IN THE SUPREME COURT OF FLORIDA

OLEN CLAY GORBY,

Appellant,

v.

CASE NO. 79,308

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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

ATTORNEY FOR APPELLANT
FLA. BAR NO. 271543

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Olen Clay Gorby is the appellant in this capital case. The "R"s and "T"s that are liberally scattered throughout the brief refer to the Record on Appeal and the transcript respectfully.

STATEMENT OF THE CASE

An indictment filed in the circuit court for Bay County on June 27, 1990 charged Olen Gorby with one count of first degree murder, robbery with a deadly weapon, grand theft, and burglary of a dwelling (R 1849-50) to which the defendant pled not guilty (R 1852). The pretrial activity proceeded in the normal manner for such cases, and the defendant filed the following motions or notices:

1. Notice of Intent to Rely on Defense of Insanity (R 2063). Withdrawn (R 2456).

2. Motion for Appointment of Neuropsychologist (R 2181). Granted (R 2217).

3. Motion to Suppress In-court Identification (R 2367). Denied (T 996).

Gorby proceeded to trial before the honorable Don T. Sirmons. The jury convicted him of all the crimes as charged except that it found him guilty of the lesser offense of robbery (R 2495-96). It also recommended a death sentence by a vote of 9-3 (R 2546). The defendant filed an Amended Motion for New Trial, which was denied (R 2641, 2663).

The court sentenced Gorby to death, and in support of that sentence, it found:

> 1. Gorby was under sentence of imprisonment.
>
> 2. He had a prior conviction for a felony involving the use or threat of violence.
>
> 3. He committed the murder for financial gain.

4. The murder was especially heinous, atrocious, and cruel.

(R 2622).

In mitigation, the court found:

1. Gorby was under the influence of a mental or emotional disturbance.

2. His capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired.

3. His family love him.

4. He comes from a poor background.

5. He had an abusive father and a failed marriage.

6. He was affected by his sister being shot.

7. He was the victim of a car accident when he was four years old.

(R 2625-26).

As to the other convictions, the court sentenced Gorby as follows:

1. Robbery-15 years in prison

2. Grand theft-5 years in prison

3. Burglary-life in prison

(R 2627-28). All sentences are to run consecutively with the murder sentence but concurrently with each other (R 2628).

This appeal follows.

STATEMENT OF THE FACTS

Robert Jackson had stolen a car in Alabama apparently to make the Grand Tour of the southern United States. In late April 1990, he met Olen Gorby in Texas, and the two rode together as they drove to Tennessee (T 539-41). Jackson paid for the gas and motel bills (T 571-72). After spending a few days there, they drove to Panama City, and Jackson checked into a motel (T 542). That night he went to a local bar where he ran into Gorby, who had picked up a girl (T 542-43). Sometime during the evening, the two men got into a fight, and Jackson decided he needed to return to Tennessee so he could "get my head together, go over all that happened." (T 547) He stayed there for only a short while, and deciding he wanted a job, he returned to Panama City on Sunday May 6. He checked into a homeless shelter known as the Rescue Mission because by this time he was "low on cash." (T 551)

Jackson attended a church service at the Rescue Mission, and during it, Gorby came in briefly to thank everyone for the help they had given him (T 554). He had stayed at the shelter on Friday and Saturday but left Sunday morning.

J.A. Raborn was a cripple, and he occasionally picked up drifters and strangers to do odd jobs about his trailer in Bay County (T 714, 719). On Sunday May 6, he told a neighbor that he needed a commode seat fixed, and later that day, he apparently picked up Gorby to make the repair (T 630, 689).

The next afternoon, his neighbor saw a note on the door of Raborn's trailer which merely said "will be home Tuesday."

(T 717) It was ostensibly written by Gorby (T 1259). Opening the door with the key Raborn had given to her, she went inside and found Raborn's body laying on the bathroom floor (T 717). It was later determined that he had died from seven blows to the head by a hammer (T 1380, 1383), and although there was an electrical cord and Raborn's shirt wrapped around his neck, strangulation was not a cause of or factor in the victim's death (T 1377).[1]

Over the next two days, someone used Raborn's credit cards to buy gas at various locations from Florida to a community outside of San Antonia, Texas. Gorby showed up at Allen Brown's house[2] in San Antonia on May 8 driving a car generally matching the description of Raborn's vehicle (T 791). He told his friend that he had stolen some credit cards, a car, and murdered someone (T 791).

Gorby apparently sold the car sometime later to Cleo Callaway, a stranger he had picked up hitchhiking in Texas (T 1001-1003). The defendant was eventually arrested and returned to Panama City. While awaiting trial, he told another inmate, that he did not like homosexuals and that "he had beat a dude with a hammer." (T 1302)

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[1]Raborn also had a blood alcohol level of .11 (T 1395).

[2]Brown was a friend of Gorby. He was deaf and a cocaine addict who had many problems. Among them, he got confused and could not remember things correctly. On 8 May, he was using cocaine, marijuana, and alcohol together (T 798-99).

When questioned by the police, Gorby said that he had traveled to Florida from Texas with Jackson (T 1198). Jackson introduced the defendant to Raborn and later took him to Raborn's trailer (T 1203). Gorby did some work for Raborn and was paid $15 for his labor (T 1203). Jackson returned Gorby to Panama City and later at a bar the pair evidently got into an argument because Jackson pulled out a gun and told the defendant that he had just killed one person and would kill another if he had to (T 1204). The next day, the defendant and Jackson headed for Texas, and when Jackson learned that the police had gone to Gorby's friend's house, he became scared and fled (T 1205).

SUMMARY OF THE ARGUMENT

Gorby presents this court with nine guilt phase and four penalty phase issues for it to consider. He first argues that the court erred when it denied his request to continue his trial. Delays should be freely granted to avoid some identifiable prejudice to the defendant. In this case, the defendant told the court he needed more time to pursue leads which would have cast doubt on the veracity of the state's witnesses that he was seen driving a car similar to that Raborn owned. Additionally, he needed more time to develop his penalty phase defense regarding the brain damage he suffered as a child. In short, Gorby asked for more time to develop specific issues rather than chasing some speculative theory.

Cleo Calloway identified Gorby as the one who had sold him Raborn's car. The court admitted the procedures used to make the identification were suggestive, but it allowed the in-court identification anyway. That was error because it was two months after Calloway had bought the car that he picked Gorby out of a photospread. The officer who showed him the pictures asked him if the person who had sold him the car had any tattoos, at which point Calloway "remembered" that he did. Until then, Calloway had never mentioned anything about tattoos. Significantly, Gorby's picture was the only one in the six man photospread that showed any tattoos.

Jerry Wyche was a key witness for the state because while he and Gorby shared a cell, Wyche claimed the defendant had told him he did not like homosexuals and "he had beat a dude

with a hammer." That was probably the most inculpatory evidence the state presented. Gorby's lawyer's ex-partner, however, had represented Wyche while the partnership existed, and the defendant's lawyer had stood in for her when she could not attend some hearings scheduled in Wyche's case. The court refused to recognize any conflict of interest. That was error because there was a risk of a conflict, which trial counsel may have silently resolved in Wyche's favor. The Sixth Amendment so favors risk free representation that even the smell of a taint precludes counsel from representing a defendant if there is the possibility of some conflict.

The state also used questioned documents examiner Karen Smith to identify the handwriting of a note found on Raborn's door with Gorby. During her qualification as an expert, she told the jury that she had formerly worked for the state lottery, and in response to a state hypothetical question, she agreed that she had to verify the authenticity of signatures before a "forty million dollar" lottery prize was awarded. In closing, the state improperly bolstered Smith's reputation by converting the hypothetical into a fact: that she was a reliable witness because the lottery people had relied on her verification of signatures before awarding millions of dollars. That was error because a witness's reputation cannot be bolstered by specific instances of conduct, it cannot be rehabilitated until there has been an attack on it (which Gorby had not done), and it bolstered her trustworthiness rather than her reputation for truthfulness.

During its closing argument, the state said Gorby had never shown any remorse for killing Raborn. That was error as the court recognized, but its tepid curative instruction did not erase the damage of the comment. The court told the jury only to disregard the state's allegation. It never chastised the prosecutor for it, or in any other way let the jury know that what they had heard was grossly improper.

Similarly, during the state's case in chief, a witness said Raborn needed to help Gorby because he had just gotten out of jail. Again the court sustained the defendant's objection to the comment, yet its curative instruction "to disregard the last comment of the witness" in no way assuaged the damage done by what this person had said.

And again, during Robert Jackson's testimony for the state, the prosecutor asked its witness whether he and Gorby had had a fight. The court again granted defense counsel's objection and again told the jury disregard "the last comment of the witness." As before, or when considered with the other errors in this trial, that admonishment could not erase the damage done.

As usually done in murder cases, the state wanted several pictures of the crime scene admitted. While Gorby, as is also common, objected to many of the photographs, his claim became much stronger when the state also wanted to introduce a videotape of the crime scene. In other words, the jury got a double dose, and a highly subjective one at that, of the crime scene. While admitting the pictures was probably not error by

itself, nor was admitting the videotape, the court unfairly highlighted the crime scene when it admitted the pictures and the tape.

The court, at the state's request, told Gorby to exhibit his tattoos to a witness. While there is controlling precedent to the contrary, the defendant asks this court to re-examine it and hold that the court erred in ruling as it did.

In the penalty phase of the trial, the court ruled that Gorby and a person identified in a Texas conviction for robbery as Freddie Banks were the same. It based this ruling solely on the testimony of a police officer who said the booking sheet listed that name as an alias Gorby had used. The court erred in that it removed the issue of identity of Freddie Banks as also being Gorby from the jury's consideration. It also erred in that the state presented insufficient evidence to make that connection.

The court found this murder to have been committed in an especially heinous, atrocious, or cruel manner. Yet the evidence shows that the victim was rendered unconscious almost immediately after the first blow, and there was no evidence he was aware of his impending death for any significant time. Although bludgeoning murders are often especially heinous, atrocious, or cruel, the one in this case was not.

Recent decisions from the United States Supreme Court have cast in doubt this court's efforts to limit the scope of the jury instructions on the aggravating factors especially heinous, atrocious, or cruel.

Finally, the court refused to tell the penalty phase jury of the penalties Gorby faced for the other crimes, which it had found him guilty of committing.

ARGUMENT

ISSUE I

THE COURT ERRED IN DENYING GORBY'S MOTION FOR A CONTINUANCE BECAUSE, A VIOLATION OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENTS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Before trial, Gorby filed a Second Amended Motion for Continuance alleging that he had had inadequate time to prepare for trial. Specifically, he wanted more time to depose two witnesses in Texas who would have cast doubt on the testimony of Allen Brown and Cleo Callaway, crucial state witnesses. The court had also appointed a neuropsychologist who had made a tentative analysis of Gorby but who needed more information to give a more "fully formed" opinion (T 2).

The state objected to this request, noting that it had filed an indictment a year earlier, and the "defense has had more than adequate time to prepare" and investigate its case (T 2). The court agreed with the prosecution, and it denied the defendant's request (T 5). That was error.

Gorby recognizes, of course, that the trial court has discretion in whether or not to grant or deny a motion for continuance and whether to appoint an expert to assist defense counsel. Valle v. State, 394 So.2d 1004 (Fla. 1981); Williams v. State, 438 So.2d 781 (Fla. 1983); Martin v. State, 455 So.2d 455 (Fla. 1984). A court abuses that discretion, however, when a defendant's right to a fair trial and assistance of counsel are violated by denying requests for delay. Thus, a reviewing court looks to the procedural prejudice a defendant has

suffered rather than any substantive harm he may have realized by the court's ruling.

In Smith v. State, 525 So.2d 477 (Fla. 1st DCA 1988) Smith's defense counsel did not get actual notice of the State's disclosure of an additional witness until the day before the scheduled sentencing hearing. This witness provided new and damaging information regarding the sexual battery and lewd conduct charges filed against Smith, and the trial court's reasons for departing from the recommended sentenced tracked language found in her report. Given the short time Smith had actual notice of the State's intent to use this expert and the harmfulness of her anticipated testimony, the court erred in not granting Smith's request to continue the sentencing hearing. Thus, the defendant in that case could point to some definite harm he would suffer by the court's refusal to postpone the hearing.

On the other hand, if the defendant's need for further investigation is speculative, the court does not abuse its discretion by denying a defense request for delay. Woods v. State, 490 So.2d 24 (Fla. 1986). In that case, counsel for Woods wanted more time to determine Woods' involvement in a prison gang which may have coerced him into killing a guard. A prison investigation, however, had never linked Woods with that group, and thus the basis for that request for a continuance was based on "nothing more than conjecture and speculation." Id. at 26.

Courts, in short, should readily grant defense requests for more time when the State has deliberately or inadvertently given counsel new evidence shortly before trial. Robert Smith v. State, Case No. 90-929, 90-1397 (Fla. 3d DCA April 9, 1991) 16 FLW D965. It need not be so generous when the purported need for more time has only a speculative basis.

In Songer v. State, 419 So.2d 1044 (Fla. 1982), this court held that the trial court had not erred in denying the defendant's request for a thirty day continuance so it could gather find an expert to testify about demographics and the effects of extended drug use. Counsel had had six months to find its expert to support his theories of defense, and he was vague about who he needed and why.

In Richardson v. State, Case No. 76,829 (Fla. April 9, 1992) 17 FLW S241, the trial court should have granted the defendant's request for a continuance because of the late disclosure of a firearm expert's report which retracted an earlier report concerning the identity of a shotgun shell found at the murder scene. Although the error was harmless, this court recognized that in severe cases, such as those involving charges of first degree murder, trial court's should readily grant the requested delay.

In this case, although as the State noted, an indictment had been filed a year earlier (T 4), there is no evidence that defense counsel had been dilatory or sought the delay for some strategic or tactical reasons. To the contrary, part of his problem arose from the need to find and depose witnesses in

Texas and West Virginia and the attendant logistical and coordination problems that imposed. Additionally, his penalty phase investigator, through no fault of his, had had inadequate time to investigate Gorby's background (T 3, R 2460). This last point was especially crucial because a neuropsychologist had concluded that Gorby suffered some brain damage, and the investigator could have supplied information confirming and corroborating this expert's conclusion (R 2461). Without such evidence, all Gorby presented at the penalty phase about his brain damage was testimony of his mother who said that after being hit by a car, he acted "more nervouser and more-I don't know the -quicker temper or something, and he wasn't the same boy really all the time." (T 1767)

Gorby also needed to depose two Texas witnesses who would have directly contradicted the testimony of other Texas witnesses (one being Allen Brown, the admitted cocaine addict with memory problems (T 796, 799)) that Gorby drove a car similar to the one owned by the victim (T 791, R 2460-61). They were the only witnesses who claimed to have seen Gorby in Raborn's car after his death, and one of them, Cleo Callaway bought the late model vehicle for only $700 after Gorby ostensibly gave him a ride as he walked along a road in Texas (T 1003). Defense counsel was unable to personally subpoena one of the crucial witnesses, and the other never appeared for a scheduled deposition (R 2461). In light of the inherent lack of credibility of the state's witnesses on this crucial issue, the court should have given the defendant more time to find and

depose the people who could have bolstered his defense. In short, Gorby wanted more time to develop specific defenses for which he had identified particular witnesses who could aid in developing his guilt and penalty phases defenses. He did not ask for more time to pursue some speculative hypothesis for which which there was only a scent of support and which he would have wandered indefinitely chasing butterflies. He requested more time to get specific information, and he was denied his right to present his case when the court denied his motion for a continuance.

The court therefore erred in not delaying the start of Gorby's trial, and by insisting the trial go forward, it denied Gorby his right to the effective assistance of counsel. Smith v. State, 525 So.2d 477 (Fla. 1st DCA 1988).

ISSUE II

THE COURT ERRED IN DENYING GORBY'S MOTION TO EXCLUDE CLEO CALLOWAY'S IN-COURT IDENTIFICATION OF HIM IN VIOLATION OF HIS DUE PROCESS RIGHTS.

Cleo Calloway claimed that sometime in the first part of May, his truck broke down, and he called for help (T 1000-1001). As he was walking back to the disabled vehicle, Gorby drove by in Raborn's car, picked him up, and after a brief discussion, offered to sell him the car (T 1003). Calloway gave him $700 and dropped him off at a bus stop (T 1003). About six weeks later, the police discovered that Calloway had the stolen car, and he was arrested (T 1004). Two weeks after being taken into custody, he was shown a photo-spread of six people, one of whom was Gorby (T 1006). Calloway picked the defendant as the one who had sold him the car.[3] The "main thing that stuck out" in his mind about Gorby was the tattoo he had, and it was that feature that he used to pick the defendant from the other five pictures shown to him (T 991).

Immediately before Calloway testified at Gorby's trial, the defendant moved to suppress his in-court identification of him. The court, after hearing Calloway's testimony, viewing the photospread, and reading the relevant depositions of Calloway and the police officers, agreed with Gorby that there

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[3]The photospread was state's exhibit 9 (T 1005).

was an unnecessarily suggestive procedure used in the photo lineup,

> but in considering all the circumstances that the suggestive procedure does not give rise to a substantial likelihood of irreparable misidentification based upon the nature of the way the witness had the chance to observe the defendant and the circumstances surrounding that.

(T 996)

The law in this area is simple. An in-court identification should be excluded if the police have obtained it by means of an unnecessarily suggestive procedure. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); Edwards v. State, 538 So.2d 440 (Fla. 1989). In this case, unless Calloway's in-court identification of Gorby was based solely on his independent recollection of the defendant, rather than the intervening illegal confrontation, the court should have excluded his testimony on that point. Edwards, supra, at 443.

Although several factors have been identified in gauging the reliability of the courtroom identification, the analysis is essentially one of examining the totality of the circumstances. Neil, supra, at 196. In this case, Calloway admitted that there was nothing unusual about the person who had sold him the car (Calloway's deposition, p. 16) He was wearing blue jeans and a non-descript T-shirt, and he had "real light hair." (Calloway's deposition pp. 15-16) Moreover, Calloway obviously was not a police officer trained in making

identifications, nor did he have any reason to believe he would ever have to identify the seller of the car again. Manson, supra, at 115. Thus, he did not pay too much attention to the owner of the car. Moreover, the description was so vague and given a relatively long time (two months) after the sale that a number of people could have matched it. This is unlike the one given in Manson, which was given within minutes of the crime and was so specific that a police officer immediately had an idea who the suspect was. "The photographic identification took place only two days later. We do not have here the passage of weeks or months between the crime and the viewing of the photograph." Id. at 116.

Also significant, unlike the situations in Manson and Neil, here we do not have Calloway placed in an inherently criminal activity, which would heighten ones sense of awareness. He merely had the opportunity to talk with a person wanting to sell his car, a reasonably common happening that does not normally engender any particular reason to notice with any great deal of attention what the seller looks like. To the contrary, one normally is more concerned with the condition of the car, than the appearance of the seller.

The crucial bit of evidence, however, was Calloway's admission that he identified Gorby virtually solely because he

had tattoos.[4] That is, as the Texas police showed him the photo spread, he remembered that "he had a tattoo." (Calloway's deposition p. 21) He did not recall the tattoo when he initially gave the description of the person who sold him the car to the police (T 1016), and it may have been one of the officers who suggested that the suspect had a tattoo (T 1027). Of crucial importance, the only picture in the photospread that showed anyone with tattoos on their arms was Gorby's picture. The others show only heads or at most the upper portion of the body.

Finally, Calloway was under considerable pressure to identify someone. As the one in possession of Raborn's car, he was a prime suspect in the victim's murder (T 1018, Calloway's deposition p. 10). That pressure was considerably relieved, however, after he made the identification because an officer told him "They got him locked up from your description. That's the guy that they were looking for." (Calloway's deposition p. 20)

Thus, the court correctly found the police procedures unnecessarily suggestive, yet it never made the additional necessary finding that Calloway's in-court identification was free of that taint. The state, in short, has not shown by clear and convincing evidence that Calloway could identify

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[4]At trial, the court, at the state's request, ordered Gorby to display his tattoos to Calloway (T 998).

Gorby based exclusively on his recollection as the one who had sold him the car. Edwards at 444.

Calloway's testimony was an important part of the state's circumstantial case against Gorby. Without him being able to point the finger at the defendant as the one who sold him Raborn's car, Allen Brown (the deaf crack addict) and Jerry Wyche (the jail house snitch with seven felony convictions (T 1310)) had to carry its case. One can thus understand why it wanted Calloway's testimony even though Calloway had credibility problems. This court cannot say beyond a reasonable doubt that Calloway's testimony had no effect on the jury's guilt determination.

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

ISSUE III

THE COURT ERRED IN REFUSING TO APPOINT OTHER COUNSEL FOR GORBY OR HAVING HIM WAIVE A CONFLICT OF INTEREST THAT MAY HAVE EXISTED BETWEEN HIM AND A JERRY WYCHE, WHICH TRIAL COUNSEL'S OFFICE ALSO REPRESENTED, A VIOLATION OF GORBY'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION AND THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITITUTION.

Before trial the State gave notice that a Jerry Wyche would be a witness in its case. Defense counsel's former partner, a Rhonda Martinec, had at one time represented Mr. Wyche, and defense counsel still had access to the confidential case file on Mr. Wyche (T 14). Counsel, in fact, had represented Mr. Wyche when "it was inconvenient for Mrs. Martinec to represent him," and he had attended some hearings for him (T 22-23). Counsel had not, however, reviewed the files (T 22).

The court refused to find an actual conflict of interest requiring appointment of new counsel, and it ordered Gorby's present lawyer not to "review those files." (T 24) That was error.

As this court said in Foster v. State, 387 So.2d 344, 345 (Fla. 1980), a defendant has a Sixth Amendment right to the assistance of counsel that is effective and unimpaired by conflicting interests. So important is this right that a court should appoint separate counsel even if there is a risk of conflicting interests, and it is reversible error not to do so. Id. Bellows v. State, 508 So.2d 1330 (Fla. 2d DCA 1987).

Moreover, Article I, section 16 of our state constitution should recognize that only a slight risk of conflict should suffice to warrant appointment of new counsel. See, Traylor v. State, Case No. 70,051 (Fla. January 16, 1992).

In Foster, the defendant and Betty Jean Strouder were jointly charged with murdering two people. They were also represented by the same lawyer, and at trial, the state called Strouder to testify. After she gave her evidence, the state dropped the charges against her. At no time did her lawyer ask that other counsel represent her, nor does the opinion reflect that his cross-examination of her in any way was compromised or reduced in effectiveness because of his joint representation of both the defendant and the state witness. Nevertheless, because there was an obvious conflict, this court said that Foster was denied his right to effective assistance of counsel by "the joint representation of the appellant and a state witness by the same court-appointed attorney."

Although the facts in this case are not as egregious as those in Foster, the result should be the same. Wyche was a crucial witness for the state. While both men shared a jail cell after Gorby's arrest, Wyche claimed the defendant had told him that "he didn't like homosexuals and that he beat a dude down with a hammer." (T 1302) Other than using Gorby's inculpatory statement to Allen Brown, who was severely impeached, the state presented only a circumstantial evidence case of Gorby's guilt. Moreover, as in Foster, there is no evidence that defense counsel's former partner's representation

of Wyche affected his cross-examination of him, but then there would have been none if counsel had resolved the conflict of interest in favor of Wyche. The absence of evidence of the conflict, in short, is not controlling because the mere risk of a conflict was strong enough that the court should have appointed separate counsel for Gorby.

At a minimum, the trial court should have told Gorby of the conflict of interest and allowed him to either get new counsel or waive the conflict. Freeman v. State, 503 So.2d 997 (Fla. 3rd DCA 1987). That it did not do so or even recognize the conflict was reversible error.

ISSUE IV

THE COURT ERRED IN ALLOWING THE STATE, DURING ITS CLOSING ARGUMENT TO IMPROPERLY BOLSTER THE CREDIBILITY OF KAREN SMITH, THE QUESTIONED DOCUMENTS EXAMINER IT HAD CALLED DURING ITS CASE IN CHIEF.

As part of its case, the state called Karen Smith as an expert in questioned documents. Specifically, she testified that Gorby's handwriting matched that of a note found on the door of Raborn's trailer a day or so after his murder (T 1259). While qualifying her as an expert, the prosecutor brought out that she had worked as a "special agent" for the division of security at the lottery, and as part of that qualification, he asked her "So if somebody won forty million dollars you would have to make sure it was not a--" to which she replied, "That's correct. There was (sic) computer checks and there was also a visual check by myself." (T 1255)

In closing the state then turned that hypothetical question it had asked during its questioning of Smith into a fact, and it further used it to improperly bolster her credibility as a reliable witness:

> You heard from Karen Smith, the lab analyst with Florida Department of Law Enforcement, who is a handwriting expert, and the State of Florida trusted her whenever it was going to hand out forty million dollars worth of lottery funds in her expertise.
>
> MR. KOMAREK [defense counsel]: Object, Your Honor. Improper bolstering.
>
> THE COURT: I'll overrule that particular objection.

(T 1556).

Sections 90.404 and 90.609 of Florida's evidence code control this issue. They provide in relevant part:

> 90.404(1) Character evidence generally. -Evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion, except: (c) character of witness. -Evidence of the character of witness, as provided in ss. 90.608-90.610.
>
> 90.609. A party may attack or support the credibility of a witness, including an accused, by evidence in the form of reputation, except that:
> (1) The evidence may refer only to character relating to truthfulness.
> (2) Evidence of a truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence.

The court's error was threefold: 1) It allowed the state to bolster Smith's trustworthiness, rather than her reputation for truthfulness. 2) It allowed such evidence and argument even though Gorby had never attacked her character. 3) It allowed the state to establish her trustworthiness by specific evidence of Smith's good character rather than by reputation testimony and further compounded that error by having her "self-authenticate" her reliability.

First, the court allowed the prosecutor to bolster Smith's credibility even though Gorby never attacked it. Generally, unless a defendant attacks a state witness' credibility by presenting evidence of bad character, the prosecutor cannot bolster her standing before the jury. Whitted v. State, 362 So.2d 668, 673 (Fla. 1978); See, General Telephone Co. v. Wallace, 417 So.2d 1022 (Fla. 2d DCA 1982).

Second, the state inquired about a specific instance of Smith's reliability or trustworthiness: verifying signatures of people winning forty million dollars in the lottery. In Florida, evidence of specific instances of trustworthiness or even the witness' opinion of her own trustworthiness are inadmissible. Buford v. State, 403 So.2d 943, 949 (Fla. 1981); Farinas v. State, 569 So.2d 425 (Fla. 1990). In Farinas, this court held that the state had improperly impeached a defense expert by examining him about his alleged unethical conduct while he had worked as a doctor for the city of Miami Beach. Evidence of a particular act of misconduct cannot be used to impeach the credibility of a witness. Conversely, evidence of a particular act demonstrating a witness' trustworthiness cannot bolster that person's credibility. This is especially true in this case where Smith in essence gave her own opinion regarding her credibility. In General Telephone, supra, a medical doctor gave his expert opinion regarding the pain the plaintiff Wallace suffered, but he also said that he believed the victim was honestly reporting his injuries. While the doctor could give his opinion about the extent of Wallace's injuries, he could not give an opinion regarding his patient's truthfulness. Similarly here Smith could give her expert opinion about who wrote the note found on Raborn's door, but she could not could not support that conclusion with specific evidence of her trustworthiness, and the state could not use this evidence to bolster the credibility of her conclusions in its closing argument.

The harm of this evidence is critical to this case because Smith's testimony was the strongest direct evidence linking Gorby to the murder victim. That is, people saw the defendant with Raborn the day before the murder and shortly after, but there is precious little evidence connecting the defendant to the murder location. Wyche's testimony that Gorby said he did not like homosexuals and had beat one is weak because of Wyche's inherently poor credibility. Allen Brown, who claimed Gorby told him that he had stolen a car and murdered, likewise had severe credibility problems because he was deaf, a crack addict, and had memory problems. Admittedly, there is evidence Gorby drove Raborn's car and had his credit cards, but there is no evidence how he got them. The note, however, provides the crucial evidence that the defendant was at the trailer, and it became an important piece of the circumstantial puzzle the state put together. It was unfair, however, for it to emphasize Smith's credibility by her previous employment at the lottery, and because most of the crucial evidence in this case hangs on the witness' credibility, this court cannot say beyond a reasonable doubt that bolstering it was harmless.

ISSUE V

THE COURT ERRED IN DENYING GORBY'S MOTION FOR MISTRIAL MADE DURING THE STATE'S CLOSING ARGUMENT BECAUSE THE STATE SAID HE HAD SHOWN NO REMORSE FOR KILLING J. RABORN.

During the state's closing argument, the prosecutor reminded the the jury of the photographs of the victim's body, and told them that it had not created them, but

> these are photographs that have been created through the defendant's own plotting, own cruelty. He was merciless in the way he killed W.J. Raborn. He has shown no remorse since.

(T 1582).

Gorby objected to the comment about the lack of remorse, which the court sustained. It denied, however, his motion for mistrial, and instead told the jury to disregard the state's last comment (T 1583). The court erred in not granting the motion for a mistrial.

When the state has made an improper comment, as it did in this case, the court has two choices. It can either grant the motion and give a curative instruction or it can order a new trial. Obviously, the former course is preferred, and a mistrial is appropriate only when the comment is so prejudicial as to vitiate the fairness of the entire trial. Duest v. State, 462 So.2d 446 (Fla. 1985). Nevertheless, in a close case merely telling the jury to disregard the state's improper comment, as the court in this case did, is inadequate. Instead the court should affirmatively rebuke "the offending prosecuting officer as to impress upon the jury the gross

impropriety of being influenced by the improper argument." Williamson v. State, 459 So.2d 1125 (Fla. 3rd DCA 1984); Deas v. State, 119 Fla. 839, 845, 161 So. 729 (1935). This is especially true in a case where the prosecutor tried the defendant for his life. Murders are inherently inflammatory, and in this case the jury could only have been overly influenced by the state's comments.

In Geralds v. State, Case No. 75,938 (Fla. April 30, 1992) 17 FLW S268, this court recognized that merely telling the jury to disregard a question has only marginal effectiveness.

> Although the judge gave a so-called "curative" instruction for the jury to disregard the questions, such instructions are of dubious value. Once the prosecutor rings the bell and informs the jury that the defendant is a career felon, the bell cannot, for all practical purposes, be "unrung" by instruction from the court. See Malcom v. State, 415 So.2d 891, 892 n.1 (Fla. 3d DCA 1982)(labelling such an instruction as being "of legendary ineffectiveness").

The improper comment in this case was made with particular reference to the pictures of the victim's body which had been introduced (over the defendant's objection). Not only did the jury have those photographs to examine, they also saw a videotape of the body and the crime scene (T 182). Moreover, Raborn was not the typical victim, but one who was a cripple from the waste down, who would give persons lodged at the Rescue Mission a chance to earn some money by doing simple chores about his house (T 719). For the State to have noted that Gorby has never shown any remorse could only have evoked

resentment against the defendant for killing the Good Samaritan. Yet if Gorby was innocent, why should he feel or display any remorse? He did not commit the murder, so there was nothing for him to feel sorry about.

Moreover, the state's case against Gorby was not overwhelming or even particularly compelling. It consisted largely of circumstantial evidence tying the defendant to Raborn at about the time he was killed. The most incriminating evidence came from Allen Brown who said Gorby had told him that he had stolen a car and murdered (T 792). Brown, however, was deaf and as evident from his trial testimony, had a hard time understanding people. Moreover, he had an admitted cocaine habit (T 796) and did not always remember things correctly (T 799).

The improper comment, if harmless in the guilt phase portion of the trial, nevertheless tainted the penalty trial. Counsel renewed his objection to the comment immediately before that part of the trial began, particularly noting that "it takes away any mitigating circumstance, I will probably will argue, as we regret, the death of the victim and the pain of the family." (T 1749)

Significantly, Gorby's counsel also argued that the state's comment "is going to be taken as an aggravating circumstance even if it's not listed." (T 1749) This court has held that the defendant's lack of remorse could not justify a death sentence nor have any place in considering of aggravating factors. Pope v. State, 441 So.2d 1073, 1076 (Fla. 1984).

Thus, for the jury to have received an anemic instruction to disregard the prosecutor's lack of remorse comment during the guilt phase was no guarantee that it would do so when it considered what penalty to recommend.

Without a stronger curative instruction, this court cannot presume the jury followed the court's direction either in the guilt or penalty determinations, and this court should remand for a new trial or at least a new sentencing hearing before a new jury.

ISSUE VI

THE COURT ERRED IN ADMITTING EVIDENCE THAT GORBY HAD JUST GOTTEN OUT OF JAIL BECAUSE IT HAD NO RELEVANCE TO THE CRIMES CHARGED AND ONLY TENDED TO PROVE HIS BAD CHARACTER AND PROPENSITY TO COMMIT CRIMES.

During the state's case, one of the prosecution's witnesses, Fred Grice, in response to how the defendant appeared said that he had what looked like about five days growth of beard. Grice had talked with Raborn, and he told Grice that he "needed to help this feller out because he just got out of jail." (T 633) Defense counsel objected to that comment and moved for a mistrial. The court apparently sustained the objection but it denied the request for a mistrial, and instead gave a curative instruction that the jury "disregard the last comment of the witness." (T 636) That instruction was insufficient, and the court should have granted Gorby's request for a new trial or given a stronger instruction.

First, the comment was hearsay (T 634), and second, irrelevant. It had no bearing on this case because generally evidence of unrelated crimes is irrelevant and inadmissible. Ferguson v. State, 417 So.2d 639 (Fla. 1982). It reflects only upon the defendant's criminal propensities and bad character. Roman v. State, 475 So.2d 1228 (Fla. 1985). While such error is presumed harmful, Straight v. State, 397 So.2d 903 (Fla. 1981), a curative instruction can ameliorate the mistake, Ferguson, but because of the great likelihood that the jury may be improperly swayed by the evidence, Nickels v. State, 90 Fla.

659, 685, 106 So. 479, 488 (1925), the instruction should be unusually strong, so as to leave no doubt in the jury's mind that it would be improper for them to consider the objectionable comment. Here, merely telling the jury to "disregard the last comment of the witness" because it was "not responsive to the lawyer's question" (T 636) inadequately impressed on them the seriousness and impropriety of the witness' testimony. Williamson v. State, 459 So.2d 1125, 1128 (Fla. 3rd DCA 1984). It merely implied that the witness had given an unanticipated answer, which is correct but incomplete and misleading. The error was that Grice's response suggested that Gorby besides being "kind of scroungy looking," had a character to match since he had just gotten out of jail (T 633).

The state countered Gorby's objection to this comment by claiming that the evidence was going to be admitted through other witnesses because "It goes to identity of the individual." Yet Robert Jackson, Allen and Marisa Brown and Cleo Callaway, witnesses most likely to comment on Gorby's past, never mentioned that the defendant had just gotten out of jail. Even Michael Bennett, a fishing partner of Grice's who testified immediately after Grice, never mentioned anything about Gorby's just having gotten out of jail.

The error therefore was very prejudicial, casting Gorby as the man who had killed the Good Samaritan, and the court did little to correct the impression conveyed by the improper

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

ISSUE VII

THE COURT ERRED IN DENYING GORBY'S MOTION FOR A MISTRIAL AFTER THE WITNESS ROBERT JACKSON SAID THE DEFENDANT HAD ATTACKED HIM.

During the state's case, Robert Jackson talked about picking up Gorby in Texas and taking him to Panama City. While there, the pair went to a bar where the defendant apparently picked up a woman and asked Jackson to take her home. He took her and Gorby to "a place, I'm not sure where it is," and later the two men split up, "Not in a very friendly fashion." (T 543) More, specifically, in response to the state's questions, "You had a fight; is that correct?" and "You kicked him out of your car?" Jackson said, "It was not what you would call a fight. I was attacked in the car, sir, while I was driving." (T 543)

Defense counsel objected to that response, and the court apparently granted it, because it told the jury to disregard "the last comment of the witness." (T 545) As argued in the previous issue, however, the court's tepid admonition to the jury insufficiently apprised them of the error and the dangers of considering it. Williamson v. State, 459 So.2d 1125, 1128 (Fla. 3rd DCA 1984). This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VIII

THE COURT ERRED IN ADMITTING NUMEROUS PHOTOGRAPHS AND A VIDEOTAPE OF THE VICTIM'S BODY, IN VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

At trial, the state, as is normal in cases of this type, had a pathologist testify about the nature of the victim's wounds and the cause of death. As is also routine, over defense objection, the state introduced numerous photographs of the deceased depicting the wounds inflicted and the surroundings in which the murder occurred. What was not typical was the state's use (again over defense objection) of a videotape to repeat much of what the pictures had earlier revealed. The court admitted the videotape because

> the cumulative effect of the video is not duplicitous to the photographs and that -their probative value outweighs any prejudicial impact that may be attributable to the video by virtue of showing the decedent, the victim, in a -I note that the video did not dwell at length on close-ups of the victim, just a shot where the victim was located and some focusing in on specific instances of the knot, the blood smear pattern, and the location of the cord, and those items were not necessarily covered in the same way as the photographs have shown.

(T 1180).

The court would not have erred if it had admitted only the photographs or only the videotape. Its err came from the cumulative effect of admitting both.

The law regarding gruesome and gory photographs is simple, well-settled, and very difficult for a defendant to use to his advantage. The test of admissibility is relevancy, not

necessity, and generally if the pictures or videotapes will assist the trier of fact, they are admissible. Straight v. State, 397 So.2d 903 (Fla. 1981).

While pictures and videos may be admitted, the danger of their prejudicial value significantly increases when an abundance of either is considered by the jury. In this case, the jury had a plethora of pictures which they could have viewed with diligence or quickly scanned depending upon whatever relevance they may have had. Not so with the video, which started outside the trailer and slowly moved about the trailer, dwelling upon such inconsequential and irrelevant items as a child's doll placed on a pillow on a bed in the trailer. The video also panned pictures of what appeared to be the victim's family or friends. It repeatedly showed the blood stained carpet in the hall, and for unknown reasons dwelt on knots in the extension cord which had been tied around Raborn. For investigative purposes, when the police may have no idea what is relevant or not, such agonizing attention to every possible detail may have merit, but at trial, the state should have known what was relevant, and all this video did was emphasize what the pictures showed and diverted the jury into considering Raborn's life when it deliberated on Gorby's guilt.

In Davis v. State, 586 So.2d 1038 (Fla. 1991), the defendant argued that the court had erred in admitting videotape evidence and a color photograph. This court rejected that claim because the tape depicted the victim's wounds and the murder scene, the medical examiner used it to explain the

wounds inflicted and that two different knives were used, and the tape showed a house in a condition which was inconsistent with Davis' claim of self-defense. The evidence, in short, had specific relevance to Davis' case instead of putting "together and complement[ing] the evidence previously presented by the photographs." (T 1174)

In this case, Dr. Sybers, the medical examiner, never used the video to explain the nature of the wounds Raborn suffered. In fact, he did not even use the photographs; instead, he used slides to explain the number, nature, and severity of Raborn's wounds (T 1372). Nor was the video used to refute any defense Davis offered. It was, in short, repetitive of the numerous photographs admitted, and the unedited tape exposed the jury to matters irrelevant to the guilt phase of the trial such as his family ties. The prejudicial and cumulative effect of the videotape outweighed whatever relevancy it had, and the court erred in admitting it. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IX

THE COURT ERRED IN OVERRULING GORBY'S OBJECTION TO ITS RULING THAT HE DISPLAY THE TATTOOS ON HIS ARM AND NECK TO THE JURY, IN VIOLATION OF THE FIFTH AMENDMENT AND ARTICLES I, SECTION 23 OF THE FLORIDA CONSTITUTION.

At trial, the court granted a state request (over defense objection)that Gorby display to a witness, Cleo Callaway the tattoos that he had on his arms and chest (T 998). Gorby exhibited these markings because the witness had said he remembered seeing them on Gorby when he sold him a car in Texas shortly after the murder (T 1001-1002).

This court's opinion in Macias v. State, 515 So.2d 206 (Fla. 1987) controls this issue, and it holds that such displays are not testimonial and hence do not violate a defendant's Fifth Amendment right against compelled testimony. Despite this holding, Gorby respectfully asks this honorable court to re-examine its ruling and adopt Justice Barkett's dissent in that case.

ISSUE X

THE COURT ERRED IN FINDING, AS A MATTER OF FACT, THAT THE DEFENDANT, OLEN GORBY WAS THE SAME PERSON REFERRED TO AS FREDDIE BANKS IN TEXAS AND FLORIDA RECORDS.

As the only evidence it presented during the penalty phase of the trial, the state introduced a Texas conviction for robbery for one Freddie Banks (T 1757). The court (outside the jury's presence) also heard testimony that the booking sheet used in Bay County when Gorby was jailed indicated that he had used the alias of Freddie Banks (T 1756). The court, based on this evidence, ruled that the state had established that

> Freddie Leon Bands and Olen Clay Gorby are one and the same person for purposes of this conviction being used against Mr. Gorby in this particular case. And I'll overrule the defense objection and advise the jury that the individual referred to as Freddie Leon Banks in the judgment of conviction is in fact the defendant Olen Clay Gorby.

(T 1757-58).

The court did as it indicated, and told the jury that Freddie Banks was Olen Gorby (T 1761). That was error because the determination should have been left to the jury, and in any event, the state presented insufficient evidence to establish beyond a reasonable doubt the identity of Gorby as Freddie Banks.

The aggravating factors identified by section 921.141 Fla. Stats. (1991) define a capital murder, and as such must be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). One of those factors is that "the defendant was previously convicted of another capital felony or of a felony

involving the use or threat of violence to the person." Section 921.141(5)(b) Fla. Stat. (1991). It follows that the state must establish beyond a reasonable doubt that the defendant who was previously convicted of a violent felony is the same defendant currently on trial. Gorham v. State, 454 So.2d 556 (Fla. 1984); c.f. Fla. Std Jury Instr. (Crim.) 2.03. Identity, in short and as in any trial, is a matter of fact for the jury to determine. Thus, the court in this case effectively directed a verdict for the state when it found that Olen Gorby was Freddie Banks. That should have been a contested issue, and the court erred when it precluded Gorby from arguing that the circumstantial evidence presented did not establish beyond a reasonable doubt that the Freddie Banks identified in the Texas robbery charge was the Olen Gorby before them.

Had it allowed Gorby to do so, he would have had a very strong argument that as matters of fact and law, the state had not established the crucial element of identity beyond a reasonable doubt. The only evidence linking Freddie Banks and Olen Gorby was the hearsay testimony of the police officer Frank McKeithen that Gorby had used aliases in the past, and that "On the original booking sheet his name appears as Freddie Banks on there also, as an alias." (T 1756) The witness also said that records from Texas also reflected the name Freddie Banks on them as being also Olen Gorby. The problem which the state could not overcome, however, was that with regard to the crucial charge of robbery, which had the Texas case number of

87 CR 2102 (R 2309-16), Olen Gorby's name is nowhere mentioned. That case indicates that only a Freddie Banks was charged with what in Florida would be robbery with a firearm. The only link the state could provide was McKeithen's hearsay. There are no fingerprints on any of the crucial documents, as required in Florida, nor is there any other identifying information which might sufficiently limit the possibility that the Freddie Banks mentioned in the Texas charge was the Olen Gorby facing a death sentence.

In Gorham, supra, the defendant apparently challenged the North Carolina records that a David Kidd Gorham in that state who had been sentenced to prison and escaped was the Gorham currently on trial. Although a Florida Assistant State Attorney introduced the record at Gorham's Florida trial, and he had no personal knowledge of the identity of the North Carolina Gorham, this court affirmed the trial court's admitting the evidence of the North Carolina records. In that case, "the identical name, sex, race and date of birth of the defendant and the North Carolina convict" sufficiently established that the two people were in fact one person.

Here, there are none of the limiting similarities as in Gorham. There is no identity of the names, no indication that "Freddie" was a man, that he (or she) was white, black, or pink, or that he had the same birth date as Gorby.

Gorby recognizes that in the sentencing phase of a capital trial the rules of evidence are somewhat relaxed. Section 921.141(1) Fla. Stat. (1991). Yet, even in this circumstance,

only hearsay established the identity of Gorby and Banks, and that should be disapproved. In probation revocation proceedings, hearsay can establish a disputed fact, but the court cannot revoke a defendant's probation based solely on the hearsay. Reeves v. State, 366 So.2d 1229 (Fla. 2d DCA 1979). Even more so in a capital case, with its heightened respect for due process protections, while hearsay may be admissible, it should not be able, by itself, to establish an aggravating factor.[5]

The trial court in this case erred in taking the identity issue from the jury, and that error was compounded by the insufficiency of the evidence establishing beyond a reasonable doubt that Olen Gorby was Freddie Banks. This court should reverse the lower court's sentence and remand for a new sentencing procedure before a new jury.

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[5]It also should be argued that relaxing the rules of admissibility of evidence should only be for the defendant's benefit, not the state's. If Florida's death sentencing procedure has survived repeated appellate scrutiny, it is because it ensures with as much precision as possible that only those worthy of death are so sentenced. It therefore is surprising that a statute which relaxes the rules of evidence, which are themselves designed to promote the truth seeking function of the trial, should apply to the state.

ISSUE XI

THE COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Over defense objection, the court instructed the jury on the aggravating factor "especially heinous, atrocious, or cruel" (T 1739), and the court, in justifying its death sentence, found that factor (R 2622-24). It relied primarily on the fact that the death was not instantaneous and that the victim was struck seven times with a blunt instrument. He could have been conscious after the first or second blow, and when found, his body had been dragged from the hall to the bathroom where his shirt was knotted and "a complex pattern of knots [was] tied around his neck over the shirt." There was, however, "nothing from the physical evidence to determine when these items were placed around the victim's neck in relation to when the blows wee delivered." The court also used the victim's immobility due to his polio affliction to justify finding this aggravating factor (R 2624). While this was a brutal killing, the state produced insufficient evidence that it was especially heinous, atrocious, or cruel as this court has defined that phrase. Specifically, there is insufficient evidence of how Raborn died to support the inevitable conclusion that he endured a great amount of emotional strain or fear before being killed.

The key to this argument comes from the medical examiner who said that Raborn could have lost consciousness after the first or second blow, and that any of the seven blows could

have killed him (T 1388, 1393). Moreover, there is no evidence the victim had any awareness of his impending death for any appreciable length of time. In Preston v. State, Case No. 78,025 (Fla. April 16, 1992) 17 FLW S252, the victim was taken to a remote location, forced to walk across a dark field, told to disrobe, and then stabbed. This court, in upholding the heinousness of this murder found that the victim must have suffered great fear and emotional strain before her death, and such "torture" can justify finding the murder to have been especially heinous, atrocious, or cruel. Accord, Francois v. State, 407 So.2d 885 (Fla. 1981).

Stabbings, bludgeonings and the like tend to make the resulting murders fall into the heinous, atrocious, or cruel category because during the stabbing or bludgeoning the victim is usually conscious and aware that he or she is being killed. Thus, where there is evidence of defensive wounds on the victim's arms, even though he was initially struck from behind, this aggravating factor can legitimately be found. Roberts v. State, 510 So.2d 885, 894 (Fla. 1987). Prolonged killings in which the victim is aware of his death tend to be especially heinous, atrocious, or cruel.

On the other hand, quick killings, usually done by a single shot from a gun tend not to be especially so when the victim has no appreciable foreknowledge of his or her impending death. Richardson v. State, Case No. 76,829 (Fla. April 9, 1992) 17 FLW S241. Even when the victim suffers excruciating pain for hours after being shot, undoubtedly knowing that death

is imminent, the resulting murder does not per-se allow the application of this aggravating factor. Tefftellerv. State, 439 So.2d 840, 846 (Fla. 1983).

Thus, the mode or method of killing is not so important as the suffering the victim consciously endured before death. This in turn is important because it is a strong indicator of the degree of the defendant's "utter indifference to, or even enjoyment of, the suffering of others." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). It follows that if Raborn was killed, or at least rendered unconscious soon after the first blow was struck, that the resulting murder was not done in an especially heinous, atrocious, or cruel manner. Since he may have been unconscious, he could not have suffered any great emotional strain or been under any prolonged fear. Gorby, therefore, would not have "enjoyed" the victim's suffering.

The evidence supporting the court's finding of this aggravating factor is circumstantial, and as such, if there is any reasonable hypothesis supporting its non-applicability, this court must accept it and reject the trial court's finding that it applied to this case. C.f., State v. Law, 559 So.2d 187 (Fla. 1990). Gorby's theory is simply that Raborn had no idea of his impending death until at most seconds before he was struck. Moreover, he lost consciousness almost immediately and died a short time later, and he suffered no more after becoming unconscious (T 1395).

Additionally, although Raborn's body was found in the bathroom, the victim died in the hallway (T 1394). The cords

that were found knotted about his neck did not contribute to his death, and the pathologist could not say whether they were placed there before or after the blows were struck (T 1397). Also, he could not identify which blow was struck first (T 1393).

Thus, the evidence arguably supported the court's finding of this aggravating factor, but it also more plausibly supports Gorby's contention that Raborn had no idea of his impending death, and he became almost immediately unconscious after the first blow was struck. Because the state presented no evidence to refute that reasonable hypothesis (which has record support), it has to be accepted, and the trial court's findings rejected.

As a matter of law, there was insufficient evidence that this murder was especially heinous, atrocious, or cruel, and the court should not have instructed the jury that they could consider it in determining what recommendation to make. This court should, therefore, reverse the trial court's sentence of death and remand for a new sentencing hearing before a new jury.

ISSUE XII

THE COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD FIND THE MURDER TO HAVE BEEN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL BECAUSE THAT INSTRUCTION INADEQUATELY DEFINES WHAT CONDUCT IT INTENDS TO PUNISH.

The court instructed the jury that it could aggravate the murder Gorby had committed if it found the murder to have been committed in an especially heinous, atrocious, or cruel manner Specifically, it told them that:

> The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless.

(R 2537).

Those instructions inadequately limited the jury's consideration of the appropriate factors when it determined whether Gorby should live or die.

This court rejected this argument in Smalley v. State, 546 So.2d 720 (Fla. 1989). Recent decisions from the United States Supreme Court have, however, cast in doubt the continuing validity of that case. In Espinosa v. Florida, Case No. 91-7390 (June 29, 1992) 6 FLW Fed S662 the high court summarily rejected the especially heinous, atrocious, or cruel instruction read to the jury. Significantly, the court seemed to also reject this court's efforts in Smalley to narrow and clarify the scope of that guidance. In Smalley, this court had limited the trial court's instruction in a fashion the court in this case had not. Specifically relying on its opinion in

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), the court also limited the heinous, atrocious, or cruel aggravating factor to "those conscienceless or pitiless crimes which are unnecessarily torturous to the victim." Smalley at 722. Such additional guidance may satisfy the Eighth Amendment's demands for specific guidance from the court on what can aggravate a murder to a capital sentence. Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). That limiting instruction, however, was missing from what the court read the jury in this case. It allowed them to rely on their unchanneled discretion to determine what that instruction meant. Because the jury cannot be left on its own to figure out what is especially heinous, atrocious, or cruel, the court in this case erred in telling them that it could consider that aggravating factor in recommending Gorby be sentenced to death.

ISSUE XIII

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED BY THE DEFENDANT ON THE PENALTIES HE FACED FOR THE OTHER CRIMES IT HAD FOUND HIM GUILTY OF COMMITTING, IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

During the charge conference for the penalty phase of Gorby's trial, defense counsel requested the court instruct the jury on the maximum penalties Gorby faced for the other crimes that it had found him guilty of committing (T 1744, R 2532). The state objected to this instruction, and the court refused to give it (T 1745). That was error.

Rule 3.390(a) Fla. R. Crim. P. controls this issue.

> (a) The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial.

This court interpreted this rule in Wright v. State, Case No. 78,790 (Fla. April 9, 1992) 17 FLW S229. In that case, Wright had been charged with first degree murder, and he requested, pursuant to Rule 3.390(a) that the jury be instructed on the possible penalties he would face if convicted. The trial court refused to read it, the Fifth District agreed but certified the issue to this court, and on review, this court affirmed the lower courts' rulings.

> We agree with the Fifth District Court of Appeal that the most logical interpretation of the rule is that the penalty instruction is required 'only in the penalty phase of a capital trial when the jury must recommend the penalty.'

(cite omitted. emphasis in opinion.)

Thus, the issue is that if, in the penalty phase of a capital trial, the jury is told what punishment a defendant may face for the murder conviction, should it also be told what sentences he may also receive for crimes which the jury also had convicted him of committing?

Rule 3.390(a) succeeded the prior rule which required the court during the guilt phase of every criminal trial to instruct the jury on the penalties which the defendant faced if convicted of the charged crimes. Tascano v. State, 393 So.2d 540 (Fla. 1981). Judicial uproar over telling them about such an irrelevancy led to the rule's amendment to its current form. Whatever logic attends reading the jury a penalties instruction for their use during the guilt determination portion of a trial becomes a compelling consideration in the sentencing phase of a trial.

The jury that must recommend a sentence to the trial judge is in a unique position when compared with juries in non-capital trials. In no other situation does a body of common citizens recommend what sentence a defendant should receive. Normally, the trial court sentences without knowledge or consideration of the jury's thoughts on the matter. Instead, in reaching the appropriate punishment, the court uses the sentencing guidelines which factors the punishment or severity of other crimes the defendant has contemporaneously committed with the crime for which he is now being sentenced.

In a capital case such as this one, the jury will also, of course, know what other contemporaneous crimes he has committed along with the first degree murder, but according to the court's ruling in this case, it is not entitled to know what punishment he may receive for those crimes. It can only speculate on the severity of such crimes as robbery and burglary, and such ignorance of the actual sentences permitted may lead that body to conclude that the defendant will be either more or less harshly punished than the law actually allows.

Allowing the jury to remain ignorant of a logically important element in their sentencing recommendation does not seem fair, especially when it may know of his prior violent criminal record, and it can be instructed on the governor's pardoning power. California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). Indeed, in Ramos, the Supreme Court approved of an instruction telling the jury of the governor's pardoning power because it helped achieve the constitutional goal of individualized sentencing. "[A]s a functional matter the Brigg's Instruction focuses the jury's attention on whether this particular defendant is one whose possible return to society is desirable." Id. at 1005.

Similarly, telling the jury what additional punishments the defendant faces, as was requested in this case, helps focus its deliberations on the necessity of recommending a death sentence for this particular defendant. That is, that body may consider that a life sentence with the possibility of parole

after twenty-five years does not adequately protect society. On the other hand, death may be too harsh. But if it knows that the defendant faces a significant, additional amount of prison time for, as in this case, theft of a car, robbery and burglary, such additional guidance may assist it in deciding to recommend a life sentence. On the other hand, it may recommend death because even those prison terms inadequately safeguard the people of this state. Thus, an instruction on the possible penalties the defendant faces in addition to that of life or death helps the jury in reaching an appropriate recommendation, and the court in this case erred in not so instructing the jury.[6]

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[6]The state's argument that what Gorby wanted was "proper argument, but not a proper instruction from the Court." misses the point (T 1745). While he could have told the jury that he faced prison time for his other crimes, there was no evidence of what the maximum penalties would be for those crimes. He would, therefore, been unable to argue very forcefully that death was inappropriate because in addition to life in prison he was also facing at least another life sentence plus an additional 20 years in prison for the other crimes the jury had convicted him of committing.

CONCLUSION

Based on the arguments presented in this brief, Mr. Gorby respectfully asks for the following relief: 1) Reversal of the trial court's judgment and sentence and remand for a new trial, or 2) Reversal of the trial court's sentence and remand for a new sentencing hearing before a jury.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
Assistant Public Defender
Fla. Bar No. 271543
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, OLEN CLAY GORBY, #286008, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 24th day of July, 1992.

DAVID A. DAVIS