to the propriety of a jury's conduct, it is the responsibility of

> the trial judge to ensure that the jury verdict is in no way tainted by improper outside influences. [Citation omitted.] Once a court becomes aware that extrinsic influence or information may have been brought to bear upon the jury, it must investigate the alleged wrongdoing.

676 F.Supp. at 1550. Had the court below fulfilled its obligation to conduct a timely inquiry into what the jury may have been exposed to, as requested by defense counsel, Appellant would be in a much better position to carry the burden which Appellee says he bears.

According to Appellee, United States v. Williams, 568 F.2d 464 (5th Cir. 1978) "points out" that the key to reversal due to jury exposure to media reports is not "'potential prejudice,'" but the effect such accounts "may have on the jury." (Brief of Appellee, p. 30) However, in Williams the court reversed and remanded even though the jurors who saw the news story both stated that it would in no way influence their decision in the case! 568 F.2d at 471. Appellee is urging a distinction without a difference when it seeks to distinguish "potential prejudice" from "the effect such media accounts may have on the jury."

Appellant would also note that in Williams the court found that the trial court's standard admonition to disregard everything not heard in court was insufficient to cure the problem of the jurors' exposure to the media report.

The central thrust of Appellee's argument is that the record shows that no juror was exposed to the prejudicial article that appeared in the May 10 Tampa Tribune because two days later

the jury gave a negative response to the following question from the court:

> THE COURT: Folks, we have had lots of newspaper publicity about this case, and I admonished you at the beginning of the trial not to read anything in the newspaper about it. Have any of you read anything in the newspaper about it?

(R575) This inquiry was too little, too late to fulfill the court's duty to ferret out whether the jurors truly had been exposed to the earlier article. By couching his question in terms of it being a violation of the court's admonishments if any juror admitted reading a newspaper account of the case, the court virtually guaranteed a negative response. The jury's response to the court's question is recorded in the record as follows:

> THE JURY: No.

(R575) It is not clear from the record whether or not every single juror answered "no" in response to the court's inquiry. There is no record support for Appellee's assertion that the jury's response was "resounding." (Brief of Appellee, p. 28)

ISSUE V

THE TRIAL COURT ERRED IN UNDULY RESTRICTING APPELLANT'S CROSS-EXAMINATION OF SEVERAL STATE WITNESSES.

With regard to the trial court's restriction of Appellant's cross-examination of the first State witness, Harry Lee, Appellee erroneously says, "Appellant has not argued that he was not attempting to elicit hearsay testimony from the witness."

(Brief of Appellee, p. 33) Apparently, Appellee failed to read page 59 of Appellant's initial brief, on which Appellant said, "Clearly defense counsel was not attempting to elicit hearsay; he was asking what Lee knew from his personal knowledge."

As for Appellant's aborted attempt to impeach key prosecution witness David Lowry by using his deposition testimony that he had felony convictions numbering "[f]our, five, six something like that" (R1010), rather than the two convictions he claimed he had during his trial testimony (R311-312), although the prosecutor suggested that some unspecified number of these convictions may have occurred when Lowry was a juvenile, Lowry himself made no mention of any of his convictions having occurred before he reached his majority.

Appellee asserts that even if Appellant had been allowed to impeach Lowry with his prior inconsistent statement, it probably would have made no difference in the way the jury viewed Lowry's credibility. (Brief of Appellee, pp. 35-36, 37) Appellant submits that had the jury been permitted to know not only that Lowry had so many felony convictions that he could not keep straight exactly how many he had, but that he had lied under oath regarding the number of his crimes, this could well have had a major impact on the credence the jury gave to the testimony of this vital prosecution witness.

ISSUE VII

APPELLANT WAS DENIED HIS RIGHT TO A FAIR PENALTY RECOMMENDATION BY THE TRIAL COURT'S REFUSAL TO GIVE HIS PROPOSED INSTRUCTION WHICH WOULD HAVE PREVENTED THE JURY FROM GIVING IMPROPER DOUBLE CONSIDERATION TO THE AGGRAVATING CIRCUMSTANCES OF PECUNIARY GAIN AND COMMITTED DURING A ROBBERY.

In the recent case of Campbell v. State, 15 F.L.W. S342 (Fla. June 14, 1990) this Court again held that commission of a capital felony during the course of an armed robbery (and burglary) and for pecuniary gain should be counted as one aggravating factor, not two (where the offense underlying the burglary was robbery).

In State v. Quesinberry, 354 S.E.2d 446 (N.C. 1987) the court held it error to submit to the jury both the aggravating factors of committed during a robbery and pecuniary gain. Such redundancy of overlapping elements results in an automatic cumulation of aggravating circumstances which the Supreme Court of North Carolina found to be "neither appropriate nor equitable." 354 S.E.2d at 453.

ISSUE VIII

THE TRIAL COURT'S INSTRUCTIONS ON THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AND COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCES WERE UNCONSTITUTIONALLY VAGUE BECAUSE THEY DID NOT INFORM APPELLANT'S JURY OF THE LIMITING CONSTRUCTION GIVEN TO THESE AGGRAVATING CIRCUMSTANCES.

The Supreme Court Committee on Standard Jury Instructions (Criminal) recently recognized that the standard jury

instruction on the especially heinous, atrocious, or cruel aggravating circumstance needed improvement, and this Court agreed. In Standard Jury Instructions Criminal Cases - No. 90-1, 15 F.L.W. S368 (Fla. June 21, 1990) this Court approved for publication the committee's recommendation that definitions of "heinous," "atrocious," and "cruel" taken from State v. Dixon, 283 So.2d 1 (Fla. 1973) be employed in the instruction on this aggravator. The committee decided that the additional language improved the instruction and adequately addressed "any problem the paragraph may present in light of Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)." 15 F.L.W. at S368.

ISSUE IX

THE TRIAL COURT ERRED IN SENTENCING SAMUEL JASON DERRICK TO DIE IN THE ELECTRIC CHAIR, BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. The trial court erred in instructing the jury on, and in finding the existence of, the aggravating circumstance that the homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Appellee misstates Appellant's argument when Appellee says at page 49 of its brief that Appellant bases his argument "on the erroneous assumption that this Court has mandated that only

'execution or contract murders or witness elimination murders' qualify under this factor." Rather, Appellant specifically recognized that this list of types of murders which may qualify for the cold, calculated, and premeditated aggravating circumstance was not all-inclusive. (Initial Brief of Appellant, p. 81)

Three recent decisions of this Court lend additional support to Appellant's argument that this aggravator does not apply to his case. Particularly relevant is Campbell v. State, 15 F.L.W. S342 (Fla. June 14, 1990). Campbell went to the Bosler residence armed with a knife. Upon gaining entry he began stabbing Billy. Sue Zann came out of the bathroom, saw her father being attacked, and made a noise. Campbell then attacked Sue Zann, stabbing her three times in the back as she turned away before being knocked to the floor. Campbell returned to Billy, stabbing him many times in the back as he fell to the floor. When Sue Zann tried to help her father, Campbell backed her into another room and stabbed her in the head several times. Sue Zann fell to the floor and pretended to be dead. Campbell went through the house and left with some amount of money. Billy died; Sue Zann lived.

In Campbell, this Court disagreed with the trial court's finding that the stabbing was committed in a cold, calculated, and premeditated manner. The Court specifically rejected the State's argument that "because Campbell stabbed Billy, then stopped when he attacked Sue Zann, and then returned to stabbing Billy, he had time to reflect upon and plan his resumed attack on Billy." 15 F.L.W. at S343. The Court went on to write:

> Campbell's actions took place over one continuous period of physical attack. His assault on Sue Zann provided him with no respite during which he could reflect upon or plan his resumption of attack on Billy, unlike the situation in Swafford [v. State, 533 So.2d 270 (Fla. 1988)] wherein the act of reloading the gun provided a break in the attack.

15 F.L.W. at S343. Appellee's argument that Appellant had "time to think about what he was going to do" during a "20 foot 'space of time' between the onslaught of the first plunges to where Rama Sharma eventually suffered the remaining causes of his death" (Brief of Appellee, p. 50) is very similar to the argument this court rejected in Campbell, and should meet with the same fate here. Even if the homicide occurred as Appellee claims it did, which is speculative, as mentioned at page 79 of Appellant's initial brief, there was still but one continuous period of physical attack upon Rama Sharma, providing no respite for reflection.

Campbell also indicates that Appellee's argument that Appellant must have intended to kill Sharma all along because Appellant carried a knife with him is untenable. (Brief of Appellee, pp. 49-50) If Appellant went to the area of the Moon Lake General Store intending merely to rob Sharma, as he told the sheriff's deputies, this purpose could much more readily be accomplished with a weapon than without. A request for "your money or your life" obviously carries more weight when the perpetrator is holding a knife than when his hands are empty.

In Thompson v. State, 15 F.L.W. S347 (Fla. June 14, 1990) this Court again rejected the cold, calculated, and premeditated aggravating circumstance. The evidence in Thompson was equally susceptible to two disparate theories: that Thompson killed his victim after thinking it over for 30 minutes and that he killed her "instantly in a deranged fit of rage." 15 F.L.W. at S350. The Court noted that, absent other evidence of heightened premeditation, rage is inconsistent with premeditated intent to kill. Similarly, here the number of stab wounds suggests that Sharma was killed in a frenzy, which, like rage, is inconsistent with premeditation.

Finally, in Porter v. State, 15 F.L.W. S353 (Fla. June 14, 1990) this Court reemphasized what it had said in other cases regarding the interpretation of the cold, calculated, and premeditated aggravating circumstance:

> Hamblen[v. State, 527 So.2d 800 (Fla. 1988)] and Rogers[v. State, 511 So.2d 526 (Fla. 1987)] show that heightened premeditation does not apply when a perpetrator intends to commit an armed robbery of a store but ends up killing the store clerk in the process. Nor does it apply when a killing occurs during a fit of rage because "rage is inconsistent with the premeditated intent to kill someone," unless there is other evidence to prove heightened premeditation beyond a reasonable doubt. Mitchell v. State, 527 So.2d 179 (Fla.), cert. denied, 109 S.Ct. 404 (1988).

15 F.L.W. S354.[4] Here the facts showed that Appellant went merely to rob Sharma, but ended up killing him in the process, and/or that he stabbed Sharma in a sudden frenzy. The principles this Court reiterated in Porter bar application of the cold, calculated and premeditated aggravating factor to Appellant's case.

> B. The trial court erred in instructing the jury on, and finding the existence of, the aggravating circumstance that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

On page 55 of its brief Appellee says, "It is undisputed that Appellant ... deliberately lost his blood stained shirt." Besides having no relevance, this comment is not supported by the record. According to Detective Clinton Vaughn, Appellant said he tore a piece from his T-shirt and dropped it after the knife brushed against his shirt. (R375); Appellant did not deliberately lose the shirt. According to Detective Gary Fairbanks, Appellant sid that he took off his shirt almost immediately and stuck it in his back pocket or belt and lost it on his way to Moon Lake (R432); there was no indication that Appellant "deliberately" lost the shirt.

Appellee says at pages 54-55 of its brief that Appellant took a knife to the robbery scene to "use it should it become necessary to quiet someone who might later 'squeal' on him." Appellee's argument suggests that the killing of Sharma was not

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[4] This Court upheld the finding of cold, calculated, and premeditated in Porter, concluding that the homicide was not committed in a sudden fit of rage.

pre-planned, but was a spontaneous response to Sharma's crying out. Appellee's argument thus is inconsistent with its argument in support of cold, calculated, and premeditated. Under the facts and circumstances of this case, Sharma's homicide was not both cold, calculated, and premeditated and committed for the purpose of avoiding or preventing a lawful arrest.

D. The trial court failed to give proper consideration to all evidence Appellant offered in mitigation.

Again, the record fails to support Appellee's statement that "Appellant regaled the court with a detailed summary of the evidence offered in mitigation" at the sentencing hearing. (Brief of Appellee, p. 56) As Appellant noted in his reply to Appellant's Statement of the Case and Facts, the defense argument at sentencing focused on matters other than the mitigating evidence that had been presented.

In Campbell v. State, 15 F.L.W. S342 (Fla. June 14, 1990) this Court recently sought to clarify the troublesome area of how the sentencing court should address mitigating circumstances. The Court set forth these guidelines:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The court must find as a mitigating circumstance each proposed factor that has been reason-

> ably established by the evidence and is mitigating in nature: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla. Std. Jury Instr. (Crim) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). Hopefully, use of these guidelines will promote the uniform application of mitigating circumstances in reaching the individualized decision required by law. [Footnotes omitted.]

15 F.L.W. at S344. The court below did not fulfill even the first part of his duty under the above-quoted guidelines, to expressly evaluate each proposed mitigating circumstance to determine whether it is supported by the record and whether (for nonstatutory factors) it is truly of a mitigating nature. Rather, after finding Appellant's "youthful age of 20" as a (statutory) mitigating circumstance, the court summarily disposed of all other potential mitigation with the single sentence, "No other statutory or nonstatutory mitigating circumstances apply" (R996), even though, as discussed at pages 89-90 of Appellant's initial brief, there were

additional substantial mitigating factors that could have been and should have been specifically considered by the court.

CONCLUSION

Appellant, Samuel Jason Derrick, respectfully renews his prayer for the relief requested in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Attorney General's Office, 2002 N. Lois Avenue, Suite 700, Tampa, FL 33607, on this 13th day of July, 1990.

Respectfully submitted,

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