IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,499

WILLIAM THOMPSON,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT WILLIAM THOMPSON

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STATEMENT OF THE CASE AND FACTS

The appellant respectfully relies upon the Statement of the Case and Statement of the Facts as recited in his initial brief.

ARGUMENT

I.

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO OFFER THE PREVIOUS TRIAL TESTIMONY OF ITS CHIEF PROSECUTION WITNESS WHERE THE SCOPE OF CROSS EXAMINATION WAS DIFFERENT, THE STATE FAILED TO ESTABLISH THE REQUISITE DUE DILIGENCE IN ATTEMPTING TO PROCURE THE ATTENDANCE OF THAT WITNESS, AND THE DEFENDANT WAS DENIED THE OPPORTUNITY TO OBTAIN THE WITNESS HIMSELF, THEREBY DENYING THE DEFENDANT HIS RIGHT OF CONFRONTATION AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The State contends that the trial court correctly allowed the jury to consider the former testimony of chief prosecution witness Barbara Savage Garritz "since the defense was given ample notice of the state's intention to rely upon it, the witness was unavailable pursuant to Fla. R. Crim. P. 3.640, and the defendant was not deprived of his right of cross-examination at the former proceeding." [Appellee's brief at p. 5]

By so stating its position, appellee has tacitly defined the correct issues for this court's resolution:

1. Whether the state gave the defense adequate notice and whether the trial court erred in failing to grant the defendant sufficient time to procure the attendance of the witness himself.

2. Whether the state met its burden of proving the witness was unavailable, and

3. Whether the scope of the defendant's cross-examination at the former hearing was improperly restricted.

The notion that former testimony may be admissible at all

depends upon the opportunity for full cross-examination. The right of confrontation is fundamental. The absence of proper confrontation at trial "calls into question the ultimate integrity of the fact-finding process." Ohio v. Roberts, 448 U.S. 56, 64 (1980). The United States Supreme Court in Pointer v. State of Texas, 380 U.S. 400, 405 (1965), expressed the sanctity of this Sixth Amendment right:

> There are few subjects, perhaps upon which this Court and other courts have been more nearly unanimous in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

The Supreme Court has repeatedly held that a showing of the denial of the right of effective cross-examination "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Davis v. Alaska, 415 U.S. 308 (1974); Brookhart v. Janis, 384 U.S. 1 (1966); Smith v. Illinois, 390 U.S. 129 (1968).

The State expresses no opposition to these basic truths but contends that "the unredacted version of the original trial testimony contained in the record is devoid of any objections that were improperly sustained by the court or any ruling by the court restricting areas that the defense could persue (sic) on cross-examination." [Appellee brief at p. 611 The State

overlooks the supplemental record submitted with appellant's initial brief and made part of this record by this Court's order dated November 6, 1990, which corrects the omission in the original record of five pages of Garritz's testimony.

That record reflects severe restriction of the defendant's cross-examination. Thompson was not allowed to ask Garritz what she thought would have happened to Thompson if he had refused to obey co-defendant Surace:

> *** Knowing what you know of these two men, what would Rocky might have done to Bill Thompson had there ever been a confrontation of, "no, I will not," or " I'm through with this, and I'm going to call the cops, "or" I"m going to do something like that,"
>
> Mr. McHale: Judge, I'm going to object to that.
>
> The Court: Sustained.

Thompson was also precluded from cross-examining Garritz relative to her perception of his intent:

> Q. And I think I asked you in the deposition the key question, right? These two stupid men, did they intend to kill this girl with all that beating?
>
> Mr. McHale: Judge, I object to that.
>
> The Court: Sustained.

Perhaps most important, however, the State objected to "anything about intoxication", claiming that it was " irrelevant to this proceeding." Accordingly, the trial court foreclosed the defendant's line of questioning directly related to the establishment of a valid mitigating circumstance:

> Q. *** (By Mr. Solomon) were they taking any pills during the ongoing period of time?
>
> Mr. McHale: I'm making the same objections on the grounds of relevancy to this particular proceeding, Your Honor. It would be relevant at a guilt trial, not in this proceeding.
>
> Mr. Solomon: I don't know about that, Judge. It strikes me that the jury ought to know the entire physical and mental condition of the defendants. You'll see one of the mitigating circumstances in their point directly to it.
>
> The Court: Sustained.
>
> Mr. Solomon: I have no further questions, Your Honor.

Thompson's alcohol and drug abuse at the time of the offense and the extent of his incapacity due to that substance abuse constituted a crucial defense issue, a proper subject of cross-examination, and a valid mitigating circumstance. See, Waterhouse v. State, 522 So.2d 341 (Fla. 1988). Alcohol or drug abuse can constitute a mitigating circumstance. Huddleston v. State, 475 So.2d 204, 206 (Fla. 1985); Cannady v. State, 427 So.2d 723, 731 (Fla. 19831. In Amazon v. State, 487 So.2d 8 (Fla. 1986), this Court held improper an override where, among other mitigating factors, there was "some inconclusive evidence that [appellant] had taken druqs on the night of the murders" alonq with "stronger" evidence of a drug abuse problem. Id. at 13. Similarly, the defendant's drug problem and claim of intoxication at the time of the murder in Norris v. State, 429 So.2d 688 (Fla. 1983), resulted in the vacation of his death penalty sentence.

Here, Barbara Garritz was the only human being capable f corroborating Thompson's ingestion of intoxicants and his resulting behavior. The exclusion of cross-examination questions on the subject was error in 1978. The perpetuation of that error in 1989 repeated the same unconstitutional limitation erroneously imposed on the scope of the defendant's cross-examination. In fact, it is noteworthy that Thompson's initial death penalty sentence was reversed by this Court for the same kind of error - the failure of the sentencing judge to allow presentation and jury consideration of non-statutory mitigating circumstances in the sentencing phase. Hitchcock v. Dugger, ____U.S.____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

Accordingly, regardless of the state's purported "due diligence" or the adequacy of its notice to the defense, the limitations improperly imposed upon the defendant's cross-examination at the initial hearing rendered the subsequent jury's consideration of Garritz's one-sided prior testimony unfair and violative of the defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

II.

THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION TO STRIKE THE JURY PANEL AND IN FAILING TO AT LEAST CONDUCT INDIVIDUAL VOIR DIRE WHEN IT BECAME APPARENT THAT THE JURY WAS CONCERNED THAT THE DEFENDANT ON A LIFE SENTENCE COULD BE RELEASED AFTER AS LITTLE AS TWELVE YEARS IN LIGHT OF THE FACT THAT HE BAD ALREADY BEEN INCARCERATED FOR THIRTEEN, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL BY A JURY PREDISPOSED TO IMPOSE A SENTENCE OF DEATH

III.

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE INTO EVIDENCE THE DEFENDANT'S PRIOR FALSE TESTIMONY GIVEN AT THE TRIAL OF CO-DEFENDANT SURACF WHERE SUCH TSSTIMONY WAS NOT OFFERED FOR ITS TRUTH, BUT ONLY TO INFLAME THE JURY WITH EVIDENCE OF THE DEFENDANT'S PERJURY AND OBSTRUCTION OF JUSTICE BY HIS SUCCESSFUL EFFORT TO HELP HIS EQUALLY CULPABLE CO-CONSPIRATOR AVOID JUSTICE, THEREBY DENYING THE DEFENDANT DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant respectfully relies upon the arguments and authorities advanced in his initial brief with regard to these two issues except to note the following.

No notion is better settled in capital cases than the rule that the only permissible aggravating factors which a jury can consider are those specificly enumerated by statute. Fla. Stat. §921.141; Elledge v. State, 346 So.2d 998 (Fla. 1977). Both these issues address the fact that the jury here was improperly exposed to non-statutory aggravating factors. The jury was Eree to consider: (1) The idea that because the defendant had already

served a substantial portion of his sentence he would be prematurely released and (2) The notion that the defendant had previously lied under oath to save his equally guilty co-defendant from the electric chair.

even if, as the state suggests, these issues were poorly or inadequately preserved by defense counsel below, the chance that the jury's seven to five vote for execution was based, to any degree, upon unlawful considerations is unacceptable. It is incumbent upon a trial court in a capital case to insure that this does not happen.

For example, a jury or juror, such as was the case here, which asks whether a defendant will receive credit for time served should be told, truthfully, that he will. Then, and only then, can a defendant pursue the extent of any juror's impermissible bias based on that fact. The trial court in Downs v. State, 16 FLW S55 (Fla. January 11, 1991) was clearly correct to instruct a similarly inquisitive jury truthfully and accurately. Under those circumstances, this Court appropriately found no abuse of discretion. Here, to the contrary, the jury was compelled to speculate and no vehicle existed to explore the jury's bias. By the same token, the trial court took no precaution against the very real possibility that this outraged jury would. vindicate Surace's avoidance of justice by electing Thompson's death in retribution.

4 new sentencing hearing, at which the jury is properly instructed by the court and the jury is directed to consider only the proper issues, should be granted.

IV.

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE INTO EVIDENCE EXCRUCIATINGLY GORY PHOTOGRAPHS OF THE DECEASED TAKEN AT THE MEDICAL EXAMINER'S OFFICE DEPICTING HER POST-TRAUMA DISSECTION THEREBY DENYING THE DEFENDANT A FAIR AND IMPARTIAL TRIAL GUARANTEES) BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The state contends that the contested photographs were not "exceptionally gory" and that they were both "highly relevant" and "necessary to the state's case." [Appellee brief at p. 721 The state could not be more wrong.

Contrary to the state's assertion, appellant has never suggested that the photographs were irrelevant merely because they were unnecessary. In fact, there can be no question that the tampon and vaginal tear were relevant. Our complaints are:

1. The photographs depicted a great deal that was irrelevant.

2. The photographs were exceedingly and unnecessarily gruesome.

3. The offer of these photographs was so unnecessary to the state's case that the conclusion is compelled that they were offered gratuitously and solely to inflame the jury.

The state's denial that these photographs are gory is incomprehensible and troubling. State's exhibit 30 [R 466] depicted, not only the tampon swallowed by the victim, but also the victim's bloody, dissected stomach splayed open on the dissec-

tion table. State's exhibit 7 [R 239] showed, not only the tear in the victim's vagina, but the entire sex organ surgically torn from the victim's body, displayed in an ensanguined, grisly, heap. Neither the victim's excoriated vagina or stomach were relevant. The relevant facts involve the tampon and the tear, not the stomach or vagina.

whatever the defendant may have done, he did not disembowel the victim. These photographs generated horror beyond what the defendant did, extending the tragedy of the victim's assault to what the medical examiner did to her, as well.

Finally, it is important to note how very unnecessary was the state's conduct. As the state notes, everything relevent which the photographs depicted was independently proven beyond a reasonable doubt by not only the testimony of Barbara Garritz but by handwritten and formal statements made by the defendant, himself. [TR 1750-3, 1769-70, 1783-4, 1908-9, 1941, 19431. There was never a challenge to the "violent and extensive nature of the injuries inflicted." In short, there was no reason for the state to introduce these photographs except to unfairly inflame the jury.

The photographs in question, in color and taken far from the scene of the crime, were undeniably gruesome and irrefutably hideous, and must have appeared especially so to a lay jury. To the extent to which they depicted relevant information, they also depicted far more utterly irrelevant and gory scenes. The ultimate irrefutable conclusion which must be reached, however, is that whatever relevance the photographs may have had, their pro-

bative value was *so* vastly outweighed by their prejudicial effect that they should never have been introduced as evidence by the trial court. That abuse of discretion must be corrected by the grant of a new sentencing hearing.

V.

THE TRIAL COURT ERRED IN UNFAIRLY LIMITING THE TESTIMONY OF DEFENSE WITNESSES, PROHIBITING SUCH WITNESSES FROM OFFERING OPINION AS THE APPROPRIATE PENALTY, AND IN FAILING TO CONSIDER SUCH PROFFERED OPINIONS IN MITIGATION, THEREBY IMPROPERLY RESTRICTING THE DEFENDANT'S ABILITY TO PRESENT A DEFENSE AND EVIDENCE IN MITIGATION RESULTING IN A DENIAL OF DUE PROCESS AND A FAIR TRIAL AND THE IMPOSITION OF A CRUEL AND UNUSUAL PUNISHMENT UNDER TYE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state argues, for the most part, that because the opinion testimony of the defendant's proffered witnesses was not sufficiently predicated that their testimony was therefore not relevant. We suggest that the state has confused relevance and admissibility with the weight given such evidence by the jury.

In a capital sentencinq proceeding, at which the only issue to be determined is whether or not a defendant will suffer execution, there can be no question that the testimony of a witness to the effect that the defendant should not die is relevant. Nothing could be more relevant. The real question is whether such evidence, in the form of lay opinion testimony, is otherwise admissible. Perhaps better stated, the issue is whether there exists any legal reason not to allow such testimony. By the same token, the predicate established for a witnesses' opinion testimony governs its weight, not its admissibility. The state was free, as it did in its brief, to argue for whatever reason that the witnesses' opinion testimony was entitled to little or no weight.

The fact remains, however, that Fla. Stat. §90.701 provides for the admission of opinion testimony by lay witnesses and §90.703 (1979) avoids the state's chief complaint:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.

When these relevant portions of the Florida evidence code are considered in pari materia with a defendant's irrefutable right in a capital murder prosecution to present non-statutory mitigating circumstances, the conclusion results that there was no good reason for the trial court to exclude the defendant's evidence. Such is precisely the conclusion reached by the only court which appears to have addressed the precise issue. People v. Heishman, 753 P.2d 629 (Cal. 1988) (en banc).

This Court should reach the same conclusion here.

VI.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND EQUAL PROTECTION WHILE IMPOSING A DISPROPORTIONAL, CRUEL AND UNUSUAL, PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A.

The Trial Court Erred In Failing to Determine the Existence of Statutory Mitigating Circumstances "Age" and "No Significant History of Criminal Activity'' Where such Factual Determinations had already been Found in the Defendant's Favor, Such Findings Constituted the Law of the Case and were Established by Collateral Estoppel and Res Judicata

This Court's opinion in sing v. Dugger, 555 So.2d 355 (Fla. 1990) appears to resolve this issue against Thompson. King, however, appears to be this Court's only consideration of this issue which, hopefully, remains open to reconsideration.

Kina and its rule does irremediable violence to the sacrosanct ideology that a criminal defendant can not be punished for his or her prosecution of a successful appeal. Since Blackledge v. Perry, 417 U.S. 21 (1974) and through its progeny, the United States Supreme Court has consistently condemned prosecutorial retaliation against a defendant for the exercise of a statutory or Constitutional right. As the Court in United States v. Goodwin, 475 U.S. 368 (1982) succinctly reasoned:

> To punish a person because he has done what the law clearly allows him to do is a due process violation 'of the most basic sort'. ... [cite omitted] for while an individual cer-

> tainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right. [footnote omitted.]

Thompson's reversal of his original sentence due to a Hitchcock violation had nothing whatever to do with the findings of the trial court that "age" and "no significant history of criminal activity" were applicable statutory mitigating circumstances. These findings were completely uneffected by the error of which the defendant successfully complained on appeal and there exists no legitimate reason to subsequently take from the defendant the benefit of the courts' prior adjudications.

To do so constitutes nothing less than a "punishment" - a punishment inflicted only because the defendant succeeded in bringing to this Court's attention other, unrelated, errors which independently vitiated the fundamental fairness of his sentencing proceedings. This, and the simple fact that a third, new sentencing judge (with more conservative ideas about the application of mitigating circumstances), has operated to place the defendant in a far worse, more precarious position than he has ever been before, simply because he has exercised his constitutional right to appeal with some degree of success. This result is abhorrent to basic notions of fairness, due process of law, and established precedent.

B.

The Trial Court Erred in Finding That the Homicide was Committed for Financial Gain and Comitted in a Cold, Calculated and Premeditated Manner Without any Pretense of Moral or Legal Justification

The doctrine of collateral estoppel prohibits the government from relitigating facts necessarily established against it in a previous trial. U.S. V. Bolinger, 796 F.2d 1394, modified on denial of rehearing 837 F.2d 436, certiorari denied 108 S.Ct. 1737, 100 L.Ed.2d 200 (11th Cir. 1986). The reason for the collateral estoppel rule is to prevent the state from relitigating the same issue it has once lost. Nacher V. State, 465 So.2d 598 (Fla. 3d DCA. 1985). **Here,** the issues of financial gain and CCP have already been litigated and decided in the defendant's favor. The state had no right to relitigate facts necessarily established against it.

Collateral estoppel in a criminal context prohibits the government from forcing a defendant to defend against charges or factual allegations which he overcame at an earlier trial. United States v. Corley, 824 F.2d 931 (11th Cir.1987). Here, for all the same reasons described above, the defendant should never have been compelled to defend again against the charge that the homicide was committed for financial gain and committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Both of these issues had previously been resolved aqainst the state. Thompson v. State, 389

So.2d 197 (Fla. 1980).

In Dunlap v. Dugger, 890 F.2d 285 (11th Cir. 1989), the court held that a murder defendant's acquittal of felony murder at the guilt phase of his first trial collaterally estopped the jury from finding that the murder occurred during the commission of a felony so as to constitute an aggravating factor justifying imposition of the death penalty at a second trial. For the same reasons, the state should be collaterally estopped here.

Moreover, for all the same reasons advanced in his initial brief, the offense of which the defendant stands convicted was not, under present case law, committed in a cold, calculated and premeditated manner.

CONCLUSION

Wherefore, for all the reasons advanced herein and in appellant's initial brief, appellant prays this Court to reverse his sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to Giselle D. Lylen, Esq., Assistant Attorney General, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida 33128, this 8th day of march, 1991.

GEOFFREY C. FLECK, ESQ.