IN THE SUPREME COURT
OF FLORIDA

APPEAL DOCKET NO. 73,300

JOEY B. THOMPSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Appeal from the Circuit Court
Duval County, Florida

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, Joey Burton Thompson, will be referred to in this brief as "appellant" or "Mr. Thompson." Appellee, the State of Florida will be referred to as "appellee," "the State," or "the prosecution." References to the pleadings contained in this Record on Appeal will be designated as "R," followed by the appropriate page number(s), set forth in brackets (Example: [R.1]). References to the transcripts of pre-trial, trial, sentencing and post-trial proceedings in this case will be referred to as "Tr.," followed by the appropriate page number(s), set forth in brackets (Example: [Tr.1]).

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I.

THE FACTS OF THE CASE DO NOT WARRANT THE IMPOSITION OF THE DEATH PENALTY.

Appellee attempts to compare the facts of the instant case, as alleged by the State and found in the trial court's Order imposing the death penalty, with three cases in which this Court upheld the imposition of the extreme sentence of death. Even assuming the facts as contained in the trial court's Order to be true, however, those facts do not warrant the death penalty and are not analogous to any case in which this Court has upheld a sentence of death. Such sanction is reserved only for the most heinous and unmitigated crimes. In each of the three cases appellee urges for this Court's consideration, the appellee lists the facts in one sentence, but neglects to detail the extreme aggravating factors in each case which distinguish the facts and foreclose them from guiding this Court's judgment in the instant case.

The first case cited by the appellee is Way v. State, 496 So.2d 126 (Fla. 1986), the facts of which the appellee describes as "the defendant struck his daughter on the head with a blunt instrument and set her on fire." (Appellee's Brief, p.8). The facts of the case, as set forth in this Court's opinion, were much more egregious. The actions of the defendant in killing both his wife and his young daughter were found to support the cold, calculated and premeditated aggravating circumstance:

> The record before us contains an abundance of competent evidence to support a finding of this aggravating circumstance. Here,

> appellant called the victim into the garage and struck her twice in the head with a blunt instrument. He poured gasoline over her and doused the rest of the garage, setting the area ablaze. Appellant then returned to the house to smoke a cigarette and, after being alerted to the fire by a younger daughter, he impeded subsequent rescue attempts by denying knowledge or possession of a key to a locked door. These acts warranted characterization by the trial court as 'the highest degree of calculation and premeditation.'

Id. at 129.

Additionally, this Court cited the extreme pain the defendant intentionally inflicted and found:

> The medical examiner's report clearly shows that the victim was still alive at the time of the fire. she was observed by eyewitnesses to be on fire in the garage and struggling to move. Certain witnesses heard screams coming from the garage. It was not unreasonable for the trial court, based on all of the circumstances, to infer that the victim suffered immense mental agony from the time she was first struck until her death during the ensuing fire.

(emphasis added). Id. at 128.

In Way, at least one of the two victims was conscious and obviously in agony prior to death. The facts of the Way case are thus not comparable to those in the instant case, since the trial court in the instant case found that "because the defendant did not want her to feel any pain he stabbed her once in the back." [R.296] Nor does the instant case, assuming the facts as alleged by the State, have the kind of extreme indifference to the suffering of others presented in the Way case, where the defendant pretended not to know the location of the key to a garage door while the victims burned to their deaths inside. The

instant case thus does not contain the unmitigated viciousness presented in Way. Appellee's argument urging similarity of the two cases should be rejected by this Court.

The second case urged by the appellee to demonstrate the appropriateness of the death sentence in this case is Middleton v. State, 426 So.2d 548 (Fla. 1983). According to appellee, the facts of that case are: "the defendant shot the woman he lived with as she awoke." [Appellee's Brief, p.8] The facts of Middleton, however, again are significantly more egregious than the appellee's misleading synopsis would suggest. In fact, the Middleton case presented facts which involved both a higher degree of intentional emotional torture to the victim, as well as significant aggravating factors not found in the instant case. Further, the Middleton case was a felony-murder case, not a premeditation case, making the cases less amenable to the comparison suggested by the appellee.

This Court found four aggravating circumstances in Middleton, namely that "appellant had previously been convicted of a violent felony, was on parole from a prison sentence, had a pecuniary motive, and murdered the victim in a cold, calculated, and premeditated manner." Id. at 553. This Court also found no mitigating circumstances. Id. Middleton cannot be used to approve the imposition of death in this case, because the trial court below found five mitigating circumstances and only one aggravating circumstance. Thus, the weight of all evidence here clearly requires the imposition of a life sentence.

The final case cited by appellee as containing analogous facts prompting imposition of death in this case is Spinkellink v. State, 313 So.2d 666 (Fla. 1975), which appellee describes as a case wherein a "sentence of death was upheld where the defendant shot his travelling companion." [Appellee's Brief, p.8] The case involved significant aggravating factors which were not presented in the instant case, therefore foreclosing the cases from comparison. In addition, this Court has refined the weighing or balancing process since its decision in Spinkellink.

In Spinkellink, this Court found the aggravating factors, and the lack of mitigating factors, dispositive as to penalty:

> As more fully set out above the record shows this crime to be premeditated, especially cruel, atrocious, and heinous and in connection with robbery of the victim to secure return of money claimed by Appellant. The aggravating circumstances justify imposition of the death sentence. Both Appellant and his victim were career criminals and Appellant showed no mitigating factors to require a more lenient sentence.

Id. at 671. Thus, in Spinkellink, the defendant established no mitigating circumstances. Moreover, there existed a number of aggravating circumstances. Such is not the case here. At 29 years of age, appellant had never been arrested before in his life. He was a family man, who supported his wife and children. Yet the trial court found that one aggravating circumstance outweighed five mitigating circumstances. This finding was clearly erroneous and must be reversed by this Court.

II.

THE TRIAL COURT ERRED AT THE PENALTY PHASE WHEN IT DETERMINED THAT THE ONE AGGRAVATING CIRCUMSTANCE FOUND OUTWEIGHED THE FIVE MITIGATING CIRCUMSTANCES FOUND IN THIS CASE.

Appellee argues that the trial court's sentence of death should be upheld even though the lower court found only one statutory aggravating circumstance and five mitigating Circumstances. A death sentence in this case is inappropriate, however, for three fundamental reasons. First, the single statutory aggravating circumstance found, namely that the killing was committed in a "cold, calculated, and premeditated" manner, is not satisfied in this case. Second, appellee argues that the trial court appropriately found and applied a number of nonstatutory aggravating circumstances. Finally, contrary to appellee's assertions, imposition of the death penalty was disproportionate in this case as measured by the requisite weighing of aggravating and mitigating circumstances.

A. The Trial Court Erred in Finding that the Requirements for Imposition of the "Cold, Calculated, and Premeditated" Aggravating Circumstance Had Been Satisfied.

In the present case, the State alleged that appellant awakened at 8:00 a.m. and at some point within the next one-half hour decided, in an act of desperation, to kill the victim and himself. [Tr.1060] At 8:30 a.m., according to the trial court, he killed the victim. [Tr.1060] In its brief, however, appellee presents a a picture of a much greater degree of premeditation than is present in this case. For instance, appellee maintains:

"On the morning of February 10th, appellant awoke at 8:00 a.m., having decided to kill his girlfriend." [Appellee's Brief, p.10] (emphasis added). Similarly, the State suggests that "[t]he record in this case shows that Appellant contemplated murdering Miss Place for at least 1/2 hour on the morning of the killing, and possibly during the preceding night as well." [Appellee's Brief, p.11] (emphasis added). Finally, appellee boldly asserts that appellant "had the whole night to premeditate the murder of his sleeping victim." [Appellee's Brief, p.13]

No evidence was ever presented, however, that appellant contemplated killing Ms. Place for even a full thirty minutes prior to the act. Likewise, no evidence emerged at trial or at the penalty phase to even suggest that appellant engaged in a pre-arranged plan -- which appellee now contends included prolonged preparations for committing the act and predetermined attempts to avoid its legal consequences. To the contrary, all relevant evidence indicates that his mental state was highly emotional, and not contemplative or reflective. [Tr.266, Tr.1060] Appellee's suggestion that appellant's act was premeditated, to the extent of planning the act prior to awakening at 8:00 a.m., is wholly unsupported by the record. To the contrary, at best the record establishes that appellant woke up at 8:00 a.m. and that the crime occurred at 8:30 a.m. The greatest possible duration of possible premeditation, then, was quite minimal.

In Rutherford v. State, 545 So.2d 853 (Fla. 1989), this Court discussed the type of facts which will support a finding of this aggravating circumstance:

> Rutherford also argues that this case does not contain the heightened premeditation necessary to support a finding that the killing was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. We disagree. Rutherford apparently planned for weeks in advance for [the victim] to write him a large check and then kill her in a manner that would look like an accidental drowning.

Id. at 856 (emphasis added). [1] Under the Rutherford analysis, the keystone for assessing whether the "cold, calculated, and premeditated" aggravating circumstance should be applied is the duration of the opportunity for premeditation, as suggested by

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[1] The Rutherford court further held:

> Rutherford relies on language that originated in Herring v. State, 446 So.2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989 (1984), to the effect that this aggravating circumstance is limited to "execution or contract murders or witness-elimination murders." As we said in Herring, however, "this description is not intended to be all inclusive." Id. While we receded from Herring's outer limits in Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 108 S.Ct. 733 (1988), we reiterate that the finding of cold, calculated, and premeditated is not limited to execution-style murders. It is appropriate, evidence of calculation, which we defined as consisting "of a careful plan or prearranged design." Id. at 533.

545 So.2d at 856 (emphasis added).

the requirement of "a careful plan or prearranged design." Here, the State made no such showing of premeditation. Thus, this aggravating circumstance was erroneously imposed and this Court should remand to the trial court with instructions to impose a sentence of life imprisonment.

B. The Trial Court Erred in Finding Several Nonstatutory Aggravating Circumstances.

Contrary to appellee's assertions, imposition of any aggravating circumstances not explicitly delineated in §921.141(5), Fla. Stat. (1987), is impermissible. Appellee cites Barclay v. Florida, 463 U.S. 939 (1983), for the proposition that "there is no constitutional defect in a sentence based on both statutory and nonstatutory aggravating circumstances." [Appellee's Brief, p.15] This interpretation of Barclay is simply incorrect. In distinct contrast to the State's interpretation, the Barclay Court held that the sentencing scheme:

> requires the sentencers to find at least one valid statutory circumstance before the death penalty may even be considered.... [and] does not permit nonstatutory aggravating factors to enter into this process.

Id. at 954 (emphasis added).

Case authority reflecting this elementary principle is exhaustive. See Miller v. State, 373 So.2d 882, 885 (Fla. 1979) ("[t]he aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose."); Trawick

V. State, 473 So.2d 1235, 1240 (Fla. 1985) ("In effect the trial judge went beyond the proper use of statutory aggravating circumstances in his sentencing findings and the sentence of death cannot stand."); Purdy V. State, 343 So.2d 4 (Fla. 1977) ("The specified statutory circumstances are exclusive; no others may be used for that purpose."). This Court's opinion in Barclay V. State, 470 So.2d 691 (Fla. 1985), also held that by improperly using a defendant's record as a nonstatutory aggravating factor, "the court failed to follow the correct weighing process." Id. at 695, citing Mikenas v. State, 367 So.2d 606 (Fla. 1978).

Appellee maintains that the trial court's findings that Thompson failed to commit suicide and that he subsequently blamed his wife "are legitimate circumstances of the crime which the trial court was bound to consider." [Appellee's Brief, p.16] This assertion is completely meritless and should be rejected by this Court. First, consideration of facts occurring after the commission of a homicide is impermissible. In Blair V. State, 406 So.2d 1103 (Fla. 1981), this Court held:

> ...[o]nce the victim dies, the crime of murder was completed and [a subsequent act] many hours later was not primarily the kind of misconduct contemplated by the legislature in providing for the consideration of aggravating circumstances.

Id. at 1109, citing Halliwell V. State, 323 So.2d 557 (Fla. 1975).

As this Court in Rogers, supra, held, the essence of the "cold, calculated, and premeditated" aggravating circumstance is heightened premeditation, as evidenced by a prearranged design or

careful plan. In addition to finding that appellant "blamed his wife" and failed to commit suicide, the trial court also found that he remained in the house with the body for eighteen hours, acted "cowardly," and believed in the death penalty. Simply stated, none of these findings relates even remotely to the prearranged design necessary for imposition of the aggravating circumstance. In Trawick v. State, 513 So.2d 1257 (Fla. 1987), this Court rejected the application of unauthorized aggravating circumstances, holding:

> Acts committed independently from the capital felony for which the offender is being sentenced are not relevant to [the] question of whether the capital felony itself [satisfied a statutory aggravating circumstance.]

Id. at 1240. Employing this analysis, it is clear that the trial court erred in applying a number of nonstatutory aggravating circumstances under the guise of the "cold, calculated and premeditated" aggravating circumstance.

C. **Based Upon a Weighing of Aggravating and Mitigating Circumstances as Required by Section 912.141(3), Florida Statutes (1987), Imposition of the Death Penalty is Disproportionate in this Case.**

In its brief, appellee asserts that "[o]ne valid aggravating circumstance may be sufficient to support a death sentence in the absence of at least one overriding mitigating circumstance." [Appellee's Brief, p.18] Yet, the trial court found that at least five mitigating factors existed, one statutory and the remainder nonstatutory. This case involves a finding by the

lower court of only one statutory aggravating circumstance, which itself is subject to invalidation. See supra. under this Court's longstanding approach to the weighing of aggravating and mitigating circumstances, death would be highly disproportionate in this case.

In Smalley v. State, ___ So.2d ___, 14 F.L.W. 342 (Fla., July 14, 1989), this Court explained that the requisite proportionality evaluation "is a process whereby this Court compares the circumstance present in the case before it to similar cases. The aim is to ensure that capital punishment is inflicted only in 'the most aggravated, the most indefensible of crimes.'" Id. at 343, quoting State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). In Songer v. State, 544 So.2d 1010 (Fla. 1989), this Court held in circumstances quite similar to the present case:

> Our customary process of finding similar cases for comparison is not necessary here because of the almost total lack of aggravation and the presence of significant mitigation. We have in the past affirmed death sentences that were supported by only one aggravating factor, but those cases involved either nothing or very little in mitigation.

Id. at 1011 (emphasis added) (citation omitted). In Rhodes v. Florida, ___ So.2d ___, 14 F.L.W. 343 (Fla., July 14, 1989), this Court overturned a death sentence in the context of a single statutory aggravating factor and a single nonstatutory mitigating factor. Id. at 346.

Like the combination of factors faced by the court in the present case, in Caruthers v. State, 465 So.2d 496 (Fla. 1985), this Court found that balancing one statutory aggravating circumstance against one statutory, and several nonstatutory, mitigating circumstances warranted a life sentence. Id. at 499. Clearly, under the facts of this case a death sentence is impermissible. Banda v. State, 536 So.2d 221, 225 (Fla. 1988). Appellee's suggestion that non-statutory mitigating circumstances should not be considered as significant as statutory mitigating circumstances is patently erroneous. Consequently, this Court should appropriately remand to the trial court with instructions to reduce appellant's sentence to life imprisonment.

III.

THE TRIAL COURT ERRED BY MAKING AND ALLOWING THE PROSECUTION TO MAKE STATEMENTS WHICH MISCHARACTERIZED AND DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY IN ITS SENTENCING RECOMMENDATION, IN VIOLATION OF CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

The appellee argues that the Caldwell issue was not preserved, and thus that defense counsel's alleged failure to object to the judge's and the prosecutor's comments denigrating the jury's perceptions of its sentencing role in imposition of the death penalty bars this court from consideration of the issue.

However, defense counsel did indeed attempt a curative instruction which would have impressed upon the jury its proper role as presumptive sentencer under this Court's holding in Tedder v. State, 322 So.2d 908 (Fla. 1975). Referring to deceptive comments made throughout the trial, appellant's counsel stated:

> MR. CHIPPERFIELD: Yes, sir. Your Honor, my point in this one is that in this case during voir dire and also in the defendant's testimony there was some mention of delays in capital cases and that if a person gets the death penalty he never is really executed because appeals go on. I don't think the jury should be allowed to consider that. I think the jury should be told that it will be carried out and if a life sentence is imposed it will be carried out.

[Tr.1069] (emphasis added). The trial court denied this curative instruction, which would have properly impressed upon the jury the presumptive finality of its sentence. The appellant's

trial counsel thus requested a curative instruction which would have properly instructed the jury of its role under the law.

The Caldwell case requires that jury speculation regarding the appellate process be corrected:

> Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

472 U.S. at 333 (emphasis added). The issue, therefore, was properly preserved for this Court. Indeed, the trial court's reason for rejection of the instruction reflected the trial court's own uncertainty and speculative diminution of its own sentencing role:

> Well, Mr. Chipperfield, I am not going to give this because what we have done here this week will be reviewed by more courts than I care to list at this time, and I am never sure any more of what any sentences mean at this point without getting into a discussion on that topic...

[Tr.1070] (emphasis added). Thus, the trial court was also confused as to the finality of its sentence under Florida law.

Further, this Court's holdings requiring objection preserving the issue misapply Caldwell, since the Caldwell holding implicates fundamental constitutional rights in the correct application of the death penalty. Courts in other states have recognized the fundamental nature of this error, and have ruled that the error mandates reversal even if no objection is made. In State v. White, 211 S.E. 2d 445 (N.C. 1975), for

example, the North Carolina Supreme Court held that it was the duty of the trial judge to correct such error:

> When such an argument is made it is counsel's duty "to make timely objection so that the judge may correct the transgression by instructing the jury." However, in a death case intimations by counsel for the State that a jury's verdict is not necessarily a final disposition of the case are so prejudicial that counsel's failure to make timely objection will not waive defendant's right to object. It is the duty of the trial judge to correct such an abuse at some time in the trial "and, if the impropriety be gross, it is the duty of the judge to interfere at once."

Id. at 450. (emphasis added) (citations omitted). Thus, in North Carolina, even prior to Caldwell, the improper derogation of the jury's role is an error to be charged to the trial court, and does not require objection by counsel to be preserved for review.

This rule is followed in another sister state, Georgia, as the Georgia Supreme Court found in Hawes v. State, 240 S.E. 2d 833 (Ga. 1977). That court found, regarding statements by the prosecution minimizing the finality of the jury verdict:

> We agree with the appellant that under Prevatte v. State, 233 Ga. 929, 214 S.E. 2d 365 (1975), these remarks by the district attorney to the jury, even though unobjected to, require that the death penalty be set aside.

Id. at 839. (emphasis added). Thus, at least two sister states reverse death penalty cases on the basis of improper comments, despite the lack of objection.

Finally, appellee argues that the statements made by the prosecution and trial court in the instant case are correct statements of the law. This argument is specious, for there can be no contention that the statements, including such emotional appeals as "Don't feel like it is on you, like the burden's on you," and "you should not feel bad for being here or having to vote" are not intentional attempts to distance the jury from the presumptive impact of its decision under Tedder.

Further, the trial court never corrected statements heard by the venire from a prospective juror, who stated:

> ...it leads me to the conclusion that the judges who try these people meaning the jurors who try these people and then the death penalty is imposed and they are sentenced to let's say months later to be carried out and it is not...
>
> . . .
>
> what I am trying to confirm is that this situation has already occurred and now that we have got the death penalty imposed on you, okay. Why hasn't it been carried out?

[Tr.455-56]. These statements reemphasized the belief that if the death penalty were imposed by the jury, it would not be carried out.

These statements clearly are not the law under Tedder, where the jury's sentence is given presumptive weight. Therefore, the jury's verdict and sentence was tainted and must be reversed.

IV.

THE PENALTY PHASE JURY INSTRUCTIONS FAILED TO CHANNEL THE JURY'S DISCRETION IN CONSIDERING WHETHER THE CRIME WAS "COLD, CALCULATED AND PREMEDITATED."

In his initial brief, appellant argued that, under the United States Supreme Court's decision in Maynard v. Cartwright, 486 U.S. ___, 100 L.Ed.2d 372 (1988), the jury instructions given regarding application of the "cold, calculated and premeditated" aggravating circumstance were unconstitutionally vague. In response, appellee asserts that appellant is barred from making this argument because the first part of the instruction is taken directly from the Florida Standard Jury Instructions and the second part was requested by appellant.

Appellee cites no case authority supporting a concept of waiver on either ground. Certainly, appellant is in no way barred from bringing a Maynard claim against Florida's "cold, calculating and premeditated" aggravating circumstance. In Maynard, as stated above, the United states Supreme Court held that Oklahoma's "especially heinous, atrocious or cruel" aggravating factor was unconstitutionally vague under the Eighth Amendment. First, the Court rejected the notion that inclusion of the word "especially" effectively channelled the jury's discretion. Id. at 382. According to the Court:

> To say that something is "especially heinous" merely suggests that the 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."

Id., citing Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980) (emphasis added). ~~See also~~ Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (~~en banc~~) (invalidating Arizona's "especially heinous, cruel or depraved" aggravating factors on similar grounds).

Like the aggravating factor invalidated by the Maynard court, Florida's "cold, calculated, and premeditated" aggravating factor is impermissibly vague in that ordinary jurors are led to believe that every taking of a human life satisfies this standard. The instructions given by the trial judge, although constituting an attempt to channel the jury's discretion in applying this aggravating circumstance, failed to cure it of its constitutionally impermissible vagueness.

Thompson concedes that this Court has, in the past, upheld various trial courts' imposition of this aggravating circumstance. The State cites several cases in which this Court has done so. Yet, each of these cases was decided prior to this Court's opinion in Rogers v. State, 522 So.2d 526 (Fla. 1987), in which this Court reformulated the standard for proper imposition of this aggravating circumstance. The Rogers court required "heightened premeditation," "which must bear the indicia of

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[2] Just prior to Rogers, in Nibert v. State, 508 So.2d 1 (Fla. 1987), this Court held that this circumstance could only be imposed "when the facts show a particularly lengthy, methodic, or involved serious of atrocious events or a substantial period of reflection and thought by the perpetrator." Id. at 4, quoting Preston v. State, 444 So.2d 939, 946-47 (Fla. 1984).

'calculation.'" Id. at 533. Further, this "calculation" must "consist[] of a careful plan or prearranged designed." Id. In Amoros v. State, 531 So.2d 1256 (Fla. 1988), this Court interpreted Rogers to require "heightened premeditation, calculation, or planning...." Id. at 1261. The degree to which the standard was raised in Rogers is demonstrated in the subsequent case of Jackson v. State, 530 So.2d 269 (Fla. 1988). In Jackson, this Court acknowledged that the victim:

> was bound, gagged and then choked with a belt until he was unconscious. After [the victim] regained consciousness, [defendant] beat him in the face with a cast on his forearm and then straddled his body and repeatedly stabbed him in the chest.

Id. at 270. The Jackson court concluded, however, that "the evidence ~~does~~ ~~not~~ establish the heightened degree of prior calculation and planning required by our Rogers decision." Id. (emphasis added). The State fails to cite a single post-Rogers case in which imposition of the "cold, calculated, and premeditated" circumstance was upheld by this Court under its new heightened standard. The trial court erred by imposing this aggravating circumstance under the rationale of Maynard. The court below failed to bridle jury discretion by applying the post-Rogers limitations upon the "cold, calculated, and premeditated" aggravating circumstance. After Rogers, only a "careful plan" or "prearranged design" will permit a court to apply this factor in aggravation. The trial court failed to comply with Maynard's dictate that a jury empowered to impose a

death sentence must be carefully instructed as to the limited circumstances in which a given aggravating factor is appropriately applied.

V.

THE TRIAL COURT ERRED WHEN IT EXCLUDED EXCULPATORY POLYGRAPH RESULTS FROM CONSIDERATION DURING THE SENTENCING PHASE OF THIS CASE.

Appellee, like the trial court in the instant case, errs by focusing its arguments on a question of admissibility of the polygraph results. The proper focus, however, is not on admissibility, since there is no question that the polygraph results do not go into evidence in any Florida proceeding where the strict rules of evidence regarding reliability of scientific evidence are applied. But far from such a strict evidentiary proceeding, a capital sentencing proceeding is a more a relaxed evidentiary hearing in which many forms of evidence are presented which would not be admissible in a guilt-determination proceeding. For example, evidence of a Boy Scout award received at age 10 or of a talent for painting would not be deemed "admissible" at the trial level, but are examples of the type of "evidence" heard in mitigation of a death sentence. Such evidence bears little semblance to traditionally accepted norms for relevance or probative value of evidence. Thus, the trial court's and the appellee's arguments on admissibility of the evidence are misplaced.

The polygraph evidence proffered in the instant case is not completely devoid of probative character, and is indeed admissible upon stipulation by the parties. Further, had the results of the test been unfavorable to the appellant it is likely the State would have sought its admission.

The jury should have been able to consider the polygraph results and give the information whatever weight it merited. The failure to allow the jury to hear the evidence was error that unconstitutionally foreclosed consideration of mitigating evidence in violation of Lockett v. Ohio, 438 U.S. 586 (1978).

VI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER THE VICTIM'S FATHER IDENTIFIED THE VICTIM AS HIS DAUGHTER TO THE JURY.

The trial court found that allowing the jury to hear the father's testimony identifying his daughter and revealing the familial relationship was error:

> THE COURT: All right. The Court finds in this case that error has occurred and Mr. Tienter after being instructed and was informed not to reveal his relationship with the deceased did, in fact, testify that he was the father after being instructed and advised not to do so.

[Tr.572] The trial court, however, erred by failing to grant the motion for mistrial based upon this prejudicial identification. The testimony by the father identifying his daughter from autopsy photographs is improper victim impact testimony designed to elicit emotional appeal and victim sympathy from the jury. The testimony revealing the relationship was a back-door attempt at creating victim sympathy for the otherwise unsympathetic victim, who was a topless dancer. Thus, the testimony impermissibly tainted the jury by revealing close emotional ties, and was an appropriate foundation for mistrial.

Such improper victim impact testimony has been held by the United States Supreme Court as grounds for reversal of a death sentence in Booth v. Maryland, 482 U.S. 496 (1987). Accord, South Carolina v. Gathers, ___ U.S. ___, 57 U.S.L.W. 4629 (1989). In Booth, the Court held that the introduction of a victim impact statement during the sentencing phase of a capital murder trial

violated the Eighth Amendment's prohibition against cruel and unusual punishment. 482 U.S. at 509. The Court also invalidated the Maryland statutory capital sentencing procedure which required the submission of a victim impact statement as part of the capital sentencing proceeding. Id. In Booth, the State argued:

> The State claims that this evidence should be considered a 'circumstance' of the crime because it reveals the full extent of the harm caused by Booth's actions. In the State's view, there is a direct foreseeable nexus between the murders and the harm to the family, and thus it is not 'arbitrary' for the jury to consider these consequences in deciding whether to impose the death penalty. Although 'victim impact' is not an aggravating factor under Maryland law, the State claims that by knowing the extent of the impact upon and the severity of the loss to the family, the jury was better able to assess the 'gravity or aggravating quality' of the offense.

Id. at 503-504 (emphasis added). The court found this purpose to be impermissible, and therefore held the sentencing procedure invalid.

Similarly, in the instant case, the face-to-face confrontation of the jury with the father, who was viewing an autopsy photograph of his daughter, tainted the guilt and sentencing procedure. This Court must reverse the conviction and sentence improperly obtained in the instant case.

VII.

THE TRIAL COURT ERRED IN PERMITTING JANICE THOMPSON TO TESTIFY AT TRIAL AFTER SHE HAD DELIBERATELY CONCEALED HERSELF FROM DEFENSE COUNSEL PRIOR TO TRIAL AT THE STATE'S ACQUIESCENCE.

Appellee argues that the appellant and the State had equal access to Janice Thompson, and an equivalent ability to determine her testimony. However, this assertion is belied by the facts of the conduct of the State's agents. The prosecutors warned Janice Thompson that for the State's purposes it could "bring you in whether you want to come or not." [Tr.925], while in describing the subpoena power of the trial court upon the appellant's notice of taking deposition, the State responded to Mrs. Thompson's questions regarding whether she needed to respond to the subpoena by stating, "That's up to you." [Tr.924] Thus, the appellant's ability to conduct his defense was actively diminished and substantially prejudiced by the State's foreclosure of access to this vital witness.

The State continually assured the defense that it would inform appellant of Mrs. Thompson's address "as soon as [it] knows." [Tr.923] Yet the State waited until the close of appellant's testimony, and thus the end of his presentation of his defense, before revealing the location of Mrs. Thompson. Given such intentional concealment and delayed revelation of her presence in Jacksonville for trial, after the defense was presented, the State cannot claim no prejudice to the preparation

of the defense occurred, particularly where Mrs. Thompson's testimony directly rebutted the defense theory of the case.

Appellee argues that the Richardson violation was harmless "since the trial court offered the defense an additional hour to further depose her." [T.937] [Appellee's Brief, p.36] In response to this contention, appellant would respectfully submit that no matter how many hours the defense was given to depose Janice Thompson, it could not alter the months of preparation or the countless defense decisions made up to that point, which is the true focus of the Richardson inquiry. Once the defense was presented, the access to Mrs. Thompson could not aid the preparation of that defense. Therefore, appellee's arguments are groundless.

The deliberate withholding of Janice Thompson's testimony until after the defense was presented was prejudicial to the presentation of that defense in violation of Richardson. The erroneous admission of this testimony requires reversal of the conviction and sentence.

VIII.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE HIGHLY PREJUDICIAL PHOTOGRAPHS OF THE DECEASED VICTIM WHICH INFLAMED THE JURY AND PREVENTED A FAIR CONSIDERATION OF THE EVIDENCE.

Appellee contends that the photographs of the victim were relevant to issues in the trial. However, each area of relevancy asserted by the appellee is adequately addressed by other, more probative, and non-inflammatory evidence. For example, appellee asserts that the photographs were relevant to show time of death by the amount of lividity present in one of the photographs. [Appellee's Brief, p.39] Time of death, however, was amply evidenced by expert testimony from the medical examiner, and was even testified to by the appellant, and thus was not in contention. Similarly, the defense offered to stipulate as to the cause of death, obviating that asserted relevancy for the photographs. [R.189]

The photographs were thus cumulative evidence, at best, and inadmissible under §90.403, Fla. Stat. (1987), which prohibits introduction of such cumulative evidence where such non-probative evidence has its probative value substantially outweighed by the "danger of unfair prejudice." §90.403, Fla. Stat. (1987).

In the recent case of Gomaco Corporation v. Michael J. Faith, ___ So.2d ___, 14 F.L.W. 1853 (Fla. 2d DCA, August 11, 1989), the court held:

> Photographs that are gruesome, offensive and/or inflammatory must be relevant to an issue required to be proved in the case. Welty v. State, 402 So.2d 1159 (Fla. 1981).

> While the photographs may have been tangentially relevant to appellee's case, their relevance is overwhelmingly outweighed by their gruesome and inflammatory nature. 590.403, Fla. Stat. (1987). The photographs do not in themselves independently establish any material part of appellee's case nor were they necessary to corroborate some disputed factual issue. Because we cannot determine that the highly inflammatory nature of the photographs did not permeate the entire case to the prejudice of appellant, we must reverse and remand for a new trial on all issues.

Id. (emphasis added).

Appellee argues that the photographs are necessary to show the position of the victim, to corroborate the State's theory of the identity of the killer. Yet there is no showing that the position the body when found related in any way to the victim's position when killed, and further, the State could have presented expert testimony which would have been less emotionally volatile yet more informative.

The Gomaco case arose in the context of a personal injury suit. The instant case is a capital murder case, and thus implicates far more grave interests of fundamental fairness in the integrity of capital proceedings. Therefore, the photographs, which were not relevant to any issue in contention, should have been excluded due to their profound prejudice upon the appellant. Accordingly, the conviction and sentence must be reversed.

IX.

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR DISCOVERY OF PROSECUTORIAL INVESTIGATIONS OF PROSPECTIVE JURORS OR FUNDS TO CONDUCT SIMILAR INVESTIGATION.

Disclosure by the State of its knowledge of the criminal records of prospective jurors to a defendant is constitutionally required under the Sixth and Fourteenth Amendment's guarantee to a trial by an impartial jury. Although Florida courts have held summarily that a defendant has no absolute right to such information, see Monahan v. State, 294 So.2d 401 (Fla. 1st DCA 1974); Robertson v. State, 262 So.2d 692 (Fla. 2d DCA 1972), this Court had not addressed this issue of constitutional magnitude. Other state courts have held that criminal defendants are entitled to the criminal records of prospective jurors on grounds of fundamental fairness. ~~See e.g.~~, State v. Bessenecker, 404 N.W. 2d 134 (Iowa, 1978). The trial court erred in failing to grant Thompson's motion to compel the State to disclose this information.

X.

THE TRIAL COURT ERRED WHEN IT REMOVED A QUALIFIED JUROR FOR CAUSE IN VIOLATION OF THE APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO *AN* IMPARTIAL JURY.

Appellant relies on his argument of this issue as presented in his initial brief.

XI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO RECORD THE PROCEEDINGS OF THE GRAND JURY.

In State v. McArthur, 296 So.2d 97 (Fla. 4th DCA 1974), cert. denied 306 So.2d 123 (Fla. 1975), the court found constitutional consequences in the denial of a motion to record grand jury proceedings when, among other situations, a defendant "has a viable need for grand jury testimony...." Id. at 99. Further, the McArthur court held that "any request for recordation should be given great weight." Id. at 100. The McArthur court, however, found simply that: defendant failed to prove the requisite "viable need"; no constitutional rights were abrogated in the case; no Florida law was contravened; and no request for recordation was made. Id. at 99-100. In contrast, each of these criteria were present in this capital case. The need, of course, was extremely high, indeed of a constitutional magnitude. Most importantly, Thompson specifically requested recordation in his Motion to Record Grand Jury Proceedings. [R.12] Finally, because this is a capital case, a court is obligated to grant such request.

XII.

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO PRECLUDE STATE ATTORNEY VOIR DIRE EXAMINATION OF PROSPECTIVE GRAND JURORS.

The trial court erred in permitting the State to perform a voir dire examination of prospective grand jurors. Neither statutory nor common law authority supports this practice.

XIII.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO ENJOINING GRAND JURY DELIBERATIONS ON THE GROUND THAT THE GRAND JURY WAS IMPROPERLY CONSTITUTED.

The 23-member grand jury employed by Duval County violates both §905.01(1), Fla. Stat. (1987), which mandates that a grand jury "shall consist of not fewer than 15 nor more than 18 persons," as well as the federal constitutional right to a fair and impartial jury secured by the sixth and Fourteenth Amendments. By statute, only twelve grand jurors' votes are necessary for indictment. Section 905.01(1) thus reflects the Florida legislature's intent that the percentage of jurors voting for indictment not fall below a certain minimum. Under the legislative scheme, at a minimum twelve of eighteen jurors (or 67%) must vote for indictment. In contrast, an indictment in Duval County can occur with as little as 52% (twelve of twenty-three) of the jurors so voting. The sixth Amendment Clause forbids such a small percentage to suffice. See Apodaca v. Oregon, 406 U.S. 494 (1972) (United States Supreme Court holding that in a twelve person jury, a minimum of 10, or 83% must vote for conviction to be upheld under Sixth Amendment Challenge). Under statutory and constitutional standards, then, the Duval County scheme is impermissible, and indictments based thereon are void.

CONCLUSION

Appellee has failed to counter appellant's initial arguments asserting thirteen points of error by the trial court. Therefore, the conviction and sentence must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Bradley R. Bischoff, Esq., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite #29, Tallahassee, Florida 32301, by mail, this 11th day of September, 1989.

ATTORNEY