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IN THE SUPREME COURT OF FLORIDA

JOHN C. BARRETT,

Defendant/Appellant/
Cross-Appellee,

v.

STATE OF FLORIDA,

Plaintiff/Appellee/
Cross-Appellant.

CASE NO. 78,743

APPEAL FROM THE CIRCUIT COURT
IN AND FOR CITRUS COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT
ANSWER BRIEF OF CROSS-APPELLEE

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT/REQUEST FOR SANCTIONS

In pertinent part, Florida Rule of Appellate Procedure 9.210(c) provides, "The answer brief shall be prepared in the same manner as the initial brief; provided that the statement of the case and of the facts **shall** be omitted unless there are areas of disagreement, **which should be clearly specified**." (emphasis added). The Statement of the Case and Facts set forth in the state's answer brief ("AB" at 4-74) violates this rule, obstructs the ability of this Court to fairly and impartially review this case, wastes judicial time and resources, and otherwise prejudices Barrett by denying him the ability to meaningfully address the improper argument and allegations of "fact" contained in the state's Statement of the Case and Facts.

The state does not, and could not in good faith, allege that Barrett's Statement of the Case and Facts is inaccurate or that it contains improper matter. Rather, the state asserts that

"restating" and making additions to the statement of the case and facts is necessary because "a large part of the case involves inferences drawn from circumstantial evidence which have not been fully discussed in the initial brief." AB at 4, (emphasis added). Thereafter, the state randomly interjects as "fact" unsupported and misleading allegations, suppositions and/or conclusions, interlaced with argument that is totally improper when it is contained in this segment of an appellate brief. The state's presentation of the "facts" track the closing argument of the prosecutor. A closing argument is designed to persuade. To the undersigned, advancing a closing argument as "fact" in the Statement of the Case and Facts is unfair and unethical.

This Court is respectully asked to expressly address this improper gambit. The Public Defender's Office does not have the resources to make a prolonged complaint about such ploys and instead must concentrate of the merits of each case. It is hoped that the following examples (the respective footnote refers to the prosecutor's closing argument) adequately demonstrate what occurs throughout the state's Statement of the Case and Facts:

"The circumstances reflect that Barrett likely took the pipe off the gun, and waited. There was no one else in the house. He got some towels and shoved them around Roger's head to keep the blood from flowing into the hallway where it couldn't be seen." (AB 16)[1]; "From the evidence one can see what events

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[1] "Roger Wilson, I would suggest to you, very likely died around 4 o'clock that afternoon. . . . There was no one else in the house, this was no frenzy. . . . Because what he did, he got

transpired in that house. Roger Wilson was killed early in the afternoon, around 4 o'clock. Around 6:45 p.m. Jerry Lee Clark came home with an industrial size floor sander. . . . The jury reasonably could have concluded . . ." (AB 16)[2]; "Barrett still wasn't done. He still hadn't killed JoAnn Sanders." (AB 17)[3]; "According to the testimony of Charles Burnside, Barrett picks up cartridge cases after he uses his gun. But Barrett apparently couldn't find the one that careened off and landed in the bathtub." (AB 19)[4]; "At about 4 o'clock the Citrus County Sheriff's Office got two very important pieces of information."

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some towels and shoved them up around Roger Wilson's head to keep the blood from flowing out in the hallway." (prosecutor's closing argument, R1502-03) Comparison of the prosecutor's closing argument to that of the Attorney General's Statement of the Case and Facts shows that the progression in which the "facts" are revealed, as well as the terminology, is virtually identical. (AB at 16, R1503)

[2] "Because from the evidence you can see what happened in that house. Roger Wilson was killed early in the afternoon, 4 o'clock. At 6:45 Jerry Lee Clark came home with an industrial-size floor sander, big floor sander, it's in the pictures. . . ." (prosecutor's closing argument, R1504)

[3] "And then he dug into the closet, but he still wasn't done. He still hadn't killed JoAnn Sanders. She hadn't come home yet." (prosecutor's closing argument, R1507)

[4] "That fact, put together with what Charley Burnside told you, explains that. John Barrett picks up cartridge cases after he uses that gun. But he couldn't find the one that careened off and landed in the bathtub, not anywhere around Roger Wilson." (prosecutor's closing argument, R 1500) Please note that the remainder of the argument of the prosecutor concerning "Four full grown, adult men . . . " is tracked by the Attorney General in its Statement of the Facts and Case. The only record citation ("R1024) given for all of the foregoing is in reference to use of the PR 24 police baton. (AB at 19)

(AB 20)[5]; "From such set of circumstances it is reasonable for the jury to have concluded that the Barretts were somehow alerted, perhaps by the hilicopter (sic), and never went home that Saturday." (AB 21)[6]

Also objectionable is the state's inclusion of the testimony of Dr. Dee and the victims' relatives. (AB 65-70) The proffered testimony was excluded by the trial judge, who expressly ruled that the proffered evidence played no part in his decision to override the jury's life recommendation. (R 4925) The state did not timely appeal that ruling, nor does the state raise that ruling as an issue on cross-appeal. This testimony, not heard by the jury, not relied on by the trial judge, and not raised as a point on cross-appeal, is irrelevant as a matter of law. The interjection of that excluded testimony before this Court for no other purpose than to recite it and hopefully taint the impartiality of this Court is offensive.

Finally, pages 70 through 75 of the state's Statement of the Case and Facts, which consists of one paragraph, contain at the very end only one record citation, itself spanning seven

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[5] "At about 4 o'clock the Citrus County Sheriff's Office got two very important pieces of information." (prosecutor's closing argument, R1482)

[6] "From those set (sic) of circumstances it is absolutely reasonable to conclude, independent of anything that John Barrett tells you, that the Barretts never went home that Saturday. Because when the Sheriff's Office helicopter flew low enough for the people at the ranch to see them they knew there was a problem. And John Barrett was warned not to go home. And he didn't." (prosecutor's closing argument, R1484)

pages. Here, the state paraphrases what it believes was stated by the trial judge in the court's sentencing order.

Barrett respectfully objects. Barrett did **not** omit any material facts from his Statement of the Case and Facts, and in fact Barrett's Initial Brief set forth, as appendices, a complete copy of the trial court's sentencing order (Appendix A) and the transcript of the suppression hearing that included the verbatim text of Barrett's prior statements (Appendix B). **Every** assertion of "fact" set forth in Barrett's brief is accompanied by at least one citation to the record which enables the state and/or this Court to verify the accuracy and/or fairness of each assertion. Pursuant to Rule 9.210(c), the state is to respond accordingly by either identifying and disputing any specific factual assertions contained in the Statement of the Case and Facts that the state feels are incomplete/incorrect/erroneous, or by making whatever additional factual assertions the state feels are material but which were omitted, with appropriate record citations.

The state should not abuse Rule 9.210(c) by improperly presenting the prosecutor's closing argument as fact. There is a place in the brief for argument. It is offensive for the state or any party to unduly repeat facts that have been fairly presented and conceded to exist by the other party. This is so, because mere repetition blurs whether what has previously been stated as fact by the appellant is somehow being contested as inaccurate and/or incomplete.

The time it takes for this Court and the undersigned to unnecessarily read, research and digest the seventy pages of paraphrased factual assertions, an undertaking involving text that is here twenty pages lengthier than that normally permitted for the entire brief, Fla.R.App.P. 9.210(a)(5), is wasted. The Public Defender's Office does not have the time to waste. By slipping in as a statement of fact the prosecutor's closing argument, the state has not placed things "in context" in its own Statement of the Case and Facts, but instead has abused the rules and wasted the time and energy of the undersigned and the Court. The undersigned respectfully objects, and urges this Court to impose an appropriate sanction.

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PREVENTING BARRETT FROM INTRODUCING INTO EVIDENCE THE TAPES OF HIS INTERROGATION ON AUGUST 9 AND 10TH BECAUSE THE EVIDENCE WAS RELEVANT/ADMISSIBLE AND BECAUSE THE STATE OTHERWISE OPENED THE DOOR FOR ITS USE BY CROSS-EXAMINING BARRETT ABOUT THE CONTENT OF THE STATEMENTS.

The state argues that this issue has been waived for appellate purposes because Barrett did not object when the state asked Barrett whether he had previously told police, in his prior statements, that Burnside had committed the murders. (AB at 77) In reply, Barrett submits that the prosecutor's question was not objectionable. The state has not indicated on what basis an objection should have been made and/or why Barrett should not have been permitted to address the state's questioning by presenting evidence in his own behalf. Specifically, Barrett's cross-examination went as follows:

> Q: (Tatti) You had the opportunity to speak with Jerry Thompson and Marvin Padgett on August 10, 1990; didn't you?
>
> A: (Barrett) Yes, sir, I did.
>
> Q: **You didn't tell them about Scott Burnside killing anybody, did you?**
>
> A: No, sir. But it was my understanding that Scott Burnside was to be arrested along with Dorsey Sanders, III, and that they were going to try to arrest Doc Sanders also. So I figured that if you guys didn't mess it up, and you got a hold of Scott, then I would be able to tell you everything. But, of course, my faith in the police were (sic) correct, and they were unable to apprehend Scott Burnside.

Q: The police messed this all up?

A: The police made a mistake and they let Scott Burnside get away.

Q: You knew, on August 10, 1990, that the police were interested in arresting Dorsey Sanders, Jr.; Dorsey Sanders, III; and Scott Burnside for hiring you to kill the four people in Inverness or in Floral City, right?

A: Correct.

Q: That's what you knew?

A: I knew they were going to arrest them, yes, sir, correct.

Q: For hiring you?

A: Yes, sir.

Q: Not for killing anybody?

A: I knew that's what you were charging me with, yes, sir.

Q: **But you never mentioned Scott Burnside?**

A: No, sir. I was not going to have it written in the paper that man says so-and-so kills four people in Floral City, and then wake up in a jail cell and read in the paper that my children were murdered, no, sir. I didn't have that kind of faith in you.

Q: **And you haven't said anything about Scott Burnside doing that until today, have you?**

A: I told the people that were defending me.

Q: **But you didn't tell the police?**

A: The people that were defending me came and asked me.

(R1385-87)(emphasis added).

The state suggests that the foregoing questioning was objectionable and that such questions did not justify having the tapes introduced. The tapes contain statements by the police, statements designed to place Barrett in fear of what the others involved in the crime would do to Barrett's family if he failed to implicate his accomplices. One example should suffice to demonstrate the relevancy of the tape; it explains the plausibility of why Barrett stopped short of naming people:

> Q: (POLICE) Do you (inaudible)? In other words, that's acceptable to you. that's acceptable (inaudible). I want to make sure that you understand that what you're doing (inaudible) jeopardy of being killed. That's what we're here (inaudible). I just want to know the answer, because if something happens tomorrow or the next day, I'm going to come back to you and say, John, you killed them. (inaudible). I want to make it (inaudible).
>
> I want to make sure if I do that, it'll be all right with you when I walk in your cell three days from now, I (inaudible), Paula just had her head cut off. Is that going to be all right? (Inaudible). So I come, look at you in the eyes just like I'm looking at you right now. I'm going to say, John, well, John, she was tortured and killed, hope you are happy. (Inaudible). I want to make sure I understand. That's all right?
>
> A. (Barrett) That's (inaudible).
>
> Q: Whenever she's dead and gone (inaudible).
>
> Q: Is that it, John?
>
> A: Sir, I just want to do what I was advised.
>
> Q: I don't care about (inaudible).

> Q: You're attorney is thinking about your rights. He's not thinking about your family.
>
> A: I understand. I think about my family all the time.

(R4825-26).

The state now asserts, "The right to remain silent or to stop answering questions is not implicated. Barrett never told the investigators he wanted the questioning to cease or that he would not talk further. He simply refused to admit to the murders." (AB at 77). Barrett respectfully disagrees, and submits that Barrett was entitled[7] under Article 1, Sections 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution to present the tapes of the questioning sessions to the jurors so that they could determine whether Barrett invoked the right to cease answering questions and/or whether the prior statements were in fact inconsistent with Barrett's trial testimony, as directly implied by the state.

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[7] It bears noting that the state continues to argue that Barrett's statements to the police were inconsistent with his trial testimony: "This self-serving statement would not have explained Barrett's prior refusal to implicate Burnside and would not even have been consistent with his trial testimony that he was afraid of Burnside." (AB at 78) This Court must review the statements to determine whether the omission of Burnside's name is consistent with what Barrett told police. The jury, too, should have been afforded that ability.

POINT II

THE STATE'S DISCOVERY VIOLATION DENIED BARRETT A FAIR TRIAL AND DUE PROCESS IN VIOLATION OF ARTICLE I, SECTIONS 2, 9, 16 AND 22 OF THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state misrepresents the facts by arguing that Barrett's counsel did not request a Richardson[8] inquiry until **after the next witness had testified.** (AB at 80) Defense counsel notified the Court that Lt. Strickland's testimony constituted a discovery violation and asked for an inquiry of the circumstances surrounding that testimony immediately when Lt. Strickland's rebuttal testimony concluded:

> Q: (Defense Counsel) (Last question asked on cross-examination of Lieutenant Strickland) Do you know when the requests were made for those prints?
>
> A: (Lt. Strickland) No, sir.
>
> Defense counsel: Nothing further.
>
> Prosecutor: Nothing else, sir.
>
> Court: You may step down.
>
> Prosecutor: Your Honor, we would next call Miss JoAnn Sanders.
>
> Defense Counsel: Your Honor, may we approach the bench?
>
> Court: Approach.
>
> Defense Counsel (at bench): Your Honor, I believe that **the evidence that we've just received is a discovery violation** in evidence. Just the fact that they

[8] Richardson v. State, 246 So.2d 771 (Fla. 1971)

> sent off for known prints of Scott Burnside, and have had them compared, I would suggest, at this point, Your Honor, under that **it's a discovery violation**, and I also move for a mistrial.
>
> Defense Counsel: Your Honor, I would also **ask that the Court inquire** as to -- ask that these prints be obtained, and whether there was any indication that the request was a result of testimony that was heard on the witness stand.
>
> Court: Well, we can do all that later, but I don't see any reason to do that at this time.
>
> Defense Counsel: We've got a mistrial posture ---
>
> Court: Well, I'll deny the motion for mistrial.

(R1452-53).

When the Court stated, "we can do all that later," the judge was fully apprised that a discovery issue was being raised by Barrett. See Thomas v. State, 419 So.2d 634 (Fla. 1982) (magic words not needed so long as trial judge is informed that objection is being made and basis therefore). Defense counsel should not be faulted for obeying the trial judge and not arguing with the court's ruling. To require otherwise is to require attorneys to take exceptions to rulings and argue with the judges lest an objection is deemed to have been waived. Such is not the law. This issue is properly preserved for review.

Of further import is the manner in which this issue arose. Lt. Strickland had been deposed by defense counsel. He had previously testified. **AFTER** testifying, Strickland was

directed by the prosecutor to obtain Burnside's prints and compare them with those found at Sander's house. The state then ignored its duty to timely disclose to defense counsel that Strickland performed **additional** comparisons, choosing instead to spring that testimony on Barrett in rebuttal without providing defense counsel any meaningful opportunity to address that testimony. Defense counsel had no way to know or reasonably anticipate that Lt. Strickland's rebuttal testimony would concern new tests of Burnside's prints that were made after Strickland testified earlier. This is so, because once discovery is invoked the attorneys for the defense and the state have a continuing duty to disclose discoverable information. Barrett's counsel was entitled to rely on that premise.

Barrett respectfully submits that, as an appropriate sanction, the trial court could have declared a mistrial when the state intentionally "hid the ball" with Lt. Strickland's rebuttal testimony. Florida's full, reciprocal discovery is intended to promote fair trials, not trial by ambush. Such an intentional violation of the rules of discovery denies a fair trial under Article 1, Sections 9, 16 and 22 of the Florida Constitution, and a mistrial would be an appropriate sanction to not only punish the state attorney for intentional misconduct but also to deter similar gambits in the future. The failure of the trial court to conduct any inquiry into the good faith or bad faith of the state attorney, who quite obviously made a conscious decision not to

disclose that Lt. Strickland performed fingerprint comparisons during trial, exemplifies why per se reversal is required.

The rebuttal testimony of Lt. Strickland was presented by Mr. Bradley King, Esq., (R1450), THE state attorney for the Fifth Judicial Circuit. Apparently, Mr. King was showing his assistants how a capital trial should be conducted in his jurisdiction. That is a compelling reason for the trial court, and for this Court, to find that the conviction was unfairly obtained. Intentionally withholding discoverable information in order to gain an unfair advantage cannot be tolerated, and the practice can only be effectively discouraged where effective sanctions accompany intentional misconduct from elected officials.

The conduct of the lawyers representing the State of Florida in this case fails to instill any confidence that the withholding of the results of the fingerprint comparisons by Mr. King was unintentional. Assistant State Attorney Anthony Tatti, Esq., an officer of the court and of the State of Florida, not only attended the interrogation of Barrett by the police when Barrett's unequivocal and repeated assertions of his right to counsel were ignored, this prosecutor actively participated in questioning Barrett, where unfair pressure was exerted on Barrett to give statements contrary to the advice of his counsel.

In conducting only a superficial inquiry and by ruling that Barrett's request for a Richardson inquiry was untimely, evidently because it occurred at the conclusion of Strickland's

testimony, the trial court committed per se reversible error. The convictions should be reversed and a new trial ordered.

POINT III

THE TRIAL COURT ERRED IN OVERRIDING THE JURY RECOMMENDATION FOR SENTENCES OF LIFE IMPRISONMENT BECAUSE REASONABLE PEOPLE COULD AND DID AGREE THAT SENTENCES OF LIFE IMPRISONMENT ARE MORE APPROPRIATE THAN THE DEATH PENALTY.

The state argues that the inquiry here is not whether these jurors could reasonably have found sufficient mitigation to justify imposition of life sentences. The state claims, "The issue, rather, is whether no reasonable person could differ on what penalty should be imposed. Ferry v. State, 507 So.2d 1373, 1377 (Fla. 1987)." (AB at 86) Barrett disagrees with the state's reading of Ferry, and submits that the standard set forth in Ferry, and that advanced in Barrett's initial brief, is set forth in the following emphasized language:

> The final issue we address concerns the trial court's override of the jury's recommendation of life sentences for each of the murders. Ferry claims that the override violates the standard set forth in Tedder v. State, 322 So.2d 908 (Fla. 1975). We agree. The principle enunciated in Tedder, "[I]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ," id. at 910, has consistently been interpreted by this Court to mean that **when there is a reasonable basis in the record to support a jury's recommendation of life, an override is improper.** See e.g., Amazon. **When there are valid mitigating factors discernible from the record upon which the jury could have based its recommendation an override may not be warranted.**

Ferry, 507 So.2d at 1376 (emphasis added).

Thus, whether the state agrees with it or not, the controlling standard is clear and, because there were many valid mitigating factors discernible from this record upon which the jury could have reasonably based its recommendation for life sentences, the override was unwarranted. The state advances the wrong standard by arguing that the evidence **can** be viewed to support finding various statutory aggravating factors (AB at 89) and/or to reject finding various mitigating considerations (AB at 91-94). The standard of review when a jury has recommended life imprisonment is not whether the evidence can be viewed to reject that recommendation, but instead whether the evidence can be viewed to support the recommendation.

Of particular interest is the state's disavowal of there being sufficient evidence to prove that Barrett was guilty of murder as a principal. (AB at 91-92) The state requested that the jury be instructed on this theory of prosecution, thereby implicitly asserting that there was sufficient evidence to support giving the instruction. (R 1468) The state should not now be heard to complain that one of its theories of prosecution used to convict the defendant reasonably could have been relied upon by the jury to recommend a sentence of life imprisonment.

As did the trial judge, the state relies primarily, if not exclusively, on this Court's decision in Zeigler v. State, 580 So.2d 127 (Fla. 1991), to argue that overriding the jury's life recommendation was proper. (AB at 96). Barrett respectfully maintains that the mitigation previously set forth in the Initial

Brief could reasonably have been found to exist by this jury, and such mitigation has in the past justified a sentence of life imprisonment. Contrary to the state's assertion, this jury did not have to reject Barrett's explanation of his involvement in the crimes to find him guilty of first degree murder. The state has not shown that the evidence, viewed in a light most favorable to the jury recommendation, fails to justify imposition of life sentences rather than the death penalty. The death sentence must accordingly be vacated and the matter remanded with directions that Barrett be resentenced to terms of life imprisonment in conformity with the jury's recommendation.

POINT IV

THE TRIAL COURT ERRED IN FINDING THAT TWO MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED FASHION WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION BECAUSE A PRETENSE OF MORAL OR LEGAL JUSTIFICATION EXISTS.

The state argues that Barrett was not trying to protect his wife and family when he went along with Burnside's plot to kill JoAnn Sanders because Barrett was able to "fearlessly slay four adult men in one murderous marathon . . . ." (AB at 99). The premise that Barrett, by himself, personally killed four adult men is inconsistent with the state's own evidence. The state presented evidence that Barrett had been drinking all day, yet argues that Barrett was not intoxicated because he was personally able to kill four adult men all by himself. (AB at 91) This conclusion begs the question. Another, more reasonable explanation, as could have been found by the jury, was that Barrett was so intoxicated that he could not have provided much assistance to Burnside and the other person who did kill these four adult men. The state is trying to have it both ways rather than fairly addressing the evidence it presented, evidence which shows that it is unreasonable to conclude that one man, alone, killed four adult men.

The state must prove beyond a reasonable doubt, not only that a murder was cold, calculated and premeditated, but also that there exists no pretense of moral or legal justification. Banda v. State, 536 So.2d 221 (Fla. 1988). The jury here could have concluded that Barrett's actions were

motivated out of concern for his family, even where the only evidence of that comes from his own testimony. See Cannady v. State, 427 So.2d 723 (Fla. 1983). The state has failed to present any evidence that is inconsistent with the premise that Burnside and another person killed these men, while Barrett remained outside Mrs. Sanders' house. Because Barrett's testimony provides at least a "pretense" of moral or legal justification, the CCP factor cannot be said to exist beyond a reasonable doubt.

POINT V

THE FINDING THAT THE MURDERS WERE COMMITTED FOR THE PURPOSE OF AVOIDING A LAWFUL ARREST IS NOT SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

Barrett relies on the argument and authority set forth in the Initial Brief of Appellant in reference to this Point on Appeal and adds only that, even if this factor was properly found, the jury was entitled to give it little weight.

POINT VI

THE FINDING THAT THE MURDERS WERE COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF A GOVERNMENTAL FUNCTION AND ENFORCEMENT OF LAWS IS NOT SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

Barrett relies on the argument and authority set forth in the Initial Brief of Appellant in reference to this Point on Appeal and adds only that, even if this factor was properly found, the jury was entitled to give it little weight.

POINT VII

THE TRIAL COURT ERRED IN DENYING BARRETT'S MOTION TO DECLARE FLORIDA'S DEATH PENALTY STATUTES UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED.

Barrett relies on the argument and authority set forth in the Initial Brief of Appellant in reference to this Point on Appeal.

POINT I ON CROSS-APPEAL

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL STATUTORY AGGRAVATING FACTOR WAS NOT PROVED BEYOND A REASONABLE DOUBT?

The state contends, "The sentencing court refused to find [the HAC] factor because even though the defensive wounds on Johnson would seem to indicate that he had knowledge of his impending death and fought back, the state could not establish what "length" of time he suffered. The court evidently felt that such suffering must be of long duration. It also felt that any contemplation of death could not occur between rapid blows leading to unconsciousness (R4924). Appellee submits that this was clear error . . . ." (AB at 115) Barrett disagrees with the state's interpretation of the trial court's finding of fact.

Specifically, the court found the following:

> However, this Court does not find that as to Larry Johnson or any of the victims of this case that the aggravating factor of heinous, atrocious or cruel applies. While the evidence does show that Larry Johnson's body exhibits defensive wounds to his hands and shoulders, the amount of time he suffered has not been shown. Mr. Johnson's wounds could well have been inflicted instantaneously in four or five rapid blows before unconsciousness. This would leave little, if any, time to contemplate death or impending pain. These defensive wounds would have been no more than instinctive reaction. Therefore, without having been shown beyond a reasonable doubt that any of these Murders were heinous, atrocious or cruel, that aggravating factor is not found.

(R4924, See Appendix A to Initial Brief of Appellant.)

The standard jury instruction defining this statutory aggravating factor comes from State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). It provides:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. **The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim**.

(emphasis added). The trial judge was correct in determining from this evidence that the state failed to prove that the death of Johnson, or any of the other victim's, was **accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim**.

"An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). Under the state's rationale, unless a defendant can conclusively demonstrate that a victim lost consciousness instantaneously with the first blow that was inflicted, the HAC factor must be found as a matter of law. The state's position is clearly untenable.

On appeal, the question is whether the trial court's factual determination is supported by substantial, competent evidence. Tibbs v. State, 397 So.2d 1120 (Fla. 1981). Such is the case here. The state failed to demonstrate that Johnson's death was unnecessarily torturous.

The medical examiner testified that Mr. Wilson died as a result of a gunshot wound to the head. (R460) Mr. Clark died from blunt force trauma to the head. (R464) Mr. Hemingway died as a result of blunt force trauma to the head caused by multiple blows. (R470) Mr. Johnson died from blunt force trauma to the head. (R475). In explaining the "defensive wounds" that were suffered by Mr. Johnson, the medical examiner testified:

> Q: Now, when you mentioned, in the course of describing the idea of defensive wounds, these contusions are on the hands, or on the knuckles, you said?
>
> A: Yes. They're on the knuckles and on the thumbs. On the right hands -- and also some down on the fingers of the right hand.
>
> Q: All it suggests is that some trauma landed in that area of the hands, is that correct?
>
> A: That's correct.
>
> Q: And you don't have enough history, do you, to determine exactly how those injuries got there?
>
> A: No, I do not.

(R484). The state did not present any testimony concerning how long the victims would have remained conscious.

It is well established that things occurring after death are not properly considered when determining whether the murder was especially heinous, atrocious or cruel. See Jones v. State, 569 So.2d 1234 (Fla. 1990). The state did not establish the order in which any of the wounds received by the victims occurred. Based on this testimony and on the lack of testimony, the trial judge did not "clearly err" in rejecting an aggravating factor that was not sufficiently proved by the state. The state's issue on cross-appeal should accordingly be rejected.

CONCLUSION

Based on the argument and authority set forth in Points I and II, it is respectfully submitted that the convictions must be reversed and the matter remanded for retrial. This Court is otherwise asked to reverse the death sentences and to remand for imposition of life sentences based on the argument set forth in Points III through VII. This Court is asked to reject the state's argument presented on cross-appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, and to Mr. John C. Barrett, #122653, P.O. Box 747, Starke, FL 32091-0747, this 3rd day of September, 1992.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER