IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

SAMUEL JASON DERRICK

APPELLANT

v. Case No: 79,143

STATE OF FLORIDA

APPELLEE

_____/

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, STATE OF FLORIDA

REPLY BRIEF OF THE APPELLANT

JAMES MARION MOORMAN
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IN THE SUPREME COURT OF FLORIDA

SAMUEL JASON DERRICK,

Appellant,

v. Case No. 79,143

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF THE APPELLANT

STATEMENT OF THE CASE AND FACTS

The Appellant will rely on the Statement of the Case and Facts as contained in his initial brief.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN RESPONDING TO THE JURY'S INQUIRY REGARDING A SIX TO SIX VOTE.

Appellee argues that defense counsel approved the instruction the trial court read to the jury when the court responded to the jury's question regarding the six to six vote. While appellant will concede defense counsel did agree to the court reiterating the standard instruction on advisory verdicts, trial counsel did not agree to the gratuitous comments with which the trial judge prefaced them, specifically, "I obviously cannot tell you what you should do." To the contrary, the trial court should have done just that, told the jury to sign the verdict form advising life imprisonment. By advising the court in writing that they had a vote of six to six, the jury had given the court the equivalent of the actual advisory form. Because of that, appellant maintains the circumstances herein constitute fundamental error, therefore the lack of a specific objection on the part of defense counsel is irrelevant.

As to the case of Cave v. State, 476 So. 2d 180 (Fla. 1985) cited by appellee, it can be distinguished by the fact the jury merely advised the court it had a split decision. It did not specify what the split was. In common parlance, split decision means a decision that is other than unanimous. Although the case does not explain the circumstances further, it could be believed the jury had mistakenly assumed that the advisory verdict for the

penalty had to be unanimous.

The instant case demonstrates some of the aberrations in the penalty phase which are not present in the guilt phase of a murder trial. As a guilty verdict must be unanimous, it is readily apparent when jury deliberations have concluded, that is when there is agreement among all twelve jurors. The same cannot be said about penalty phase deliberations. Is one vote sufficient? How many votes can be taken? Can jurors change their votes? What is to keep a strong-willed and opinionated foreman from keeping the deliberations going until the votes go his way or rushing an advisory verdict form to the judge before anyone has a chance to re-consider their initial vote? An allegation has been made to the undersigned that one of the jurors was subjected to undue pressure to alter her vote after the matter of the six-to-six vote had been brought to the court's attention and the jury re-instructed.[1]

It is axiomatic that in matters of criminal law, all other things being equal, any doubts or ambiguities are to be resolved in favor of the defendant. As the jury voted six-to-six and that vote was made known in writing to the trial court, the advisory verdict was life imprisonment and re-instruction was unnecessary and under the instant circumstances, coercive. Any re-instruction which tends to coerce the jury into reaching a

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[1] The undersigned makes no claims for the truth of this allegation as it is not apparent from the record and was not brought to the attention of the trial court. The undersigned merely uses it as an example of a potential "horror".

certain verdict or to coerce an individual juror into changing his position is impermissible and constitutes fundamental error. Webb v. State, 519 So. 2d 748 (Fla. 4th DCA 1988) The circumstances under which an instruction is made can serve to make its effect coercive, although its actually wording does not. The jury's change from a tie vote to a seven to five vote in favor of a death sentence evidences that coercive effect in this case.

ARGUMENT

ISSUE II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON BOTH AGGRAVATING FACTORS OF COMMISSION DURING THE COURSE OF A ROBBERY AND COMMISSION FOR PECUNIARY GAIN.

Appellee insists that while Castro v. State, 597 So. 2d 259 (Fla. 1992) requires the trial court to give a limiting instruction when instructing the jury on doubled aggravating circumstances, [pecuniary gain and robbery], unless defense counsel specifically requests the limiting instruction, no error occurs, even in the face of an objection by defense counsel to the court's instructing the jury on both aggravating factors.

Appellant disagrees with appellee's perception of the record finding defense counsel failed to request a limiting instruction. While defense counsel may have be somewhat less than artful in addressing his concerns to the trial court, it was clear that he felt the need for some sort of instruction. The trial judge appeared to understand this as he stated:

> "Doug, if you have some case law that says that doubling up deals with jury instructions rather than the judge's reasoning, that the judge is required to put in an order should I enter an order to that effect, then I'll be happy to look at it. But right now that's not what I understand it to be. If I'm wrong, I invite efforts to educate me."
> .....
> "Defense counsel: Judge, I agree that none of the cases I submitted to Your Honor addressed the question of whether the Judge could instruct on the doubling up. The problem is that neither did these cases indicate that -- I recall that nobody raised the question."

Unfortunately, defense counsel could not educate the judge, because the opinion in Castro had not yet been issued when this

proceeding took place.[2]

Appellant also differs with appellee's conclusion that the error, if any, is harmless. First, these two aggravating factors were "a given", as far as the facts were concerned. It is a certainty the jury being instructed on both, they found both to exist. Secondly, appellant disputes appellee's conclusion that there was so little in mitigation, the recommendation would have been the same irregardless of the invalid factor.

Finally, appellant contends anything that led to a jury death recommendation is necessarily prejudicial as the trial judge is required by law to give great weight to the jury's recommendation. Espinosa v. Florida, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992) specifically held it improper for any sentencing authority, be it judge, jury or both, to weigh an invalid aggravating factor either directly or indirectly. Considering the close vote in this case, any claim of harmless error can not be accepted.

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[2] This sentencing proceeding took place in November of 1991. This court's opinion in Castro was not issued until March of 1992.

ARGUMENT

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO CONSIDER ALL NON-STATUTORY MITIGATING FACTORS FOR WHICH EVIDENCE WAS PRESENTED WHEN IMPOSING SENTENCE.

Appellee's answer to appellant's complaint that the trial court failed to consider all nonstatutory mitigating factors for which evidence was presented is: 1) even if the court did not address each of the non-statutory mitigating circumstances urged by appellant, its failure to do so was harmless error and 2) that it is clear beyond a reasonable doubt that the judge knew he had to consider each, that he did so and he would have still imposed the same sentence even if those matters had been specifically addressed in his sentencing order.

This court has recently reaffirmed its decisions in Rogers v. State, 511 So. 2d 526 (Fla. 1987) and Campbell v. State, 571 So. 2d 415 (Fla. 1990) holding that the trial court in any penalty phase must expressly find, consider and weigh in its written sentencing order all mitigating evidence urged by the defendant, both statutory and non-statutory which is apparent anywhere in the record. see Ellis v. State, 18 Fla. L. Weekly. S417 (Fla. July 1, 1993) [Case No. 75,813] There is nothing in any of these cases allowing the trial court to limit its considerations to only those mitigating circumstances discussed in defense counsel's closing arguments, as appellee appears to suggest. To the contrary, this court has stated that the trial court must consider any mitigating factors made manifest at any

point during the proceedings.

Appellant suggests that it requires a leap of faith to assume that the trial court actually considered those mitigating circumstances which were not addressed in its sentencing order. Obviously, this is the reason why this court requires trial court to specifically address each and every mitigating circumstance for which the defendant has presented evidence. While the trial court may choose not to give the circumstances the weight appellant feels they should be accorded, it cannot discount them entirely, when there is nothing to refute them.

ARGUMENT

ISSUE IV

THE TRIAL COURT ERRED IN FINDING THAT THE OFFENSE WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST WHEN THE EVIDENCE DID NOT ESTABLISH THAT FACTOR BEYOND A REASONABLE DOUBT.

Appellee asserts there is no doubt the victim recognized appellant, therefore, appellant necessarily murdered him to avoid detection. Furthermore, appellee belittles the idea of frenzy as a factor in the murder.

Appellant cites the case law which holds proof of the aggravator has to be beyond and to the exclusion of reasonable doubt, ie. it has to exclude all other reasonable hypothesis to the contrary and moreover it has to be shown to be the dominant motive for the homicide. Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Scull v. State, 533 So. 2d 1137 (Fla. 1988); Cook v. State, 542 So. 2d 1137 (Fla. 1988) and Robertson v. State, 611 So. 2d 1228 (Fla. 1993). The trial court cannot merely draw what is otherwise a logical inference. Clark v. State, 443 So. 2d 973 (Fla. 1983). The evidence presented is equally open to the inference that appellant killed the victim due to panic or frenzy as it is to the finding appellant committed the murder to eliminate a possible witness.

While appellee may chose to discount frenzy as a catalyst, its existence is documented in medical literature. When stab wounds are close and plentiful, inflicted in a localized area, in

a chaotic manner and not all penetrate, frenzy can be suspected. The greater the number, the greater the probability that this "overkill" represents a loss of control by the perpetrator who later may not remember the event. see Forensic Sciences, Cyril H. Wecht, M.D. Matthew Bender, New York, copyright 1990, section 25.05.

Although the state presented evidence which could have been interpreted as showing appellant murdered the victim to keep from being identified, the state failed to conclusively exclude the additional explications of panic and frenzy and establish that witness elimination was appellant's governing purpose. For this reason the trial court erred in finding this aggravating factor and employing it in the weighing process to determine appellant's sentence.

ARGUMENT

ISSUE V

THE TRIAL COURT ERRED IN FINDING THAT THE OFFENSE WAS HEINOUS, ATROCIOUS OR CRUEL WHEN THE EVIDENCE OF THAT AGGRAVATING FACTOR WAS NOT ESTABLISHED BEYOND A REASONABLE DOUBT.

The Appellant will rely on the issues as stated in his initial brief.

ARGUMENT

ISSUE VI

THE TRIAL COURT ERRED IN CONSIDERING AS AN AGGGRAVATING FACTOR THAT THE MURDER WAS COMMITTED IN PERPETRATION OF A FELONY.

The Appellant will rely on the issues as stated in his initial brief.

ARGUMENT

ISSUE VII

BASED UPON PROPORTIONALITY, THIS COURT SHOULD REDUCE APPELLANT'S SENTENCE TO ONE OF LIFE IMPRISONMENT.

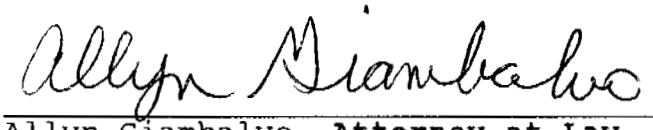
The Appellant will rely on the issues as stated in his initial brief.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Appellant respectfully requests that this Honorable Court reverse the judgment and sentence of the lower court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the Attorney General, Westwood Center, 2002 North Lois Avenue, 7th Floor, Tampa, FL 33607, and to Samuel Jason Derrick, Inmate No: 097494, Union Correctional, P.O. Box 221, Raiford, Florida 32083 on October 7, 1993.



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