IN THE SUPREME COURT OF FLORIDA

JIMMY LEE EADDY,

Appellant,

v.

CASE NO. 79,987

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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_____:

REPLY BRIEF OF APPELLANT

ARGUMENT

ISSUE I

THE COURT ERRED IN DENYING EADDY'S CAUSE CHALLENGES OF TWO PROSPECTIVE JURORS, AND IT COMPOUNDED THAT ERROR BY REFUSING TO GIVE THE DEFENDANT MORE PEREMPTORY CHALLENGES AS HE REQUESTED, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

If we focus on prospective juror Williams, the key portion of the state's argument on this issue is on pages 31-34 of its brief. The lynchpin of its position focuses, as it must, on the trial court's generalized request to tell it "If . . . any member of this jury panel who feels that you could not follow the law that the Court will instruct you . . . in the guilt or innocence portion of this trial and in the recommendations to the Court as the to sentencing portion of this trial." (T 350-51). Predictably, no one responded. From this silence, the state has spun an elaborate web that misses more than it catches.

It assumes that because Williams did not respond to the court's rather vague "feel good" inquiry of the entire venire he could follow the law. Silence, however and as this court is aware, is inherently ambiguous. Moreover, there is no reason to believe that what he said in response to Eaddy's questions was somehow "simply a confused response to a poorly phrased series of questions posed by defense counsel." (Appellee's brief at p. 32) First, the questions were not "poorly phrased." They were simple, direct inquiries that virtually anyone, including obviously Mr. Williams could understand (T 296-99). By his responses, he understood precisely what defense counsel was asking.

Second, the state here is trying to do what the trial court did in Bryant v. State, 601 So. 2d 529 (Fla. 1992): place the burden of rehabilitation of an objectionable juror on the defendant. Third, the state seems to believe that unless Williams unequivocally said that "regardless of circumstances, he would always recommend death" he was qualified to serve. (Appellee's brief at p. 32). That, at least since Wainwright v Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), has not been the law. Instead, the standard is whether "the juror's views would `prevent or substantially impair the performance of his duties as a juror in accordance with his instructions." Id. at 424 (footnote omitted.) Under that measure, the trial court should have excused Williams.

The state then relies on this court's opinion in Lambrix v. State, 494 So. 2d 1143 (Fla. 1986). In that case, one poor

prospective juror gave conflicting responses to questions asked by the defense and prosecution. This court recognized that what she told either counsel was not determinative of her qualifications to sit because they led her "down the path of their choosing." Instead, as the state has noted, "This court found the most pertinent portion of this venire person's testimony was her response to the questions of the trial court . . . " (Appellee's brief at p. 33)

The state here tries to make Lambrix controlling, but the crucial distinction was that in the earlier case, the prospective juror finally gave some responses affirmatively indicating her opposition to the death penalty. Here, Williams unequivocally favored its imposition, yet the state claims he could follow the law because he said nothing (as did the rest of the venire) in response to the court's general inquiry. That is, his silence was his answer. "However, when the trial court posed its question to clarify the conundrum created by defense counsel's opaque questions, Williams and the entire panel indicated that they could follow the law, despite their personal views." (Appellee's brief at p. 33). They indicated they could follow the law by saying nothing. That, however, is no answer, and that prospective juror could just as well have believed either the court knew his responses and nothing more needed to be said, or that he believed he could follow the law. In any event, his silence does not rise to some sort of affirmative indication that his views on the death penalty had in anyway changed from what he told defense counsel.

As the United States Supreme Court has recently observed, regarding a court's refusal to ask more probing questions than whether the juror could follow the law in considering the imposition of the death penalty:

> As to general questions of fairness and impartiality, such jurors [those who unalterably favor the death penalty] could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed. More importantly, however, the belief that death should be imposed ipso facto upon conviction of a capital offense reflects directly on that individuals inability to follow the law. . . Any juror who would impose death regardless of the facts and circumstances of of conviction cannot follow the dictates of the law. . . . It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so.

Morgan v. Illinois, 504 U.S. ___, 112 S.Ct. ___, 119 L.Ed.2d 492, 506-507 (1992).

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

ISSUE II

THE COURT ERRED IN LIMITING EADDY'S RIGHT TO QUESTION THE PERSPECTIVE JURORS ABOUT THEIR VIEWS ON THE DEATH PENALTY, IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH RIGHTS.

At trial and on appeal the state has claimed Eaddy's question was an incorrect statement of the law in Florida (T 300, Appellee's brief at p. 25) What was wrong with it? Counsel was merely trying to determine if, in all homicide cases, members of the venire would impose death. Such inquiry was of the type routinely used by counsel in capital cases. Certainly, if it was too broad, the court unfairly limited the defendant by confining him to asking only if the members of the venire could follow the law (T 302).

The state tries to distinguish this court's opinion in Lavado v. State, 492 So. 2d 1322 (Fla. 1986) by claiming the trial court in that case "wholly precluded defense counsel from discovering juror attitudes toward a defense." (Appellee's brief at p. 37) That is not entirely true because the court did allow the defendant to ask questions of the jurors about their biases towards drinking.

In this case, the court precluded even the limited inquiry permitted by the trial judge in Lavado. Eaddy had to be content with generalized questions regarding prospective jurors unchallengeable beliefs that they could follow the law. What is more, on appeal the state has confirmed that limitation. On page 37 of its brief it says "the test for determining juror competence is whether a juror can lay aside a bias and decide

the case solely on the evidence adduced and instructions given." It has turned a standard of competence into the only question counsel can ask, yet the United States Supreme Court has rejected such a narrow view of voir dire.

In Morgan v. Illinois, 504 U.S. ___, 112 S.Ct. ___, 119 L.Ed.2d 492 (1992), the trial court, in a capital case, refused to ask the jury any questions regarding their individual view on the death penalty beyond the inquiry of whether they could "follow my instructions on the law, even though you may not agree?" Id. 119 L.Ed.2d at 499. The nation's high court rejected that limitation on the defendant's right to inquire into the prospective juror's biases and prejudices.

> As to general questions of fairness and impartiality, such jurors [those who unalterably favor the death penalty] could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed. More importantly, however, the belief that death should be imposed ipso facto upon conviction of a capital offense reflects directly on that individuals inability to follow the law. . . Any juror who would impose death regardless of the facts and circumstances of of conviction cannot follow the dictates of the law. . . . It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so.

Id. 119 L.Ed.2d at pp. 506-507.

That case, if not directly controlling this issue, at least points the way this court should rule on it. The defendant should have a full opportunity to thoroughly explore

a prospective juror's views on imposition of the death penalty. Any limitations of that right are inherently suspect and subject to especially close appellate scrutiny.

Thus, in this case, the court unfairly limited Eaddy's right to expose the views of the remaining members of the jury panel on the death penalty.[1] This court should reverse the trial court's judgment and sentence and remand for a new trial.

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[1]In his Initial Brief, Eaddy showed how the court's limitation affected his questioning of Ms. Harrison. He used it as an example, and in no way suggested that the curtailed questioning was confined only to her.

ISSUE III

THE COURT ERRED IN PROHIBITING EADDY FROM ASKING THE STATE'S KEY WITNESS, ISMAEL LOPEZ, ABOUT THE FACTS OF THE CRIME HE HAD COMMITTED, WHICH BORE A STRIKING SIMILARITY TO THOSE FACTS HE CLAIMED EADDY HAD TOLD HIM ABOUT THE MURDER HE WAS CHARGED WITH COMMITTING, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONT HIS ACCUSERS.

The state obviously does not understand why Eaddy wanted to ask Lopez about the facts of the crime which had landed him in jail. It was not to show that he had committed the Edmonds' murder. (Appellee's brief at p 40). Instead, it was to discredit him by showing that the facts of his case were suspiciously similar to the ones he said the defendant had relayed to him. A jury would certainly have viewed Lopez' testimony with skepticism if it had known that this witness had murdered his victim similarly to the way he claimed Esty told him he killed Edmonds.

Eaddy, therefore, cannot understand why the state raises the possibility that he could have called Lopez as his own witness under a variation of the Williams rule rationale. At no time has the defendant ever alleged this jail house informant killed Edmonds. The state has completely missed the point of this issue and the purpose of cross examination when it says on page 41 of its brief "The fact that Lopez committed a similar crime years before does not make it relevant in the instant case unless it can be show that Lopez could have committed the instant crime."

Cross examination, as explained in the Initial Brief, has a much broader role than that claimed by the state. A defendant can inquire into matters germane to direct examination and plausibly relevant to the defense. Coxwell v. State, 361 So. 2d 148 (Fla. 1978); Coco v. State, 52 So. 2d 892, 895 (Fla. 1953). Nevertheless, the purpose of the cross-examination, even under the state's unjustifiably narrow definition of that right, would have allowed Eaddy to inquire about the facts of Lopez' crime. It would have discredited or cast doubt on the believability of this witness' testimony. (Appellee's brief at pp. 38-39)

Finally, the state says this error was harmless. If the jury had chosen to disbelieve this witness' testimony the state would have had no case against the defendant. Refusing to let him question Lopez about the facts of his case was prejudicial error.

ISSUE IV

THE COURT ERRED IN REFUSING TO LET EADDY ELICIT ANY TESTIMONY THAT WAS REFRESHED OR RECALLED AS A RESULT OF UNDERGOING HYPNOSIS, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The state answers this issue in part by noting that Eaddy's counsel was unaware of the relevant case law authorizing her client to testify that he had been hypnotized. (Appellee's brief at p. 45) While that is true, what the state has omitted is that the prosecutor below, who raised the objection to Eaddy testifying on this subject, also was unaware about the change in the law:

> MS. COREY (The prosecutor): First, we want Mrs. Sasser held in contempt. She knows that is an improper question to bring hypnosis into a trial.
>
> * * *
>
> Judge, that it's completely irrelevant, it is an improper question and it's prejudicial. And it is in violation of every case I've ever read about hypnosis.
>
> THE COURT: All right. Let me hear from you, Mrs. Sasser.
>
> MRS. SASSER: Well, it's true that hypnotic testimony is on occasion allowed in court. I do think it is also an issue.

(T 979-80).

The state also says the trial court correctly ruled because Eaddy did not comply with the decision in Morgan v. State, 537 So. 2d 973 (Fla. 1989). It does not know that, however, because the court never inquired about the procedures or methods that were used when Eaddy was hypnotized. In short,

the court never got to the issues discussed in Morgan because the court simply excluded the evidence as irrelevant. Under the court's ruling, whatever the defendant had done, proper or not, was not subject to judicial inquiry because the hypnosis evidence was irrelevant.[2]

The state, on pages 46-47 of its brief, claims that since Eaddy violated the rules announced in Morgan, it has the sole right to call for a Richardson hearing. Eaddy, contrary to the state's claim, is not invoking its right to the hearing. He is claiming that he had the right to it. When the court summarily, totally excluded his relevant evidence without any effort to measure the prejudice suffered, he was prejudiced, not the state. While a court does not have to formally announce that it is conducting a Richardson hearing, it can satisfy the demands of this court's opinion in Richardson v. State, 246 So. 2d 771 (Fla. 1971) only if the areas of inquiry identified in it have been discussed.

Finally, the state says that whatever error occurred was harmless, but of course, the failure to conduct the proper inquiry is not subject to a harmless error analysis.

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[2]Similarly, we cannot assume, as the state does in its brief (at pages 45-46), that Eaddy "failed to comply with [all] applicable law before introducing evidence of hypnosis."

ISSUE V

THE COURT ERRED IN EXCLUDING, FOR HEARSAY REASONS, EVIDENCE THAT THE PERSON WHO TOOK EADDY TO SOUTH CAROLINA AFTER HE LEFT EDMONDS' HOUSE TOLD HIM TO SIGN EDMONDS' NAME TO THE CREDIT CARD RECEIPT WHEN THEY HAD STOPPED TO BUY GAS, IN VIOLATION OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO PRESENT A DEFENSE AND TO A FAIR TRIAL.

The state has presented several hurdles it claims Eaddy must jump before it can win on this issue. The first one, the hearsay problem, he easily sailed over in his Initial Brief. The second one is as easily overrun. It claims that Eaddy's explanation for why he had signed the credit card receipt was irrelevant to this case. (Appellee's brief at p. 49) This amazing claim comes from the same party who at trial introduced the credit card receipts, who had a handwriting expert testify that Eaddy had signed the receipts, and who argued that they were evidence of the defendant's guilt. If Eaddy could not explain why he signed them, his signature being the only evidence he did, why should the state have been able to introduce them? Both parties below and Eaddy on appeal recognized their relevancy.

Finally, the state says this evidence is harmless, but the facts it musters hardly show that it was so beyond a reasonable doubt.[3] Other than Lopez' testimony, the credit card receipts

[3]The state claims Edmonds' burned car was found near Eaddy's mother's home. (Appellee's brief at p. 50). The car was found 40 miles from where she lived (T 665, 1010).

provide the strongest link between the murder and Eaddy. The fingerprints merely put him in the victim's house sometime before the murder, and Edmonds' burned car found in South Carolina adds very little to the state's case. As argued in Eaddy's Initial Brief, the court's error was not harmless beyond all reasonable doubts. This court should, therefore reverse for a new trial.

ISSUE VI

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES TO FIRST DEGREE MURDER, IN VIOLATION OF EADDY'S FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

The state first claims Eaddy never personally waived the statute of limitations on the lesser offenses, so his lawyer doing it for him was insufficient. (Appellee's brief at pp. 51-52.) Eaddy relies on what he said in his Initial brief on that issue. This court should also recall that the waiver issue was never before the lower court, it believing instead that the defendant could not waive the statute of limitations so that it could give instructions on the lesser included offenses (T 1026).

The state responds to Eaddy's argument relying on Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) by citing a passage from Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). (Appellee's brief at pp. 52-53). In the latter case, the defendant, like Eaddy, was charged with first degree murder years after the crime occurred and beyond the time allowed for prosecution of noncapital crimes as provided by state law at that time. At the close of the evidence, the court told Spaziano that if he waived the statute of limitations, it would instruct the jury on the applicable lesser included charges. He apparently refused and the court gave the jury the law only on the charged offense. The jury convicted him as charged.

When Spaziano appeared before the United States Supreme Court, he presented them with a remarkable proposition. He claimed that he was entitled to the instructions on the lesser offenses, as Beck required, yet at the same time he insisted he could not be convicted of them. Id. at 455. The defendant, in short, and as the nation's high court correctly perceived, would have "tricked [the jury] into believing that it has a choice of crimes for which to find the defendant guilty, [when] in reality there is no choice." Id. at 456.

Eaddy did not seek to perpetrate such fraud on the jury. He wanted, as Spaziano did, the jury to be instructed on all the applicable lesser included offenses to first degree murder. He did not, and this is the crucial distinction, ask the court to also exempt him from the consequences of his choice. He was perfectly willing for the jury to have returned a verdict for any of the crimes properly encompassed by the first degree murder charge.

Thus, Spaziano has no relevance to this case, and there is no "Spaziano choice" as argued by the state on page 53 of its brief. By invoking the statute of limitations before trial, he in no way sought to mislead the jury into believing it had more choices than it really had.

The state on the same page argues that at the pretrial hearing on Eaddy's motion to dismiss the robbery charge he should have told the court that he intended to waive the statute of limitations on the lesser included offenses. Why? Because the state believed it was "limited to first-degree

murder and nothing else." (T 157) When the issue before the court was only the robbery charge the defendant had no obligation to notify the state it may waive the statute of limitations on a separate charge. As far as Eaddy knows, he had no obligation, at any stage of the trial, to do so.[4] Moreover, at the charge conference, the prosecutor never claimed the notice surprised her or that in any other way Eaddy's request for the instructions on the lesser included offenses prejudiced her (T 1027-28).

Finally, the state presents a hypothetical in closing designed to chill Eaddy's argument, and if read on a superficial level, with one eye closed, and the mind wondering about the Gator's or Seminole's chances this year, it has a certain persuasive air. The fatal flaw occurs in the second point, that Eaddy would remain silent when his lawyer requested a waiver of the statute of limitations for instructions on the lesser included instructions, and the court would accept it. On appeal, Eaddy would claim the waiver was invalid, this court would accept it, and having been convicted of only second degree murder, would avoid prosecution altogether.

The first and obvious answer is that the state initially charged Eaddy with only second degree murder (R 3), so the

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[4]Adopting the state's strategy of placing the burden on the opposing party for not having a perfect trial, Eaddy argues that the state should have asked the defendant if he intended to waive the statute of limitations for the lesser included offenses.

scenario which so horrifies the state on appeal would have occurred anyway, only much earlier in the proceedings.[5]

More pertinent, if Eaddy had waived the statute of limitations through his lawyer rather than personally making the request, he could not, under his interpretation of this court's opinion in Tucker v. State, 459 So. 2d 306 (Fla. 1984) raise his silence as a defense on appeal. (See, Initial Brief at p. 47) If his counsel had waived the statute for him that would be sufficient to defeat his argument on appeal that he had not personally waived it.

On the other hand, if we accept the state's position, that Eaddy must personally approve the court giving the lesser included offenses we are faced with Beck, which is precisely the problem this court now must resolve. Thus, it makes more sense for the defendant's lawyer to be able to waive the statute of limitations for his client, as he does in the vast majority of other issues presented in the criminal law. By doing so, this court avoids the hypothetical the state has presented and the constitutional miasma that might otherwise be presented.

This court should order a new trial.

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[5]One must wonder if the state upgraded the homicide from a second to first degree murder, not because the evidence warranted it, but only to avoid the statute of limitations constraints.

ISSUE VII

THE COURT ERRED IN INSTRUCTING THE JURY ON FELONY MURDER AND THAT, IN CONSIDERING WHAT SENTENCE TO RECOMMEND, IT COULD CONSIDER EADDY HAD COMMITTED THE MURDER DURING THE COURSE OF A ROBBERY BECAUSE THE STATE PRESENTED INSUFFICIENT EVIDENCE HE HAD ROBBED THE VICTIM.

After you get past the weeping and wailing and gnashing of teeth over the state's dislike of this court's well settled law on circumstantial evidence, the state merely provides its theory of what Eaddy thought when he allegedly killed Edmonds. Predictably, it included robbery. While that version of the events may have been true, there is nothing that says it is gospel, that it was the only way, within a reasonable degree of certainty, that the murder could have happened. Eaddy's theory has as much validity as the states', in fact it has more. With only scant evidence establishing he was even at Edmonds' house, and much less what he did inside, the state is reduced to speculation and hunches. Under the circumstances that is understandable but insufficient.

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

ISSUE VIII

THE COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD CONVICT EADDY UNDER A FELONY MURDER THEORY BECAUSE THE STATE COULD NEITHER PROSECUTE OR CONVICT THE DEFENDANT ON THE UNDERLYING FELONY, ROBBERY, BECAUSE THE STATUTE OF LIMITATIONS PRECLUDED IT.

This court's opinion in Sochor v. State, 580 So. 2d 595 (Fla. 1991) provides the foundation for the state's argument on this issue, and Eaddy must discuss that case. Without repeating the relevant quote on page 66 of the state's brief, two points need to be recognized. First, Sochor failed to request an instruction on the effect of the statute of limitations. On appeal, this court refused to recognize his claim as fundamental error. "This, too, is a defensive matter that must be raised at trial." Id. at 602. Thus, on this point, this court simply ruled the defendant had failed to preserve the issue for appeal. Whatever else it said was dicta.

Second, section 775.15(6) Fla. Stats. (1989) does not toll indefinitely the statute of limitations when the defendant has left the state.

> (6) The period of limitations does not run during any time when the defendant is continuously absent from the state or has no reasonably ascertainable place of abode or work within the state, but in no case shall this provision extend the period of limitation otherwise applicable by more than 3 years.

(emphasis supplied.)

In short, there is a 7 year statute of limitation when the defendant has left the state. Significantly, in Sochor, this

last clause would not have protected the defendant because he had only been out of the state 5 years. This court, therefore was correct when it said that his "continuous absence from the state tolled the running of the statute." Id. at 602. The state, however, has mistakenly extracted from it the rule that section 775.15(6) tolls indefinitely the application of the statute of limitations when the defendant has left the state.

More troubling is the sentence in that case that "In addition, capital crimes are not subject to a statute of limitation. Section 775.15(1), Fla. Stat. (1989)." Id. We could simply dismiss it as dicta, as noted above. The more logical answer is that when an element of a capital crime cannot be established, it is no longer a capital offense.

This conclusion accords with the underlying philosophy of Tucker v. State, 459 So. 2d 306, 309 (Fla. 1984). There, this court said that "The statute of limitations defense is an absolute protection against prosecution or conviction." (Emphasis supplied.)

Finally, the state finds "Inherent in this policy" an intent to prevent the state from vindictively stalling prosecution of a case "until Eaddy's possible defense witnesses became unavailable." (Appellee's brief at pp. 68-70) Eaddy can understand why the state wants to look for inherent policies. The plain language of the statute and the opinions of this court are uniformly against it on this issue. Here, we have a plain legislative intent to bar prosecution and conviction for crimes committed years earlier. Following the rule of

statutory construction, that criminal statutes are to be strictly construed in favor of the defendant, Section 775.021 Fla. Stats. (1992), this court has said in Tucker, that the "statutes of limitations defense is an absolute protection against prosecution or conviction." Good faith, bad faith, or no faith prosecutions, therefore, have nothing to do with whether the statute of limitations applies. The legislature has made a clear, universally applicable rule that this court is not free to alter, and certainly not in the way the state suggests.

The trial court erred in instructing the jury on the time barred robbery charged, and it compounded that error by also instructing them that they could use that crime to aggravate his sentence. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IX

THE COURT ERRED IN REFUSING TO LET EADDY ARGUE IN CLOSING THAT THE STATE HAD PRESENTED NO EVIDENCE ON THE MOTIVE FOR THE MURDER AND IN ALLOWING THE STATE TO CALL A LIAR, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

On the lying issue, the state says 1) Eaddy failed to preserved the issue because he never requested a curative instruction or mistrial, and 2) in any event the error was harmless. On the motive issue, it argues 1) the court was correct in its ruling, and 2) anyway he argued motive, though in a different guise.

As to the state's claim that Eaddy was lying, defense counsel's objection was initially sustained. When the state persisted in calling the defendant a liar the court overruled his objection (T 1056-57).

> Before he had a chance to fabricate that defense that I submit to you insults the intelligence of every person--
>
> MRS. SASSER: Objection, Your Honor, that's beyond the bound of argument.
>
> THE COURT: The objection is overruled.

(T 1056-57).

Eaddy has adequately preserved this issue for appeal. Moreover, as to the state's improper slander of Eaddy that the court sustained, it has an independent duty to affirmatively rebuke the prosecutor for its inflammatory argument.

> [T]he trial judge should not only sustain an objection at the time to such improper conduct when objection is offered, but should so affirmatively rebuke the offending prosecuting officer as to impress upon the

> jury the gross impropriety of being influenced by the improper arguments.

Deas v. State, 119 Fla. 839, 161 So.729, 731 (Fla. 1935).

The rebuke needs to be unusually strong because as this court has recognized, curative instructions generally have little impact on the jury. Geralds v. State, 601 So. 2d 1157 (Fla. 1992).

The state seeks to salvage its case by claiming the state's error was harmless "due to its extremely limited reference." (Appellee's brief at p. 73) This "extremely limited reference," made at the beginning of its closing argument, attacked the entirety of Eaddy's defense. It characterized his case as a "package of lies," a "fabricate[d] defense" that "insults the intelligence of every person." (T 1056-57) It was hardly "extremely limited." It substantially affected his defense by contaminating the jury's mind and forcing him to refute what the law says was improper, and which common sense suggests is impossible to erase anyway.

As to the court precluding Eaddy from arguing the state had presented no evidence of his motive to kill, from the entire context of his argument, he clearly had reference to its absence as proving a lack of premeditation. At no time did he claim or infer the prosecution had to establish the reason underlying the murder. Instead, he was simply arguing that it had presented no evidence of premeditation because the defendant had no reason to kill Edmonds. Certainly that was permissible argument.

The court erred, however, in both rulings, and this court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE X

THE COURT ERRED IN FINDING THIS MURDER TO HAVE BEEN COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL MANNER.

Eaddy must agree with the state's argument about what could have happened. All of its scenarios are plausible, possible. But, then so is his explanation for how the murder occurred, and there is the problem. The state has never, not at trial, and not on appeal, refuted his reasonable explanation about how Eaddy killed Edmonds. The defendant's theory, as supported by the medical examiner's testimony, was that the victim was first knocked unconscious then stabbed and killed (T 611).

For all its speculation the state never refuted that defense. It says the "hysterical laughter heard by the next door neighbor could have been the victim screaming, muffled by the walls between the apartment." (Appellee's brief at p. 76) Speculation. The "two shallow slashes to the victim's right leg could have been inflicted while the victim raised his leg defensively." (Appellee's brief at pp. 76-77) A wild surmise.

It says on page 77 of its brief that this court has "consistently upheld the finding of this aggravating factor under similar circumstances" and cites several cases to support its claim. In each of them, however, the victim was conscious, a critical and decisive difference from the reasonable scenario Eaddy has positioned here. In fact, this court in Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987) supported Eaddy's legal position when it noted that the medical examiner in the

former case testified that the victim "did not die, or even necessarily lose consciousness instantly."

Finally, the state rings the standard harmless error bell but, but it does so without much fervor or effect. As argued elsewhere, the court ignored a wealth of mitigating evidence. So, with only one aggravating factor remaining, it is hard to see how the trial court would inevitably have reached the same result without considering the especially heinous, atrocious, or cruel aggravator.

This court should reverse for resentencing.

ISSUE XI

THE COURT ERRED IN INSTRUCTING THE JURY ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR.

One cannot, really, argue with the state's legal position here. If it had produced sufficient evidence to support giving an instruction on the cold, calculated, and premeditated aggravating factor, a court should do so even though it does not find it was proven beyond a reasonable doubt. Eaddy's problem comes from the premise of the state's argument. It failed to produce sufficient evidence to support giving this instruction.

His argument on this point arises from this court's refinement in the law on this aggravating factor. To justify instructing the jury, the evidence must show the defendant had "a careful plan or prearranged design to kill." Rogers v. State, 511 So. 2d 526 (Fla. 1987). It must provide at least some proof he had a heightened intent to kill. That he may have coldly and with deliberation planned to rob his victim and steal his car does not support instructing the jury on this aggravating factor. Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984).

In short, the evidence the state presented in its brief on pages 80-81 arguably show Eaddy coldly planned to rob Edmonds, but that is all. This court has never approved and has, in fact rejected, some sort of felony murder theory to establish the cold, calculated, and premeditated aggravating factor. Instead the evidence presented at trial must clearly show the

careful planning, the prearranged design, the heightened premeditation to murder.

In this case, the clarity required, as a matter of law, is missing. This is evident when the court itself described the murder as having been committed in a "killing frenzy." (R 283) Even the evidence most strongly supporting an instruction on the cold, calculated aggravating factor, that Eaddy had changed his mind about engaging in further sex with Edmonds and "went up [on] him with a steel dick" does not. It shows, instead, that the defendant, at the last moment, or at most, a few seconds before the murder, changed his mind. That hardly supports telling the jury that it could consider an aggravating factor that requires careful planning and a prearranged design.

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

ISSUE XII

THE COURT'S INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR INADEQUATELY LIMITED THE JURY'S DISCRETION IN APPLYING IT TO THIS CASE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state primarily, thoroughly briefly, argues a procedural bar because Eaddy "objected strictly to the act of the sentencing court instructing on this factor, but did not object to the wording of the instruction itself (T 1262-67)." (Appellee's brief at p. 82. Emphasis in quote.) Huh?

Eaddy argued two points regarding this issue. One, the evidence was insufficient to warrant giving this instruction. The defendant discussed that argument in Issue XI. The second, and the one this issue focuses on was the constitutionality of the instruction. He raised it first by way of a lengthy "Motion to Declare Section 921.141(5)(i), Florida Statutes Unconstitutional." (R 141-165) The court denied it (R 188). He then renewed that motion at the charge conference, and the court again denied Eaddy's request to declare (5)(i) unconstitutional (T 1258-62). Eaddy, in a manner that is a clear as this court has ever seen, argued that the jury instruction on the cold, calculated, and premeditated aggravating factor vague and overboard. He objected to the "act" of instructing on this aggravating factor as discussed in Issue XI. He also complained that the aggravating factor itself was constitutionally deficient, and that formed the basis of this issue.

The defendant has done as much as the law demands to preserve an issue for appellate court review.

The state then complains about the United States Supreme Court's characterization of Florida's death penalty sentencing scheme (Appellee's brief at pp. 83-84). The nation's high court, however, never imposed on this state any law that this court itself had not announced. All that court did was carry the logic of its pronouncements to their logical end.

This court has said that a jury's recommendation should be given great weight and ignored only when no reasonable person could differ about the appropriate sentence. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). If the jury's recommendation is given so much respect, the trial court must properly instruct the jury on the applicable law, otherwise the sentencer may give its advice more consideration than it deserves. That is what Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d 854 (1992) means.

In this case, the jury had only the barest of hints regarding the law on the cold, calculated, and premeditated aggravating factor. Without the court giving them the limiting and defining constructions this court has added, the jury may very well have believed, for example, that a cold, calculated plan to rob was the same thing as a cold, calculated design to murder (See T 1288). That is, there was a sort of felony murder theory justifying this aggravating factor, a notion directly contrary to what this court has ruled. Hardwick v. State, 461 So. 2d 79, 91 (Fla. 1984). This court, therefore,

cannot say beyond a reasonable doubt that the trial judge's error on this point was harmless.

ISSUE XIV

UNDER A PROPORTIONALITY REVIEW, EADDY DOES NOT DESERVE A DEATH SENTENCE.

The state presents three arguments on this issue: 1) Eaddy has a significant record of prior criminal activity, 2) His case is comparable to other cases in which this court has rejected a proportionality claim, and 3) He was not drinking on the day of the murder. The defendant will respond to them in the order presented.

Eaddy never argued that he should receive a life sentence because he has no record of criminal activity. What is significant for this issue, as this court's opinions in Proffitt v. State, 510 So. 2d 896 (Fla. 1987) and Mason v. State, 438 So. 2d 374 (Fla. 1983) make clear, is that he had no record of violent criminal activity. That is an important and distinguishing consideration in proportionality review. Was this murder an "explosion of total criminality" as it was in Proffitt? Or was it merely the last in a long list of violent acts committed by the defendant as it was in Mason? Society rightfully has less sympathy or compassion for the person who repeatedly has shown a willingness to use violence to achieve his ends. It is more understanding of the defendant who, in an act totally out of character, resorts to force. Eaddy, though apparently no stranger to the criminal justice system, had never robbed, beaten, or bludgeoned anyone. Indeed, his crimes more often than not occurred as testimony to his alcoholism than of some innate criminal mind.

Thus his case compares well with Durocher v. State, 596 So. 2d 997 (Fla. 1992) and Lusk v. State, 446 So. 2d 1038 (Fla. 1984) (Appellee's brief at pp 89-90) in which both defendants had the odious distinction of having committed prior murders. It also compares well with Kight v. State, 512 So. 2d 922 (Fla. 1987). In that case, the defendant had a cab driver drive to a remote location where he then stabbed him several times and then killed him after the victim tried to flee.

We do not have that situation here. Edmonds invited Eaddy to his house, possibly for sex, at which point the defendant killed him, arguably in a homosexual rage (R 742, 745).

Finally, the state claims on page 88 of its brief that Eaddy's reference to other proportionality cases in which alcohol was involved has no application here. It does not, it says, because he presented no evidence he had drunk any on the day of the murder.

Not so. The defendant testified that when he went to Edmonds' house "I had a couple of beers, about three beers I think." (T 972) This admission, coupled with his acknowledged alcoholism, militates against a death sentence. See, Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985) (The defendant's alcoholism was relevant even though there was conflicting evidence that he had been drinking when he killed the victim.)

ISSUE XV

THE COURT ERRED IN NOT CONSIDERING THE ABUNDANCE OF MITIGATION EADDY PRESENTED TO THE COURT AND JURY.

So, which case controls this issue, Campbell v. State, 571 So. 2d 415 (Fla. 1990) or Lucas v. State, 568 So. 2d 18 (Fla. 1990). In Lucas this court said that the trial court "need not expressly address each nonstatutory mitigating factor in rejecting them . . . and `[that] the court's findings of fact did not specifically address appellant's evidence and arguments does not mean they were not considered.'" Id. at 23. Yet in Campbell, a case this court cited in Lucas, it also held "the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." Campbell at 419 (footnote omitted.) The cases can be reconciled only by recognizing that in Lucas this court required the defendant "identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish." Lucas at 24. The question then is what mitigation did Lucas identify for the court?[6]

[6]The Lucas court reversed the defendant's sentence of death because the trial court's sentencing order was not of "unmistakable clarity." The court did not identify what was unclear about it. Perhaps the case was remanded because the lower court's treatment of the mitigation remained muddied.

The trial judge himself recognized all the mitigation the defendant has presented in his Initial Brief at page 91:

> THE COURT: I will direct this to both Counsel, we have had an advisory sentencing hearing at which time both of you were given plenty of opportunity to present any aggravating or mitigating circumstances to the jury. You are repeating the same arguments basically that have already been made in this case.
>
> But since this is a first degree murder case, to bend over backwards, the Court will hear you. But I don't want to spend the rest of the afternoon listening to a rehash of what has already occurred in this case. Do we all understand this?

(T 1345).

Nevertheless, Defense counsel "repeated the same arguments" it had made earlier. Specifically, it argued in mitigation that Eaddy had no significant history of criminal activity, he has overcome a severe learning disability, a life of poverty and child abuse, he is well respected in his community, and he had helped others during hurricane Hugo (R 1346-47).

Most significantly, however, counsel for Eaddy filed a memorandum listing ten mitigating circumstances the court should consider when it decided what sentenced to impose on the defendant (R 289-93). He has therefore, satisfied the Lucas requirements. The court erred in failing to expressly consider, as Campbell demands, this suggested and support mitigation in its sentencing order.

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

CONCLUSION

Based on the arguments presented in this brief and the Initial brief, the Appellant, Jimmy Lee Eaddy, respectfully asks this honorable court to either reverse the trial court's judgment and sentence and remand for a new trial, or reverse the trial court's sentence and remand 1) for imposition of a life sentence or 2) a new sentencing hearing before a new jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Gypsy Bailey, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, JIMMY LEE EADDY, #301788, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this 15th day of September, 1993.

DAVID A. DAVIS