IN THE SUPREME COURT OF FLORIDA

DANIEL PETERKA,

Appellant,

v. CASE NO. 75,995

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR #271543

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

IN THE SUPREME COURT OF FLORIDA

DANIEL PETERKA,	:	
Appellant,	:	
v.	:	CASE NO. 75,995
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This is a capital case in which the State used solely circumstantial evidence to prove the defendant's guilt. There are several significant guilt and penalty issues for this court to consider. References to the record on appeal will be by the letter "T."

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Okaloosa County on August 10, 1989 charged Daniel Peterka with one count of First Degree Murder (T 1947-48). He pled not guilty to that offense, and later he filed some motions which are relevant to this appeal:

1. Motion to Suppress the results of a search of the house he lived in (T 2018). Denied (T 356).

2. Motion to Suppress the various statements he made to the police (T 2019). Granted in part (T 357).

3. Motion in Limine to prevent the state from introducing into evidence at trial that Peterka had prior convictions and had ostensibly cashed a forged money order (T 2020-21, 2023). Granted only as it pertained to the State's opening statement (T 375). The court, however, admitted the evidence during trial.

Peterka was tried before the Honorable Judge Erwin Fleet, and the jury found him guilty as charged (T 2042). The defendant then proceeded to the sentencing phase of the trial, and the jury recommended he die (T 2043). The court accepted that recommendation and sentenced him to death. In aggravation, it found:

> 1. Peterka was under sentence of imprisonment at the time he committed the murder.
>
> 2. The murder was committed for the purpose of avoiding or preventing a lawful arrest.
>
> 3. The murder was committed for pecuniary gain.

> 4. The murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.
>
> 5. The crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

In mitigation, it found Peterka had no significant history of prior criminal activity. The court also said "there was evidence tending to show other mitigating circumstances, [but] the Court did not find any to exist." (T 2078)

Peterka filed a Motion for New Trial, which the court denied (T 2024-25).

STATEMENT OF THE FACTS

In February 1989 Daniel Peterka received two consecutive one year prison sentences in Nebraska (T 1136). He apparently fled the state before he began serving them, and by the late spring he had moved to Okaloosa County where he found a job at a local construction supply company (T 1648-49). The owner of the company, Shorty Purvis, also rented houses, and one of his tenants, John Russell (T 1648), had a difficult time paying his rent. Mrs. Purvis suggested that Johnson share the house with Peterka (T 1656), and he agreed to do so, and in April or May the defendant moved in with Johnson (T 1163).

Sometime later Peterka asked if he could use Russell's name and vital statistics to get a driver's license (T 1378). For $100, Russell agreed, and a driver's license with Peterka's picture, but Russell's name and other information on it, was issued on June 27, 1989 (T 1642).[1]

On July 12 he and Peterka had a fight over money

---

[1]At trial the court admitted as evidence solely to show Russell's state of mind at the time he was killed that on June 27 Peterka had cashed a money order sent to Russell by forging his name on it (T 1428-29). His aunt had sent it to him as a birthday gift, and when she did not get any thank you note, she called her nephew (T 1428). Russell got a copy of the forged note and, after some investigation he believed Peterka had cashed it. By July 11 he had decided to let the police handle the matter (T 1457). Because these "facts" were not admitted for their truth, they are included by way of footnote. They are mentioned because the trial court's admission of them is an issue on appeal. (See issues VI and X.)

(T 2442-43). What initially had started as a shoving match, escalated into a fight (T 2443). The two men struggled in the living room where Peterka had laid a pistol that he had bought. Both of them saw the gun and went for it (T 2443). Peterka got it first, and as Russell got up from the couch in the living room, Peterka turned around and fired the weapon. The bullet entered the top of Russell's head, and he sat down on the couch then fell to the side (T 2444). The defendant tried to soak up the blood and do what he could, but Russell was dead.

Peterka panicked (T 2455-56), and he wrapped the body in a rug, put it in Russell's car, and drove to Eglin Air Force Base, where he buried it (T 1197). Later, he talked with his girlfriend, Frances Thompson, who had lived with Peterka in the house he shared with Russell (T 1608).[2] He told her that he was wanted in Nebraska but did not want to go to prison (T 1613). They talked some more, and about midnight they went to Peterka's and Russell's house and spent the rest of the night there (T 1614). He went to work in the morning, and she left several hours later so she could get to her job (T 1615).

Russell had several friends and relatives in the area that he saw almost every day (T 1153, 1171, 1271). Gary Johnson, a lifelong friend and co-worker with Russell, noticed that Russell did not come to work on Thursday, July 13

---

[2]About noon that day she moved her things out of the house, and Russell had helped her load her belongings in her car (T 1610).

(T 1276). He remembered it because that was payday, and Russell had never missed work before (T 1276). Johnson went to Russell's house to check on Russell, but no one was home, although he saw Russell's car parked in front (T 1280). He broke into the house and wandered through it, noticing a pack of cigarettes, the keys to Russell's car, and a lighter. He also saw Peterka's gun, which was unloaded (T 1281-82). He stayed inside for only twenty minutes but returned after work when Peterka was home. The defendant told Johnson that Russell had left, and Peterka pointed out that Russell had left without taking his glasses, which was very unusual since he needed them to see (T 1287).

Kevin Trently, another friend, also dropped by the house on July 12 on his way home from work (T 1163-64). Peterka told him that Russell had left with someone the night before (T 1164).

Johnson called the police to report that Russell was missing, and they went to Peterka's and Russell's house about 8 p.m. (T 10). Peterka was at home with Thompson, and the deputy asked him if he knew the whereabouts of Russell (T 1351). The defendant said he had last seen Russell drive away with a person he described as being "tall, long scraggly type dark hair." (T 1352) On a table in the living room were Russell's glasses, his car keys, and a pack of cigarettes (T 1353). The officer asked Peterka for some identification, and he showed him his birth certificate because he had lost his driver's license (T 1353-54).

Later that night, the officer entered Peterka's name into a nationwide computer system, and shortly, he received a notice from Nebraska that the defendant had fled that state (T 1355). About 1 a.m. several police officers went to where Peterka lived and knocked on the front door. He answered their knock, obviously having been asleep, and after getting some shorts to wear, he went outside, where he was arrested (T 1360-61). Peterka let the police search the house, and once inside, they found a gun (T 1364). They did not seize it because the defendant said it belonged to a friend, and he produced a bill of sale verifying it (T 1365-66). The police did seize, however, his wallet which had the false driver's license as well as Russell's social security card, a bank card, Peterka's Nebraska Driver's license, and about $400 (T 21).

They informed Peterka of his rights (T 23) afterwhich he told the them about "buying" Russell's identity. As to Russell's disappearance, he essentially said that when he last saw Russell he was leaving with someone (T 24). Peterka ended the interrogation by saying he did not want to answer anymore questions, and the officers stopped talking with him (T 56). He was put in jail, and the next morning (the 14th) he called Thompson. He told her what had happened, and she asked him what she should do with his things (T 143). He told her to keep them and the gun (T 144). She did as he had asked, and she also cleaned his house, for which Mrs. Purvis paid her (T 147).

The police resumed their questioning on the 18th (T 280). By this date, they had searched his house several times without a search warrant (T 59, 64). During these searches they found a blood stain underneath the couch, blood on the door frame, and blood in the trunk of Russell's car (T 91). After finding this evidence, the sheriff told Deputy Vinson talk with Peterka and "not come back without a confession." (T 287) Accordingly, he told the defendant that the State was planning to charge him with first degree murder based on the theory that he had killed Russell to complete his plan to assume Russell's identity. He also talked with him about the different degrees of murder, manslaughter, and the possibility of having killed Russell in the "heat of passion." Vinson did this, as he admitted, to "give [Peterka] an out." (T 288-89) Peterka did not say anything then but asked to talk with Shorty Purvis (T 214). Vinson arranged the call, and within a short while, Peterka's employer came to the jail. Peterka, crying and very emotional (T 214), wanted to confess to Purvis, but before he could do so, Purvis said he would have to tell the police everything he told him (T 97). The defendant agreed that was what he wanted (T 97-98), so Purvis called one of the jailers, who read Peterka his rights (T 102), gave him some paper and a pencil, then called an investigator (T 214). A short time later Vinson and the sheriff arrived, and Peterka told them about killing Russell.

After giving this statement, the defendant took the police officers to where he had buried Russell (T 103). He led them

to a deserted area on Eglin Air Force Base (T 262-265), and the body, when found, had extensively decomposed (T 1197).

SUMMARY OF THE ARGUMENT

Peterka has raised 11 issues in this capital appeal, seven guilt phase and five penalty phase questions, for this court to resolve. The first issue focuses upon the court excusing for cause a prospective juror Piccorossi because he was opposed to imposition of a death sentence for "practical purposes." This juror repeatedly said he would follow the court's instructions during the guilt and penalty phases of the trial. He would find it very hard, however, to give much weight to the aggravating factors. He never said that he would never recommend a death sentence, and there is no evidence that his views regarding the death penalty would have substantially interfered with his following the court's instructions or his duty to impartially determine Peterka's guilt and recommend the appropriate sentence. Merely being reluctant to return a death sentence is not a good reason to excuse a prospective juror.

When arrested, Peterka talked with the police but later he cut off further interrogation. The police honored that request then, but four days later officer Vinson reinitiated contact with Peterka. During this questioning, Vinson told him that the state was planning to charge him with first degree murder, but the killing may have been only been second degree murder or manslaughter if the defendant acted in the heat of passion. Vinson said this to give Peterka an out. The trial court suppressed all he had said until then.

After Peterka heard Vinson's explanation, he asked to talk with Shorty Purvis, and he confessed to him that he had killed

Russell accidentally. The court did not suppress this confession because it reasoned that by calling Purvis, he had voluntarily reopened his conversation with the police. That was error because the state presented no evidence that the taint of the illegal interrogations by Vinson had been removed. Without such evidence, the presumption arises that whatever Peterka may have said after the improper questioning was illegally obtained.

The court also erred in that it never considered the effect of Vinson's lure of the possibility of reduced charges upon Peterka. Had it done so, and had it then considered this improper influence upon Peterka in light of the presumption that his latter statements were tainted, it would not have hesitated in suppressing all of what the defendant said to the police.

The state's case regarding Peterka's intent when he killed Russell rests solely upon circumstantial evidence. Despite the defendant's claim that he only accidentally killed the victim, the state argued that the murder was only the last step in a bizarre plan to assume his identity. While there is evidence to support that theory, the evidence also supports the reasonable hypothesis that the killing happened as Peterka confessed. That is, the two men struggled and during the fight the defendant accidentally killed Russell. The bloodstains found on the couch supports this theory as does the defendant's pathetic efforts to explain away the presence of Russell's glasses and cigarettes. If this was the coolly planned and

executed killing the state hypothesized, he surely would have disposed of these items. He did not, and the reasonable, alternative explanation is that he accidentally killed Russell, and while still panicked he forgot to take the glasses and cigarettes. That explanation for the murder makes as much sense as the states, and that is all Peterka needed do to win a motion for judgment of acquittal based upon insufficient circumstantial evidence.

When the police asked the authorities in Nebraska if they wanted Peterka, they said they did, adding that he should be considered armed and dangerous. The court admitted that evidence because it clarified why the police who arrested the defendant for being a fugitive from Nebraska did "certain things." But why they did those things was not a material issue in this case, hence the evidence was irrelevant. It was also irrelevant because the police who arrested Peterka never considered him armed and dangerous. The evidence, moreover, was harmful in that it confirmed the state's theory that Peterka is a cold blooded killer.

The court admitted evidence that Peterka had forged a money order he had stolen from Russell because it rebutted Peterka's anticipated defenses of self-defense and accident. That is, the court admitted it to show Russell's state of mind. Evidence of the victim's state of mind, however, is generally irrelevant because there is the temptation for the state to use it to prove the defendant's state of mind. In this case that is precisely how the state used it during its closing argument.

Also, the two exceptions to the general rule against admitting evidence of the victim's state of mind argued by the state were irrelevant here. Peterka never claimed he killed Russell in self-defense, and the evidence also was inadmissible to show the killing was accidental. That is, Peterka never argued that Russell killed himself accidentally. He argued that the homicide was unintentional. The accident exception to the general rule against admitting evidence of the victim's state of mind is inapplicable because Peterka never argued Russell killed himself. If he had, evidence that Russell was afraid of guns would have been admissible to rebut that defense, but since it was not argued, evidence of Russell's state of mind was irrelevant.

At trial, the state sought to introduce photographs of the victim's skull and body as they appeared when was found. It also wanted Russell's skull, which had been cleaned, admitted. Peterka objected to all this evidence. The court, agreeing in part with the defendant, let him choose what evidence he wanted admitted, the skull or the photographs. Peterka chose the skull. Then shortly before the state's closed its case in chief, it sought to introduce all the photographs it had tried earlier to get admitted. The court rejected that request, except for exhibit 36, a photograph of Russell's head. Despite Peterka pointing out the court's previous ruling, it admitted that photograph. By doing so, the court denied Peterka his Sixth Amendment right to confront the medical examiner regarding the picture. Peterka never cross-examined him about

the picture, and he could not have done so. To have completely prevented him from questioning the forensic expert about the photograph of the skull was error.

In sentencing Peterka to death, the court merely listed several aggravating factors it believed applied to this case. It never provided any facts to support them, and its short summary preceding its findings generally do not support all the aggravating factors it found. This court has required sentencing orders to be of the utmost clarity, and it has also said that the trial courts should make findings of fact, not this court. By completely omitting any factual analysis for all of the aggravating factors, the trial court provided nothing for this court to review. Likewise, appellate counsel has nothing to argue. At best he must review the record and find facts he thinks might support a finding, and argue why they do not support that finding. This court should not do the work it has said the trial court is best suited to do, and appellate counsel should not have to find supporting facts and then argue why they are insufficient to support a particular aggravating factor.

The court found as an aggravating factor that Peterka killed Russell to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. It presented no evidence to support this factor probably because the record provides none. Only sheer speculation justifies this finding.

Likewise, there is no evidence Peterka committed the murder for pecuniary gain. If he had stolen any money, it had

occurred two weeks before the killing, thus it was not necessary to obtain what he already had. This court has said that this aggravating factor applies only when the murder is necessary and direct link in the plan to obtain some wealth. Here the circumstantial evidence of the killing being for pecuniary gain is very weak, and the temporal separation and juxtaposition of the theft and the killing do not support a finding Peterka killed Russell for pecuniary gain.

The court, in its sentencing order, also said that other mitigation was present, but it did not find it to exist. That cursory dismissal of the mitigation violates this court's directions contained in Campbell v. State, Case No. 72,622 (Fla. June 14, 1990) in which this court said the court must, in writing, explain why it has rejected the mitigation argued by the defendant.

Finally, during the state's cross-examination of the defendant's mother, it asked her about his juvenile record, and specifically it questioned her about an uncharged theft of a gun. The state also never produced any evidence that Peterka had any juvenile criminal record. The court erred in letting the State question Peterka's mother about the uncharged theft of the gun, and it compounded that error by letting it question her about crimes for which it could not prove the defendant had been convicted of committing.

ARGUMENT

ISSUE I

THE COURT ERRED IN EXCUSING FOR CAUSE PROSPECTIVE JUROR PICCOROSSI BECAUSE HE WAS AGAINST IMPOSITION OF THE DEATH PENALTY FOR "PRACTICAL PURPOSES," IN VIOLATION OF THE DEFENDANT'S EIGHTH AMENDMENT RIGHTS.

During jury selection, the court excused for cause prospective juror Piccorossi because he could not "tell the Court that he can weigh the aggravating and mitigating circumstances and make a decision in favor of the aggravating circumstances and vote accordingly which of course, the law would require." (T 802) The voir dire of this prospective juror is included as appendix A to this brief, but the gist of it was that although he opposed the death penalty because he was catholic, and it would be hard for him to think of a situation in which it would be called for, he would keep an open mind and follow the court's instructions (T 792-802).

The court's ruling raises the question of whether, under federal constitutional law, the court erred in excusing this member of the venire because, even though he would follow the law, he would be very reluctant to recommend a death sentence. Did the court err in excusing a law abiding prospective juror who would have a hard time recommending a death sentence?

The law in this area is simple. In Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court adopted language from its decision in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65

L.Ed.2d 581 (1980), concerning the standard courts should apply in excusing for cause death scrupled prospective jurors:

> We therefore that this opportunity to clarify our decision in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and to reaffirm the above quoted standard from Adams as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that in dispensing with Witherspoon's reference to "automatic" decision-making, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity."

Witt, at 424 (footnote omitted.)

Applied to this case, the question is whether prospective juror Piccorossi's views would have substantially interfered with his determination of the proper sentence. His death penalty views would not have affected his decision regarding Peterka's guilt (T 792), and he also would have considered and weighed all the evidence in the penalty phase as instructed by the court. So, what was the problem?

The court excused Mr. Piccorossi because he was reluctant to return a death sentence (T 802). But he never said that he would always recommend life regardless of the facts or the law, he merely said that he it would be very difficult for him to do recommend death. That is different than saying that he could never recommend death, thereby disregarding his oath as a juror to follow the law as instructed by the court. He simply would

not have given very much weight to the aggravating factors. But giving them little weight is not the same thing as refusing to give them any weight. Doing that would be a substantial impairment of a juror's duties. Mr. Piccorossi repeatedly said he would follow the court's instructions (T 792, 798, 799, 800), and there is no evidence he would have disregarded his oath as a juror. There was, in short, no evidence that his views on the death penalty would have substantially impaired his duties as a juror, and the court erred in excluding prospective juror Piccorossi for cause. This court should reverse the court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN NOT SUPPRESSING ALL OF PETERKA'S STATEMENTS BECAUSE THE INTERROGATING OFFICER HAD IMPLIEDLY TOLD HIM THAT HE WOULD NOT BE CHARGED WITH FIRST DEGREE MURDER IF THE KILLING WAS AN ACCIDENT OR COMMITTED IN THE HEAT OF PASSION, A VIOLATION OF THE DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

The crucial events leading up to Peterka's confession on the evening of July 18 can be briefly summarized as follows: The police arrested Peterka about 1:30 a.m. on July 14 when they learned he was a fugitive from Nebraska (T 1355, 1360-61). He was read his Miranda rights and waived them, and in response to police questioning, he gave an exculpatory story regarding what happened to Russell (T 1378). That is, he said Russell had left with someone. During the questioning, Peterka said he did not want to answer any more questions, and the police stopped talking with him (T 56, 72).

Over the next several days, the police searched Peterka's house and discovered the blood stained carpet and couch (T 1310). On the 18th Sheriff Gilbert told Vinson to get a confession from Peterka (T 287), and the deputy went to the jail to talk with the defendant. Vinson read the defendant his rights again afterwhich Peterka waived them (T 247). During the ensuing interrogation, Vinson told Peterka that the state was planning to charge him with first degree murder (T 288), but to give him an "out" Vinson also told him what he might face if he had killed the Russell in the heat of passion or he had committed a second degree murder (T 289-293). Peterka said

he said he wanted to go back upstairs, and on the way out of the interrogation room, he asked Vinson if he could call Mr. Purvis, his employer (T 250). Vinson arranged for the call and left the jail about 8:30 (T 251).

Purvis showed up a short time later, and an obviously emotional Peterka confessed to killing Russell (T 100, 214). Vinson was called, and the defendant also confessed to him and the sheriff when they showed up.

The court suppressed all of Peterka's statements except those made after the defendant had confessed to Purvis (T 356-57). The court ruled that by talking with his employer, he had resumed his "dialogue with the law enforcement officers" because he knew Purvis would tell them what Peterka had told him (T 357). The court erred in two ways. First, it failed to consider if the taint of Vinson questioning Peterka on July 18 had been removed so as to render his "reinitiating" of the interrogation at most one or two hours later voluntary. Second, the court never considered the effect of Vinson's lure of an "out" to first degree murder upon the voluntariness of the defendant's subsequent confession.

The key "fact" is that the court suppressed the statements taken after Peterka invoked his right to remain silent on July 14 (T 356-57). This includes what the defendant told Vinson on the evening of July 18, immediately before he called and confessed to Shorty Purvis. Vinson had not "scrupulously honored" his right to remain silent. Michigan v. Mosely, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Specifically, he

had violated the defendant's Fifth Amendment right to remain silent when he reinitiated contact with Peterka. Consequently, what he said that night was "the product of compulsion" because the State produced no evidence that the taint of Vinson's violation of Peterka's Fifth Amendment rights had been removed. Miranda v. Arizona, 384 U.S. 436, 473-474, 86 S.Ct. 1602, 16 L.Ed.694 (1966).

> Once it is established that there were coercive influences attendant upon an initial confession, the coercion is presumed to continue `unless clearly shown to have been removed prior to a subsequent confession.' State v. Outten, 206 So.2d 392, 396 (Fla. 1968). The inquiry is whether, under the circumstances, the influence of the coercion that produced the first confession was dissipated so that the second confession was the voluntary act of a free will.

Brewer v. State, 386 So.2d 232, 236 (Fla. 1980).

True, Vinson reread the Miranda rights before questioning him on the 18th, but in Brewer, this court held that a judge reading Brewer his rights at a first appearance hearing and between two confessions did not remove the taint of the first illegally obtained statement upon the latter. Similarly here, the trial court correctly recognized that telling Peterka what his rights were had not dissipated the taint upon at least his first talk with Vinson. The question, thus, is what removed the stain from Peterka's subsequent damning statements?

Peterka called Purvis immediately after his last conversation with Vinson (T 254-57), so if anything removed the taint of that questioning, it would have had to have occurred

between the end of this latest questioning and the phone call to Purvis. But there was nothing, so the presumption must remain that the taint which accompanied the interrogation session which had just ended attached to the conversation with Purvis.[3] This conclusion becomes stronger because Vinson held out the possibility of a manslaughter or second degree charge if the homicide was unintentional or accidental thereby giving the defendant an "out," and by doing so impliedly also gave him a promise of leniency.

Very well settled law regarding confessions requires that all confessions must be freely and voluntarily made, and if the police use any direct or implied promises, however slight, the resulting confession is inadmissible. Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897). Several cases suggest that Vinson's offer to Peterka amounted to the subtle coercion condemned in Bram.

In Fillinger v. State, 349 So.2d 714 (Fla. 2d DCA 1977), the police had arrested Fillinger for a petit theft, and she was suspected of having committed a grand theft. When told of her impending arrest for the latter crime, she confessed. The officer questioning her, however, told her that he would tell

---

[3]That taint arguably could have been removed if a long time separated the illegal statement from subsequent interrogations, it was conducted by a different police officer on a different topic and at a different location, and the defendant had talked with counsel between the confessions. Gaspard v. State, 387 So.2d 1016 (Fla. 1st DCA 1980)

the state attorney about any cooperation she might give or the lack of it. He also told her that if she helped him, he would help her get a reduced bond for the grand larceny. Such promises, the Second District said, amounted to the influence condemned in Bram.

In State v. Favalor, 424 So.2d 47 (Fla. 3rd DCA 1983) and State v. Foreham, 400 So.2d 1047 (Fla. 1st DCA 1981) promises, implied and explicit, not to prosecute the defendants rendered their subsequent confessions involuntarily obtained. On the other hand, merely exhorting the defendant to tell the truth in Bush v. State, 461 So.2d 936 (Fla. 1984) did not delude Bush as to his true position. Instead he confessed because he had not substantiated his alibi, and not because the police interrogator had encouraged him to tell the truth. He had confessed because of his own fears and hopes and not by those generated by the police. State v. Caballero, 396 So.2d 1210, 1213 (Fla. 3rd DCA 1981).

Here, Peterka stuck with his original story that Russell had disappeared with some "long haired" fellow (T 243). He confessed only when Vinson told him that the State was planning to charge him with first degree murder (T 288-89), which he could avoid if the killing was accidental or done in the heat of passion. The deputy planted the fear in him with the first degree murder charge then gave him hope by telling him that it could have been an accident and if so, he would only have to

spend a few years in prison (T 252).[4] Hence Peterka confessed, not out of any urging of Vinson to tell the truth, but in response to the subtle coercion this deputy knowingly exercised over the defendant. As such, the resulting statement was not freely and voluntarily given, and this court should reverse the defendant's judgment and sentence and remand for a new trial.

---

[4]Vinson said he did not mention the electric chair to Peterka (T 254), but it is unreasonable to believe the defendant was unaware of that penalty or at least that the punishment for first degree murder would be significantly more severe than that for manslaughter or second degree murder.

ISSUE III

THE COURT ERRED IN DENYING PETERKA'S MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE THE STATE HAD PRESENTED INSUFFICIENT EVIDENCE HE HAD COMMITTED THIS HOMICIDE WITH THE REQUIRED PREMEDITATION.

This is an unusual case because the uncontested evidence showed that Peterka had a driver's license with Russell's vital statistics, and he also had Russell's social security card (T 1371-72). From this and other circumstantial evidence, the state argued that Peterka was not only assuming Russell's identity, but more sinisterly, he killed the victim, as he laid on a couch, to complete the process. This scenario sounds like the plot of the latest made-for-TV mystery movie. As in those shows, the state's theory makes an interesting story, but like those TV plots, it lacked a basis in reality. An equally plausible explanation is that Peterka planned to use Russell's birth date and other information to start a new life and that plan was independent of the killing. What he wanted to do in the future did not provide the premeditation required to convert this homicide into a first degree murder.

Since the state relied solely upon the circumstances of the homicide to prove Peterka's intent, a little needs to be said regarding appellate review of cases depending solely upon circumstantial evidence to prove at least one element of a crime charged. Although the State can establish Peterka's guilt of first degree murder using circumstantial evidence, special rules apply to test the sufficiency of that evidence. Jaramillo v. State, 417 So.2d 257 (Fla. 1984). If the state

relies solely upon such proof to establish the defendant's guilt then no matter how strong that evidence may be pointing to his guilt, it is insufficient as a matter of law if the state has not rebutted every reasonable hypothesis of innocence which the evidence may also support.[5] McArthur v. State, 351 So.2d 972 (Fla. 1977); Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986). On the other hand, the jury is the exclusive determiner of the reasonableness of any hypothesis of innocence.

How these conflicting rules apply in practice can be illustrated by this court's analysis of the facts in Law. In that case, a boy died from head injuries which the State suspected Law had inflicted. Using the evidence found on the boy's body and the testimony of the last people to see him alive, experts created the most likely scenario of what had happened. Law raised four possible alternative theories of how the child had died, but the State presented evidence rebutting each one. On appeal, this court analyzed each hypothesis argued by the defendant, and it rejected them using the State's evidence. Thus, in order for a reviewing court to reject a reasonable hypothesis of innocence it must be able to point to some evidence in the record to support its position. The court

---

[5]The defendant need not have raised at the trial level every reasonable hypothesis of innocence. See, Davis v. State, 90 So.2d 629, 631-32 (Fla. 1956); Cheshire v. State, Case No. 74, 477 (Fla. September 27, 1990) 15 FLW S504.

cannot affirm a conviction by merely saying that the jury could reject the defendant's unrebutted hypothesis of innocence.

PETERKA'S EFFORTS TO ASSUME RUSSELL'S IDENTITY

Although the evidence at trial supports the State's version of what happened, Peterka's explanation of what happened also has record support which the state never refuted with other evidence. Instead, it argued that the killing was the final stage in Peterka's efforts to take over Russell's identity. That theory, while attractive to the mystery novel reader, upon close examination has no foundation in this case. There is no evidence the killing was part of Peterka's overall plan to gain a new identity.

Taken in the light most favorable to the state, the evidence shows that by July 12, Peterka had shared a house with Russell for about two or three months (T 1163). Russell agreed (for $100 (T 24)) to let Peterka use his name and vital statistics so he could get a driver's license (T 1378), which was issued to the defendant on June 27, 1989 (T 1642). On the same day, Peterka cashed a money order sent to Russell by an aunt (T 1454). Russell learned about the check from his aunt, and by July 11 he was ready to file a complaint with the police alleging that Peterka had stolen the money order and forged his signature (T 1454). The next day Russell disappeared (T 1163), which was pay day where he worked (T 1276), although there is no evidence he had been paid.

When the police investigated Russell's disappearance, Peterka gave somewhat conflicting stories about where in the

house he was when Russell left (T 1378). Russell's glasses and a pack of cigarettes were also seen lying on a table in the house (T 1353, 1177-78). This was crucial evidence that something was wrong because Russell had a strong tobacco dependency and needed the glasses to see and probably would not have left the house without either (T 1286, 1177-78). The officer asked the defendant for some identification, and instead of using his false driver's license, he showed him his birth certificate (T 1354-55). From that information, the police learned he was a fugitive from Nebraska (T 1455).

The police left Peterka, but several hours later they returned to arrest him, not for murder, but for being a fugitive (T 1358-60). He was arrested outside his house, and when he asked to go inside to get some clothes (he was wearing only shorts at the time), the police, with his consent, looked through his wallet (T 1371). In it they found the false driver's license as well as Russell's social security card, a bank card, and a newspaper advertisement announcing jobs in Alaska (T 1371-72, 1377). The wallet also had about $400 cash (T 1393). The police saw, but did not seize at that time, Russell's gun (T 1366). Parked outside was Russell's car (T 1382).

From these facts, the state theorized that Peterka killed Russell as he laid on the couch (since that is where the blood was found) to complete the identity change, but rather than being a well connected chain of events, the evidence has several weak links that snap under the weight of close

scrutiny. First, and most crucial, there is absolutely no evidence that even though Peterka had used Russell's name and vital statistics and had his social security and bank cards, that murder was the next step in his plan. Peterka does not have a history of violence, his crimes in Nebraska being thefts and burglaries (T 1135, 1901). What is more plausible is that he took advantage of his new identity to steal from Russell, and naively thought he could get away with it. Peterka did nothing for two weeks after cashing the money order, although Russell had discovered the theft and was intending to prosecute the defendant. Except for Peterka's statement, there is no evidence he knew of Russell's intention before July 12, the day Russell was killed (T 1276).

If Peterka was trying to take money from Russell before he fled, murdering the victim on July 13 made little sense. Russell would not be paid until that day (T 1276), and there is no evidence he had been paid. Likewise, Peterka would not have received his wages until Friday (T 132), two days after the shooting. All this raises the question of why Peterka shot Russell when he did. June 27 or 28 would have been a better time because he had completed assuming Russell's identity by then, and he had cashed the money order. He also had the keys to the car, so if he wanted to flee, he could have easily done so.

If he could have left in June, then the next unanswered question is why he did not do so after the killing, and especially after the police had started their investigation?

Did he really think he was going to become John Russell if he stayed in Fort Walton Beach? That was absurd because Russell had several friends and relatives in the area, and they were the ones who had first checked on Russell's whereabouts. They became worried about him almost immediately after he disappeared. Also, if murder was Peterka's intention, he certainly would have planned and executed it better. For instance, why would he have killed a person he knew had several friends who almost on a daily basis came to his house (T 1153, 1171, 1271)? Likewise, why would Peterka have killed a person chronically short of money (T 1656) in mid-day, immediately before payday and in his house (T 1276, 1657)? Also, he surely would have come up with a better story of Russell's disappearance than that he went off with a man with "scraggly hair" (T 1352) because the friends who came looking for the victim almost immediately saw his glasses and cigarettes laying on a table in the house. Certainly, anyone who had methodically planned to kill Russell to assume his identity would have taken the glasses and cigarettes with him when he disposed of the body. C.f. Rembert v. State, 445 So.2d 337 (Fla. 1984).

Then, the ultimate problem the state had with its theory is why Peterka stayed in town, knowing that he was a fugitive, and the police had his correct name and birth date (T 1354). Instead of fleeing like he could have done two weeks earlier, he stayed and waited for them to arrest him. For a man trying to start a new life, that does not make much sense.

Instead, the better explanation is that provided by Peterka. Yes he planned to use Russell's identification, and yes, he had taken the money order, but the shooting arose out of a fight the two young men had when Russell had confronted him about the stolen money order (T 2442-43). Rather than calmly carrying out his plan, he panicked, hid the body, and created a story which could not be checked but which he repeatedly changed the details (T 1378). He simply was too scared to know what to do, and instead of running he stayed put.

That version of what happened is more credible than the state's theory. It fits with the evidence and what Peterka told the police and his friends. What is more, it is a story the state never presented any evidence to refute.

THE SHOOTING OF JOHN RUSSELL

If the State's evidence is insufficient to support a first degree murder conviction, what does it prove? Homicides committed during a fight are hard to classify. In Wilson v. State, 493 So.2d 1019 (Fla. 1986), Wilson attacked his step mother after she had told him to stay out of the refrigerator. When his father tried to intervene, Wilson attacked him. During this struggle, the defendant stabbed and killed his five year old cousin. The father asked his wife to get his gun, but when she did, Wilson took it from her and shot his father. This court found that Wilson had sufficient time during this prolonged struggle to have fully contemplated killing his father, and it affirmed his conviction for that murder. It

reversed, however, his conviction for the murder of his cousin because that was an accident, and there was a reasonable doubt he ever intended to kill the boy.

In Spence v. State, 515 So.2d 312 (Fla. 4th DCA 1987), Spence and his victim had a fight, during which the victim approached the defendant with a closed fist. Spence hit him with the pistol he carried, then shot it in the air. As the victim got off the ground, Spence though he shot the gun so the bullet would hit near him. Instead, he killed him. Such an imminently dangerous act evinced Spence's depraved mind, and the court affirmed his conviction for second degree murder.

In Mahone v. State, 222 So.2d 769 (Fla. 3rd DCA 1969) Mahone caught his estranged wife at home with another man. During the ensuing argument with the man, he threw a bottle at the defendant who then chased him and stabbed him thirteen times. Although Mahone initially may have been provoked, what he did afterwards evinced his depraved mind so that he was guilty of second degree murder. Thus, an unintentional killing done through ill will, hatred, or spite is second degree murder if the act resulting in death was committed with a reckless disregard for life.

Distinguishing between second degree murder and manslaughter is not always easy, but the acts surrounding manslaughters reflect more an utter disregard for the safety of others than any ill will or hatred of the victim. For example, in Williams v. State, 336 So.2d 1261 (Fla. 1st DCA 1976), Williams got a shotgun out of the trunk of his car during a

lull in a fight at a bar in which he had been involved. As he shifted the gun from one hand to the other, it discharged, killing the victim. Williams was guilty of manslaughter. In Cunningham v. State, 385 So.2d 721 (Fla. 3rd DCA 1980), Cunningham brought a shotgun to a scene where there had been a disturbance. The gun fired as the victim tried to take it from him. Cunningham was guilty of manslaughter. Finally in Martinez v. State, 360 So.2d 108 (Fla. 3rd DCA 1978), the defendant's daughter called her father for help against the ultimate victim. When he arrived, the unarmed victim attacked Martinez, who shot the man. Martinez certainly was provoked, but he responded with excessive force by shooting the victim. Thus, in a manslaughter case, the defendant either created the dangerous situation or used excessive force in responding to a provoking situation.

Peterka's killing of Russell was manslaughter. Although the pair had fought for a while, until the very end, neither of the men used any deadly force. The killing is similar to those homicides where the defendant overreacts to the threat the victim has presented. Martinez. Certainly, the fight with Russell provoked him, but just as certainly, Peterka used excessive force in killing him. Like Cunningham, Peterka "brought" his pistol to the scene because it laid on a table in

the living room.[6] Both men went for the gun, but Peterka got it first, and as he turned around to face Russell, the victim lunged at the defendant who shot him. What happened was more consistent with manslaughter than second degree murder.

This court should, therefore, reverse the trial court's judgment and sentence and remand for imposition of a judgment of guilt for manslaughter and sentence him accordingly.

---

[6]Russell's friends often saw the defendant point the gun at the television screen while he was watching TV and "shoot" various characters (T 1273-74).

ISSUE IV

THE COURT ERRED IN ADMITTING HEARSAY THAT PETERKA HAD FLED NEBRASKA AND WAS CONSIDERED "ARMED AND DANGEROUS."

During Peterka's trial, the State called Deputy Harkins to recount the events leading to the defendant's arrest at 1 a.m. He told the court and jury about a nationwide computer check which "came back with that same name and that same date of birth as being wanted as a fugitive from out of state, considered armed and dangerous." (T 1355) Peterka objected on hearsay grounds to the testimony that the defendant was "armed and dangerous." (T 1355) The court rejected the hearsay argument, ruling that the testimony was admissible because "the State has to prove why the officer did certain things." (T 1356) Peterka disagreed, and moved for a mistrial, which the court denied (T 1357).

Later, the State asked Harkins if "based on the information you had from the State of Nebraska, did you have any reason to believe that he would be in possession of any weapon or guns?" (T 1361). Over relevancy and hearsay objections, Harkins said "Yes." A few questions later, the State asked Harkins why they wanted to search Peterka's house. Harkins said it was for weapons, and when asked why the police wanted to search for weapons, Harkins (again over objection) said that the information he had received over the teletype from Nebraska led them to believe the defendant had a gun (T 1363). Repeatedly letting Harkins tell the jury that Nebraska considered Peterka armed and dangerous had no

relevance other than to show his bad character. Proving "why the officers did certain things" had no relevance to the issues raised by the state alleging Peterka murdered Johnson.

"Relevant evidence is evidence tending to prove or disprove a material fact." Section 90.401, Florida Statutes (1988). Here the crucial word is "material," and the crucial question is "What certain things did the state have to prove the police did?" Ostensibly, that Nebraska considered Peterka "armed and dangerous" was relevant to show why the police used a ruse to arrest Peterka (T 1361), but why they had to trick the defendant was not an issue raised by the pleading in this case or contested by the defendant. It was collateral to the issues of whether he had killed Russell with a premeditated intent. The police arrested the defendant because he had fled Nebraska, not because they suspected him of murdering Johnson (T 1361). Thus, why they used a ruse to arrest him or asked his permission to search the house had no tendency to prove any fact of consequence in this case, and the evidence Nebraska considered him "armed and dangerous" was of no consequence here and was immaterial to resolving the issues presented by this case.

Florida courts have not said much regarding what is material evidence. Ehrhardt, in Florida Evidence (2d Edition), cites the comparable federal definition of relevancy which omits the word "material" in favor of the phrase "any fact that is of consequence to the determination of the action." Id. at 84. Facts which have consequence include "background facts

necessary to the trial of a lawsuit" which may not be "technically" in issue. Id. at 84.

In Smith v. State, 365 So.2d 704 (Fla. 1978) this court tacitly accepted Ehrhardt's definition of materiality when it held that collateral crimes evidence was admissible to establish "the entire context out of which the criminal conduct arose." Id. at 707. In Smith, this court approved admitting evidence that Smith had committed a murder on the same night he had earlier killed someone because "the two murders occurred during one prolonged criminal episode." Id. The second murder was "clearly a part of the context surrounding the murder for which Smith was tried."

In this case, why the police had to do "certain things" when they arrested Peterka as a fugitive from Nebraska was of no consequence in this first degree murder trial, nor did it put the murder in context. The ruse was not part of the steady flow of events like those in Smith that naturally led from one killing to the other. By 1 a.m. Peterka had long since killed Russell and hid his body. He was, in fact, asleep when the police knocked on his door. The State did not have to show why they used a ruse to arrest Peterka as a fugitive from Nebraska, and the evidence showed only that someone thought he was a desperate fugitive.

It was also immaterial because Harkins' and the other officers' actions belie the court's rationale. They never considered him dangerous. When Peterka answered Harkins' early morning knock, he came to the door wearing only his underwear.

Harkins told him to go inside and put some clothes on (T 1360). The defendant did so, during which time he could have gotten his gun. When the police searched his house, they found the weapon but did not take it because Peterka said it belonged to a friend (T 1365). Certainly, if they believed he was armed and dangerous, they would have arrested him on the spot and would have seized the gun they found.

The evidence, moreover, was harmful, not only because the state managed to get Harkins to say three times that Nebraska considered him a dangerous person but also because it tended to negate Peterka's defense that he had shot Russell without any intent to kill him. That is, the jury may very well have considered the evidence as proof of his dangerous propensities.[7] Since the State's evidence of Peterka's premeditation was purely circumstantial, it may have assumed crucial importance because it confirmed the state's theory that the defendant coldly killed Russell while he laid on the couch (T 1782). C.f. Zerquera v. State, 549 So.2d 189 (Fla. 1989). It was, therefore, not clear beyond a reasonable doubt that the jury would have found him guilty of first degree murder if this evidence had been properly excluded. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

---

[7]The court said it would give a limiting instruction to the jury regarding how it could consider this evidence, but it never did (T 1356-57). Defense counsel objected to any such instruction as ineffective, and he moved for a mistrial, which the court denied (T 1357).

ISSUE V

THE COURT ERRED IN ADMITTING TESTIMONY THAT THE VICTIM SUSPECTED PETERKA HAD STOLEN A MONEY ORDER FROM HIM AND THE VICTIM WAS GOING TO LET THE POLICE HANDLE THE MATTER.

During the State's case, the prosecutor presented three witnesses who recounted conversations they had had with Russell regarding a money order his aunt had sent to him as a birthday present which Russell thought Peterka had purportedly stolen. Kimberly Cox, an employee of the bank where the money order was cashed said that Russell had talked with her about the procedure for prosecuting Peterka because he thought he was the one who had forged his name and cashed the instrument. He also told the clerk that he intended to let the police handle the matter (T 1455-57).

Gary Johnson, a long time friend of Russell also told the jury that Russell had contacted the bank and the sheriff's office, that he planned to let them handle it, and he did not want to confront the defendant about the matter (T 1600-1601). Deborah Trently testified that Russell was going to turn the matter over to the police, and he would not confront Peterka until he knew "the gun was out of the house." (T 1603)

Over defense objection, the court admitted this testimony, apparently accepting the state's argument that it was relevant to show the homicide was not committed in self-defense or by accident (T 1433). The court also told the jury that they were to consider this evidence "solely for the purpose of going towards the purpose of proving the state of mind of the victim

at the time of the alleged killing" (T 1452). The court, however, erred in admitting this evidence because Russell's state of mind was not at issue.

In criminal cases, the reason the state punishes a defendant for doing an unlawful act is that he has the requisite criminal mind or mens rea to be guilty of some criminal offense. The focus, therefore, is upon the defendant's mental state when he committed the crime, and what mental condition the victim may have had is generally irrelevant. The law does not punish or reward the victim for what he thought or felt, it is only concerned with the defendant's intent since he is the one the state is trying to punish. Thus, as a general rule of law, in a homicide case, evidence of the victim's state of mind before he was killed is irrelevant. Fleming v. State, 457 So.2d 499 (Fla. 2d DCA 1984).

The principle danger in admitting evidence of the victim's state of mind is "that the jury will consider the victim's statement of fear as somehow reflecting on the defendant's state of mind rather than the victim's-i.e., as a true indication of the defendant's intentions, actions, or culpability." United States v. Brown, 490 F.2d 758, 766 (D.C. Cir. 1974) (emphasis in opinion. Footnote omitted.) Accord, Correll v. State, 523 So.2d 562, 565 (Fla. 1988). In this case, the state made precisely that inference during its closing argument:

> How do we know that he told lies in that

> interview? Where are the lies on that tape? "John started a fight over the check." John Russell started a fight over the check. First, ladies and gentlemen, you can ignore it, if you want to. Everybody that told you anything about John Russell as a man as far as whether he fought or not told you he was a peaceful and nonviolent. He did not start a fight with Daniel Peterka. If he had ever been in any other fights, you would have found out about it in this courtroom. He hasn't ever been in one. You are supposed to believe that with Daniel Peterka, the gunman, with a gun laying out in the room, that he started a fight with Daniel Peterka. That is what you are supposed to believe. No, ladies and gentlemen, John told everyone, he told Lori his girlfriend, he told his cousin Deborah, and even told the bank manager Kim Cox what he was going to do, he was going to go to the Sheriff. He was not going to confront Daniel Peterka about the check, especially while Daniel Peterka had the gun in the house. He feared that gun and he feared Daniel Peterka.

(T 1780-81).

> I hope you'll take all this evidence and look at it and find out what it means to you. Spread out John Russell's identification, spread the pictures of John Russell, spread out the pictures that show the evidence in the house and you will come to one inescapable conclusion, beyond any reasonable doubt that John Russell was murdered with premeditation. There never was a fight. There never was an accident (T 1796).

Clearly from this argument, the prosecutor used Russell's state of mind to infer that Peterka killed Russell in cold blood, but as the court in Brown and this court in Correll recognized, that is an impermissible reason to admit evidence of Russell's state of mind.

There are three exceptions to this general rule: 1. The defendant claims he acted in self defense, which can be rebutted by evidence showing the victim feared the defendant. 2. The defendant claims the victim committed suicide, which can be rebutted to show the victim did not intend to kill himself. 3. The defendant claims the death was accidental, which the state can rebut by showing the victim feared whatever the instrument of death proved to be. See, Kingery v. State, 523 So.2d 1199 (Fla. 1st DCA 1988). In this case, the only claim meriting discussion is the State's argument that evidence of Russell's state of mind was relevant to rebut Peterka's claim that the killing was accidental. The state, however, has misconstrued what types of accidents make this evidence relevant.

They are not the type claimed in this case. That is, Peterka's claim of accident is really that during the struggle he unintentionally killed the victim. It is not that, while the pair struggle, he dropped the gun and it fired with Russell's death the result. In Hunt v. State, 429 So.2d 811 (Fla. 2d DCA 1983), the state introduced the rebuttal testimony of several people who said the victim had told them she feared Hunt. The Second District said that such statements could have been admitted if Hunt had claimed the killing was an accident, suicide, or in self-defense. Yet, the court rejected the State's claim that because Hunt had said he accidentally shot the victim, the evidence of her state of mind was relevant. "The deceased's state of mind was not placed in issue by Hunt's

claim that he had accidentally shot the deceased." Id. at 813. It was not in issue because Hunt said he accidentally shot the victim, not that the victim accidentally shot herself. The "accident" state of mind exception exists to show that the victim had a fear or aversion to the instrumentality of death. Brown, supra at 767. Admitting evidence of the victim's fear of the defendant to show that the defendant did not accidentally kill the victim, is an impermissible way proving the defendant's mental state. Correll. Here, Peterka never claimed Russell shot himself accidentally, and thus the evidence of his state of mind was irrelevant because it rebutted a defense Peterka never raised.

Evidence of a victim's state of mind may also be relevant if the crime charged requires a lack of consent or willingness on the part of the victim. For example, in Peede v. State, 474 So.2d 808 (Fla. 1985), the state charged Peede with committing a felony murder, the underlying felony being Peede's kidnapping of his estranged wife. Evidence of the victim's state of mind immediately before the kidnapping was relevant to show she had not gone with Peede voluntarily, a contested issue. The lack of consent or an unwillingness to go with the defendant was necessary for the state to prove, therefore, evidence that she did not willingly do so was relevant.

Here, the State charged Peterka with committing premeditated murder. Unlike the prosecutor in Peede, the one in this case never had to show a lack of consent on the part of the victim to rebut some theoretical or actual defense. Peede,

therefore, has no bearing on this case, and the court erred by letting the State elicit from several witnesses that Russell was afraid of the defendant. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VI

THE COURT ERRED IN ADMITTING A PHOTOGRAPH OF THE VICTIM'S DECOMPOSED SKULL WHEN IT HAD PREVIOUSLY RULED IT INADMISSIBLE BECAUSE NOT ONLY WAS IT GRUESOME AND GORY, BUT ADMITTING IT AT THE CLOSE OF THE STATE'S CASE DENIED PETERKA HIS RIGHT TO CONFRONT THE PATHOLOGIST ABOUT IT, A VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

During the pathologist's testimony, the prosecutor sought to introduce several photograph's of Russell's decomposed body and skull. The pathologist had also cleaned the victim's skull, and the state wanted it admitted because it helped the doctor explain Russell's wound. Peterka objected to all of this evidence, and the court, after some discussion, gave him the choice of what he wanted admitted: the skull or the photographs (T 1205). Given that option, Peterka opted for the skull, and the court accordingly excluded all of the pictures showing the victim's decomposing body, including exhibit 36, which was a close-up picture of Russell's skull (T 1206).

The court, however, later reversed itself when the State, near the end of the presentation of its case, sought to introduce all the pictures, including exhibit 36. The court, following its previous ruling, excluded all the pictures except exhibit 36, which, over defense objection, it admitted, even though defense counsel reminded the court about its earlier agreement (T 1701-1702). Counsel also objected to admitting the picture because it did not show the body as it was found, and the court overruled that objection (T 1702). By admitting this arguably gruesome and gory photograph of the victim's

decomposed head, the court denied Peterka his right to cross examine Dr. Kielman, the pathologist about this photograph. Such action on the court's part denied Peterka his Sixth Amendment right to confront his accusers.

Confronting ones' accusers ensures the reliability of the truth finding process. Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986). Confrontation in turn means at least the opportunity to cross-examine witnesses, See, Dutton v. Evans, 400 U.S. 74, 94, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)(Harlan, concurring), because cross-examination is the best guarantee of the reliability of the truth-finding process. 5 Wigmore On Evidence Section 1367 ("Nevertheless, [cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth.") If a defendant is entitled to a full and fair cross-examination of a witness, a court will err if it unduly limits that form of questioning. Coco v. State, 62 So.2d 892 (Fla. 1953); Steinhorst v. State, 412 So.2d 332, 337 (Fla. 1982). In short, a court should sparingly limit a defendant's cross-examination. Salter v. State, 382 So.2d 892 (Fla. 4th DCA 1980).

In this case, the court prevented rather than limited Peterka's cross-examination of the medical examiner regarding the photograph of Russell's skull. If a court errs in limiting cross-examination for a bad reason, this court erred in prohibiting any cross-examination for no reason.

Admitting the logic of this argument does not answer the question of its harm. Peterka had earlier objected to

admitting both the pictures and the skull, but the court ruled that only one of them was necessary for the medical examiner to use, and it gave the defendant the choice of which he thought would be the less gruesome. Faced with that choice, he selected the skull, which indicates how prejudicial he believed the pictures to be. Afterall, there is a certain queasiness in holding up the victim's skull and calmly saying, "Alas! poor Yorick. I knew him."[8] Yet Peterka preferred this to showing the jury the gory photograph (T 1206). Whatever prejudice he may have suffered from the skull was preferable to that presented by the picture. Moreover, the State did not present an overwhelming case against Peterka. As argued earlier, this is a circumstantial evidence case in which the defendant presented a plausible explanation to the State's theory. The prosecutor, in his closing argument, repeatedly called the jury's attention to the lies Peterka had told to various people (e.g. T 1779-80). Attacking his credibility was the key to overcoming his defense, and as such, it cannot be said beyond a reasonable doubt that the emotional revulsion naturally engendered by looking at the photograph of a gory skull, which the court prevented Peterka from mitigating, did not unfairly sway the jury's evaluation of Peterka's defense. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

---

[8]Hamlet, Act V Scene 1, line 201.

This court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VII

THE COURT ERRED IN SENTENCING PETERKA TO DEATH BECAUSE ITS SENTENCING ORDER LACKS THE CLARITY REQUIRED, A VIOLATION OF HIS EIGHTH AMENDMENT RIGHTS.

The court's sentencing order includes three short paragraphs recounting some of the facts surrounding this murder, a list of five aggravating factors it said were established "beyond a reasonable doubt," one mitigating factor found by the court, and a statement that although there was evidence "tending to show other mitigating circumstances, the Court did not find any to exist" (R 2077-78). The sentencing order is deficient in that it does not provide any facts to support the aggravating factors found, and it lacks the unmistakable clarity this court said such orders must have. Mann v. State, 420 So.2d 578 (Fla. 1982). Alternatively, assuming the court's brief recitation of facts included in the sentencing order are intended to be the facts to support the five aggravating factors, then those factors, as will be argued in other issues, have not been established beyond a reasonable doubt as required. State v. Dixon, 283 So.2d 1 (Fla. 1972).

Section 921.141(3), Florida Statutes (1989) provides the statutory justification for this argument. It requires the trial court to

> enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Regarding a court's findings of mitigating factors, this court has recently articulated "guidelines for findings in regard to mitigating evidence." Rogers v. State, 511 So.2d 526 (Fla. 1987); Campbell v. State, no. 72,622 (Fla. June 14, 1990). It did so because trial courts are the appropriate judicial body to make factual findings, not this court. Lucas v. State, Case No. 70,653 (Fla. September 20, 1990). The same rationale applies to findings of aggravating factors. The trial court should analyze the facts, in its discretion, it believes prove beyond a reasonable doubt, the relevant aggravating factors. This court should not become involved in evaluating and weighing evidence gleaned from a "cold" record whenever the trial court has failed to do what the law requires of it. Likewise, the factual findings supporting each aggravating factor should be of "unmistakable clarity" to this court Mann, supra. This court should not have to guess what facts are relevant or whether they have any weight. This court reviews death sentences, it does not impose them, yet the sentencing order in this case requires this court to make findings of fact and pass on their importance. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). The trial court, in short, has given this court (and appellate counsel) virtually nothing to review, and to affirm the death sentence, this court will have to provide the facts and analysis omitted by the trial court.

This case is similar to Van Royal v. State, 497 So.2d 625 (Fla. 1986) in which the trial court orally sentenced Van Royal to death, but never filed its written order doing so until after this court had assumed jurisdiction over the case. This court reduced Van Royal's death sentence to life in prison because the court had not timely filed its written reasons for sentencing the defendant to death. Even though the trial court had orally sentenced him to death, this court had nothing to review to determine if the sentencing authority had applied the aggravating and mitigating factors in a well-reasoned manner. Instead of giving the trial court the opportunity to correct its oversight it held that the record on appeal was inadequate rather than incomplete.[9]

In this case, the aggravating factors have either no facts to support them or they are patently insufficient. Besides hampering this court's review of the propriety of the death sentence, it has prevented Peterka from presenting several penalty phase issues. For example, Peterka would like to argue that the court erred in finding the court erred in finding he committed the murder for pecuniary gain and in a cold, calculated, and premeditated manner. This court has said that

---

[9]In Cave v. State, 445 So.2d 341 (Fla. 1984), the trial court filed no written findings, but dictated them into the record. This court found that the transcribed record satisfied the writing requirement of the statute, but that holding has been rejected by this court in Grossman v. State, 525 So.2d 833 (Fla. 1988) which holds that the written findings must be made contemporaneously with the oral statement.

finding those two factors in a particular case does not necessarily mean the trial court impermissibly "doubled" them. Instead,

> There is no reason why the facts in a given case may not support multiple aggravating factors provided the aggravating factors are themselves separate and distinct and not merely restatements of each other as in a murder committed during a robbery and for pecuniary gain, or murder committed to eliminate a witness and murder committed to hinder law enforcement.

Echols v. State, 484 So.2d 568, 575 (Fla. 1985). Whether the facts in this case support finding multiple aggravating factors remains unknown because the trial court provided none for the defendant to use in challenging its findings.

Rather than giving the trial court the opportunity to correct what it should have done originally, this court should reduce Peterka's sentence of death to life in prison. The requirement to put findings in writing appeared in the earliest form of the current death penalty statute, Section 921.141(3), Florida Statutes (1973), and it is plainly set forth there. Yet the trial court chose to present this court with reasons for sentencing Peterka to death for which it provided no adequate justification. Like the trial court's order in Van Royal, supra the sentencing order in this case lacks the thoroughness this court had consistently and clearly required; it is insufficient for this court to review. This court should therefore remand for imposition of a life sentence.

ISSUE VIII

THE COURT ERRED IN FINDING THAT PETERKA COMMITTED THIS MURDER TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS.

Illustrative of the problem presented in the previous issue, the court found that Peterka committed the murder of Russell "to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws" (R 2078). It provided no facts to support that aggravating factor either when it found that aggravating factor or in its statement of the relevant facts for sentencing (R 2077). What it did provide establish only that 1. at the time of his arrest, Peterka had a driver's license but with Russell's identifying data and some other identification with the victim's personal data. 2. Peterka came to Florida with the express purpose of changing his identity. 3. Peterka shot Russell in the head as he lay on the couch, and 4. he buried him in a shallow grave in some woods. None of these facts establish that the defendant killed Russell to avoid the disrupt or hinder the lawful exercise of any government function.

Typically, that aggravating factor applies when the defendant has created an actual or imminent disruption of the government. In Koon v. State, 513 So.2d 1257 (Fla. 1987) Koon killed a crucial witness against him in a federal case in which he had been charged with counterfeiting. Supporting a finding of this aggravating factor was evidence that a federal magistrate had told Koon that the charge would have been

dismissed if there was one less witness. Also Koon was angry with the victim for intending to testify against him, and he was heard to say that "Dead men can't tell no (sic) lies." Accord, Francis v. State, 473 So.2d 672 (Fla. 1985)(witness elimination.) In Provenzano v. State, 497 So.2d 1177 (Fla. 1986), the defendant, angry at being arrested, swore vengeance against the two policemen who had arrested him. On the day of his trial, he came to court and shot a bailiff who was trying to search him. This was sufficient evidence that he intended and had attempted to disrupt the orderly administration of justice. Likewise, in Tafero v. State, 403 So.2d 355 (Fla. 1981), Tafero shot two policemen who had discovered guns and drugs in the car in which he was a passenger.

On the other hand, this aggravating factor is inapplicable when the disruption is speculative. In Barclay v. State, 470 So.2d 691 (Fla. 1985) the trial court found Barclay had disrupted or hindered the lawful exercise of a governmental function because Barclay and his co-defendants had called for a black revolution which would destroy the government. "A prediction of future conduct or events, however, will not support finding an aggravating factor." Id. at 695.

In this case, the court articulated no facts to support this aggravating factor, and Peterka does not believe it is his responsibility to search for the facts the court should have put in its sentencing order, so he can then explain why even those facts do not support a finding of this aggravating factor. In short, based upon the facts presented in the

court's sentencing order, Peterka did not commit this murder to disrupt or hinder the lawful exercise of a governmental function or the enforcement of the laws.

ISSUE IX

THE COURT ERRED IN FINDING PETERKA COMMITTED THE MURDER FOR PECUNIARY GAIN.

The court, again without providing any facts to support its finding, held that Peterka had committed the murder for pecuniary gain (T 2078). The court's factual statement introducing its finding also provides no basis for finding this aggravating factor. The court, in fact, provided no explanation for this homicide, and this court will have to delve into the record to find any support for the court's ruling on this aggravating factor. It will, however, be a futile search because neither the law or the facts of this case support a finding Peterka killed for financial gain.

This court has clearly said the pecuniary gain aggravating factor applies when the murder was necessary to obtain some specific gain. Hardwick v. State, 521 So.2d 701 (Fla. 1988). The link between the killing and the financial benefit must be direct and certain, as for example, it usually is in the typical robbery-murder. Id.; Buenoano v. State, 527 So.2d 194 (Fla. 1988)(Husband murdered to get insurance and veteran's benefits she would not have gotten if defendant was divorced from her husband.) Of course, circumstantial evidence can establish this aggravating factor, but as with other issues, such evidence must exclude all reasonable hypothesis of innocence. Simmons v. State, 419 So.2d 316 (Fla. 1982). Some examples will clarify how this court has applied this factor.

In Hildwin v. State, 531 So.2d 124 (Fla. 1988), the defendant admitted forging one of the victim's checks after killing her, saying that he needed money (he had searched for pop bottles along side the road for gas money), and he was found in possession of her ring and radio. This court found Hildwin had committed the murder for pecuniary gain.

In Hill v. State, 549 So.2d 179 (Fla. 1989) the state proved Hill had taken the money in the victim's purse after the murder, but such proof was insufficient to establish he had killed the victim to get the money. It was not, in short the motivating reason for the killing, and the evidence supported the equally plausible theory that Hill had taken the cash as an afterthought.

Similarly, in Scull v. State, 533 So.2d 1137 (Fla. 1988), Scull took the victim's car after the murder, but the equally plausible reason he took it was to escape rather than improving his financial worth.

Extending the holding of Scull, this court ruled in Peek v. State, 395 So.2d 492 (Fla. 1981), that the court erred in finding pecuniary gain even though Peek had ransacked the victim's house and taken her car. The defendant had taken nothing, and he could have stolen the car to ease his escape. There was, in short, no evidence Peek committed the murder to facilitate the theft or that he intended to profit from it.

In this case, the state presented no evidence Peterka had stolen any money or anything else from Russell. The court, over defense objection, admitted testimony that Russell

believed Peterka had forged and cashed the money order his aunt had sent him, but that evidence was admitted solely to show the victim's state of mind (T 1451-52). It could not be used to show that Peterka had stolen the draft.[10] There is, therefore, no evidence of any financial gain at any time by the defendant.

But, assuming the financial gain the court had in mind was the money order, there is no evidence Peterka killed Russell to keep the money he had already taken. He had cashed the draft two weeks earlier, and it is illogical to argue he killed the victim to get what he already had. The cases dealing with the pecuniary gain aggravating factor involved situations where the murder was one step in the defendant's plan to acquire some wealth. This aggravating factor has no application for a murder committed so long after a theft.

The temporal separation between the two crimes only underscores the inherent ambiguity surrounding this killing. The facts support with equal certainty the conclusion that Peterka killed Russell to avoid going to prison. Russell, after all, knew Peterka was trying to create a new identity, and he very well could have figured that the easiest way to get back at Peterka was to turn him in for being a Nebraska escapee. Peterka, thus, may have killed Russell, not to hide the theft of the money, but to prevent him from going to the

---

[10]The state never charged Peterka with the theft of the money order, and it presented no witnesses to prove that the defendant had forged the check.

police to report that he was wanted in Nebraska. That theory is as plausible as the presumed justification that the defendant committed the murder to steal $300.

This court should therefore strike this aggravating factor and remand for a new sentencing hearing. A hearing before a new jury is called for because the court, over defense objection (T 1851), instructed the jury it could consider this aggravating factor, but there was no evidence to support it.

ISSUE X

THE COURT ERRED IN MENTIONING IN ITS SENTENCING ORDER THAT OTHER "MITIGATING CIRCUMSTANCES" EXISTED BUT DID NOT SAY WHAT THEY WERE OR WHY THEY DID NOT AMOUNT TO MITIGATION, AS REQUIRED BY THIS COURT IN CAMPBELL V. STATE, NO. 72,622 (FLA. JUNE 14, 1990).

The court, in its sentencing order, said the following regarding mitigation:

> The Court also found the following mitigating circumstance to exist:
>
> (1) The defendant has no significant history of prior criminal activity.
>
> While there was evidence tending to show other mitigating circumstances, the Court did not find any to exist (T 2078).

The court's order failed to meet the standards this court has articulated regarding the mitigation a court recognizes exists but refuses to find. Campbell v. State, Case No. 72,622 (Fla. June 14, 1990). In Campbell, this court established guidelines to clarify how trial courts are to treat mitigation.

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigation circumstance propose 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. . . . The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence, and is mitigating in nature. . . . The court next must weigh the aggravating circumstances against the mitigating factor 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.' Id. at 15 FLW S344.

The court here plainly violated the requirements of Campbell. Although the sentencing order expressly mentions that other mitigation was present, the trial court's order simply dismisses it without mentioning what it was. The court should have discussed and evaluated the mitigation trial counsel argued in his letter to the court (T 2056-2076). In it, he pointed out that until this killing, all of Peterka's prior crimes had been non-violent. Several letters to the court attested to the defendant's peaceful nature, which can mitigate a death sentence. See, Brown v. State, 526 So.2d 903 (Fla. 1988). Peterka has shown by his remorse that he can be rehabilitated, and his cooperation with the police to solve this homicide is evidence that he can change. Magill v. State, 386 So.2d 1188 (Fla. 1980). Such remorse is further evidenced by Peterka's assistance, without which the police would never have found Russell's body, and the State would have had a very difficult time proving the defendant killed Russell.

The court ignored evaluating this mitigation, and by doing so, it committed reversible error. This court should reverse the trial court's sentence and remand for resentencing.

ISSUE XI

THE COURT ERRED IN ALLOWING THE STATE, DURING CROSS EXAMINATION OF THE DEFENDANT'S MOTHER, TO ALLEGE THAT PETERKA HAD AN EXTENSIVE JUVENILE RECORD.

As part of his case in the sentencing phase of the trial, Peterka had his mother testify that he was a good boy while growing up. The state challenged that characterization by asking her about the defendant's apparently extensive juvenile record for burglary and thefts, and in particular, it asked her about Peterka stealing a gun (T 1897-99). The State, however, never produced certified copies of the crimes it alleged Peterka had committed (T 1899). The court, therefore, erred in letting the State cross-examine the defendant's mother regarding the defendant's past when it was not prepared to establish his juvenile criminal record.[11]

As a general rule, this court has allowed the State to use a defendant's criminal record to rebut a defendant's claim that he has no significant criminal history. Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983); Booker v. State, 397 So.2d 910 (Fla. 1981). This court, however, has insisted that impeachment must be based upon the defendant's criminal convictions and not simply upon allegations of uncharged crimes. Robinson v. State, 487 So.2d 1040 (Fla. 1986). In

---

[11]The State also alleged Peterka had stolen a gun from his father in February 1989, and had returned it only after he had been caught (T 1886).

Robinson, the state, on cross examination of several defense witnesses called during the penalty phase of the trial, sought to cast doubt upon their testimony of Robinson's good character by asking them if they were aware that "the defendant went back to the jail and committed yet another rape?" This court rejected that attack upon the defendant's character because "[h]earing about other alleged crimes could damn the defendant in the jury's eyes and be excessively prejudicial." Id. at 1042.

This case is similar to Robinson in that the State alleged Peterka had stolen a gun, a crime which he apparently was never charged with committing, much less convicted (T 1884-86). Robinson directly controls, and this court should reverse because the trial court let the State impeach a defense witness with allegations of an unconvicted crime.

This case is also similar to Robinson in that the state merely alleged Peterka had an extensive juvenile record. It never called any records clerk or other similar witness to verify that, yes, the defendant had a long criminal record as a child. Presumably, the State could have done so because it did call a clerk who verified Peterka's adult record in Nebraska (T 1899-1900). It chose not to call such a witness to establish his juvenile record, and all the jury had to consider was the State's unsubstantiated allegations of what offenses the defendant had committed as a child. Thus, the court in this case was faced with a situation similar to that in

Robinson, and this court should do as it did in that case and reverse for a new sentencing hearing.

CONCLUSION

Based upon the arguments raised above, Peterka respectfully asks this honorable court to grant him the following relief: 1. Reverse the trial court's judgment and sentence and remand for imposition of a conviction for manslaughter, 2. Reverse the trial court's judgment and sentence and remand for a new trial, or 3. Reverse the trial court's sentence and remand for a resentencing.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, DANIEL PETERKA, #119773, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 4th day of December, 1990.

DAVID A. DAVIS