IN THE SUPREME COURT OF FLORIDA

WILLIAM D. CHRISTOPHER, :

Appellant, :

vs. : Case No. 74,451

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The state's answer brief will be referred to herein by use of the symbol "S". Other references are as denoted in appellant's initial brief.

This reply brief will address Issues I, IV, and V. Appellant will rely on his initial brief with respect to Issues II, III and VI.

ARGUMENT

ISSUE I

> THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE A STATEMENT ALLEGEDLY MADE BY APPELLANT TO INVESTIGATOR YOUNG AT THE MEMPHIS AIRPORT; AS THAT STATEMENT WAS A DIRECT CONSEQUENCE OF APPELLANT'S EARLIER CONFESSION WHICH WAS OBTAINED BY IMPROPER AND COERCIVE POLICE TACTICS, AND IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT.

The state's reliance on Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985) is misplaced. As the Eleventh Circuit expressly recognized in Martin:

> In footnote 3 of the majority opinion in [Oregon v.] Elstad, the Supreme Court described as "inapposite ... the cases the dissent cites concerning suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation." Id. at ____ n.3, 105 S.Ct. at 1296 n.3. Read in conjunction with the rest of the Elstad opinion, the meaning of footnote 3 is clear: where the police "flatly ignore" a suspect's invocation of rights, any confession obtained thereby is likely to be involuntary. Hence, in such cases, the "cat out of the bag" psychological effect may call into question the voluntariness of a subsequent confession.

> Here, on the other hand, Martin never explicitly refused to answer any more questions. See supra note 13. We therefore cannot say that Martin's request to cut off questioning was "flatly ignored," and we already have held that Martin's July 4 confession was voluntary. In our view, the "technical" Miranda violation committed by the police in the instant case was no more likely to render a subsequent confession involuntary than was the "technical" failure to administer the Miranda warnings in Elstad.

Martin v. Wainwright, 770 F.2d at 929, n.14 (emphasis in opinion).

This statement in Martin is consistent with State v. Madruga-Jiminez, 485 So.2d 462, 465 (Fla. 3d DCA 1986), which states:

> It is important to note, however, that Elstad involved only a technical violation of Miranda and the court was careful to so limit the decision by stating that "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that the suspect has made an unwarned admission does not warrant a presumption of compulsion." Elstad, 105 S.Ct. at 1296. We can only conclude from a reading of Elstad that when the police use deliberately coercive and improper tactics a presumption of compulsion is warranted. In that case, any subsequent statements must be suppressed unless the taint of the improper activity is sufficiently attenuated.

(emphasis in opinion)

In the present case, appellant was interrogated by Collier County Sheriff's deputies at the Memphis, Tennessee police department and jail facility. He initially made an exculpatory statement. When he finished, Officers Mills and Young made it clear that they didn't believe him, and admonished him that he had his daughter and his whole family "drawn into this thing." (T.39-

47) They repeatedly used his daughter Norma as an emotional weapon [see Christopher v. State of Florida, 824 F.2d at 842]:

> MILLS: It don't present any problem to me at all, but ah, it might present some problems to you. So, ah, there is a different way that this thing happened, you know it and I know it, Norma knows it. I don't know how much you care about her.
>
> CHRISTOPHER: What in the hell has she got to do with it. What -- what are you -- are you trying to use her against me or something like that?
>
> YOUNG: No. You used Norma, we haven't.

(T.44-45)

Appellant consistently maintained that he did not kill Ahern and Skillin. (T.40, 46) The interrogation continued as follows:

> YOUNG: Well, that is why we're trying to find out why he was shot.
>
> CHRISTOPHER: My god. No. I didn't shoot him, nor I never shot Bertha.
>
> YOUNG: That's the real corker. I can't understand why you killed this elderly lady, I mean I can understand you might be --
>
> CHRISTOPHER: Well, save --
>
> YOUNG: Now wait a minute. Yea, I accused you, for we signed a warrant against you.
>
> CHRISTOPHER: Then I got nothing else to say. If you're accusing me of murder, then take me down there.
>
> MILLS: You were accused when you came in here. You knew you were accused --
>
> CHRISTOPHER: That's right. That's right.
>
> MILLS: -- you knew what you were accused of, and I told you what the girl was accused of, so don't make out like you don't know what you're accused of.

> CHRISTOPHER: Oh, ah, -- I know what I'm accused of, I know that I'm accused of both murders.
>
> MILLS: I told you awhile ago you were being charged with both murders.
>
> CHRISTOPHER: Okay then. I got nothing else to say.

(T.46-47)

See Christopher v. State of Florida, 824 F.2d at 840-43.

Ignoring appellant's attempts to invoke his right to remain silent, Young and Mills unlawfully continued the interrogation. (T.47-51) In the face of their accusations, he still maintained that Ahern had shot himself and Bertha. (T.49) When Mills said "I asked you earlier if you had any other blood on you other than your hands, and you told me no", appellant replied:

> Well, look, I'm just constantly telling lies, look I ain't got nothing to say at all, pete, why I have, you know, and that's it. I ain't saying nothing else.

(T.51)

Still the interrogation did not cease. See Christopher v. State of Florida, 824 F.2d at 843, n.20, and 845-46. Eventually, the officers' illegal and coercive tactics "paid off", and appellant (with the tape recorder turned off) confessed to both murders. (R.1308-09) Immediately afterwards the tape was turned back on so that appellant could repeat the confession. (R.1310-12, 1324, TT.2-16)

Thus, in contrast to Martin, in the present case it is plainly true that appellant's repeated attempts to invoke his constitutional right to remain silent were flatly ignored while the police

officers subjected him to continued interrogation [see Martin, 720 F.2d at 929, n.14], and that the officers used deliberately coercive and improper tactics to overcome appellant's will to resist, and obtain the initial confession [see Madruga-Jiminez, 485 So.2d at 465]. See also Breedlove v. State, 364 So.2d 495, 497 (Fla. 4th DCA 1978) and the other cases discussed at p. 34-35 of appellant's initial brief. Therefore, the "fruit of the poisonous tree" doctrine and the "cat out of the bag" rule retain their applicability, and preclude the state from using the subsequent statement at the Memphis airport, unless it can show that the taint of the original illegal confession was sufficiently attenuated. See Oregon v. Elstad, 470 U.S. 298 (1985) [discussed at length in appellant's initial brief, p. 31-37]; Martin v. Wainwright, 770 F.2d at 929, n.14; State v. Madruga-Jiminez, 485 So.2d at 465. Here, there were no intervening circumstances sufficient to remove the taint of the primary constitutional violation. After Officers Mills and Young succeeded in obtaining the confession at 10:44 p.m. on September 22, 1977, appellant was returned to his cell in the Memphis jail. Two days later, around 6:30 p.m., the same police officers picked him up at the jail and drove him to the airport. At the time the airport statement was made, appellant was in custody, handcuffed, seated with Young in front of the ticket counter. There had been no intervening court appearance or consultation with an attorney, nor even any repetition of the

Miranda warnings.[1] Appellant's statement to Young - one of the same officers who had conducted the illegal interrogation - was essentially a postscript to the confession he had already given him (a fact which is further illustrated by the misleading manner in which the prosecutor presented it to the jury, see appellant's initial brief, p. 38-39). The introduction of the airport statement was harmful error (see initial brief, p. 39-40), and appellant's convictions must be reversed for a new trial.

ISSUE IV

BECAUSE THE TRIAL COURT SENTENCED APPELLANT TO DEATH WITHOUT PRIOR OR CONTEMPORANEOUS WRITTEN FINDINGS, AND BECAUSE THE SENTENCING PROCEEDING TOOK PLACE A FULL YEAR AFTER THIS COURT'S DECISION IN GROSSMAN V. STATE, 525 So.2d 833 (Fla. 1988) BECAME FINAL, THIS COURT MUST REMAND FOR IMPOSITION OF A LIFE SENTENCE.

Looking for a way to circumvent this Court's directive in Grossman v. State, 525 So.2d 833, 841 (Fla. 1988), the state contends that a sentencing order filed two weeks late is "contemporaneous." (S.20) Citing Bouie v. State, 559 So.2d 1113 (Fla. 1990) (a case tried pre-Grossman) for the proposition that trial courts have been given considerable leeway in the timely filing of written sentencing findings (S.19-20), the state ignores the fact that this Court's clearly stated purpose in Grossman was to stop giving leeway and to start requiring trial judges to comply with

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[1] Even if there had been intervening Miranda warnings, that would not have been sufficient to remove the taint of the improper tactics used to procure the initial confession, especially since appellant was not made aware that the tape recorded confession could not be used against him. Madruga-Jiminez, 485 So.2d at 466.

the requirements of Fla. Stat. § 921.141(3) and VanRoyal v. State, 497 So.2d 625 (Fla. 1986). Previously the Court had simply "stated a strong desire that written sentencing orders and oral pronouncements be concurrent" [525 So.2d at 841], but despite this admonition, and even after VanRoyal was decided, death sentences continued to be imposed without contemporaneous written findings. 525 So.2d at 841. As a result, this Court concluded in Grossman that stronger measures were necessary, and said:

> We recognize that the trial court here, and the trial court in other cases which have reached us or will reach us in the near future, have not had the benefit of VanRoyal and its progeny. Nevertheless, we consider it desirable to establish a procedural rule that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement. Accordingly, pursuant to our authority under article V, section 2(a), of the Florida Constitution, effective thirty days after this decision becomes final, we so order.

In Stewart v. State, 549 So.2d 171, 176-77 (Fla. 1989), this Court made it abundantly clear that the Grossman rule has teeth:

> Prior to, or contemporaneously with, orally pronouncing a death sentence, courts now are required to prepare a written order which must be filed concurrent with the pronouncement. Grossman, 525 So.2d at 841. Should a trial court fail to provide timely written findings in a sentencing proceeding taking place after our decision in Grossman, we are compelled to remand for imposition of a life sentence.

Grossman became effective on June 24, 1988. The sentencing proceeding in the instant case occurred on June 26, 1989 - a full year after Grossman and nearly three years after VanRoyal. Moreover, the trial court here did not even make any oral findings

concurrently with his pronouncement of the death sentence. Compare Patterson v. State, 513 So.2d 1257, 1261 (Fla. 1987) with Stewart.

The state's argument that a sentencing order filed two weeks late is sufficient is untenable. Contemporaneous means contemporaneous, not "close enough for government work". In Ree v. State, 565 So.2d 1329, 1330 (Fla. 1990), the trial judge departed from the sentencing guidelines and imposed a ten and one half year prison sentence. Five days later, he "signed a written order citing four reasons justifying the ... departure". This Court, citing its prior decisions in State v. Jackson, 478 So.2d 1054 (Fla. 1985) and State v. Oden, 478 So.2d 51 (Fla. 1985), held that a trial court may not depart from the guidelines "without providing a contemporaneous written statement of the reasons therefor at the time [the] sentence was pronounced. Ree v. State, 565 So.2d at 1331 (quoting with approval Oden v. State, 463 So.2d 313, 314 (Fla. 1st DCA 1984)) (emphasis in opinions). [Since the Court also stated that this rule shall be applied prospectively only, Ree is in effect the guidelines equivalent of what Grossman is to capital sentencing]. The Court observed:

> We realize this procedure will involve some inconvenience for judges. However, a departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court.

Ree v. State, 565 So.2d at 1332.

If a guidelines departure is an extraordinary punishment which requires serious and thoughtful attention, then certainly no less can be said of the ultimate penalty of death. The United States

Supreme Court has recognized that the imposition of death by public authority is "profoundly different from all other penalties", and requires stronger substantive and procedural safeguards than any form of noncapital sentencing. See e.g. Lockett v. Ohio, 438 U.S. 586, 605 (1978); Sumner v. Shuman, 483 U.S. 66 (1987). Clearly if five days late is insufficient to comply with Ree in the guidelines context, then two weeks late is insufficient to comply with Grossman in imposing a death sentence. Whether the order is two days, two weeks, two months, or two years late, the point of Grossman is that an after-the-fact justification of a previously pronounced death sentence is not what the statute requires. See the concurring opinion of Justice Ehrlich in VanRoyal, 497 So.2d at 630. In accordance with the mandate of Grossman and Stewart, this Court must remand for imposition of a life sentence.

ISSUE V

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON, AND FINDING, THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE.

In Jones v. State, ___ So.2d ___ (Fla. 1990) (case no. 72,461, opinion filed September 13, 1990) [15 FLW S469, 471], this Court found reversible error in the trial court's instructing the jury on the "especially heinous, atrocious, or cruel" aggravating factor, even though this factor was not relied on in the judge's sentencing order. Noting that events occurring after death cannot be considered in determining whether the HAC factor applies, see e.g. Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983), this Court said:

> In this case, the jury heard evidence and argument that after Jones killed Perry, he sexually abused the corpse. The jury could have believed that such an act was sufficient to find that the killing was heinous, atrocious, or cruel and thus supported the death penalty. We cannot say under these facts that the error was harmless under the standard announced in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Jones v. State, 15 FLW at 471.

In the present case, the trial court (over defense objection) instructed the jury on the HAC factor and also found the factor to apply. He erred in doing so, because the circumstances of the killings did not warrant the instruction or finding. See e.g. Cook v. State, 542 So.2d 964, 970 (Fla. 1989) ("HAC" aggravating factor "generally is appropriate when the victim is tortured, either physically or emotionally, by the killer"). This limiting construction is what prevents the aggravating factor from being unconstitutionally overbroad. To apply it in a case like this one, where both victims were killed by gunshot wounds to the head which would have caused immediate unconsciousness, and where neither victim was subjected to physical or emotional torture, would be overbroad application of the HAC circumstance, and would violate the Eighth Amendment of the U.S. Constitution. Maynard v. Cartwright, 486 U.S. 356 (1988); see also Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 1 (1990) (instruction on HAC constitutionally insufficient).

In the instant case, appellant's incestuous relationship with his daughter Norma was completely irrelevant to whether the killings of Bertha Skillin and George Ahern were "especially

heinous, atrocious, or cruel." Similarly, the fact that the bodies were not discovered for two weeks, by which time they were "markedly decomposed" and maggot infested is an improper consideration in finding HAC. See Jones, Pope, and the cases cited at p. 61 of appellant's initial brief. Despite this, both the prosecutor's argument to the jury asking it to find HAC, and the trial court's sentencing order, are replete with such irrelevant considerations, virtually to the exclusion of the circumstances of the actual killings. The prosecutor argued:

> I also know that the Judge is going to tell you that another aggravating circumstance that you can find in this particular case, is that the capital felony was especially heinous, atrocious or cruel.
>
> Now, why was this particular crime [especially] heinous, atrocious, or cruel?
>
> Well, let's review the particular circumstances under which this particular crime occurred.
>
> You will recall the testimony which was presented during the first phase of this trial, and that was that the Defendant comes to Naples, and now the Defendant had previously found out about the relationship between Mr. George Ahern, and Norma.
>
> He made the threat to kill George Ahern previously. We know what he did in that particular case, he came into that household, and had a secret intent in his heart to do harm to Mr. George Ahern.
>
> He did not like Mr. George Ahern. He deceived I submit to you ladies and gentlemen, both Bertha Skillin and George Ahern.
>
> With that deception in his heart, he goes into the home in which they provide him with food. They provide him with shelter. They provide him with money. And all the while he

is taking their gratuities and the generosities that they bestowed upon the Defendant. And the Defendant secretly in his heart despises, hates, and ultimately kills the individuals who had befriended him.

In addition to that ladies and gentlemen, the circumstances here, under the guise, I submit to you, that "Oh, I am the father, I want to be with my daughter."

I submit that he had no desire, except lustful desires, for the sexual attention of his daughter. He didn't care about her as an individual, he didn't know her.

The first time he ever saw her, was in 1975, when she's twelve years old.

MR. OSTEEN [defense counsel]: Your Honor, I would like to object.

I think that the jury has already convicted the Defendant of premeditated first degree murder, and if it's the case, I think he should be trying to convince the jury that it was cruel, wicked and --

MR. BROCK [prosecutor]: Your Honor, that's exactly what I'm doing here, Your Honor.

THE COURT: I'll sustain the objection, I think that you've already covered that in the other phase.

MR. BROCK: In any event, ladies and gentlemen, he goes into the home with deception in his heart. He's going to take from Mrs. Ahern -- Mrs. Skillin, I'm sorry, her daughter. That's why he sets about to do.

Whenever she detects what he's doing, he shoots her. And then he continues his deception of the people who reside in that home.

Either going with, or waiting until George Ahern goes to the bank and gets his money, and then kills Mr. George Ahern. Shoots him twice. Shoots him once in the arm and then shoots him in the head.

> He then leaves them in this room, in this house, where they lay for thirteen days before anyone finds the bodies.
>
> From the time that he came to Naples until the time that he left, he lived a life of deception with two people. He deceived them by his actions, he took advantage of them. And I submit to you ladies and gentlemen, that makes this particular case, the fact that he killed two people in the manner in which he killed them. And the deception which he practiced on these two people, makes this an especially heinous situation. It makes it a cruel and evil situation.

(R.1377-80)

Similarly, the trial court's sentencing order (set forth and discussed at p. 60-61 of appellant's initial brief) relies almost exclusively on irrelevant and/or constitutionally prohibited[2] considerations. The judge's finding of HAC states, inter alia:

> The bodies were not discovered until September 13, 1977, some two weeks after the murders. Both bodies were markedly decomposed. The right upper forehead of George Ahern showed an irregular rounded crater-shaped gunshot entrance wound located above the right eye, as well as a bullet wound in the arm. There was maggot infestation in the wounds, eye sockets, mouth, nose, and ears.
>
> The body of Bertha Skillin was found in the bathroom of her apartment at the same time that the body of George Ahern was discovered. On the right temporal area of the skull was located a gunshot entrance wound above the

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[2] Several of the details set forth in the second paragraph of the finding were not established by the circumstantial evidence at this trial, and could only have been derived from the unconstitutionally obtained confession which was introduced at appellant's prior trial. See Fla. Stat. §921.141(1) (evidence secured in violation of United States Constitution or Florida Constitution is inadmissible in capital sentencing proceeding); see also Harich v. State, 437 So.2d 1082, 1085-86 (Fla. 1983); Huff v. State, 495 So.2d 145, 152 (Fla. 1986).

> right ear. The wound, the eyes, and nose were maggot infested.

(R.1237)

As in Jones, the jury's death recommendation here was tainted by an instruction on HAC which (a) was not supported by the facts relating to the actual killings [compare e.g. Amoros v. State, 531 So.2d 1256 (Fla. 1988); Garron v. State, 528 So.2d 353 (Fla. 1988)]; (b) was constitutionally insufficient to prevent overbroad application of the aggravating factor [see Maynard v. Cartwright; Shell v. Mississippi], and (c) allowed the prosecutor to urge the jury to consider irrelevant and prejudicial facts - including incest, decomposition, maggot infestation, and appellant's so-called "deception" in his dealings with Ahern and Skillin - to find the homicides "especially heinous, atrocious, or cruel", and as a reason to recommend death. Under these circumstances, appellant's death sentence is constitutionally flawed, and must be reversed for resentencing, with a new advisory jury. Maynard; Shell; Jones.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests the relief set forth on p. 67 of the initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 7th day of December, 1990.

Respectfully submitted,

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