IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,072

JIMMIE LEE CONEY,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

REPLY BRIEF OF APPELLANT

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INTRODUCTION

In this reply brief of appellant, as in the initial brief of appellant, all emphasis is supplied unless the contrary is indicated.

SUMMARY OF ARGUMENT

Just as the instruction on weighing evidence of confessions is based on constitutional considerations under the Fifth Amendment, the instruction requested in this case on weighing evidence of dying declarations is based on constitutional considerations under the Sixth Amendment. Just as a specific instruction is given to a jury concerning how to weigh expert testimony because special reliability considerations inhere in such testimony, a similar instruction is needed when dying declarations are placed before the jury due to the special reliability concerns inherent in such evidence. Such an instruction does not constitute an improper comment on the evidence.

The pretrial motion in limine filed in this case was sufficient to place the court on notice that the defense was challenging the admissibility of every portion of the statements made by Patrick Southworth, and was sufficient to place the state on notice that it had the burden of establishing the admissibility of every portion of those statements. Accordingly, as that motion was denied before the trial started, and renewed at trial, the error was preserved for appellate review.

The nature of the proceedings at the pretrial conference in this case differs markedly from the nature of the proceedings in the cases cited by the state in which this Court has found no prejudice to the defendant from his involuntary absence. What the state characterizes as "scheduling discussions" in this case were in fact discussions concerning both the evidence in the case and matters which would bear on the judge's ultimate sentencing decision. The record in this case also establishes that Jimmie Coney was prejudiced by his involuntary absence from the exercise of challenges for cause.

Recent decisions from the United States Supreme Court and the Supreme Court of Louisiana bolster the claim of error in the trial judge's refusal to allow

defense counsel to question prospective jurors concerning their ability to accept and apply the court's instructions on reasonable doubt. Defense counsel did not waive the right to raise this error when he abided by the judge's edict that no such questioning would be allowed.

The recent decision of this Court in *Duncan v. State*, 619 So. 2d 279 (Fla. 1993) clearly establishes that the testimony in this case of the mother of a victim of a totally unrelated crime requires reversal. The mother's testimony was not in any way necessary to establish the violent nature of the prior offenses, and the prejudicial effect of the improper admission of the mother's testimony was enormous. The prosecutor's use of the testimony in his closing argument as a basis for a death recommendation greatly heightened that prejudice.

As the state makes no attempt to justify the prosecutor's arguments repeatedly urging the jury to consider the impact of their sentencing recommendation on the community, and as the state makes no attempt to prove the error harmless, reversal is required as the error was sufficiently preserved for appellate review when the judge overruled defense counsel's objection to the first of these arguments and advised defense counsel that he need not object again on the same grounds.

Having secured a conviction and sentence of death based on the theory that Jimmie Coney killed the victim because the victim had ended their homosexual relationship and had become involved with another man, the state is barred from arguing on appeal that the murder was not the result of a domestic dispute. None of the cases cited by the state establish that the death sentence imposed in this case can withstand proportionality review.

The findings in the sentencing order demonstrate that the trial judge flatly rejected each of the nonstatutory mitigating factors which Jimmie Coney established at the penalty phase. The state's contention that the trial judge engaged in the

constitutionally required weighing process, and then found that the nonstatutory mitigating evidence was outweighed by the aggravating factors, is simply not supported by the record. Similarly unpersuasive are the state's attempts to paint the trial judge's finding of no mitigating circumstances as a routine resolution of factual conflicts and credibility determinations against Jimmie Coney. Most, if not all, of the mitigating evidence presented at the penalty phase in this case was uncontroverted.

GUILT PHASE ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST FOR A JURY INSTRUCTION ON WEIGHING EVIDENCE OF DYING DECLARATIONS, IN VIOLATION OF THE CONFRONTATION CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

To support the trial judge's refusal to give the requested jury instruction on weighing evidence of dying declarations, the state relies heavily on comments made by the trial judge at the time of her ruling (R. 2496-98). However, the reasoning of the trial judge in support of her refusal to give the instruction cannot withstand scrutiny.

First, the trial judge rejected the analogy to the required instruction on weighing evidence of confessions because that instruction is based on constitutional considerations (R. 2496-97). Yet, the requested jury instruction on weighing evidence of dying declarations also has a constitutional basis. Just as the Fifth Amendment requires that a confession not be considered by a jury unless the confession was freely and voluntarily made, the Sixth Amendment requires that a dying declaration not be considered by a jury unless the statement was made at a time when the declarant was conscious of immediate and impending death.

The admission of a hearsay declaration violates an accused's rights under the Sixth Amendment unless it bears adequate "indicia of reliability". *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Because dying declarations fall within a firmly rooted hearsay exception, reliability can be inferred. However, if a hearsay declaration fails to meet the requirements of the dying declaration exception, in that the declarant was not conscious of immediate and impending death at the time of the declaration, the declaration does not bear adequate indicia of reliability, and its admission would violate the Sixth Amendment. Thus, both the

instruction on weighing evidence of confessions and the instruction requested in this case on weighing evidence of dying declarations are based on constitutional considerations.

The trial judge also based her refusal to give the requested instruction on an analogy to the admission of expert testimony (R. 2497). The judge noted that where such testimony is sought to be admitted, the court determines its admissibility and no instruction need be given to the jury concerning how to weigh that evidence once it is admitted. While the trial judge's analogy is valid, the conclusions she reached are faulty. Although the judge determines the admissibility of expert testimony, once such testimony is admitted the judge is required to give the jury the following instruction concerning how such evidence is to be weighed:

> **2.04 Weighing the Evidence**
>
> * * • •
>
> **2.04(a) Expert Witnesses**
>
> Expert witnesses are like other witnesses, with one exception---the law permits an expert witness to give his opinion.
>
> *However, an expert's opinion is only reliable when given on a subject about which you believe him to be an expert.*
>
> Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

Fla. Std. Jury Instr. (Crim.) at 16.

Thus, because special reliability considerations come into play when expert testimony is placed before the jury, a specific instruction is given to the jury concerning how to weigh such testimony, even though the trial judge has determined that the testimony is admissible. In just the same fashion, because special reliability considerations come into play when dying declarations are placed

before the jury,[1] a specific instruction must be given to the jury concerning how to weigh such evidence notwithstanding the court's ruling admitting the evidence.

The trial judge's final stated justification for denying the requested instruction is the decision of this Court in *Fenelon v. State*, 594 So. 2d 292 (Fla. 1992). In *Fenelon*, this Court ruled that trial judges should no longer give a jury instruction on flight. This ruling was based on the absence of any "valid policy reason why a trial judge should be permitted to comment on evidence of flight as opposed to any other evidence adduced at trial." 594 So.2d at 294. This Court noted the difficulty inherent in the flight instruction in deciding when flight actually indicates consciousness of guilt.

None of the concerns expressed by this Court in *Fenelon* are implicated by the requested instruction in this case concerning weighing evidence of dying declarations. The instruction requested here does not advise the jury concerning inferences of guilt or inferences of innocence. The instruction simply advises the jury concerning the special reliability determination that must be made when considering evidence of dying declarations. In this sense, the instruction requested in this case is no different than a number of the standard jury instructions grouped in Section 2.04 under the heading "Weighing the Evidence". As previously noted, Instruction 2.04(a) advises the jury on the special reliability determinations involved in weighing the testimony of expert witnesses. Instruction 2.04(b) advises the jury on the special reliability determinations involved in weighing accomplice testimony. Instruction 2.04(e) advises the jury on the special reliability determinations involved in weighing evidence of a defendant's out-of-court statements. The same rationale which requires that these instructions be given applies in this case to require the

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[1]Those considerations are fully detailed in the initial brief of appellant and need not be detailed again here.

instruction on weighing evidence of dying declarations.

The state's half-hearted efforts to meet its heavy burden of demonstrating harmless error beyond a reasonable doubt must be rejected. The fact that defense counsel argued that the dying declarations were unreliable does not render the failure to give the requested instruction harmless, as the jury must apply the law as given by the court's instructions, rather than counsel's arguments. *Gardner v. State*, 480 So. 2d 91, 93 (Fla. 1985). As far as the testimony of the inmates is concerned, the force of that testimony pales in comparison to the force of the dying declarations admitted at trial, as demonstrated in the initial brief of appellant in this case.

II.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE OVER DEFENSE OBJECTION STATEMENTS MADE BY THE DECEDENT CONCERNING HIS OPINION AS TO THE MOTIVE OF JIMMIE CONEY, IN VIOLATION OF THE CONFRONTATION CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Apparently conceding the inadmissibility of the decedent's statements concerning motive, the state attempts to avoid the consequences of the trial court's error by arguing lack of preservation and harmless error. The record in this case does not support either of these arguments.

Prior to the trial in this case, defense counsel filed a "Motion for Order in Limine", in which he moved to preclude any reference at trial to the hearsay testimony of the victim, Patrick Southworth, on the grounds that such testimony was "incompetent, irrelevant, or immaterial or not allowed as evidence to the issues involved herein, and will serve only to unfairly prejudice the jurors against the Defendant." (R. 60). This motion was sufficient to place the court on notice that the defense was challenging the admissibility of every portion of the statements made by Patrick Southworth, and was sufficient to place the state on notice that it had the burden of establishing the admissibility of every portion of those statements. Yet, the state provided the trial court with no basis for the admission of Southworth's statements concerning motive, and indeed has not provided this Court with any such basis.

Unquestionably, the focus of the pretrial evidentiary hearing in this case concerned the issue of whether the decedent was conscious of his immediate and impending death at the time he made the statements which the state was seeking to introduce. However, the focus was directed on that issue because the state was required to present witnesses to meet its burden as to that issue. The state, as

well as the defense, provided a number of witnesses to testify concerning that issue, and the trial judge ruled that the state had met its burden of demonstrating that Southworth was conscious of immediate and impending death at the time he made the statements.

This ruling, however, only allowed the admission of those statements by Southworth which related to what actually transpired, who were the actors, the position of the parties, what were the instruments used, who used them and how, and similar matters, excluding, if possible, everything except what relates to the res gestae. *Morris v. State*, 100 Fla. 850, 130 So. 582 (1930); *Sealey v. State*, 89 Fla. 439, 105 So. 137 (1925); *Malone v. State*, 72 Fla. 28, 72 So. 415 (1916). The statements relating to motive remained inadmissible, absent some other basis for their admission. *Malone*; *Sealey*. As the defense had moved to exclude the statements in their entirety, and as the state provided no basis for the admission of those portions of the statements concerning motive, those portions of the statements were erroneously admitted, and the issue was preserved for appellate review.

This error was certainly not rendered harmless by Daries Barnes' testimony concerning animosity between Coney and Southworth. There is a significant difference in the effect on a jury of evidence which establishes the existence of a possible motive for a murder, and evidence of the victim's statements before his death indicating the victim's opinion that the defendant had killed him based on that motive. The erroneous admission of the latter type of evidence is infinitely more prejudicial, and accordingly reversal is required in this case.

III.

JIMMIE CONEY'S INVOLUNTARY ABSENCE FROM A NUMBER OF CRUCIAL STAGES OF THE TRIAL REQUIRES REVERSAL OF HIS JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH AS HIS ABSENCE THWARTED THE FUNDAMENTAL FAIRNESS OF THE PROCEEDINGS, IN VIOLATION OF FLA.R.CRIM.P. 3.180 AND THE DUE PROCESS CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

A.

JIMMIE CONEY'S INVOLUNTARY ABSENCE FROM THE PRETRIAL CONFERENCE CONTRARY TO RULE 3.180(a)(3) REQUIRES REVERSAL AS HIS ABSENCE FROM THAT PRETRIAL CONFERENCE THWARTED THE FUNDAMENTAL FAIRNESS OF THOSE PROCEEDINGS.

The nature of the proceedings at the pretrial conference in this case differs markedly from the nature of the proceedings in the cases cited by the state in which this Court has found no prejudice to the defendant from his involuntary absence. In *Stano v. State*, 473 So. 2d 1282 (Fla. 1985), *cert. denied*, 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986), the state simply presented two motions at a status conference. In the first motion, the state asked that the defense be compelled to disclose the addresses of two potential defense witnesses. This Court found the granting of such a motion to be a purely ministerial act. In the second motion the state requested that Stano be compelled to undergo a psychiatric examination, and the court specifically deferred ruling on this motion because of Stano's absence. Similarly, in *Roberts v. State*, 510 So. 2d 885 (Fla. 1987), *cert. denied*, 485 U.S. 943, 108 S.Ct. 1123, 99 L.Ed.2d 284 (1988), the court considered a number of motions filed by the state and the defense, all of which dealt with strictly legal matters in which the defendant, if present, could not have assisted defense counsel in arguing. In *Garcia v. State*, 492 So. 2d 360 (Fla.), *cert. denied*, 479 U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986), the defendant

was absent when his counsel argued motions for a change of venue, for additional peremptory challenges, to sequester the jury, and to grant individual voir dire of the jury panel.

As characterized by the state in its answer brief, the proceedings at the pretrial conference in this case would appear to be similar to the proceedings in *Stano*, *Roberts* and *Garcia*. However, the state's characterization of the proceedings at the pretrial conference in this case is extremely misleading. The state's sole description of the events which took place at the beginning of the pretrial conference is the following:

> Thereafter, the trial judge, prosecutor, and defense counsel discussed scheduling of the upcoming trial, (R. 389-396).

(Brief of appellee at 55). Included in this "scheduling discussion" were the prosecutor's response to the court's request, "Just tell me what the facts are according to the state", and defense counsel's response to the court's query, "What is the defense in the case?" (R. 393-394). Also included in this "scheduling discussion" was the prosecutor's detailing of the defendant's prior record (R. 394-395). Later in the pretrial conference, the prosecutor again detailed for the court certain portions of the evidence which he intended to introduce at the trial (R. 397-98, 402-03). Once again, the state would lead this Court to believe that nothing more than "scheduling" was discussed during this portion of the proceedings:

> A discussion regarding the number of witnesses, time needed for hearing, and other scheduling matters followed (R. 397-409).

(Brief of appellee at 55).

If nothing more than scheduling was discussed at the pretrial conference in this case, then perhaps *Stano*, *Roberts*, and *Garcia* would support the proposition that Coney's involuntary absence from the pretrial conference was not prejudicial.

However, the record here clearly establishes that discussions were held concerning both the evidence in the case and matters which would bear on the judge's ultimate sentencing decision. That being the case, Jimmie Coney's involuntary absence from that pretrial conference requires reversal. *Rose v. State*, 617 So. 2d 291 (Fla. 1993).

B.

THE DEFENDANT'S INVOLUNTARY ABSENCES DURING JURY SELECTION CONTRARY TO RULE 3.180(a)(4) REQUIRE REVERSAL AS THOSE ABSENCES THWARTED THE FUNDAMENTAL FAIRNESS OF THOSE PROCEEDINGS.

The state claims that Jimmie Coney's involuntary absence from the first group of challenges for cause was harmless because Coney could not have provided any input to defense counsel concerning the exercise of the challenges. Once again, the record belies the claim made by the state.

During the jury selection in this case, challenges were exercised on two separate occasions (R. 721-728, 1094-1121). Jimmie Coney was involuntarily absent from the first set of challenges, and he was present for the second round of challenges (R. 721, 1094). When Jimmie Coney was present, he provided his attorney with a great deal of input concerning the exercise of those challenges. On three separate occasions, defense counsel identified prospective jurors whom Coney wanted to challenge for cause because he did not feel they could be fair and impartial (R. 1100, 1102, 1106-08). In addition to these examples of direct participation by Coney in the exercise of challenges for cause, the following example of Coney's participation in the exercise of such challenges is particularly significant:

> THE COURT: That's 11. Next is Corine Brant. State?
>
> [PROSECUTOR]: Move for cause.
>
> THE COURT: Grounds?

> [PROSECUTOR]: She's indicated, because of religious feelings, she could not sign a verdict. She's indicated throughout this proceeding she's uncomfortable with the proceeding. She had trouble with the death-penalty issues. Ask for cause.
>
> THE COURT: Is there an objection?
>
> [DEFENSE COUNSEL]: Your Honor, my client indicated he has no objection. I'm sorry, strike that, judge. I misunderstood my client. I'd like to confer with him further. Your Honor, we would object. I misunderstood my client's instructions. We would object. I believe those questions were asked, and reasked, and somehow she kept being rehabilitated.
>
> THE COURT: I'm going to deny it at this time. What would the state like to do?

(R. 1103).

This exchange is significant because at the earlier exercise of challenges, when Jimmie Coney was involuntarily absent, defense counsel allowed the state to challenge five prospective jurors for cause without registering an objection (R. 722-724). Had Jimmie Coney been present during this portion of the exercise of challenges, it is very likely that he would have registered an objection to one or more of these challenges, and upon such objection the challenge might have been denied, as it was when Coney was present and registered his objection during the second set of challenges for cause.

The state also seeks to establish a lack of prejudice in Jimmie Coney's involuntary absence from jury selection by relying on defense counsel's statement that he had discussed each prospective juror with his client (R. 1094). However, this statement was made immediately prior to the *second* set of challenges, and clearly referred to the prospective jurors who were about to be submitted for challenges at that time. Defense counsel made no such statement prior to the *first* set of challenges, which was the set of challenges from which Jimmie Coney was

involuntarily absent. Accordingly, defense counsel's statement does not establishes that Jimmie Coney was not prejudiced by his involuntary absence from that first set of challenges.

IV.

THE TRIAL COURT ERRED IN RESTRICTING DEFENSE COUNSEL'S QUESTIONING OF PROSPECTIVE JURORS, IN VIOLATION OF JIMMIE CONEY'S RIGHT TO A FAIR AND IMPARTIAL JURY GUARANTEED BY THE FLORIDA AND UNITED STATES CONSTITUTIONS.

The recent decision of the United States Supreme Court in *Sullivan v. Louisiana*, ___ U.S. ___, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), underscores the seriousness of the error committed by the trial judge in this case in refusing to allow defense counsel to question prospective jurors concerning their ability to accept and apply the court's instructions on reasonable doubt. In *Sullivan*, the Court held that the giving of a constitutionally deficient jury instruction on reasonable doubt cannot be deemed harmless error under any circumstances. The Court based this holding on its conclusion that where a jury is not properly instructed on reasonable doubt, any guilty verdict returned by that jury cannot be considered a jury verdict within the meaning of the Sixth Amendment because that amendment requires a jury verdict of guilt-beyond-a-reasonable-doubt.

If a juror cannot accept and apply the court's instructions on reasonable doubt, then any verdict returned by that juror cannot be considered a jury verdict within the meaning of the Sixth Amendment. It is therefore essential that defense counsel be given the opportunity to determine in voir dire if each prospective juror can in fact accept and apply the reasonable doubt instruction. The trial court's ban on such questioning because, "[i]t doesn't lead to any further understanding of the juror's qualifications" (R. 1062) was clearly erroneous.

A similar ruling recently led to reversal of a first degree murder conviction and sentence of death based on a unanimous jury recommendation of death in *State v. Hall*, 616 So. 2d 664 (La. 1993). There, the trial judge imposed a number of restrictions on defense counsel's questioning during voir dire, including the following:

> While exploring the concept of reasonable doubt, the defense asked a prospective juror, "[w]hat happens if the law and evidence do not fit a certain crime and a reasonable doubt exists, what is the only available verdict ...?" The trial judge interrupted, telling the defense counsel not to commit the jurors, but to "[j]ust ask them if they could follow the law. If they could follow the law that's all that's necessary." The defense counsel then continued his examination by telling the jurors that "if a reasonable doubt exists to a certain crime, it's either a lesser verdict or a not guilty verdict, everyone understand that?" Again, the trial judge interrupted, stating "you are doing the same thing." He went on to say, "[t]he question is can they follow the law as given by the Court," which was "all that's required of them."

616 So. 2d at 667. Based on its review of the record of the entire voir dire examination, the Court found that the trial judge had, "failed to temper the exercise of his discretion by giving the wide 'latitude' to counsel for defendant in his examination of prospective jurors". *Id.* at 669. The Court went on to conclude that:

> Most objectionable in our view was the trial judge's restriction of defense counsel's examination on issues of law, such as elements of the offense, reasonable doubt and specific intent."

Ibid. The arguments presented in the initial brief in this case regarding the trial court's restriction of defense counsel's examination of prospective jurors concerning the concept of reasonable doubt are bolstered by the decision in *Hall*.

The state's claim that the error in this case is not preserved for appellate review is not supported by the record. After defense counsel had begun to question prospective jurors concerning their ability to accept and apply the judge's instructions on reasonable doubt, the judge issued the following unambiguous directive:

> I don't want to cut you off, but we can't have further discussion about reasonable doubt. It doesn't lead to any further understanding of the juror's qualifications.

(R. 1062). Defense counsel obeyed the trial court's order and did not ask any further questions concerning reasonable doubt. Clearly, counsel does not waive the right to challenge a trial judge's ruling on appeal by abiding by that ruling. The state cites no authority for such a novel proposition, and this Court has repeatedly stated that once a trial judge issues a clear ruling on a particular issue, futile efforts to further argue the issue are not required to preserve the issue for appellate review. *Hunt v. State*, 613 So. 2d 893 (Fla. 1992); *Thomas v. State*, 419 So. 2d 634 (Fla. 1982); *Spurlock v. State*, 420 So. 2d 875 (Fla. 1982).

The above-quoted portion of the record in this case also conclusively refutes the state's claim that the trial court was simply "curtailing repetitious voir dire examination of the prospective jurors' understanding of the concept of reasonable doubt." (Brief of appellee at 61). The trial judge plainly stated that she was banning further questioning about reasonable doubt because it was not relevant to a determination of the qualifications of a prospective juror. The trial judge did not say anything about such questioning being repetitive. Indeed, although the state refers to a number of portions of the voir dire where the judge utters the words "reasonable doubt," on only one occasion did the judge inquire as to the prospective jurors ability to accept and apply the instructions on reasonable doubt, and on that occasion the judge simply asked the entire panel of prospective jurors if anyone did not understand or could not follow the law in that regard, and no one responded (R. 759). This single question to the entire panel certainly did not render repetitive defense counsel's subsequent attempt to question individual jurors concerning reasonable doubt. As the record demonstrates that defense counsel's questioning would not have been repetitive, and as the trial judge did not ban defense counsel's questioning on reasonable doubt on repetitiveness grounds, the state's attempt to uphold the trial judge's ruling on such grounds should be rejected.

V.

THE TRIAL COURT ERRED IN VARIOUS OTHER RULINGS MADE DURING THE COURSE OF THE TRIAL.

The arguments made by the state concerning the rulings challenged in this point on appeal are refuted by the record on appeal and the arguments presented in the initial brief.

PENALTY PHASE ARGUMENT

VI.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO CALL THE MOTHER OF THE VICTIM OF JIMMIE CONEY'S PRIOR VIOLENT FELONY OFFENSE TO TESTIFY AT THE PENALTY PHASE CONCERNING THE HORRORS SHE EXPERIENCED WHEN SHE ARRIVED HOME TO FIND HER DAUGHTER AFTER SHE HAD BEEN BRUTALLY RAPED AND STRANGLED, IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS, AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This Court's recent decision in *Duncan v. State*, 619 So. 2d 279 (Fla. 1993), establishes that the trial court erred in allowing Ann Ross Ferre to testify at the penalty phase in this case, and that the error requires reversal of Jimmie Coney's death sentence and remand for a new sentencing proceeding before a jury.

In *Duncan*, the defendant challenged the admission at the penalty phase of a photograph depicting gaping wounds to the head and face of the victim of a 1969 murder. Prior to the introduction of this photograph, a certified copy of the judgment and sentence for second-degree murder had been entered into evidence, and the state had presented the testimony of the chief police investigator of the 1969 murder. This police investigator testified concerning the injuries sustained by the prior victim and testified in detail concerning the circumstances of the prior murder. The trial court then allowed the photograph to be introduced to show the force required to cause the injuries described by the investigator and to show the position of the victim when the attack occurred.

This Court held that the admission of the photograph crossed the line drawn in *Rhodes v. State*, 547 So. 2d 1201 (Fla. 1989) regarding the admission of evidence concerning the circumstances of a prior felony conviction involving the use or threat of violence:

> We agree with Duncan that the prejudicial effect of this gruesome photograph clearly outweighed its probative value. Section 90.403, Fla.Stat. (1991). The photograph did not directly relate to the murder of Deborah Bauer but rather depicted the extensive injuries suffered by the victim of a totally unrelated crime. Moreover, the photograph was in no way necessary to support the aggravating factor of conviction of a prior violent felony. A certified copy of the judgment and sentence for second-degree murder indicating that Duncan pled guilty to and was convicted of a violent felony had been introduced. As explained above, there was also extensive testimony from Captain Stephens explaining the circumstances of the prior murder and the nature of the injuries inflicted.

Duncan v. State, supra, 619 So.2d at 282.

Just as the prejudicial effect of the photograph in *Duncan* clearly outweighed its probative value, so too the prejudicial effect of the testimony of the mother of the prior victim in this case clearly outweighed any probative value such testimony might have had. The testimony of Ann Ross Ferre did not directly relate to the murder of Patrick Southworth, but rather depicted the horrors experienced by the mother of a victim of a totally unrelated crime. That testimony was in no way necessary to support the aggravating factor of conviction of a prior violent felony. Certified copies of Jimmie Coney's judgments of conviction and sentences for involuntary sexual battery, armed burglary with an assault, and attempted first degree murder were introduced into evidence. Indeed, the jury was instructed, pursuant to Fla. Std. Jury Instr. (Crim.) at 76, that those previous convictions were for felonies involving the use or threat of violence to another person (R. 300, 2885). The testimony of Susan Ross Lumas provided the jury with the details of those prior convictions and clearly established that the prior convictions involved the use or threat of force.

To the extent that the nature of the injuries Ms. Lumas suffered were relevant, Ms. Lumas herself described for the jury the injuries that she observed

when she first looked in the mirror four days after the attack (R. 2715).[2] Ms. Lumas also testified that she underwent reconstructive vaginal surgery after the attack (R. 2715). Surely, if any testimony concerning injuries was necessary to establish the violent nature of the offenses for which Jimmie Coney was previously convicted, Ms. Lumas' testimony was more than sufficient to establish such injuries.

Furthermore, and contrary to the state's claims, the mother's testimony was not limited to a concise accounting of the injuries suffered by her daughter. Ms. Ferre detailed for the jury how she first came to realize that something terrible had happened to her 12-year-old daughter when she called home and heard her daughter pleading in a raspy voice, "Help me, help me." Ms. Ferre then detailed for the jury her frenzied ride to her house, her discovery of her daughter when she rushed in through the open front door of her house, her frantic conversations with the police officer whom she had flagged down on the way to her house, and how the officer picked up her daughter "like a baby" and carried her outside where she was rushed to the hospital (R. 2729-2730).

If the photograph introduced in *Duncan* crossed the line drawn by this Court in *Rhodes*, then unquestionably the line was crossed in this case when the mother of the victim of a prior crime was permitted to testify. However, unlike *Duncan*, the error in this case cannot be found to have been harmless beyond a reasonable doubt. This Court's finding of harmless error in *Duncan* is predicated to a great extent on the isolated nature of the improperly admitted photograph:

> Once admitted, no further reference was made to the photograph. It was not urged as a basis for a death

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[2]Having observed her injuries in the mirror at the hospital four days after the attack, Ms. Lumas certainly was perfectly qualified to identify the photograph which the state introduced through the testimony of her mother. That photograph was taken after Ms. Lumas was released from the hospital, and therefore there was no reason why Ms. Lumas could not have identified the photograph during her testimony.

> recommendation; nor was it otherwise made a focal point of the proceedings.

619 So.2d at 282. The same cannot be said in this case. The prejudicial effect of the jury hearing the live testimony of the mother of the victim is much greater than the prejudicial effect of the introduction of a single photograph. Moreover, the prosecutor vividly recalled the mother's testimony in his closing argument urging the jury to recommend a sentence of death:

> And only because her mom, for whatever reason, some intuitive feeling a mother might have for a child being hurt somewhere, makes a call out of the blue, and then rushes to the scene and finds her daughter purple, her head twice the size, horribly shaped. And this is some weeks later, cleaned up.

(R. 2862). The prejudicial effect of the testimony itself, coupled with the prosecutor's use of the testimony in his argument to the jury, preclude any finding beyond a reasonable doubt that the improper admission of the testimony did not contribute to the jury's 7-5 death recommendation. Accordingly, the error cannot be deemed harmless, and a new sentencing hearing before a jury is required.

VII.

THE PROSECUTOR'S ARGUMENT TO THE JURY DURING THE PENALTY PHASE REPEATEDLY URGING THEM TO CONSIDER THE IMPACT AND MESSAGE THEIR SENTENCE RECOMMENDATION WOULD HAVE ON THE COMMUNITY WAS IMPROPER AND INFLAMMATORY AND CONSTITUTED A NONSTATUTORY AGGRAVATING FACTOR, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state makes no attempt to justify the prosecutor's arguments urging the jury to consider the impact of their sentencing recommendation on the community. The state's reluctance to defend such conduct is understandable given the long line of cases from this Court which condemn tactics such as those employed by the prosecutor in this case. Indeed, this Court very recently had occasion to restate the precepts to which the prosecutor in this case failed to adhere:

> Closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985). Furthermore, if "comments in closing argument are intended and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument." *Garron v. State*, 528 So. 2d 353, 359 (Fla. 1988).

King v. State, 18 Fla. L. Weekly S465 (Fla. September 2, 1993).

In addition to making no attempt to defend the prosecutor's improper comments in closing argument, the state also makes no attempt to demonstrate that the prosecutorial misconduct was harmless error. The burden to prove harmless error beyond a reasonable doubt rests on the state. *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986). Thus, where the state fails to present any argument on appeal that a particular error is harmless, reversal is required if the error is preserved for appellate review. *See Lewis v. State*, 18 Fla. L. Weekly D1882 (Fla. 4th DCA August 25, 1993).

Contrary to the claims made in the state's answer brief, the error in this case was preserved for appellate review. When the prosecutor first urged the jury to consider the impact of their sentencing recommendation on the community, defense counsel objected and the objection was overruled (R. 2869). When defense counsel asked if he was required to continue objecting to such comments by the prosecutor, the judge advised him that he only needed to raise objections which had not been previously raised (R. 2869). Under these circumstances, with the judge having overruled defense counsel's objection to the prosecutor urging the jury to consider the impact of their sentencing recommendation on the community, and with the judge having advised defense counsel that he need not object again on those same grounds, defense counsel's failure to object to the prosecutor's subsequent comments urging the jury to consider the impact of their sentencing recommendation on the community cannot be deemed to preclude appellate review of those subsequent comments. *Hunt v. State*, 613 So. 2d 893 (Fla. 1992); *Thomas v. State*, 419 So. 2d 634 (Fla. 1982); *Spurlock v. State*, 420 So. 2d 875 (Fla. 1982)

VIII.

JIMMIE CONEY'S SENTENCE OF DEATH IS UNCONSTITUTIONAL AND DISPROPORTIONAL TO THE LIFE SENTENCES OF SIMILARLY SITUATED DEFENDANTS CONVICTED OF MURDERS INVOLVING DOMESTIC DISPUTES, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

To secure convictions of first degree murder and arson and a sentence of death in this case, the state presented evidence and argument to convince the jury that Jimmie Coney killed Patrick Southworth because Southworth had ended their homosexual relationship and had become involved with another man. That evidence and argument is detailed in the initial brief. Having secured the convictions and death sentence, the state now attempts to argue in this Court that the murder of Patrick Southworth did not result from any domestic dispute between Coney and Southworth.

This Court is required to conduct a proportionality review to determine if the death sentence imposed in this case is proportional to other cases where the death sentence was imposed under similar circumstances. *Porter v. State*, 564 So. 2d 1060 (Fla. 1990), *cert. denied*, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). The state prosecuted this case as a domestic killing, Jimmie Coney was convicted and sentenced to death on that basis, and this Court must now determine if the imposition of a death sentence for such a killing is proportional. For the state to now attempt to distort this Court's proportionality review by claiming that Patrick Southworth was not killed as the result of a domestic dispute is unseemly, unprecedented, and a perversion of the appellate review process which should not be tolerated by this Court.

This Court's decision in *Porter v. State, supra*, does not establish that Jimmie Coney's sentence of death is proportional. This Court did reject a proportionality

attack and uphold the imposition of the death penalty in that case even though the killings arose from a domestic dispute. However, the death penalty was found proportional in *Porter* because the circumstances of the case depicted "a cold-blooded, premeditated double murder". 564 So.2d at 1064. Indeed, this Court held that the evidence in *Porter* established the aggravating factor that the murders were committed in a cold, calculated, and premeditated manner without any moral or legal justification.

In the present case, the trial judge ruled that the evidence presented by the state did not even support giving the jury an instruction on the aggravating factor that the murders were committed in a cold, calculated, and premeditated manner without any moral or legal justification (R. 2833-2834). Accordingly, the basis for this Court's finding of proportionality in *Porter* does not exist in this case.

Neither *Morgan v. State*, 415 So. 2d 6 (Fla.), *cert. denied*, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982) nor *Marshall v. State*, 604 So. 2d 799 (Fla. 1992), *cert. denied*, 113 S.Ct. 2355, 124 L.Ed.2d 263 (1993), has any relevance to the proportionality issue in this case. Although both of those cases involve the murder of a prison inmate by another prison inmate, in neither case did the killing arise out of a domestic dispute.

In *Duncan v. State*, 619 So. 2d 279 (Fla. 1993), this Court did reject a claim of disproportionality where a death sentence was imposed for a murder arising out of a domestic dispute. There, however, this Court based its finding of proportionality on the fact that the defendant had previously been convicted of a murder similar to the murder for which he had received the death sentence. The decision in *Duncan* is consistent with the cases cited in the initial brief where this Court has affirmed the death sentence under proportionality review in domestic cases where the defendant had been convicted of prior similar violent offenses. However, Jimmie Coney's death

sentence cannot be affirmed under proportionality review based on these cases because neither of Coney's two prior offenses bear any resemblance to the killing in this case.

IX.

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY BASED ON THE AGGRAVATING CIRCUMSTANCE THAT THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The arguments made by the state concerning the rulings challenged in this point on appeal are refuted by the record on appeal and the arguments presented in the initial brief.

X.

THE TRIAL COURT ERRED IN FAILING TO FIND AND WEIGH ANY NONSTATUTORY MITIGATING CIRCUMSTANCES WHERE THE UNCONTROVERTED EVIDENCE PRESENTED AT THE PENALTY PHASE ESTABLISHED A SUBSTANTIAL NUMBER OF VALID NONSTATUTORY MITIGATING CIRCUMSTANCES, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The sentencing order in this case contains the following findings concerning mitigating circumstances:

> MITIGATING CIRCUMSTANCES
>
> Turning as the law requires, to an examination of any mitigating factors, *the Court finds none that apply*.
>
> * * * * * * * *
>
> In conclusion, the Court finds that there are more than sufficient aggravating circumstances proven beyond a reasonable doubt to justify the imposition of the death penalty. *The Court finds no mitigating circumstances*. On this record, the sentence of death is not disproportionate.

(R. 315-316). These findings demonstrate that the trial judge flatly rejected each of the nonstatutory mitigating circumstances which Jimmie Coney established at the penalty phase. The state's contention that the trial judge engaged in the constitutionally required weighing process, and then found that the nonstatutory mitigating evidence was outweighed by the aggravating factors, is simply not supported by the record. With these clear unambiguous findings of no mitigating circumstances, there can be no presumption that the judge followed her own instructions to the jury on the consideration of nonstatutory mitigating evidence. *Compare Johnson v. Dugger*, 520 So. 2d 565 (Fla. 1988).

Similarly unpersuasive are the state's attempts to paint the trial judge's finding of no mitigating circumstances as a routine resolution of factual conflicts and

credibility determinations against Jimmie Coney. Most, if not all of the mitigating evidence presented at the penalty phase in this case was uncontroverted. A good example of the state's attempts to create contradictions out of thin air is the following statement in the answer brief:

> Although Coney did not live with his mother and father, he was not bothered by the absence of his father . . . (R. 2802-03).

(Brief of appellee at 84). The evidence from which the state draws the conclusion that Jimmie Coney "was not bothered by the absence of his father" is the following colloquy during the testimony of a defense witness at the penalty phase:

> Q. Did Jimmie ever talk to you about his natural father?
>
> A. Yes.
>
> Q. And what did he tell you about him?
>
> A. He didn't have much to communicate with him as he was growing up. He went back to Georgia when he was 17 and he met with his father. I mean, he knew him before that, but he went back and he met with him when he was 17. And as far as I know, it's the last time that he saw him.
>
> Q. Prior to seeing him at that age, did Jimmie tell you he had a lot of contact with his natural father?
>
> A. No.
>
> Q. Little contact or no contact?
>
> A. He had a small amount during his growing up. He knew who he was, but his father didn't live there. He lived in Philadelphia.
>
> Q. Did he express any feelings about that?
>
> A. It was --
>
> Q. Jimmie. Did Jimmie express any feelings about that?
>
> A. It was like he knew he had a father and he would have liked to have been with him, but he felt that his mom didn't approve of him and he didn't want to be with him, but she didn't want him either. Do you understand? She didn't want him to be with his father, but she didn't want to be with him either.

Q. Are these feelings that were expressed to you by Jimmie.

A. Yes.

Q. And how did that make him feel?

A. Not as bad as his mom abandoning him. That was -- it was like part of life, growing up without a father, 'cause he had his grandfather. So it wasn't as important to him as when his mother left him.

(R. 2802-04).

To claim that Jimmie Coney "was not bothered by the absence of his father" based on the foregoing testimony that Jimmie was not as concerned about his absent father as he was concerned about the fact that his mother had abandoned him, is a total distortion of the record. Similarly, the fact that Jimmie was left with loving grandparents does not contradict in any way the extensive evidence that Jimmie felt abandoned by his mother. Not controverted in any way is the fact that when Jimmie's mother decided to move from Georgia to Miami when Jimmie was a young boy, she decided that she could only take two of her three children with her, and she left Jimmie behind in Georgia and took Jimmie's two stepbrothers with her (R. 2741-43). Not controverted in any way is the fact that Jimmie was stricken with polio at the age of three, spent six months in the hospital, and was ridiculed as he grew up because he limped as a result of his bout with polio (R. 2738-44, 2752-53).

Another attempt by the state to conjure up a conflict in the mitigating evidence presented at the penalty phase hearing is the following:

> Evidence that Coney did not get along with, and had a single altercation with, his stepfather Mr. Sanford, was contradicted by testimony that family members were not aware of any conflict between Mr. Sanford and Coney (R. 2789).

(Brief of appellee at 85). Jimmie Coney's mother, Pearlie May Sanford, gave extensive testimony at the penalty phase concerning the stormy relationship

between her son, Jimmie, and her husband, Mr. Sanford (R. 2746-2749). The fact that another relative, who did not live with Jimmie and his stepfather, was unaware of the troubled nature of this relationship does not in any way contradict the testimony of the woman who personally witnessed that relationship.

While reasonable persons might differ concerning the weight to be given the mitigating circumstances in this case when balanced against the aggravating factors, the mitigating circumstances were established without contradiction, and therefore the trial judge was required to weigh them against the aggravating factors. *King v. State*, 18 Fla. L. Weekly S465 (Fla. September 2, 1990); *Sims v. Singletary*, 18 Fla. L. Weekly S381 (Fla. June 24, 1993). As the record in this case demonstrates that the trial judge did not engage in any such weighing process, the sentence of death cannot stand.

CONCLUSION

Based on the foregoing facts, authorities and arguments, appellant respectfully requests this Court to reverse his judgments of conviction and sentences and remand the case to the trial court with directions that he be granted a new trial; or, in the alternative, reverse his sentence of death and remand for imposition of a life sentence; or, in the alternative, remand the case for a new sentencing hearing before a jury; or, in the alternative, remand the case for a new sentencing hearing before the trial judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Criminal Division, Post Office Box 013241, Miami, Florida 33101, this 28th day of September, 1993.

HOWARD K. BLUMBERG
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