IN THE SUPREME COURT OF FLORIDA

PERRY ALEXANDER TAYLOR,

Appellant,

v.

Case No. 80,121

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Officer Edward Batson went to the Belmont Heights Little League ball field at 7:24 on October 24, 1988 in response to a report of a nude female passed out in the dugout. He arrived and observed the dead female (R 195 - 96) Officer Louis Potenziano observed the victim at the scene (R 204) and directed that photographs be taken. State's Exhibits 2 - 17 were admitted without objection (R 211). There were drag marks in the dugout from one end of the dugout to the victim's body (R 211). The victim was naked form the chest down, a pair of white underwear and red blouse or dress was pulled up over the breast (R 213). A purse was on top of the body. Above the victim's head was a broken beer bottle, a broken denture and a portion of the wig. A shoe impression -- a sneaker -- was outside the dugout at the crime scene (R 214 - 215). There were bruises on the body (R 218).

Homicide detective George McNamara investigated the death of Geraldine Burch and spoke to appellant Taylor the day after the murder on October 25, 1988 (R 227). Taylor said he had heard of this homicide, that one Pine (real name Allen Sherry) told him the victim had been found (R 228 - 229) He did not indicate he had any knowledge regarding the death (R 231). He claimed not to have been in the area where the body was found in the last six weeks (R 231). Taylor consented to provide his clothing for tests (R 232). McNamara attended the autopsy and observed a tear just below the vaginal area (R 234) and Exhibit 24 was admitted over defense objection (R 235).

On October 27, McNamara again contacted appellant and gave him Miranda warnings (R 238). Taylor signed a consent to interview form (R 239) and appellant gave the same story previously given (R 240). The appellant admitted having been in the nearby basketball courts and he admitted having sex with a female at the ball park the Friday preceding the murder. The police told him his shoes matched the impressions in the dirt near the victim's body. Taylor paused, then said it was an accident; that she agreed to have sex. During oral sex she bit his penis, he choked her and struck her several times in the face. He dragged her body in the dugout, kicked her in the upper torso several times and stomped on her chest. Then he went home (R 243) He claimed he had not had vaginal sex with her. Hair samples were taken (R 244). Appellant said he was six foot two inches and weighed 235 pounds (R 246). He claimed he did not know the victim (R 247).

Detective Henry Duran also interviewed appellant and examined the defendant's penis; he made no observation of injuries or marks consistent with teeth marks. A photo was taken and Exhibits 30 and 31 were admitted without objection (R 268 - 270). Taylor admitted to Duran that he had vaginal sex with the victim (R 271) and admitted having denied that to McNamara. He admitted again kicking and stomping the victim (R 273). He did not indicate kicking her in the vaginal area (R 275). Associate medical examiner Lee Miller performed an autopsy on Geraldine Birch (R 284). The victim was age 38; 5'2" and 110 pounds (R

286). The cause of death was massive blunt injury of the head, neck, chest and abdomen (R 286). Exhibits 18 - 23 were introduced (R 288 - 291). The doctor identified a bald spot on the head where a swatch of hair had been torn away (R 293). The hair could have been pulled off by a hand or the result of a kick (R 297). The victim had no teeth of her own -- a partial lower dental plate was not in place. The piece recovered by her leg fit like a jigsaw puzzle (R 298).

It's not likely that the head injuries caused unconsciousness (R 300). There was a fracture of the larynx (R 301). Patterned injuries consistent with stomping on the chest were found (R 302). A broken rib had torn into the heart and both lungs were similarly torn by compression of the chest. Great force would be required to cause those injuries. The liver was crushed to a pulp, the kidneys were torn loose from their attachment, the spleen was torn, the pancreas badly bruised and there were tears to the small and large intestines (R 305 - 309). The ribs were fractured. Every major organ of the body suffered some type of injury. There were ten tears inside the vagina (R 310 - 311). It was possible but unlikely that vaginal intercourse caused it; he opined something was inserted (such as a hand) to stretch it to the point of tearing (R 313). It was not an instant death (R 320).

The parties stipulated that Detective Hill could give hearsay testimony about the prior offense to victim Barchie and the state would not call Barchie (R 337 - 38).

Detective Hill investigated a 1982 sexual battery of Tracy Barchie; that victim was age 12 and appellant was 16 (R 339 - 40). The statements taken from Barchie were corroborated by appellant Taylor. Appellant penetrated the victim with a finger and attempted to penetrate her with his penis. He threatened to kill her if she told anybody (R 342). Appellant was convicted of sexual battery. Exhibit 29, the judgment of conviction was introduced without objection (R 344). Exhibit 28, the sexual battery conviction in the instant case was introduced without objection (R 345).

The defense called Corporal Borhoss who worked at the county jail to testify that appellant did not give him a hard time when he was supervising him (R 356 - 365). Sergeant Sharon Smith (R 365 - 371) and Tammy Kirk (R 372 - 377) provided similar testimony.

Otis Allen testified that Geraldine was offering sex for crack and that appellant left with her (R 384). He claimed that he told this to Detective McNamara (R 387). Alvin Thomas last saw appellant when he was seven years old in foster care (R 405). Ollie May Rutlage, grandmother of appellant, testified that Taylor first went into foster care at age seven (R 413). Appellant expressed remorse to her (R 416).

Appellant's brother Stanley Graham testified that his sister has epilepsy (R 421), that appellant's father didn't help raise him (R 420) and that Taylor was in foster care from age seven to sixteen (R 423). Taylor expressed remorse (R 425).

Psychologist Robert Berland testified that he administered an MMPI (R 437) on two occasions (R 443). Berland stated that regarding the first MMPI administered it indicated appellant was trying to hide what was wrong with him (R 454). On the second test administered within the last several days appellant was feeling more pressure and making a greater effort to hide his problems (R 456 - 57). He also gave the WAIS-revised test (R 460); he came out with an average 104 I.Q. (R 463). In some areas appellant functioned like a retarded person and in others like a person of high average intelligence (R 468). He thought there was evidence of brain damage (R 472). This illness did not cause him to commit the crime (R 473). On cross-examination Berland acknowledged that the second MMPI was given while Taylor was in trial the last couple of days in the penalty phase (R 476). Appellant does not have a history of epilepsy (R 479). Taylor had been extremely aggressive, extremely rebellious (R 480). He was placed into foster care with HRS because of ungovernability at age 14 (R 482).

His I.Q. score as a whole was above average (R 485). There was no medical information to support the claim of brain damage (R 485). Taylor is a very angry man, a sociopath (R 486). The witness was "not trying to say that he's a sweet and innocent person who is a victim of his mental illness" (R 488).

Appellant relied on counsel's recommendation not to testify (R 497).

Rebuttal witness Detective McNamara interviewed Otis Allen and Allen did not tell him he heard Geraldine Birch offer sex for rocks. He mentioned no drugs (R 502 - 503).

SUMMARY OF THE ARGUMENT

I. The statutory aggravating factor F.S. 921.141(5)(d) is not unconstitutionally vague. Neither Stringer v. Black, 503 U.S. ___, 17 L.Ed.2d 367 (1992) nor the pending case of Tennessee v. Middlebrooks, ___ U.S. ___, 123 L.Ed.2d 466 (1993) provide relief.

II. The provision of the Florida death penalty statute permitting a majority death recommendation does not violate the Constitution and this Court should adhere to its prior decisions on this point.

III. Appellant's claim that F.S. 921.141 allowing a majority death recommendation is unconstitutional is meritless, the Court has previously rejected the claim and should do so again. The recommendation of the jury at penalty phase is not a verdict.

IV. The lower court did not err in excusing for cause prospective juror Arnaiz; the trial court properly exercised its discretion in concluding that the juror truly was not able to follow the law.

V. The lower court did not err in failing to hold a Neil inquiry as to juror Williams since the record affirmatively reflects a racially-neutral reason for excusal, i.e., the juror's desire not to serve and inability to concentrate because of working two jobs.

VI. No error was committed by the trial court's introduction of photographs of the victims' genitals. The photos

were not gruesome and were relevant to demonstrate the injuries to the victim.

VII. The lower court did not err in permitting testimony by a prosecution witness after the jury returned an 8 to 4 death recommendation. Cf. Engle v. State, 438 So. 2d 803 (Fla. 1983).

VIII. The lower court did not err in instructing the jury, or making a finding, on the HAC factor. Appellant specifically withdrew his objection to the instruction and consequently that claim is procedurally barred. The trial court's finding was appropriate as the evidence of the victim's injuries clearly supports the finding.

IX. The trial court did not commit reversible error since it gave the "catchall" nonstatutory mitigating instruction.

X. The imposition of a death sentence is not disproportionate; there are three valid statutory aggravators and insubstantial mitigating proffered.

ARGUMENT

ISSUE I

WHETHER FLORIDA'S FELONY-MURDER AGGRAVATING CIRCUMSTANCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

Appellant argued below in a motion to declare F.S. 921.141(5)(d) unconstitutional that the "felony murder" aggravator violated the Eighth and Fourteenth Amendments (R 722 - 729). The trial court denied the motion on May 14, 1992 (R 729, R 613).[1]

Appellant contends that the pending case of Tennessee v. Middlebrooks, ____ U.S. ___, 123 L.Ed.2d 466 (1993), supports his view that F.S. 921.141(5)(d) is unconstitutional. Appellee disagrees. The State of Tennessee is the petitioner in that case and the grant of certiorari can only be a good omen to the state since it had suffered an adverse ruling in the lower court and the failure to provide review would have left the state in a final, uncorrectable ruling favorable to the defendant. If appellant were correct, this would be very bad news indeed for the late Larry Joe Johnson who was at first granted relief on this point by a United States District Judge, which order was subsequently reversed by the Eleventh Circuit Court of Appeals. Johnson v. Singletary, 991 F.2d 663, 7 Fla. Law Weekly, Fed C 340 (11th Cir. Case No. 93-2497, May 7, 1993), cert. denied, ___ U.S.

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[1] Appellant did not object to the instruction to be given (R 516).

___, 124 L.Ed.2d 70 (1993). The Court of Appeals explained why Stringer v. Black, 503 U.S. ___, 117 L.Ed.2d 367 (1992) could not provide relief to petitioner.

> In *Stringer v. Black*, 503 U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992), the Supreme Court held that when a sentencing jury, in a weighing state, considers a constitutionally invalid aggravating factor, the appellate courts "may not assume it would have made no difference if the thumb had been removed from death's side of the scale" 503 U.S. at ___, 112 S.Ct. at 1137, 117 L.Ed.2d at 379. The issue in *Stringer* was the jury's consideration of the 'heinous, atrocious, and cruel" aggravating factor. Nothing in *Stringer* indicates that there is any constitutional infirmity in the Florida statute which permits a defendant to be death eligible based upon a felony murder conviction, and to be sentenced to death based upon an aggravating circumstance that duplicates an element of the underlying conviction.
>
> *Stringer* stands for the proposition that if Johnson's jury had considered an invalid aggravating factor, we must assume that that factor affected their weighing process. It does not hold that the consideration of the felony murder aggravating factor in this case is invalid. We hold that *Stringer v. Black* is not an intervening change in the law, which undermines the previous decision in this case, and that Johnson's successive claim constitutes an abuse of the writ.
>
> (991 F.2d at 669)

This Court should continue to reject this claim. See Clark v. State, 443 So. 2d 973, 978 (Fla. 1983); Bertolotti v. State, 534 So.2d 386 (Fla. 1988).[2]

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[2] Appellant cites Porter v. State, 564 So. 2d 1060, 1063 - 64 (Fla. 1990) as one of the decisions that "strongly suggest the opposite result". The discussion therein in Porter pertains to the heightened premeditation requirement of the CCP aggravator;

ISSUE II

WHETHER THE PROVISION OF THE FLORIDA DEATH PENALTY STATUTE ALLOWING A MAJORITY DEATH RECOMMENDATION VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Appellant filed a motion in the lower court to declare F.S. 921.141 unconstitutional because it permits a bare majority of jurors to recommend death (R 700 - 702). Not surprisingly, this motion too was denied (R 702, R 613). Since the United States Supreme Court has upheld Florida's death penalty scheme against attack on the basis that the Constitution should not permit death when there is a jury life recommendation, Spaziano v. Florida, 468 U.S. 447, 82 L.Ed.2d 340 (1984), it is difficult to comprehend why permitting a death sentence with a majority recommending death would be violative of the Constitution.

In any event, appellant has no standing to complain since his jury recommended death by an eight to four vote (R 599, 799).

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appellee finds little suggestion that the felony-murder aggravator is unconstitutional.

Appellant cites Lockhart v. Fretwell, 506 U.S. ___, 122 L.Ed.2d 180, 190, n.4 (1993), wherein the Court declined to accept Fretwell's invitation to decide whether the Eighth Circuit had correctly overruled Collins v. Lockhart, 754 F.2d 258 (8th Cir.), in Perry v. Lockhart, 871 F.2d 1384 (8th Cir.), following the decision in Lowenfield v. Phelps, 484 U.S. 231, 98 L.Ed.2d 568 (1988). That the Court declined now to re-evaluate Collins-Perry when the question was not presented does not pe se suggest that resurrection of Collins is imminent.

Appellant recognizes that this Court has consistently rejected his jury unanimity contention in Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990), James v. State, 453 So. 2d 786, 792 (Fla. 1984), Alvord v. State, 322 So. 2d 533, 536 (Fla. 1975) and Brown v. State, 565 So. 2d 304, 308 (Fla. 1990), but argues they "were wrongly decided as a matter of federal constitutional law." (Brief, p. 36). Presumably, Spaziano v. Florida, supra was also "wrongly decided as a matter of federal constitutional law." Appellee submits that there has been no erroneous decision on this score and the issue need not be revisited unless and until the Unites States Supreme Court rules to the contrary.

ISSUE III

WHETHER THE PROVISION OF FLORIDA STATUTE 921.141(3) ALLOWING A MAJORITY DEATH RECOMMENDATION CONFLICTS WITH RULE 3.440, R.CR.P.

Appellant did not present this claim below to the trial court and consequently the issue has not been preserved for appellate review. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990). Appellant concedes this fact but urges that since he is now asserting facial invalidity of the statue, he may do so ab initio pursuant to Trushin v. State, 425 So. 2d 1126, 1129 - 30 (Fla. 1983) and State v. Johnson, 616 So.2d 1 (Fla. 1993). In State v. Johnson, supra, this Court explained that a facial challenge to a statue's constitutional validity may be raised for the first time on appeal only if the error is fundamental, i.e., "the error must be basic to the judicial decision under review and equivalent to a denial of due process." Ibid. at 3. Since the United States Supreme Court has already held that the Constitution is not violated by the trial court's imposition of a death sentence following a jury life recommendation -- Spaziano v. Florida, -- it cannot be the "equivalent to a denial of due process" to reject Taylor's claim and continue to adhere to the rule that a jury's penalty recommendation is not a verdict.[3] Previously,

[3] As in Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970), this Court should refuse to consider the constitutionality issue sub judice because no fundamental error question is raised. State v. Johnson, supra, at 3.

this Court has consistently rejected challenges that the Florida death penalty statute unconstitutionally seeks to regulate matters of criminal trial and procedure. See Dobbert v. State, 375 So. 2d 1069, 0171 (Fla. 1979); Booker v. State, 397 So. 2d 910, 918 (Fla. 1981); J.L. Smith v. State, 407 So.2d 894, 899 (Fla. 1981); Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1981); Vaught v. State, 410 So.2d 147, 149 (Fla. 1982); Morgan v. State,. 415 So. 2d 6, 11 (Fla. 1982).

In presenting his warmed over complaint ab initio that the "procedural" unanimous verdict rule (3.440) renders the "substantive" statute (921.141[3]) authorizing a majority sentencing recommendation unconstitutional, he fails to explain why this Court's pronouncement in Morgan is inapplicable:

> "To the extent that section 921.141 pertains to procedural matters such as the bifurcated nature of the trial in capital cases, it has been incorporated by reference in Florida Rule of Criminal Procedure 3.780, promulgated by this Court, and is therefore properly adopted."
>
> (415 So. 2d at 11)

Furthermore, in Cannady v. State, 427 So. 2d 723 (Fla. 1983), this Court explained:

> Appellant argues that these provisions concerning the advisory nature of the jury's recommendation apply only when the jury recommends a death sentence and that for the statute to be constitutional a jury recommendation of life must be binding upon the trial court. This argument is premised upon the contention that a jury recommendation of a life sentence is in fact a jury verdict finding a defendant not guilty of aggravated first-degree murder.

> Therefore, appellant argues, the trial judge's imposition of the death sentence after the jury has reached a verdict to recommend a life sentence deprives appellant of his constitutional right to be free from double jeopardy. There is no basis in support of appellant's premise that a jury recommendation of a sentence is the same as a jury verdict as to guilt or innocence. Florida's death penalty law completely separates these two functions by establishing a bifurcated trial system. In the pnealtyphase of the trial, the judge must determine the sentence with the advice and guidance of the jury. *Cooper v. State*,, 336 So. 2d 1133 (Fla. 1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). The statute clearly provides that the jury's recommendation is advisory only regardless of whether the recommendation is for a life sentence or death. The statute's authorizing a trial judge to override a jury recomendation of a life sentence does not place a defendant in double jeopardy in violation of the state and federal constitution. *Johnson v. State*, 393 So. 2d 1069 (Fla. 1980), *cert. denied* 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981); *Phippen v. State*, 389 So. 2d 991 (Fla. 1980); *Douglas v. State*,373 So. 2d 895 (Fla. 1979).
>
> (emphasis supplied)
> (text at 729 - 730)

Additionally, this Court observed in Fleming v. State, 374 So. 2d 954 (Fla. 1979) that:

> "He [appellant] also urges reconsideration of our decision in Alvord v. State, 322 So. 2d 533 (Fla. 1975), asserting that a recommendation of death by a simple majority is unconstitutional."
>
> (text at 957)

The Court rejected the claim. And in the cited decision Alvord, this Court ruled:

[2] Defendant contends that the provisions of the Florida Statute allowing a jury to render an advisory opinion on the question of the sentence to be imposed in a capital case by a simple majority vote violates the defendant's right to a trial by jury guaranteed by the Florida and United States Constitutional. The defendant recognizes that *Johnson v. Louisiana*, 406 U.S. 356, 932 S.Ct. 1620, 32 L.Ed.2d 152, upheld a statute which allowed a conviction to be entered in certain felony cases upon a nine-three plurality verdict of the jury, but says that the court based its decision upon the fact that the Louisiana statute required the concurrence of a "substantial majority" of the jurors. The contention advanced by defendant in the case *sub judice was* rejected by the United States Supreme Court in the *Johnson* case when the Court said:

> "We note at the outset that this Court has never held jury unanimity to be a requisite of due process of law. Indeed, the Court has more than once expressly said that '[i]n criminal cases due process of law is not denied by a state law . . . which dispenses with the necessity of a jury of twelve, or unanimity in the verdict.' *Joran v. Massachusetts* 225 U.S. 167, 1765, 32 S.Ct. 651, 56 L.Ed.2d 1038, 1042 (1912)(dictum). Accord, *Maxwell v. Dow*, 176 U.S. 581, 602, 605, 20 S.Ct. 448, 44 L.Ed. 597, 605, 606 (1900) (dictum)." 406 U.S. at 359, 92 S.Ct. at 1623, 32 L.Ed.2d at 157, 158.

The argument of defendant on unanimous v. majority recommendations was specifically met by this Court in *Watson v. State*, 190 So. 2d 161 (Fla. 1967), when it stated:

> "The provisions of F.S. Section 794.01 and 919.25, F.S.A., authorizing a jury by a majority vote to recommend mercy for a defendant it has found guilty in a capital case are beneficial to the

> defendant. Requirement of a unanimous vote would lessen defendant's chance for mercy. Without these provisions said statutes would result in a defendant found guilty thereunder being automatically sentenced to death. It lies within the province of the Legislature to prescribe the punishment to be imposed upon a person who is found guilty or pleads guilty to an offense as well as the method or manner of its imposition. The power to define what acts shall constitute criminal offenses and what penalties shall be inflicted on offenders is legislative. 14 Am.Jur., Criminal Law, §16. The legislature may authorize a jury to assess punishment. 15 Am. Jury., Criminal Law, §510. It is not necessary in the sentencing phase of a criminal case that the jury's verdict be unanimous where the legislature provides otherwise. The cases cited by the Appellants from other jurisdictions do to construe statutes similar to F.S. Sections 794.01 and 919.23, F.S.A., which require only a majority vote for a recommendation of mercy. There is no provision in our Constitution requiring a unanimous verdict in respect to a recommendation of mercy." (pp. 166, 167)

(322 So. 2d at 536)

Appellant's claim has been rejected and should be rejected again.[4]

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[4] Appellant's reliance on Wright v. State, 586 So. 2d 1024 (Fla. 1991) is unavailing. In Wright this Court concluded that "when it is determined on appeal that the trial court should have accepted a jury's recommendation of life imprisonment pursuant to Tedder, the defendant must be deemed acquitted of the death penalty for double jeopardy purposes." Id. at 1032. While Wright certainly adds an evolutionary link to the Tedder

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN EXCUSING FOR CAUSE PROSPECTIVE JUROR ARNAIZ.

The record reflects that prospective juror Number 49, Ms. Arnaiz was asked what her feelings were about capital punishment and she answered:

> "I just don't believe in it. I'm sorry."

(R 124)

When the defense counsel asked, "Under any circumstances?", she replied:

> 'Well, now your getting me in doubt. It's been going around so I don't know. I don't know."

(R 125)

When asked if she could follow the law in weighing aggravating circumstances, she replied:

> "I probably could now, yes."

The prosecutor challenged the juror for cause, the defense objected and the court ruled:

> "I'm going to grant the motion. She further said she could not impose the death penalty under any circumstances. And then later she said she probably could."

(R 139)

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jurisprudence, it adds nothing to the well-established doctrine that the jury's recommendation at penalty is distinct from the verdict of guilt. An appellate court's determination that life imprisonment is the appropriate sanction, for double jeopardy purposes, does not transmogrify a recommendation into a verdict.

Appellant misperceives the import of Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841 (1985). First of all, it is not dispositive whether a juror after prolonged interrogation at one point suggests an answer that might satisfy the former Witherspoon test. After Witt it is no longer required that a prospective juror make it unmistakably clear that he or she would automatically vote against the death penalty. If a juror gives equivocal or inconsistent responses, it is the responsibility of the trial judge to make a determination whether the prospective juror is able to follow the law. The Witt court referred to Patton v. Yount, 467 U.S. 1025, 81 L.Ed.2d 847 (1984) noting that where a criminal defendant sought to excuse a juror for cause and the trial judge refused, the question was simply "did the juror swear that he could set aside any opinion he might hold and decide the case on the evidence and should the juror's protestations of impartiality have been believed." (emphasis supplied) 83 L.Ed.2d at 851.

The Court explained:

> " . . . determinations of juror bias cannot be reduced to question and answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite

> impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . This is why deference must be paid to the trial judge who sees and hears the juror."
>
> (83 L.Ed.2d at 852 - 53)

In the instant case, the trial judge who saw and heard the ambiguities and equivocations in juror Arnaiz' responses -- and those who review appellate transcripts cannot observe the physical gestures or hear the intonations of the juror -- determined that she could not impartially follow the law. That determination should not be overturned. Cf. A. Green v. State, 583 So. 2d 647, 652 (Fla. 1991) (Because the trial judge sees and hears the prospective jurors, he or she has the ability to assess the candor and the credibility of the answers given to the questions presented). Since the juror challenged had expressed an inability to follow the law (R 125) the trial court did not abuse its discretion in removing her for cause. Johnson v. State, 608 So. 2d 4 (Fla. 1992).

Appellant's claim is without merit.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FAILING TO HOLD A NEIL INQUIRY AS TO JUROR WILLIAMS.

With respect to the excusal of juror Number 31, Mr. Williams, the record reflects that the prosecutor earlier had asked if anyone had had any prior experience with law enforcement where they would hold ill will or harbor feelings against them. Mr. Williams raised his hand and acknowledged such a personal experience (R 38 - 39).

Subsequently, the bailiff reported that juror 32 and another had mentioned having to get off jury duty (R 69). The court made inquiry of Mr. Williams and Williams explained that he had a work hardship, that he had two jobs and his day job was in jeopardy by not being there (R 83). He really couldn't afford to be off a day from work (R 84). Moreover, he would be thinking about other things if he sat on the jury. He didn't think his job would be totally in jeopardy, but was concerned about the income part of it (R 85 - 86). He could still work in the evening at the cleaning service (R 86).

Thereafter, the prosecutor struck Mr. Williams and the following colloquy ensued:

> MR. HANES: Strike Mr. Williams.
>
> MR. LOPEZ: I would ask for a Neal inquiry.
>
> THE COURT: All right. Mr. Williams is black, a black male. We have a black male on the panel?
>
> MR. HANES: Uh-huh.

> THE COURT: I don't find that there is a sufficient showing that this is for anything other than that there is a race neutral reason. I don't find a sufficient showing. And for the record we have on the panel right now a black male somewhere back there, Mr. --
>
> MR. HANES: Number 25, Mr. Waymon.
>
> THE COURT: We have a black female, Ms. Mitchell, and we have a black female Ms. Smith.
>
> MR. LOPEZ: I would ask you to require the State to put on the record their reasons for the challenge.
>
> THE COURT: I'll be very frank with you, I don't think that there has been a sufficient showing to require the State to put a reason on the record.
>
> MR. LOPEZ: Very well. Note my objection.

(R 147 - 148)

Appellant contends that the trial judge failed to make a "Neil" inquiry and indeed she did not. But it also does not matter. The record reflects that prior to the defense objection and request for Neil reason, the prosecutor had volunteered a racially-neutral reason for peremptory challenge:

> MR. HANES: Judge, I had indicated Mr. Williams just because of the employment.
>
> THE COURT: For what?
>
> MR. HANES: For the reason that he said that it would impose on his employment, and he said that he would be thinking about other things during the course of the trial.

(R 141)

The record also reflects that the trial court -- without defense objection -- had excused a black prospective juror Mr.

Miller who had lost a family member in a violent crime (R 57, 73 - 74). Defense counsel erroneously argued that the state was attempting to excuse a black female Ms. Coyle but apologized and withdrew his objection when it was pointed out that Ms. Smith not Ms. Coyle was the black female (R 144 - 145).

The record further reflects that three black jurors ended up deciding the case -- Helen Mitchell, Eloise Smith and Wayman Stewart (R 757, R 147).

On February 18, 1993, this Court decided State v. Johans, 613 So. 2d 1319 (Fla. 1993), wherein the Court established a prospective rule that trial judges must hold a Neil inquiry whenever an objection is raised that a peremptory challenge is being used in a racially discriminatory manner. The instant trail predated Johans and thus the rule is inapplicable. However, the spirit of it has been complied with by the prosecutor's volunteering racially-neutral reasons for excusal. Thus, whether pre-Johans[5] or post-Johans, there is no reversible error. While Circuit Judge Diana Allen may be subject to some criticism for failing to anticipate the Johans ruling a year earlier in this resentencing proceeding, certainly nothing in the "Neil" jurisprudence penalizes the state for the prosecutor's pre-emptive voluntary exposition of racially neutral reasons for

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[5] Under pre-Johans law, the trial court was correct that Taylor failed to show a "strong likelihood" that venire members were challenged solely because of race.

peremptory excusal. If there is something in the jurisprudence which so penalizes, then perhaps the entire "Neil" line of cases should be re-examined, especially, where, as here, it appears that the defense was not legitimately concerned with prejudice by the prosecutor but merely looking for the first opportunity to inject race into the proceedings (having first erroneously urging that Ms. Coyle was a black excusal). The trial court's ability to see and hear what goes on before it should be respected; no abuse of discretion has been shown. See Reed v. State, 560 So. 2d 203, 206 (Fla. 1990) (we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a "feel" for what is going on in the jury selection process).

ISSUE VI

WHETHER THE LOWER COURT ERRED REVERSIBLY IN ALLOWING THE STATE TO INTRODUCE A GRAPHIC PHOTOGRAPH OF THE VICTIM'S GENITALS.

> "Those whose work products are murdered human beings should expert to be confronted by photographs of their accomplishments." Henderson v. State, 463 So. 2d 196, 200 (Fla. 1985).

The test of admissibility of photographic evidence is relevance. State v. Wright, 265 So. 2d 361 (Fla. 1972); Engle v. State, 438 So. 2d 803 (Fla. 1983); Welty v. State, 402 So. 2d 1159 (Fla. 1981); Booker v. State, 397 So. 2d 910 (Fla. 1981); Straight v. State, 397 So. 2d 903 (Fla. 1981); Jackson v. State, 359 So. 2d 1190 (Fla. 1978).

The introduction of photographic evidence is within the trial court's discretion which will not be disturbed on appeal unless there is a showing of clear abuse. Duest v. State, 462 So. 2d 446 (Fla. 1985); Brown v. State, 526 So. 2d 903 (Fla. 1988); Jackson v. State, 545 So. 2d 260 (Fla. 1989); Tompkins v. Dugger, 549 So. 2d 1370 (Fla. 1989).

This Court has routinely allowed the introduction into evidence photographs used to identify the victim or used by the medical examiner to illustrate wounds. Haliburton v. State, 561 So. 2d 248 (Fla. 1990): Randolph v. State, 562 So. 2d 331 (Fla. 1990).

Appellant acknowledges that this Court has been lenient in allowing into evidence photographic evidence used to identify the victim and used by the medical examiner to illustrate the wounds.

Haliburton v. State, 561 So. 2d 248 (Fla. 1990); Randolph v. State, 562 So. 2d 331 (Fla. 1990).

Appellant seems dissatisfied with the standard and precedents established by this Court and urges instead that the Court follow the district court decisions in Hoffert v. State, 559 So. 2d 1246 (Fla. 4th DCA 1990) and Gamaco Corp. v. Faith, 550 F.2d 482 (Fla. 1989). The Hoffert court cited no legal authority in its discussion of the admissibility of photographs and it appears erroneously to adopt a necessity test instead of a relevancy test enunciated in State v. Wright, and other cases cited above. In Gamaco the court found that particularly gruesome and inflammatory photos of a nearly severed foot, while perhaps tangentially relevant to the case, their relevance was overwhelming outweighed by their gruesome and inflammatory nature.

Appellant contends that the Exhibit 24 photo was gruesome and inflammatory.[6] Exhibit 24 was unquestionably relevant and aided the medical examiner in explaining the serious injuries inflicted upon the victim, including the ten tears to the vagina (R 310 - 313). The jury had to consider the victim's injuries for determining the applicability of the HAC factor. Gruesome may be -- like beauty -- in the eye of the beholder but the

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[6] The dictionary defines gruesome as "causing horror and repugnance", "frightful and shocking". Inflammatory is defined as "tending to arouse or excite anger or violence".

challenged exhibit is not even comparable to the gory, blood-filled photographs routinely permitted by the courts. And if the color photos depicting the gunshot wounds to the head were not impermissible in Burns v. State, 609 So. 2d 600 (Fla. 1992) the non-gory photo disputed here cannot be deemed erroneously introduced.

This claim is meritless.

ISSUE VII

WHETHER THE LOWER COURT ERRED IN ALLOWING THE STATE TO INTRODUCE REBUTTAL TESTIMONY AFTER THE JURY HAD RETURNED ITS RECOMMENDATION OF DEATH.

After the jury had returned its 8 - 4 recommendation of death the prosecutor sought, and the lower court allowed the prosecutor, to present the testimony of deputy sheriff Charles Kelly to the trial court that on June 9, appellant had attacked him and that a razor blade was subsequently recovered from him (R 631 - 634). As this Court well knows, trial judges routinely have access to information, most frequently in P.S.I.s, that the jury does not. See, e.g., Engle v. State, 438 So. 2d 803 (Fla. 1983).

In the instant case fortunately, the trial court was made aware in time that the argument advanced by the defense that Taylor was not dangerous in a prison setting was a false one; no undue prejudice occurred to appellant since the jury, unaware of the Kelly incident, was not fooled anyway, as evidenced by its recommendation.

Appellant cites Corbett v. State 602 So.2d 1240 (Fla. 1992) and Craig v. State, ___ So. 2d ___, 18 Fla. Law Weekly S 293, neither of which is apposite. Corbett was concerned with the same judge being the one who hears the evidence as imposes sentence; there was no substitute judge in this case. Craig too was a substitute judge case and this Court acknowledged there could be no problem if the original trial judge had resentenced Craig and the second judge erred in not empaneling a new jury.

In the instant case the state could not introduce the Kelly testimony since the incident occurred after the jury recommendation. The evidence was properly admitted and considered by the lower court.

ISSUE VIII

WHETHER THE LOWER COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE INTENT ELEMENT OF THE HAC AGGRAVATING FACTOR AND ERRED IN FINDING THIS FACTOR.

The trial court instructed the jury:

> "3. The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. 'Heinous' means extremely wicked or shocking evil. 'Atrocious' means outrageously wicked and vile. 'Cruel' means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim. Events occurring after the victim dies or loses consciousness should not be considered by you to establish this crime was especially heinous, atrocious, or cruel."

(R 778, R 586)

There is no requirement from either this Court or any federal court -- including the United States Supreme Court -- that anything more be given.

Appellant submitted defendant's instruction #16 which provided:

> "If you find that the victim suffered but the defendant did not intend such suffering to occur, then that suffering is not relevant to the heinous, atrocious or cruel nature of the offense. You may infer the intent to cause suffering from the likelihood the method used to kill the victim would cause suffering."

(R 795)

However, at the jury charge conference, appellant specifically withdrew that requested instruction:

> "Mr. Lopez: I -- concerning 16 and 17. I'd ask that you -- I withdrew my request that you give -- that you give those."

(R 528)

Regretfully, Taylor's claim regarding the jury instruction has been procedurally defaulted and not preserved for appellate review. Cf. Ponticelli v. State, ___ So. 2d ___, 18 Fla. Law Weekly S309 (Fla. 1993); Happ v. State, ___ So. 2d ___ 18 Fla. Law Weekly S 305 (Fla. 1993); Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992); Ragsdale v. State, 609 So. 2d 10 (Fla. 1992); Sochor v. State, ___ So. 2d ___, 18 Fla. Law Weekly S 273 (Fla. 1993). Appellee declines appellant's invitation to consider the merits of a procedurally barred claim.

Appellant next complains about the trial court's finding of the presence of the HAC factor. The trial court's order recites:

> The victim died of massive internal injuries. The injuries occurred prior to death as evidenced by the large amount of internal bleeding. There is no evidence as to when in the course of the brutal attack that the victim loss [sic] consciousness. There is evidence that the first injury inflicted was choking of the victim. The victim's larynx was crushed. Every major organ in the victim's body was either crushed, lacerated or torn from its position within the body. Many of the victim's ribs were broken, some of which then penetrated or tore major organs. The victim's dentures were broken in half and were found outside of the body. There was a bit mark on the victim's arm and the victim's body was dragged the length of the dugout where the attack occurred. The victim's vagina was lacerated and the outside

> of the vaginal are sustained a large tear. There is no evidence to suggest that the victim loss [sic] consciousness until this brutal attack began and any one of the injuries sustained would have been powerful enough and delivered with such force that the victim would have been aware of her impending death at the hands of her attacker. This circumstance was proved beyond a reasonable doubt.
>
> (R 813 - 14)

Appellee does not understand appellant to be complaining that the facts as found are wrong or unsupported by the evidence. Rather, Taylor argues, it was insufficiently established as to his intent regarding this aggravating factor.

To the extent that appellant is urging that it must be found that appellant had the intent to torture the victim, that claim must be rejected in light of Hitchcock v. State, 578 So. 2d 685, 692 (Fla. 1990).[7]

> "That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious, or cruel. This aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's. Stano v. State, 460 So. 2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985).

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[7] The United States subsequently vacated the judgment in Hitchcock v. Florida, ___ U.S. ___, 120 L.Ed.2d 892 (1992) and remanded for reconsideration in light of Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854. This Court thereafter directed a new sentencing proceeding because of the defective instruction. Hitchcock v. State, 614 So. 2d 483 (Fla. 1993).

Even if the Court were to require that this aggravator must be "meant to be deliberately" painful -- see Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990) -- Taylor is not entitled to relief as any sentient human being would recognize that the instant beating and stomping resulting in the destruction of every major organ in the body was intended to be painful.[8]

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[8] Appellant cites Porter v. State, 564 So. 2d 1060 (Fla. 1990); Omelus v. State, 584 So.2d 563 (Fla. 1991); Santos v. State, 591 So. 2d 160 (Fla. 1991) and Robertson v. State, 611 So. 2d 1228 (Fla. 1993) without examining their context. Omelus involved a vicarious killing -- the defendant was not present and thought that actual killer would painlessly use a gun rather than a knife. The other three cases all involved homicide by gunshot wherein a reasonable person would not expect a high degree of pain or suffering. Where the homicide occurs in a manner other than a sudden instantaneous gunshot HAC can be established by evidence of suffering of the victim irrespective of appellant's stated intent.

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY REGARDING SPECIFIC NONSTATUTORY MITIGATING FACTORS.

The record reflects that appellant submitted defendant's instruction number 8 regarding the jury's consideration of mitigating circumstances relating to his "age, character, environment, mentality, life and background or any aspect of the crime itself" (R 788). The court denied the request to give the proposed instruction (R 533 - 34) but did instruct the jury:

> "Among the mitigating circumstances you may consider if established by the evidence, are:
>
> * * *
>
> (2) Any other aspect of the defendant's character, record or background, and any other circumstances of the offense."

(R 778, R 587)

Appellant has failed to cite a single Florida case that holds the trial judge commits reversible error in giving the standard catchall instruction to embrace whatever nonstatutory mitigation a defendant wants to urge.

Appellant cites Riley v. Wainwright, 517 So. 2d 656, 658 (Fla. 1987), quoting from Floyd v. State, 497 So. 2d 1211 (1987). The Floyd court held that it was error not to give any instruction on what could be considered in mitigation. Floyd was granted post-conviction relief because of the retroactive effect given to Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 (1978).

There is no Lockett error sub judice. The judge and jury were permitted to consider and did consider whatever nonstatutory mitigating the defense offered.

As stated in Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991):

> [3] Likewise we find no merit in Robinson's next argument, that the trial court erred in refusing to instruct the jury on specific nonstatutory mitigating circumstances. Robinson suggests that the "catch-all" instruction, which explains to the jury that they may consider any aspect of the defendant's character or record and any other circumstances of the offense, denigrates the importance of the nonstatutory mitigating circumstances. We do not agree that the instruction requires or encourages jurors to consider everything within these categories as a single factor, thereby distorting the weighing process. *Jackson v. State*, 530 So. 2d 269, 273 (Fla. 1988), *cert. denied*, 488 U.S. 1050, 109 S.Ct. 882 (102 L.Ed.2d 1005 (19890. The instruction is not ambiguous, and we find no reasonable likelihood that the jurors understood the instruction to prevent them from considering and weighing any "constitutionally relevant evidence." *Boyde v. California*, ___ U.S. ___, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990).

Accord, Carter v. State, 576 So. 2d 1291 (Fla. 1989).

Significantly, appellant makes no complaint -- nor could he -- that the trial court failed to consider these matters since the sentencing order clearly explains why so little weight should be attached to them (R 812 - 817).

ISSUE X

WHETHER APPELLANT'S SENTENCE OF DEATH SHOULD BE REDUCED ON PROPORTIONALITY GROUNDS.

The trial court properly found three valid aggravating factors (prior felony conviction involving force or violence in 1982, homicide committed during a sexual battery, and especially heinous, atrocious, or cruel). As stated, supra, appellee disagrees with Taylor's erasure of the felony-murder" and HAC aggravators. With three valid statutory aggravators and the insubstantial mitigating considered by the trial court (R 812 - 817) the imposition of a sentence of death is not disproportionate.

See Dougan v. State, 595 So. 2d 1 (Fla. 1982) (rejecting a disproportionality argument where defendant was not mentally deficient and suffered no racial discrimination uncommon to all of the black community); Watts v. State, 593 So. 2d 198 (Fla. 1992) (death not disproportionate where three aggravating factors were weighed against twenty-two-year-old defendant with low I.Q.); Freeman v. State, 563 So. 2d 73 (Fla. 1990) (death not disproportional when two aggravating circumstances were weighed against mitigating evidence of low intelligence and abused childhood); Kight v. State, 512 So. 2d 922 (Fla. 1987) (death penalty proportionately imposed with two aggravating circumstances despite evidence of mental retardation and deprived childhood); Wickham v. State, 593 So. 2d 191 (Fla. 1991) (rejecting a disproportionality contention despite the trial

court's failure to find and weigh abusive childhood, alcoholism, history of hospitalization for mental disorders including schizophrenia; proportionality cases urged by the defense were domestic violence, heat of passion cases or severely mentally disturbed defendants).

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing" has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 15th day of October, 1993.

OF COUNSEL FOR APPELLEE