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

# REPLY 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. :

_____ :

REPLY BRIEF OF APPELLANT

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 KILL WAS AN ACCIDENT OR COMMITTED IN THE HEAT OF PASSION, A VIOLATION OF THE DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

The State's argument on this issue only re-emphasizes the point Peterka made in his initial brief: "The key `fact' is that the court suppressed the statements taken after Peterka invoked his right to remain silent on July 14, (T 356-7)." (Initial brief at p. 20) The court's order remains the State's biggest stumbling block, and it used various tactics to dismiss its importance.

For example, it first minimized the force of the ruling by noting the "judge did not make any express findings." (Appellee's brief at p. 31) Yet, the court granted Peterka's Motion to Suppress his Statements up to the time the defendant called for Shorty Purvis (T 348), and it specifically reserved

any ruling as to the suppressed statements' use for impeachment: "[A]nd whether or not they're admissible for impeachment purposes is a matter which the Court will attend to if and when they're offered." (T 356-57) Those were express findings although the court may not have given its reasons for its ruling. But then it is not required to do so.

The State, on page 32 of its brief, then claims "there is no basis to believe that Judge Fleet found any statement at issue involuntary." Perhaps if the court had viewed the evidence in the light most favorable to the State that was true, but by granting the motion, the court clearly gave credence to Peterka's version of what happened.[1] The defendant said the police repeatedly ignored his requests not only to cut off all questioning, but to have the assistance of counsel (T 2094). As significant, Deputy Vinson also "made it clear to me that if I gave a statement saying that if I had killed my roommate in the heat of passion that I would be charged with manslaughter." (T 2106) The law enforcement officer repeated that message on July 18, but it was "much more intense,"

---

[1]The State, by way of a footnote on page 33, cites well settled law that the reviewing court must interpret the evidence and reasonable inferences and deductions in a manner most favorable to sustaining the trial court's ruling. If so, then this court must accept the testimony of Peterka regarding his repeated requests to remain silent and for counsel and his claim Vinson told him several times he would be only charged with manslaughter if he confessed (T 2101, 2107-2107). Such evidence supports the trial court's ruling that all the statements the defendant made while in custody until he talked with Purvis should be suppressed.

meaning that unless he admitted killing Russell in the heat of passion (for which he would be charged with manslaughter), Vinson planned on charging him with first degree murder (T 2106). Peterka's version of events certainly supported the trial court's ruling, and it as clearly showed that his subsequent confession was involuntary in the sense anticipated by the United States Supreme Court in Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897).

The State, then on page 35 of its brief, subtly argues that the court erred in partially granting the motion to suppress. It does this by reviewing the evidence presented in the light most favorable to it, a position which is understandable given the rarity of such motions being granted and appealed, but which is nevertheless as incorrect as its conclusion. Thus, much of the State's argument on this issue tries to ignore the consequences the court's order partially granting Peterka's motion to suppress has on how this court should resolve the factual conflicts presented.

Also on page 35, the State finally addresses the issues Peterka raised by utilizing the factors identified by the court in Michigan v. Mosely, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), to determine a subsequent statement's admissibility. To support its argument the State again views the evidence contrary to that supporting the court's ruling, and the impression it gives is that Vinson advised Peterka of his rights on July 14, took a statement, and left him alone until Peterka called Shorty Purvis four days later (Appellee's

brief pp. 34-35). Only at the end of page 35 does it mention the two intervening interviews by Vinson, and it nowhere mentions Peterka's testimony regarding the promises made by the police officer, the ignoring of his requests for the assistance of counsel and to stop questioning. It even ignores Vinson's own admission that the sheriff told Vinson to "not come back without a confession." (T 287) Contrary to what the State would like, the evidence points to the police overbearing the defendant's will, and the court so found.

Thus, the cases cited by the State on pages 36 and 37 of its brief are factually distinguishable because in none of them did the defendants repeatedly ask to remain silent and none of them asked for counsel, as did Peterka (T 2094). The police did not scrupulously honor the defendant's request in this case, as the court found by partially granting the motion.

What the trial court and the State apparently concluded was that ignoring such requests and making promises of lenient treatment applied only to specific interrogation sessions (Appellee's brief at p. 37).[2] The trial court's fatal mistake was failing to consider the residual effects or taint the prior illegalities had upon Peterka's subsequent statements.

---

[2]Contrary to the State's claim on the bottom of page 37 of its brief, Vinson promised to charge Peterka with manslaughter if he would say he killed Russell in the heat of passion (T 2105-2106).

The cases cited by the State on this point have relevance only if the trial court had resolved the factual conflicts in the State's favor. Such a determination, however, ignores the key fact, that the court granted a critical part of the defendant's motion to suppress. To support that ruling this court must resolve the conflicts of the evidence in the light most favorable to upholding the court's ruling. To do so, large portions of Peterka's testimony, particularly those relating to the defendant's repeated requests to cut off questioning and his request for an attorney, as well as Vinson's promise of lenient treatment must be credited rather than the conflicting testimony of Vinson. Caso v. State, 524 So.2d 422 (Fla. 1988) (Trial court's order is presumed correct, and it will be sustained on appeal if there is substantial, competent evidence to support it.) In re Forfeiture of $62,200 in U.S. Currency, 531 So.2d 352 (Fla. 1st DCA 1988) (Appellate court should interpret evidence and all reasonable inferences in light most favorable to sustain trial court's conclusions.)

In short, the court's ruling was the crucial "fact" in this case because it indicated who the court believed and what evidence it rejected. Because this court's review of such motions is not de novo, but one for only an abuse of discretion, the trial court's ruling is crucial since it will determine the facts this court will use in reviewing the propriety of what the trial court did. A substantial amount of competent evidence exists to support the trial court's order

partially granting the defendant's motion to suppress in this case.

The only question was whether the taint of the prior illegalities was removed. As argued in the Initial Brief, it was not, yet the State claims on page 41 that it was somehow abated. It cites Nettles v. State, 409 So.2d 85 (Fla. 1st DCA 1982) to support its claim. While its reading of the case may be correct, that case is factually distinguishable from this one. In Nettles, the interrogating officer had merely told the defendant that if he cooperated, "it will make it a little easier." Such a mild encouragement to tell the truth differs significantly than the explicit promise that if Peterka confessed he would be only charged with manslaughter. Vinson made this promise to Peterka immediately before he called Purvis (which Vinson arranged (T 2107)), and no evidence supports the conclusion that the mere passage of time and talking to Purvis somehow attenuated the violations of Peterka's rights to remain silent and have counsel as well as the promises of leniency. This court should reverse the trial court's judgment and sentence and remand for a new trial.

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.

At least Peterka and the State agree on the law in this case, and how it should be applied. What they do not agree on is what the evidence proves. In his initial brief, the defendant pointed out the amateur manner in which this homicide was committed. He did this not, as the State assumes, to show he did not commit the "perfect crime," but to show the inherent implausibility of the State's theory of how this killing occurred.

The State argued that Peterka had spent weeks in acquiring Russell's identity. He paid Russell $100 for the use of his name and vital statistics, and when arrested he had his social security card and other cards that had belonged the victim. The murder, according to the State, was the logical and final step in this nefarious plan. If the State was billing this murder as one that was "cold, calculated, and premeditated" then its evidence should support that theory. Instead, as shown in the Initial Brief, the State's theory of Peterka's scheme wears like an older brother's hand-me-down suit. It was ill fitting with several large holes and tears.

For example, it refers to Blair v. State, 406 So.2d 1103 (Fla. 1981) where the "defendant's claim that he killed his wife during argument and panicked, refuted by fact, inter alia, that he cleaned up evidence of crime, buried victim's body and

told children that mother was in Miami." (Appellee's brief at p. 53) In Blair, the defendant claimed his wife was angry at him, and had shot a gun at him. During the ensuing struggle he "accidentally" shot her, and in a panic he buried her body in the backyard. What the defendant could not refute, however, were the facts that the victim had not been shot once but three times, she was very sick and unable to eat, and she was very emaciated and only 4 feet 10 inches tall. Such evidence refuted or at least conflicted with Blair's theory that he had shot her during a desperate struggle. That he cleaned up after the murder and told his children their mother had left was only part of the larger story that justified rejecting his "panic" theory.

In this case, Russell was not so obviously physically weaker than Peterka, and unlike the victim in Blair, Russell was shot only once, which would support the defendant's claim that this was an unintentional killing.

The State also cites this court's opinion in Peek v. State, 395 So.2d 492, 495 (Fla. 1980) for the proposition that the defendant's inconsistent statements can rebut his hypothesis of innocence. In that case, Peek had initially claimed he had never been in the vicinity of the murder victim's car. Later, he radically changed his story to admit that yes, he had been there but had entered the car only to burglarize it. In this case, Peterka's "different" version that he related to Ronald LeCompte differed only in minor details. He told the police and LeCompte that he and Russell

had struggled and during the fight they both went for the gun. The only difference is how the shooting actually occurred, but the essential evidence in both stories is that Peterka admitted shooting Russell while they fought. Unlike Peek's flip flopping stories which changed to fit the evidence, the defendant's damning admissions remained the same. The State's reliance on Peek is misplaced.[3]

Also, some of the facts the State relies upon add nothing to its argument. For example, it says the gun was fired downward, and the muzzle was very near Russell's scalp when the gun was fired (Appellee's brief at p. 48). That evidence could support the defendant's as well as the State's version of how Russell was killed. Likewise that the gun used was a .357 magnum has no value because there is no evidence Peterka had a choice of weapons from which he selected the .357 gun because of its lethality.[4] That the brain and skull "literally" exploded likewise adds no strength to the State's circumstantial evidence argument because Peterka never denied killing Russell, and his explanation of the homicide is as

---

[3]Likewise, that Peterka may have given inconsistent statements may indicate his guilty knowledge of a homicide but not necessarily of first degree murder (See appellee's brief at p. 51).

[4]The State implies or assumes that the bullet that killed Russell was "no doubt, []hollow point jacketed or semi-jacketed." (Appellee's brief at p. 52) There is no evidence to support that conclusion, and the medical examiner never recovered the bullet that killed Russell (T 1226).

consistent with this evidence as is the State's theory (Appellee's brief at p. 52). Similarly, that the medical examiner said the wound was consistent with the victim being shot while laying down does not help because he also said it was as consistent with Russell being in any number of other positions. In short, Dr. Kielman's testimony supported Peterka's theory as well as the State's explanation. This evidence only shocked the conscience, which however understandable that reaction may be, is irrelevant to the legal analysis required of this court.

That Peterka cleaned up after the killing and told Russell's friends that the victim had gone off supports his story that he had panicked. From running away from prison in Nebraska to trying to hide his impulsive stupidity in Florida, Peterka has repeatedly shown that he wanted to shun taking responsibility for his actions. He had conned his way through life until he got to Florida, and what he did after he shot Russell evinced more his mentality of avoidance and cover-up than it does of premeditation to commit murder.

Finally, the State argues that "it is inconceivable that the gun could fire accidentally or that Peterka did not intend to kill Russell." (Appellee's brief at pp. 47-48) But Peterka never claimed to have fired the gun accidentally, at least in the sense that the he dropped the gun and it went off "accidentally." As argued in his initial brief, this killing was an "accident" in the same sense that manslaughter is an accident. He did something to create a dangerous situation

from which the victim was killed. See, Cunningham v. State, 385 So.2d 721 (Fla. 3rd DCA 1980) (The defendant brought a shotgun to the scene of a disturbance, and the victim was killed as he tried to take it from Cunningham.)

Thus, while the State's theory at trial and the one on appeal has some support in the record, so does the defendant's, and what makes his argument compelling is that the State at trial and on appeal has presented no evidence to refute it. Under the law of this state, the court should have granted Peterka's Motion for a Judgment of Acquittal for first degree murder and reduced the charge to manslaughter. Peek v. State, 395 So.2d 492 (Fla. 1980) (Defendant's theory based on circumstantial evidence must be accepted unless there is evidence to refute it.) That it did not do so was error, and this court should reverse the trial court's judgment and sentence and remand for further proceedings.

ISSUE IV

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

The State apparently concedes that the court erred in admitting the evidence that the State of Nebraska considered Peterka "armed and dangerous."

> "Appellee does not deem the instant claim or error as embracing such subject matter [collateral crime evidence], in that, evidence of Peterka's fugitive status was material, relevant and properly admitted and, at most Deputy Harkins simply offered some undue embellishment on an otherwise relevant subject."
>
> * * *
>
> This one slip of the tongue by Deputy Harkins did not doom this prosecution or vitiate the entire trial, such that defense counsel's motion for mistrial should have been granted.

(Appellee's brief pp. 59, 61).

As to this latter statement, there was not one "slip of the tongue" but three (T 1355-63), which was not a slip at all but in response to deliberately asked questions regarding Peterka's status. The "undue embellishment" that Peterka was armed and dangerous is akin to admitting evidence of the defendant's bad character because his intent to commit a crime is relevant. In this case, the court could simply have limited Harkins' testimony to Peterka's fugitive status. Such a restriction is similar to what this court said the trial court should have done in State v. Baird, Case No. 75,161 (Fla. November 29, 1990). In that case the court erroneously let a

State witness say he had received information Baird "was a major gambler and operating a major gambling operation in the Pensacola area." This court said the trial court could have avoided this mistake by limiting the witness to saying the police had "acted upon a `tip or information received'" when they targeted him.[5]

The court also said the comment in Baird was error only because the testimony was elicited prematurely, a point the State relied upon in its brief (Appellee's brief at pp. 56-57). "The testimony would have been admissible on redirect after the defense attempted, during cross-examination, to establish that Mr. Baird had been targeted for prosecution." Such a determination in that case is not applicable here. First, counsel for Peterka clearly said he had inquired about the teletype because because the court had ruled the statements about the teletype admissible (T 1396). The State cannot blame Peterka's counsel for seeking to minimize the damage of what he

---

[5]The State reads this court's opinion in Baird as holding that the statement was not hearsay (Appellee's brief at p. 56). Yet, this court said it was hearsay because there was no other purpose for the statement to be admitted other than for its truth. It specifically rejected the State's argument that the challenged statement was admissible to establish why the police had investigated Baird. Such reason, however, was not a material issue, even though Baird had, in his opening statement, claimed he had been the object of selective prosecution. As applied to this case, there is no other reason than to establish that Peterka was armed and dangerous for the contents of the teletype to have been admitted. Why the police used a ruse to get Peterka out of his house when they arrested him for being a fugitive from Nebraska had no relevance to the murder prosecution.

thought was improper evidence rather than sitting back and smugly thinking that he would win the point on appeal.

Second, counsel for Peterka sought before trial to preclude the jury from hearing the "armed and dangerous" evidence, and significantly the prosecutor agreed that it should not be admitted:

> MR. ELMORE [the prosecutor]: No, I had not intended to offer evidence of contents [of the teletype] unless it comes out-- I was going to instruct the-- I don't think it's correct for me to ask the officer did he consider him--Peterka, armed and dangerous, Judge. I think that would be a prejudicial matter unless it comes out in Mr. Loveless' cross-examination of them as to why they took certain action.
>
> MR. LOVELESS: That's the main part of my objection, your Honor, to insure that nothing of that nature comes out.

(T 370).

Thus, the State's purpose for eliciting the "armed and dangerous" testimony three times from Officer Harkins was not in legitimate anticipation of what Peterka intended to ask the officer, and what this court said in Baird about anticipatory testimony has no relevance here.

The State attempts to minimize the damage by claiming the "armed and dangerous" comments were never mentioned again during the trial (Appellee's brief at p. 57). Yet one has to merely say "Bates Motel" and "Psycho" and some people will not take a shower for a week. The power of one word or phrase often carries with it connotations far beyond the meanings of the words themselves.

So it is here. An "armed and dangerous" fugitive connotes a desperate prison psychopath who has stolen a guard's gun and fled into the swamp. In the distance the hounds bay as they catch his scent, and as the escapee, out of breath, his clothes torn and dirty, stumbles he sees a small house in a clearing and a young mother hanging clothes on a line.

"Armed and dangerous" invokes such strong images that the State need only mention it once, twice, or three times to skew what should have been a dispassionate review of the evidence. Allowing the jury to hear that Nebraska considered Peterka "armed and dangerous" can not be harmless error.

The State also claims the error was harmless because the jury already knew he was a fugitive and was armed (Appellee's brief at p. 58). While that may be true at least in so far as the state established the defendant armed himself in Florida,[6] the jury did not know, until Harkins told it, that Nebraska considered him armed and dangerous, an opinion loaded with much more ominous implications.

The court erred in admitting the hearsay that Nebraska considered Peterka armed and dangerous, and such a mistake cannot be harmless beyond a reasonable doubt. This court should reverse the trial court's judgment and sentence and remand for a new trial.

---

[6]And Peterka admitted the State could establish he was a fugitive (T 367-68).

ISSUE V

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

The State argues that evidence of Russell's state of mind, specifically that he was afraid of Peterka, was relevant because the defendant claimed he killed the victim accidentally during a fight initiated by the defendant (Appellee's brief at p. 64). Russell's statement was relevant, in short, to prove he acted contrary to Peterka's claim. The accident state of mind exception to the general rule against admitting evidence of the victim's state of mind, however, refers to a defense claim that the victim accidentally shot himself, not that the defendant accidentally shot him. Hunt v. State, 429 So.2d 811 (Fla. 2d DCA 1983). Moreover, that such evidence may have showed Russell's fear of Peterka is belied by the State's theory of how the defendant killed Russell. That is, if Russell was so afraid of the defendant he certainly would not have returned to the house and laid down on the living room couch to sleep or watch the television (T 1791). Also, if he was afraid of the defendant he would have immediately called the police and told them of the theft of the money order and Peterka's possession of the gun. It is understandable why the State wanted the evidence of Russell's state of mind since it had very little other evidence to support its weak circumstantial evidence argument regarding Peterka's intent.

The State tries to bolster its argument by claiming Russell's statements were admitted under section 90.803(3)(a)(2), Florida Statutes (1987). That hearsay exception allows a statement of the

> declarant's then existing state of mind, emotion, or physical sensation, including a statement of intent, plan, . . . when such evidence is offered to: 1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.

That exception does not comfort the State because Russell's state of mind was not at issue in this case. Moreover, the cases cited by the State on page 65 of its brief indicate that the State of mind exception is admissible to show the declarant acted in conformity with his declared intent. In this case, there is no evidence that Russell did the same. That is, the hearsay was that Russell did not intend to confront Peterka. There is no evidence that he in fact avoided such contact with the defendant, yet the State wants to use this hearsay evidence to show that if he made this statement, he must not have been the aggressor in the fight (if there was a struggle), and stronger, that Peterka was lying about the fight. Thus, the evidence was relevant to establish that he did not fight Peterka rather than supporting other evidence that he had had no confrontation with the defendant.

In Jones v. State, 440 So.2d 570 (Fla. 1983), the defendant had been arrested for a traffic infraction, and at that time, he said words to the effect that he was tired of

being hassled by the police, he had guns, and he was going to "kill a pig." A week later an officer was ambushed as he sat in his patrol car near a building where Jones was subsequently found with several high powered rifles. Jones' statement was admissible to show that he acted in conformity with it, and it thus helped identify him as the killer.

In the most recent ruling on this issue, this court in Bobby Downs v. State, Case No. 73,877 (Fla. Jan. 18, 1991) 16 FLW S106, ruled that the trial court erred in letting the victim's mother testify that her daughter was afraid of Downs. In that case, Downs went to where his estranged wife lived and asked her to give him a second chance. After an argument, Downs produced a gun and shot her three times.

At Downs' subsequent trial, defense counsel attempted to elicit testimony from the victim's mother that the victim had willingly continued to spend time with Downs after their separation. On redirect, the witness then made the objectionable statement that her daughter was afraid of Downs because he had threatened her life. The trial court admitted this evidence because defense counsel had opened the door to the victim's state of mind. For the same reason the court admitted testimony that the wife had said "Bobby, I'm not going back with you, you stuck a gun to me and my kids once, you are not going to do it again."

This court said the trial court erred (though harmlessly) in admitting this testimony because the victim's state of mind

was not at issue and the statements were not offered "to prove or explain any subsequent acts of relevance."

Applying that case to this one, what Russell said he intended not to do has no relevance because it does not prove or explain any subsequent inaction on his part. Stated positively, that Russell intended to let the police handle the matter of the stolen money order does not prove he acted in conformity with that intention, hence his statements could not prove his alleged inaction.

In this case, there was no evidence Russell avoided fighting Peterka other than the hearsay, so there is no way the jury can assess its truth or the defendant can challenge it other than through denial, which is the classic reason hearsay is excluded. See, United States v. Webster, 649 F.2d 346, 350 (5th Cir. 1981)(en banc). In Morris v. State, 487 So.2d 291 (Fla. 1986) the trial court excluded hearsay evidence the defendant wanted admitted to show that he was subjectively entrapped into selling a government agent cocaine. This court held that such evidence was admissible to prove or explain Morris's subsequent conduct, section 90.803(3)(a)(2), Florida Statutes (1987). In Bauer v. State, 528 So.2d 6 (Fla. 2d DCA 1988), the district court followed this court's holding in Morris to justify excluding hearsay the government wanted admitted to rebut a defense of entrapment.

> [O]ur supreme court specifically stated in Morris that evidence pertaining to the facts and circumstances of entrapment must be presented according to the ordinary rules of admissibility. We, accordingly

> hold that where an accused has raised the defense of entrapment, hearsay is only admissible to prove predisposition according to the usual rules of evidence. . . . Clearly, the state is free to rebut an asserted defense of subjective entrapment by attempting to establish that the investigating officer had a reasonable suspicion that the defendant was engaged in similar crime. . . This reasonable suspicion, however, may not be establish at trial through the presentation of inadmissible hearsay.

Bauer. at 9.

So, it is here. The state cannot use hearsay, otherwise inadmissible, to prove the very fact it wants the hearsay admitted to support. There must be independent evidence of the fact before the hearsay can be admitted. Here there was none.

The State, however, says that the very consistency of the statements Russell made to the other persons shows their trustworthiness (Appellee's brief at p. 66).[7] Yet, other than these statements there is no other evidence to corroborate that he acted in conformity with what he told them. In short, Peterka does not contest Russell ever made them, he simply objects to their admissibility to prove he acted in conformity with his expressed intention but unproven subsequent conduct.

The court erred in admitting the extensive evidence of Russell's state of mind.

---

[7]Peterka is not alleging Russell fabricated those statements, which would allow the prior consistent statements to be admitted. Section 90.801(2)(b), Florida Statutes (1989).

ISSUE VI

THE COURT ERRED IN ADMITTING A PHOTOGRAPH OF THE VICTIM'S DECOMPOSED SKULL WHEN IT HAD PREVIOUSLY RULE 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.

The State's primary argument on this issue is that the issue Peterka raised on appeal is different than the grounds upon which he objected to the court's ruling at trial (Appellee's brief at p. 69). As to that argument, defense counsel said the following at trial:

> MR. LOVELESS [defense counsel]: Your honor, may I note an additional objection to that particular one. I would note that that body is not in the condition in which it was found. Mr. Elmore's theory of relevancy is the fact that there was tissue or little tissue on the scalp. Dr. Kielman testified that he at that point in time had already removed that tissue. That doesn't show the body in the condition in which it was found.

(T 1702). Counsel clearly raised an issue that could have been resolved by cross-examination, and the court should have realized this. Mr. Loveless need not have incanted some magic words to alert the court of the putative error, and what was done here adequately apprised the court of its failure to allow any cross-examination of Dr. Kielman regarding the photograph of the skull. Williams v. State, 414 So.2d 509 (Fla. 1982). Thus, Peterka's lawyer met a primary goal of the contemporaneous objection rule by his timely objection. Castor v. State, 365 So.2d 761 (Fla. 1978).

The court erred in admitting the photograph of the skull without giving Peterka any opportunity to cross-examine the pathologist about what it depicted.

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 State correctly states the law found in Holmes v. State, 374 So.2d 944, 950 (Fla. 1979) that "there is no prescribed form for the sentencing order containing the findings of aggravating and mitigating circumstances." (Appellee's brief at 72). If Peterka was arguing form, Holmes would control, but he is not and it does not. Peterka instead contends the court provided no substance to its sentencing order.

The State also distinguishes this case from Van Royal v. State, 497 So.2d 625 (Fla. 1986), and appellate counsel readily agrees that it is factually distinguishable from this case. He cited that case because it apparently exalted form over substance in reducing a death sentence to life in prison simply because the trial court had not timely filed its written reasons for sentencing Van Royal to death. This court presented three reasons for reaching this "technical" result:

> 1. The trial court did not file its written reasons with this court until after jurisdiction had vested with it.
>
> 2. Section 921.141(3) mandates a death sentence by supported by specific findings of fact.
>
> 3. The record was inadequate rather than merely incomplete.

Id. at 628.

The second reason was the main cause for reducing the sentence because the other two justifications could have been overcome by simply remanding the case to the trial court to provide its written sentencing order.

> A court's written finding of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it. This is even more true when, as here, we are faced with a jury override. Without these findings this Court cannot assure itself that the trial judge based the oral sentence on a well-reasoned application of the factors set out in section 921.141(5) and (6) and in Tedder v. State, 322 So.2d 908 (Fla. 1975). Thus, the sentences are unsupported.

Id. at 628. This court extended Van Royal in Bouie v. State, 559 So.2d 1113 (Fla. 1990) where the trial court orally and in writing had merely found that the aggravating factors outweighed the mitigation when it sentenced Bouie to death.

In this case, the sentencing order has a brief, and very incomplete and somewhat inaccurate[8] statement of the facts, followed by merely a listing of the aggravating factors it believed were found proven beyond a reasonable doubt and some mitigation (some unidentified). Applying the rationale of Van Royal to this case can lead this court to conclude that there is no evidence in the trial court's sentencing order to assure

---

[8]There is, for example, no evidence the defendant came to Florida for "the express purpose of changing his identity and starting another life under an assumed name." (T 2077) The court also failed to mention that Peterka led the officers to where Russell was buried.

this court that the death sentence was based on a well-reasoned application of the aggravating and mitigating factors. For all the record reveals the court merely listed several aggravating factors without any apparent thought of whether the facts developed at trial supported them. As this court said in Patterson v. State, 513 So.2d 1257, 1263 (Fla. 1987), "It is our view that the judge must specifically identify and explain the applicable aggravating and mitigating circumstances." The court here certainly identified the aggravating factors and some of the mitigation, but it never justified its findings, and because of that deficiency, there is nothing in this record indicating the trial court exercised any reasoned judgment in sentencing the defendant to death. State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). This court should reverse the trial court's sentence of death and remand for imposition of a sentence of life in prison without the possibility of parole for twenty-five years.

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.

The State with great energy has provided an abundance of evidence to support the trial court's order. It is only too bad the trial court did not show a similar effort to support its finding that Peterka committed this murder to hinder the lawful execution of the laws. What the State has done merely emphasizes the point of the previous issue, that this court and appellate counsel for the defendant and the state must provide the facts the trial court should have supplied in supporting its death sentence. That it did not do so is reversible error.

Appellate counsel is somewhat puzzled why the state argues this crime was to prevent lawful arrest since, as it points out, Peterka did not raise this issue in his initial brief. It possibly does so, because like the defendant, it is uncertain why the court found the hinder lawful exercise aggravating factor, and by arguing an aggravating factor for which the law is better defined the State apparently hopes this court will somehow confuse the two (Appellee's brief at p. 78). The State's flight of speculation reaches heretofore uncharted heights when it claims that any error in finding this aggravating factor would be harmless because it would "merge" with the avoid lawful arrest factor. Not only did the trial court fail to provide any facts for either of those aggravating factors, it never acknowledged any merging of them. So what we

have here is a magnificent intellectual exercise by the State to preserve an order which is so patently defective that individual aggravating factors cannot withstand this court's scrutiny on their own merits.

This court should reverse the trial court's judgment and sentence and remand for resentencing.

ISSUE IX

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

To support the court's finding that Peterka committed the murder for pecuniary gain, the State, on page 81 of its brief abandoned its "identity assumption" theory it argued at trial, and redefined the motive for the murder in terms of the stolen money order. It is a nice try but ultimately it fails.

It does so for several reasons. The State claims that "the theft, in effect, necessitated the homicide." (Appellee's brief at p. 81) If so, that was not proven beyond a reasonable doubt. State v. Dixon, 273 So.2d 1 (Fla. 1972). Throughout the trial, especially during its closing, the State repeatedly stressed that the defendant had killed Russell to complete his scheme to take over the victim's identity (T 1787, 1792, 1793). Now, without much record support it has built a case that no, Peterka did not kill the victim for his identity but for his money. For example "after two weeks, Peterka must have been beginning to worry" about the theft being discovered (Appellee's brief at p. 81). The State also claims that the $407 found in the defendant's wallet was highly relevant, but to what is unclear.[9]

---

[9]On pages 83 and 84 of its brief, the State argues that the court could have found Peterka had a significant prior criminal history, and a death sentence is proportionally warranted in this case. Appellate counsel does not know why the State chose to raise these issues at this point because (Footnote Continued)

The State has cited several cases that approved trial courts' findings of this aggravating factor, and Peterka would have to be blind to deny them. But every time a defendant takes money or something else of value from a person he later kills does not mean the murder was committed for pecuniary gain. What this court has emphasized, and what the State never addressed, is the direct and necessary causal relationship that must exist between the taking and the murder. Hardwick v. State, 521 So.2d 701 (Fla. 1988). In this case, there is no evidence Peterka killed to keep what he had already stolen.

The cases cited by the State only support the requirement for a direct and necessary causal link between the murder and the pecuniary gain. In Craig v. State, 510 So.2d 857 (Fla. 1987), Craig managed a cattle ranch, and he killed the ranch's owner and the man who was to replace Craig believing that in doing so he would be given control of the ranch so he could thereby continue stealing from it. In Thompson v. State, 553 So.2d 153 (Fla. 1989), the victim had stolen $600,000 from the defendant who in turn put out an "open contract" to have him killed. Thompson eventually found the victim, kidnapped him, tied him in chains and took him out to sea. Before killing him, he demanded to know where the stolen money was, telling the man that "he could die easy or he could die hard."

---

(Footnote Continued)
they certainly have no relevancy to whether Peterka committed the murder for pecuniary gain.

In Rutherford v. State, 545 So.2d 853 (Fla. 1989), Rutherford announced his plan to force an elderly woman to write a check to him and then kill her by hitting her in the head and drowning her, which he carried out.

In each of these cases, the murders were necessary (at least from the defendant's point of view) for the defendants to realize some economic benefit, or the death was the direct result of theft by the defendant or of money from him. In each case the State proved a causal relationship between the financial gain and the murder. It did not do so in this case where the only link between the stolen money and the murder was that they involved the same defendant and victim. That is insufficient to provide the necessary connection this court has required to justify finding this aggravating factor.

In any event, the court's sentencing order provides no facts to support this aggravating factor, and this court, if it finds this factor appropriate, must do as the State has done and construct a theory based upon speculation and unproven suppositions.

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, 571 So.2d 415 (Fla. 1990).

Relying upon the adage that the best defense is a good offense, the State has sought to attack not only Peterka's arguments on this issue but this court's opinion in Campbell as well. The tenor of its argument regarding what Peterka said in his initial brief can be summarized by its closing sentences on this issue:

> All in all, Peterka's attacks upon the sentencing judged would seem not only to be unwarranted, but also the height of ingratitude. The instant sentence of death should be affirmed in all respects (Appellee's brief at p. 93. Footnote omitted.)

Please excuse the defendant if he is not properly appreciative of the court's death sentence.

The State has essentially three arguments on this issue: 1) this court's opinion in Campbell v. State, 571 So.2d 415 (Fla. 1990) should not be applied retroactively. 2) Finding or not finding mitigation should be left to the sound discretion of the trial court. 3) What Lawrence offered as mitigation was either covered by the court's findings, was not established by the greater weight of the evidence, or was not mitigating.

RETROACTIVE APPLICATION OF CAMPBELL

In Campbell this court provided guidelines to clarify how trial courts should treat the mitigating evidence presented at

trial. The guidelines do not provide new requirements for trial courts to follow; instead that opinion summarizes what this court and the United State Supreme Court have been saying for years. For example, that the findings must be in writing is a statutory requirement, which this court has insisted be observed. Section 921.141(3), Florida Statutes (1989). Holmes v. State, 374 So.2d 944, 950 (Fla. 1979). Likewise, trial courts have been on notice for almost as long that their sentencing orders must be of "unmistakable clarity." Mann v. State, 420 So.2d 578, 581 (Fla. 1982). Sentencers also can not be precluded from considering any mitigating evidence, Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), thereby giving it no weight. Eddings v. Oklahoma, 455 U.S. 104, 114, 15 S.Ct. 869, 71 L.Ed.2d 1 (1982).

This court's opinion in Campbell does little more than pull together the various strands of the law on how to treat mitigating evidence and weave them into a coherent fabric to guide trial courts. Certainly, the principles underlying that decision had been articulated by this court and the U.S. Supreme Court. See, Collins v. Youngblood, 497 U.S. ___, 110 S.Ct. ___, 111 L.Ed.2d 30 (1990). What is more, this court applied Campbell retroactively in Lucus v. State, 568 So.2d 18 (Fla. 1990), so there is nothing so new in Campbell to prevent this court from applying the holding of that case to this one.

Moreover, if this court decides not to apply that case retroactively, this court should nevertheless remand for resentencing because the trial court's sentencing order lacks

the "unmistakable clarity" this court requires. The State, for example, claims that much of what Lawrence claims was mitigation, such as his peaceful nature, was included within the court's finding that he had a no significant prior criminal history (Appellee's brief at pp. 89). If the court actually did that, it should have said as much so this court does not have to guess what it considered as mitigation. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981) (Trial court, not the Supreme Court, makes findings of fact).

TRIAL COURT DISCRETION

The State next argues that this court can not mandate what is mitigation, and this court should leave to the trial court's discretion what is mitigating (Appellee's brief at pp 87).

First, this court reads more into Campbell than this court put there. As to mandating what is mitigation, this court in Lucus, supra, said:

> We, as a reviewing court, not a fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in any particular case. . . . Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain with the trial court's discretion.

Id. at 23 (citations omitted).

Second, courts have on occasion mandated certain mitigation. For example, this court in Buford v. State, 403 So.2d 943 (Fla. 1981) declared that defendant's guilty of sexual battery of a minor could not be executed. Similarly, the United States Supreme Court has said defendants who were

neither present when a murder occurred or intended it happen, cannot be executed. Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Likewise, this court has considered whether children can be executed. LeCroy v. State, 533 So.2d 750 (Fla. 1988). The Florida legislature cannot limit what this court can declare is mitigation.

Third, the State seems to view the exercise of a trial court's sound discretion as the ultimate goal of rational sentencing in capital cases (Appellee's brief at pp. 87-89). Sentencing discretion, however, is only a brief stop on the road to what is the ultimate destination in imposing a death sentence: reasoned judgment.

> Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

The requirements of Campbell push sentencing courts towards that final resting place, and this court should not convert the truck stop of judicial discretion into a sentencing heaven.

THE SPECIFIC MITIGATION PETERKA ARGUED

The State attacks Peterka's argument that he presented as mitigating that all his prior crimes have been non-violent, and it goes so far as to suggest that the court would not have erred if it had failed to find he did not have any significant prior criminal history as mitigation (Appellee's brief at pp.

89-90). It then cites the defendant's extensive juvenile record to support this argument.[10]

That record reveals that within a three month period shortly after he turned 14, Peterka admitted committing 20 burglaries and thefts (T 2427). Considering the defendant's age and the rash of non-violent property crimes, the court could have properly rejected them as of any significance. Likewise, the joyriding and other minor felonies could be considered as bush league stuff. Nevertheless, the court should have also found as non-statutory mitigation that they were non-violent. The State argues that this finding was subsumed in the court's finding that of the statutory mitigation of no significant history, but there is nothing to have prevented it from also have finding that Peterka lacked a violent past. If the court can find several aggravating factors arising from various aspects of a murder then there is no reason why it cannot also find several mitigating factors arising from the overall mitigation presented by the defendant.

---

[10]The State also argues the court went beyond the requirements of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) by telling the jury that it could consider in mitigation "any other mitigating circumstance which has been presented for your consideration." (R 1920) The best response to that argument is what the prosecutor said when the court first proposed that additional instruction: "I think it's kind of a restatement of six [the "catch-all" mitigating factor instruction.] The court did not regard Lockett as going "far enough," instead it added this instruction as reflecting the current state of the law. It was correct. C.f. Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

See, Waterhouse v. State, 429 So.2d 301 (Fla. 1983); Bundy v. State, 455 So.2d 330 (Fla. 1984).

Moreover, as to his potential for rehabilitation, the defendant has shown his remorse. Although it may have lacked the fervor the State desired, it was enough for the court to have considered. Likewise, that Peterka believes he did not commit a murder, even though the law says he did, does not diminish his remorse for the homicide (Appellee's brief at p. 91). After all, Peterka is sorry for killing Russell, and that remorse would be no less if it had been a manslaughter rather than murder.

The court in this case simply failed to follow the dictates of Campbell, and this court should 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.

The State has three arguments on this point: 1) Peterka never preserved the issue for appeal by objecting to the putative error (Appellee's brief at pp. 95-96), 2) the prosecutor had "some sort of record" upon which to base his impeachment of Peterka's mother, and 3) the defendant had opened the door to this cross-examination.

As to the preservation claim, the court itself brought up the problem:

> JUDGE FLEET: Do you have a record of convictions on these offense?
>
> MR. ELMORE [The prosecutor]: I don't have certified copies. These are the juvenile convictions.
>
> JUDGE FLEET: Does that record indicate that he was adjudicated delinquent or the equivalent of that?
>
> MR. ELMORE: Yes, Judge.
>
> JUDGE FLEET: Do you have any adult records there?
>
> MR. ELMORE: I do.
>
> JUDGE FLEET: Does it indicate convictions?
>
> MR. ELMORE: The only adult convictions are the ones already in evidence (T 1899-1900).

Thus, the trial court was aware of the problem, and the objectives of the requirement for a contemporaneous objection have been met. Castor v. State, 365 So.2d 761 (Fla. 1978).

As to excusing the State for not producing evidence of Peterka's prior record, the State claims this court should do so because the prosecutor had "some sort of record." (Appellee's brief at p. 96) Appellate counsel is unaware of the "some sort of record" standard in proving a fact. The State knew what it had to do if it wanted to establish a fact or impeach a witness. Unless it had certified copies of the defendant's record, it could not, in good faith, cross-examine the defendant's mother about her son's prior record.

Finally, as to opening the door, the court made that ruling because the defendant's mother testified about Peterka being a "loving, caring child." (T 1900) In Hildwin v. State, 531 So.2d 124 (Fla. 1988), a case which the State cited (Appellee's brief at p. 97), this court held that:

> during the penalty phase of a capital case, the state may rebut defense evidence of the defendant's nonviolent nature by means of direct evidence of specific acts of violence committed by the defendant provided, however, that in the absence of a conviction for any such acts, the jury shall not be told of any arrests or criminal charges arising therefrom.

Id. at 128.

In this case, the State did not impeach Mrs. Peterka with specific acts of violence. It also repeatedly referred to the defendant's criminal record, in violation of this court's holding in Hildwin. Finally, in a footnote to this quote, this court said, "We hasten to add that evidence that the defendant had been a devoted family man or a good provider would not place in issue his reputation for nonviolence." Id.

Similarly, in this case, that Peterka had been a loving, caring child did not open the door for the state to cross-examine his mother about specific acts of non violence.

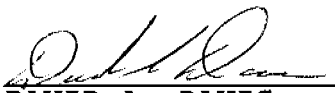
This court should remand for a new sentencing hearing before a new jury.

## 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 new sentencing hearing before a new jury.

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 Richard B. Martell, 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 27 day of March, 1991.

DAVID A. DAVIS