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

REPLY BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

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REPLY BRIEF OF APPELLANT

ARGUMENT

ISSUE I

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

As pointed out in Gorby's Initial Brief and not denied by the state, continuances should be granted, especially in capital cases, when the party asking for one needs a little bit more time to get specific evidence. It is unwarranted to relieve counsel who delay preparing their cases and suddenly discover on the day of trial that whole areas of investigation have remained unexplored. This court in Wike v. State, 596 So.2d 1020 (Fla. 1992) emphasized this point when it ordered a new penalty phase proceeding. In that case, Wike, after the guilt phase of the trial had concluded but before the penalty portion had begun, asked the court for a one week continuance. This court held that the lower court's denial was error because

"Wike's request for a continuance was for a short period of time and for a specific purpose." Id. at 1025.

The court in this case similarly erred. Unlike Wike, Gorby made his request before the trial had started. There was, therefore, not the same pressure to proceed with the trial as there was in Wike. The jury had not been chosen, so there was no risk of jury contamination as there was in Wike.

The state claims that "it is clear from the record that Gorby's counsel was prepared for trial." (Appellee's brief at pages 16-17) The state, however, has a prescience beyond that of mere mortals, and what counsel said in support of his request for a short delay in the trial refutes that. Specifically, he needed the extra time so his investigator could develop evidence "that would more clearly show and substantiate the fact that he's had a long standing impairment due to brain damage." (T 2) The neuropsychologist had reached a tentative conclusion that Gorby's brain was malfunctioning, but to withstand a prosecution attack on this expert's testimony, defense counsel needed to provide him with more information so his conclusion "could be more fully formed and broadly based." (T 2).

This need to solidify the expert's conclusion was crucial in this case because the medical examiner suggested that the murder was committed during a violent frenzy by one who had lost control of his emotions (T 1380, 1387-88). Moreover, as the state noted, Gorby did not call his expert during the penalty phase, and maybe that was because the lack of more

information prevented him from presenting a credible penalty phase argument that the defendant was sufficiently brain damaged so that he was "under the influence of extreme mental or emotional disturbance" or that he his capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Sections 921.141(7)(b)(e) Fla. Stat. (1990).[1] Of course, Gorby called his mother and sisters to testify, but what weight do we expect the jury to give to a mother's plea? Whatever value they may have ascribed to her claim the he acted "more nervouser" after being hit by a car, it certainly would have increased if the neuropsychologist could have taken the stand in the penalty phase and objectively confirmed what Gorby's parent had noticed. The defendant's request for more time should have been granted.

The state has noted that defense counsel had done an extensive amount of preparation for this case. "Here, counsel had been afforded <u>two</u> investigators, and had personally traveled to West Virginia to investigate Gorby's background." (Appellee's brief at p. 17, emphasis in the state's brief.)

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[1]That Gorby did not recall Dr. Goff to testify during the penalty phase of the trial rebuts the state's claim that the expert had "more than [an] adequate time period for the expert to 'firm up' his conclusion." (Appellee's brief at p. 18) With as much confidence as the state makes that claim, the defendant says that the fact that he did not call the psychologist indicates he did not have enough time to make a conclusive evaluation of Gorby.

Such diligence on defense counsel's part supports his request for more time. There is no evidence that he was in any manner dilatory in preparing for trial, so there is no reasonable belief that he wanted to foist a delay on the court because of his laziness or incompetence.[2]

The state relies on Stewart v. State, 420 So.2d 862 (Fla. 1982) to support its argument, but it is easily distinguishable. In that case, before the sentencing phase of the defendant's trial, counsel asked the court to appoint two mental health experts to examine Stewart and to continue the trial until they had done so. The court refused both requests, and this court approved the lower court's ruling. It did so because three psychiatrists had previously examined the defendant and the new examinations, based on the record presented to this court on appeal, would have been cumulative. In this case, only Dr. Goff had seen Gorby, and his evaluation was incomplete, which prompted the request for the continuance. Gorby requested the additional time so his expert could complete his evaluation, and since he was the only one who testified about the defendant's mental condition, what he said could have not been cumulative to any other expert testimony of his mental condition.

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[2]Counsel also asserted that the motion for continuance was made in good faith and not to delay the administration of justice (T 2354). Williams v. State, 438 So.2d 731 (Fla. 1993).

Finally, as to defense counsel's inability to depose two witnesses who would have cast doubt on the credibility of two of the state's primary witnesses, the state says on page 19 of its brief that "those witnesses who claimed to have seen Gorby in possession of the victim's car in Texas were subjected to extensive cross-examination at trial." However extensive it may have been is speculative, and it would undoubtedly have been devastating had counsel been able to depose those two people who had not shown up for the deposition.

The court, in short, erred in denying Gorby's motion to continue, and this court should reverse the trial court's judgment and sentence and remand for a new trial or reverse the trial court's sentence and remand for a new sentencing hearing.

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.

The state seems to be arguing that Gorby tried to "cast doubts upon" Karen Smith's qualifications as an expert in handwriting analysis thereby justifying bolstering her reputation during closing argument. (Appellee's brief at p. 47) Not so. After the state established her qualifications as an expert in her field, defense counsel had no questions and did not object to her being recognized as an expert (T 1255).

During his cross-examination of Smith regarding her conclusions, defense counsel only briefly and tangentially asked her about any professional organizations she might belong to (T 1270). By far, most of his inquiry focussed on the details of her conclusions, and that cannot be fairly viewed as an attack on Smith's character so as to justify the state's remarks in its closing argument. Even if it could be so interpreted, the state cannot cite specific instances of Smith's reliability to rehabilitate her character.

On page 48 of its brief, the state argues that the danger arising from bolstering is that "the jury may believe that the prosecutor has additional information about the case which was not disclosed at trial. See Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982). While that certainly may be one danger of bolstering, it is not the only reason such a tactic is discouraged. As this case demonstrates, even if trial counsel

had been asleep when the state elicited the 40 million dollar lottery question, the state cannot enhance Smith's credibility to the jury by referring to a single incident (and implying such verifications of signatures was common place).

As to the harmlessness of the court's error, the state relies on Mohorn v. State, 462 So.2d 81 (Fla. 4th DCA 1985). In that case, the specific evidence of a state witness's good character was harmless in light of the defendant's confession of guilt. In this case, we have no similar admission, and for that reason, as well as those argued in the Initial Brief, this court should reverse the trial court's judgment and sentence and remand for a new trial.

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.

Appellate counsel should not have been surprised when the state responded to his argument on this issue by claiming that the admittedly improper comment made during its closing argument in the guilty portion of the trial was harmless. He would have done the same thing had he been in that position, but regardless of who made the argument, it still would have been too weak to overcome what Gorby presented in his Initial Brief.

From his argument and that of the state this court can glean that the harmfulness of the state's closing argument depends largely what happened during the trial. e.g. Mason v. State, 438 So.2d 374 (Fla. 1983) (". . .although the comments of which appellant complains might warrant reversal in some cases, they do not here.") Comparing this case with Randolph v. State, 562 So.2d 331 (Fla. 1990) nicely illustrates how any harmless error analysis of improper comments must consider the facts of the particular case. In Randolph, the defendant robbed a convenience store at which he had worked. He originally hoped to steal some money, but the store manager saw him, and he rushed her, forcing her into a back room where he beat her until she "quieted down." He tried to open the store safe but could not, and when the victim began moving again he strangled her with a string taken from his hooded sweat shirt.

Randolph returned to the safe, but the victim regained consciousness and began screaming, and he returned to her and stabbed her with a small knife and also tried to strangle her again. To cover up the motive for the murder, he raped her to make it appear as if a "maniac" had committed the crimes. He stole some lottery tickets and fled the scene, but as he was locking the door to the store, two women approached and asked the defendant what had happened to the manager. He told them her car had broken down, and he was going to help her. Apparently the women did not believe him because they called the police, and when they broke into the store, they found the victim dying in the back room.

During the subsequent trial, the prosecutor, on redirect examination, asked Randolph's girlfriend if the defendant had acted "remorseful or ashamed, or anything, sad for what he had done." The court sustained the defense objection but denied the motion for mistrial. This court agreed with the lower court's rulings saying that "in this case we find the improper question was harmless beyond a reasonable doubt in both the guilt and penalty phases." Id. at 338.

The question was harmless because Randolph had given a detailed confession of the murder, which he apparently never denied, there were two virtual eyewitnesses to the murder, and it was particularly brutal, with the defendant repeatedly beating the victim senseless and raping her to somehow "cover-up" his real motive for killing her. In addition, the question arose only once and that briefly as part of the

state's case in chief. No one made much of it, and this court did not either.

Not so in this case. We have, first of all, no detailed and extensive confession of how Raborn was killed. To the contrary, the state's case against Gorby consisted largely of circumstantial evidence and some inculpatory hearsay relayed by witnesses of dubious quality. There were no eyewitnesses, and unlike Randolph, the defendant here has steadfastly maintained his innocence. Finally, the comment was not buried in the trial, but was made during the peroration portion of the state's closing argument, and the court's sustaining of the defendant's objection as well as its weak curative instruction hardly deterred the prosecutor from continuing its emotional closing:

> MR. MEADOWS: (continuing) As I said, the defendant was merciless.

(T 1583).

Also, Raborn was not similar to Randolph's victim who was a "lot tougher than [Randolph] had expected." Id. at 333. Raborn was an invalid who could not use his legs. More than that, he was the Good Samaritan, the man who would go to the Rescue Mission looking for derelicts he could provide work for so they could get along a bit easier in life. Gorby was one such person, and he was one who had an extensive criminal record, apparently unlike Randolph.

The stark contrast between this case and Randolph must raise reasonable doubts about the efficacy of the court's mild

curative. The prosecution's comment that Gorby "was merciless in the way he killed W.J. Raborn. He has shown no remorse since" is not harmless beyond all reasonable doubt. This court should reverse the trial court's judgment and sentence and remand for a new trial.

If not for a new trial then at least a new sentencing hearing because whatever harmlessness the comment had on the jury's determination of guilt, it was not so in their penalty phase deliberations. The state argues that, well, the improper comment was made three days before the penalty phase trial began. (Appellee's brief at p. 55) The implication forced here is that our memory of distant events dims with the passage of time, and often that is true. On the other hand, if that were universally true, there would be no Bartlett's Familiar Quotations with the following comments on the power of a single word:

> A powerful agent is the right word. Whenever we come upon one of those intensely right words in a book or a newspaper the resulting effect is physical as well as spiritual, and electrically prompt.
>
> Mark Twain, Essay on William Dean Howells.
> It is not of so much consequence what you say, as how you say it. Memorable sentences are memorable on account of some single irradiating word. Alexander Smith, Dreamthorp, On the Writing of Essays.

Depending on your political bent, consider the power of these phrases:

> "There you go again."
> "Read my lips."
> "I am not a crook."
> "Willie Horton."

These were not said three days ago, yet their efficacy to evoke memories and emotions remains years after they were uttered and needs no prompting to generate a response. So here. The State's admittedly brief comment needed much more than what the court gave to remove it, as much as any instruction could, from the jury's memory and as a factor in their deliberations. This court cannot say with easy confidence that the court's failure to give an unambiguously stronger curative instruction was harmless beyond all reasonable doubt.

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.

The state's argument on this issue as in the previous one and as well as the next issue is that the errors which occurred were harmless. In this issue, the state cites several cases such as Ferguson v. State, 417 So.2d 639, 642 (Fla. 1982) and Johnston v. State, 497 So.2d 863 (Fla. 1986) to show that under the facts of those specific situations, the trial court had not erred in telling the jury to disregard the prejudicial comments made by state witnesses.[3]

Despite the state's best efforts in these issues, it does not and cannot refute what this court has said: 1) errors created by improper comments, however made, are presumptively harmful, Straight v. State, 397 So.2d 903 (Fla. 1981), and 2) that curative instructions must be of unusual strength to remove the prejudice which naturally inheres to comments made about the defendant's character. Geralds v. State, 601 So.2d 1157 (Fla. 1992). Ho hum warnings to "disregard what the witness said" leave the stain on the defendant's character that

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[3]The state seeks to minimize the damage to its argument by characterizing Grice's testimony as "unresponsive" or not deliberately elicited. (Appellee's brief at p. 57.) That ignores, of course, the fact that for whatever reasons given, the jury heard the prejudicial comments, so the issue is not the motive of the witness in making them but the court's efforts to reduce their admittedly prejudicial impact.

a juror still contemplating the significance of Grice's comment that Raborn needed to help Gorby because he had just gotten out of jail might have missed.

To remove the blotch on Gorby's character, the curative instruction needed to be a strong bleach instead of warm water. 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.

How many times can the state beat its chest and cry "harmless error" before the accumulated smell of individual wrongs becomes an overwhelming stench requiring a new trial? Surely in this case, where the state has improperly depicted Gorby as a remorseless ex-con who started fights with friends, there comes a point where repeated warnings to disregard arguments and testimony loses its efficacy and only confuses the jury. What were we supposed to disregard? Was it what Grice said about Gorby looking scruffy? What were we not to consider when Gorby started the fight? After a point there simply is too much to forget so that the jury forgets what it is to forget. At least this court cannot say that the accumulated errors that the trial court had to repeatedly tell the jury to ignore were harmless beyond a reasonable doubt.[4]

The state relies on three cases to present its primary argument that the statement, contrary to the court's ruling, was admissible to "show [the] entire context out of which [the] criminal conduct arose." Grossman v. State, 525 So.2d 833, 837 (Fla. 1988); Heiney v. State, 447 So.2d 210, 212-214 (Fla.

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[4]The state, on page 64 of its brief, argues that the comment was not objectionable. That argument is not cognizable on appeal because it never filed a notice of appeal to challenge the correctness of the court's ruling.

1984); Jackson v. State, 522 So.2d 802, 806 (Fla. 1989). However true the court's holdings may have been in those cases, it is hard to understand how a fight between Gorby and Jackson more than a day before the murder, at a different place than where the homicide occurred, and for reasons unrelated to the killing, could possibly put the crime for which Gorby was charged in context other than to show that he consistently had a bad character.

The court's failure to give a stronger curative instruction was error and 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.

In order to bring this case within the ambit of this court's opinion in Davis v. State, 586 So.2d 1038 (Fla. 1991), the state has to assert (as it does on page 68 of its brief) that the video and photographs depicted things the other did not. In Davis, the court admitted a videotape of the victim's wounds and the murder scene and a color photograph of the victim's face that showed wounds not visible on the tape. The medical examiner used the tape as part of her testimony, and it was also used to show that the appearance of the murder scene was inconsistent with a struggle outside of the victim's bedroom, refuting a self-defense claim. The videotape and the picture were relevant because each showed something about the victim or her home that the other did not that was important to the state's case. Such cannot be said here.

True, the tape in this case showed "what Raborn's house looked like, both inside and out," (Appellee's brief at p. 68) and the pictures did not, but so what? How the victim's house looked on the outside had no bearing on this case. That Raborn had a shed outside "from which the murder weapon, i.e, the claw hammer, might have been taken" has no importance because there was never any question about how he died, or that the claw hammer used had been the victim's. Similarly, the videotape (or the photographs) of the inside of Raborn's trailer have no

special relevance because they showed where the place in the kitchen where a fingerprint was found. Likewise, that the tape showed blood splatters is not a particularly compelling reason for admitting the videotape since the analyst, Jan Johnson, did not use it (or the objected to photographs) but prepared a sketch of the walls of the hallway and some pictures she had taken (T 1286, 1288).

Thus, this case is clearly distinguishable from Davis, in that the court here allowed the jury to view the videotape and the photographs when neither of them had evidence exclusive in one but not the other. On the other hand, at least the videotape presented scenes from Raborn's house that had relevance only to the issue of Raborn's character, an irrelevant question in this part of the trial.

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

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.

The issue here is quite simple: Can the court remove from the jury's consideration an element of one of the aggravating factors the state has to establish beyond a reasonable doubt? The answer is equally simple: no.

ISSUE XI

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

The state presents three arguments on this issue meriting reply: 1) a common sense view of the murder shows that it was especially heinous, atrocious, or cruel, 2) whatever error occurred was harmless, and 3) the murder was proportionately warranted.

The state, relying on this court's opinion in Gilliam v. State, 582 So.2d 610 (Fla. 1991) primarily argues that this court should follow the "common sense" interpretation of the evidence it presented in its argument on this issue. A plea for common sense, however, does not mean we abandon the rule of law, notably the law on circumstantial evidence that requires that we accept Gorby's argument on this issue unless there is no reasonable possibility the murder could have occurred the way he suggested in his Initial Brief. C.f. State v. Law, 559 So.2d 187 (Fla. 1990). Common sense in short does not authorize speculation or conjecture. Gilliam shows how common sense applies.

In that case, the evidence showed that the victim had been horribly beaten about her body, including her face, neck, breast, shins, arms, rectum, and vagina. She also had bruises from being grabbed. She had been violently anally raped, and severe damage had been done to her vagina. The evidence showed that the victim was alive when the injuries were inflicted, but the medical examiner could not tell if she was conscious during

the beating although a woman's scream could be heard in the vicinity of where she lived about the time of the murder. Significantly, there was no injury to her brain, and the cause of death were not blows to the head as in this case, but strangulation.

In rejecting Gilliam's claim that the woman may have been unconscious when she was brutally raped and murdered, the court said, "the common-sense inference from these facts is that the victim struggled with her assailant and suffered before she died." Id. at 612. Not only common-sense supports the court's ruling, the law of circumstantial evidence refutes the defendant's theory because of the scream heard, the lack of injuries to the brain, and the extensive beating she endured for what must have been a considerable time. The only conclusion supported by the evidence is that Gilliam's victim struggled valiantly against her assailant but was brutally beaten, raped, and finally strangled while conscious of not only what was happening to her but of her impending death as well. It was an especially heinous, atrocious, or cruel murder.

This court cannot say the same about what Gorby did. While the evidence, or its lack,supports the state's reconstruction, it also, with the same or greater force, allows for his analysis. That is, unlike Gilliam, in this case the state presented no evidence Raborn screamed while being beaten. Similarly, although there were some abrasions on the victim's body, there were no bruises on it from being grabbed, as there

were on the victim's in Gilliam. The superficial wounds here could have occurred as Gorby drug Raborn's unconscious body to the bathroom. Likewise, again unlike the victim in Gilliam, Raborn was injured almost exclusively in the head, and except for the abrasions, suffered none of the brutal injuries that the girl in Gilliam endured. The location of the wounds also supports Gorby's argument that he became quickly unconscious, a claim Gilliam could not make, not only because his victim had no wounds to the head, but also because the cause of death was strangulation, a particularly horrible way to die.

The other evidence the state musters to support its argument also fails to withstand inspection. It spends a lot of time analyzing the blows inflicted, noting on page 84 of its brief, that they were struck at different angles and possibly at different times. It also notes that the first blow to the head would not have caused much blood to flow because "it takes a while to get his blood on the [murder weapon] itself." (T 1374). Raborn's head also apparently was only nine inches from the floor when one of the blows was struck (T 1293). Despite these details, they cannot overcome the single, compelling fact that any one of them could have rendered Raborn almost immediately unconscious (T 1388), so that Gorby beat an unconscious man to death, an act which is despicable but not especially heinous, atrocious, or cruel.

The state spends some time on pages 84-85 of its brief discussing the electrical cord found wrapped on Raborn, and it suggest that "these cords could have been used to immobilize

Mr. Raborn, thus explaining the lack of more obvious defensive wounds." The state has tried to pull more from what the evidence can give because the evidence shows only that the cords were wrapped about Raborn's neck (T 732). There is no evidence they were used to immobilize him, and the equally reasonable hypothesis is that he used the cords to pull Raborn into the bathroom. Moreover, as the state admits, he was crippled from the waist down (T 1385, Appellee's brief at p. 85), so there was no real need to tie him before beating him.

The state, on page 85 of its brief has catalogued several cases involving murders by either a hammer or other blunt weapon. Most of them involve situations where the victim was obviously aware of his impending death because there were defensive wounds on his or her body. Penn v. State, 574 So.2d 1079 (Fla. 1991); Bruno v. State, 574 So.2d 76 (Fla. 1991); Lamb v. State, 532 So.2d 1051 (Fla. 1988); Heiney v. State, 447 So.2d 210 (Fla. 1984). In Wilson v. State, 493 So.2d 1019 (Fla. 1986) and Muehleman v. State, 503 So.2d 310 (Fla. 1987) the victims were aware of their impending deaths. These cases are easily distinguishable Gorby's situation because there is no evidence of any defensive wounds on Raborn, indicating that he knew he was about to die.

The state, on page 86 of its brief, begins its harmless error attack by focussing exclusively on the trial court's sentencing order. Its argument falls short of convincing for two reasons. First, regardless what the trial court found, Gorby's argument is that there was insufficient evidence as a

matter of law to establish that this murder was especially heinous, atrocious, or cruel. As such, not only should the trial court not have considered this aggravating factor, neither should the jury. Because we presume they considered the law as given to them and weighed an invalid aggravating circumstance, Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854, 859 (1992), this court cannot conclude the error was harmless because the trial court did not give much credence to the mitigation. The jury might very well have given greater weight to the testimony that, because of his damaged brain, he acted spontaneously or had a "hair trigger" personality (T 1437). Without the challenged aggravating factor, the jury may well have given greater consideration to the homosexual innuendo present that Raborn made a sexual advance on Gorby, and the defendant reacted with overwhelming violence. It may also have thought more about the other mental problems he had such as his life long headaches, his blackouts when drinking, his brain dysfunctioning, and his extraordinarily poor memory (T 1437-76). In short, contrary to what the state has asserted and what the court cursorily dismissed, Gorby presented a wealth of mental mitigating evidence that cannot be so simply dismissed. The court's error was not harmless beyond a reasonable doubt.

Finally, the state argues that "the instant death sentence, both with and without the contested aggravating circumstance, is not disproportionate." (Appellee's brief at p. 87) Gorby first points out that he has not argued

proportionality, so the state's argument on this point should have no relevance to anything the court considers. More significantly, however, the state has taken a function this court performs and elevated it to a nonstatutory aggravating factor. In a different context, this court has rejected trial court efforts to transform the absence of a mitigating circumstance into an aggravator. For instance, in Mikenas v. State, 367 So.2d 606, 609-610 (Fla. 1979), the trial court found, as an aggravating factor, that the defendant had a substantial history of prior criminal activity. It had converted the statutory mitigator of "no substantial history of criminal activity" into an aggravator. That was error. Accord, Barclay v. State, 470 So.2d 691 (Fla. 1985).

Similarly here, the state wants to make its evaluation that the defendant should die a conclusive, "super" aggravating factor. That is, regardless of the mistakes made by the trial court, Gorby should nevertheless be executed because he killed the Good Samaritan, the helpless cripple who was just trying to help a bum. In Jackson v. State, 498 So.2d 906, 910 (Fla. 1986), this court held that in the penalty phase of a murder trial, it was irrelevant that the victim was married, ran a store alone; had lend and honest and good life; would be missed by the community; was an immigrant who had made a good life; and was a kind and likeable man. It was irrelevant to the court's finding that the murder was especially heinous, atrocious, or cruel because the victim's character was not a fact that had any consequence in determining if the defendant

"enjoyed the suffering of the victim." State v. Dixon, 283 So.2d 1 (Fla. 1972).

So here. Raborn's helpless status or willingness to help the down trodden has no bearing on the harmlessness of this aggravating factor in either the trial court's or the jury's deliberations. The state's invitation to ignore the harm of finding this aggravating factor invites this court to return the administration of our death penalty law to the time of unchanneled discretion. Defendants die, not because the law says they should, but by ignoring it.

This court should reject the state's harmless error analysis that incorporates a proportionality element. Instead, Gorby asks that his sentence be reversed and his case remanded to the trial court 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 state has several arguments on this issue which merit reply. The first and most serious is that Gorby did not raise a contemporaneous objection with enough specificity at the penalty phase charge conference. (Appellee's brief at 89-90) At that hearing, the state objected to the instruction on the heinous, atrocious, or cruel aggravating factor because it did not conform to the 1991 change in that guidance (T 1738). As quoted in the state's brief, the objection went beyond the wording of the instruction: he did not believe the evidence sufficient to establish this aggravating factor (T 1739). The court overruled the objection "to that particular instruction and we'll give this instruction as requested by the State." (T 1739)

If the purpose of the contemporaneous objection rule is to alert the trial court of possible errors it is about to make, Castor v. State, 365 So.2d 701 (Fla. 1978), then certainly the court in this case knew there were problems with the instruction. The state's discussion of the instruction's deficiencies and this court's response to the U.S. Supreme Court's Decision in Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), In re Standard Jury Instructions in Criminal Cases, 579 So.2d 75 (Fla. 1991), sufficiently raised the issue to the court's attention to have

satisfied the contemporaneous objection rule's concerns. The trial court's interest should have been further heightened by Gorby's concerns about the sufficiency of the evidence, that no instruction, however detailed or explicit, could make this case what the facts did not: especially heinous, atrocious, or cruel. The court should have made very sure that the instruction was so explicit that the jury would have had no problem understanding what facts would make a murder especially heinous, atrocious, or cruel. The fault that it did not do so should not be laid at Gorby's feet.

The state then cries that the United States Supreme Court's decision in Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) unfairly mischaracterizes Florida's death penalty scheme. (Appellee's brief at p. 92) Specifically, it claims the nation's high court has elevated the jury to that of being a "co-sentencer." Not so, or if they have, it is because Florida law did so. That is, one can understand why the court interpreted our death penalty process as it did after reading what this court said in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975): that the trial court should follow the jury's life recommendation unless the facts were "so clear and convincing that virtually no reasonable person could differ." Except in rare instances, the jury's life recommendation should be followed. The same holds true for death verdicts. Grossman v. State, 525 So.2d 833, 839 note 1 (Fla. 1988). Such language by this court certainly supports the U.S. Supreme Court's reasoning in Espinosa that Florida had

placed "capital-sentencing authority in two actors rather than one." Id. at 120 L.Ed.2d 859. Such a view would bring Florida's unusual sentencing scheme more in line with the majority of state's that have pure jury sentencing. Florida, in short, from Washington's perspective is not so different from the other death penalty states.

Finally, the state argues that whatever error occurred was harmless. (Appellee's brief at pp. 93-94) As argued at the trial court level and in the previous issue, the murder here was not especially heinous, atrocious, or cruel, so any instruction given to the jury was error. Moreover, because what guidance they were given was short of what they needed, they could not have properly considered the facts of this case as they should have done, and consequently their recommendation and the court's sentencing order was tainted. Id.

Additionally, although the state did not cite this court's opinion in Preston v. State, Case No. 78,025 (Fla. October 29, 1992) (because this court had not release it when the state filed its brief) that case does not assist its argument. In that case, this court reaffirmed the jury instruction found in the Florida Standard Jury Instructions in Criminal Cases. While that instruction may withstand constitutional scrutiny, the one given in this case significantly differed from the recently approved change. Specifically, the court here did not define what atrocious meant. Nor did it tell the jury that "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 supplied.)

The court erred in instructing the jury on this aggravating factor, and this court should reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE XIII

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

The state relies, appropriately, on this court's ruling in Nixon v. State, 572 So.2d 1336, 1344-45 (Fla. 1990) which held that the trial court need not instruct the jury on the penalties Nixon faced for the other crimes he had committed at the same time he murdered his victim. The defendant had argued that under Lockett v. Ohio, 438 U.S. 568, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) what sentences he might receive for the other non-capital crimes he had committed was relevant mitigation. This court rejected that rationale because:

> The fact that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime.

Nixon at 1345.

In this case, Gorby has not relied only on the Lockett rationale to justify his request that the jury be told what punishment he faced for the other crimes it had found him guilty of committing. His argument also finds support in the Supreme Court's decision in California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). The underlying justification for approving an instruction to the jury of the governor's pardoning power was that such guidance helped it reach a correct decision in the sentencing phase of the trial.

The nation's high court saw capital sentencing as far more complex than simply weighing aggravating and mitigating factors. "[T]he jury [] is free to consider a myriad of factors to determine whether death is the appropriate punishment. . . `But the Constitution does not require the jury to ignore other possible . . . factors in the process of selecting . . . those defendants who will actually be sentenced to death.'" Id. at 1008. (cite omitted.) By considering those "myriad of factors" it is fulfilling its constitutional obligation of ensuring that its choice of whether the defendant should live or die is individualized. Id.

Moreover, even though Defense counsel may have argued that he faced more prison time for the other crimes he had committed in this case (Appellee's brief at p. 97), all such argument could have done was lead to jury speculation of what additional sentences Gorby would received. Giving them an accurate statement of the law regarding that additional punishment would have curbed any such jury wandering, and in an area of the law which pays particular attention to every legal nuance, leaving the jury to its collective guessing of what additional punishment the defendant would face violates his rights under the state and federal constitutions.

Finally, the state says that "Appellant's proposed jury instructions were deficient, in that they contain no express suggestion that the matters contained therein could be considered as mitigation." (Appellee's brief at p. 97) Yet, if the "catch-all" jury instruction read to the jury in this case

(T 1825-26) can justify not giving an instruction on requested non-statutory mitigation, See, Jackson v. State, 530 So.2d 269, 273 (Fla. 1988), then that guidance should adequately inform the jury that it could consider the lengthy incarceration Gorby faced for the other crimes it had convicted him of committing when it determined the appropriate sentence to recommend.

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

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,

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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, Criminal Division, 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 21st day of December, 1992.

DAVID A. DAVIS