IN THE SUPREME COURT OF FLORIDA

SEAN PATRICK ESTY,

Appellant,

v. CASE NO. 80,598

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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

ATTORNEY FOR APPELLANT
FLA. BAR NO. 271543

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This is a capital case. The record on appeal will be referred to by the letter "R."

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Escambia County charged the appellant, Sean Esty, with one count of first degree murder (R 1801). The case proceeded in the normal course for matters of this type, and during the pre-trial period, the state or Esty filed the following motions or notices:

1. Notice of Intent to Rely on Evidence Pursuant to 90.404(2), Florida Statutes (R 2038).

2. Motion in Limine to prevent the state from mentioning or eliciting any evidence of a sexual relationship between the defendant and victim (R 2078-79). Denied (R 559).

3. Motion to Suppress evidence seized pursuant to a search warrant (R 1895). Denied (R 2058).

Esty went to trial before the Honorable Judge Michael Jones and was found guilty as charged (T 2201). The jury, after hearing further evidence, argument, and law in the penalty phase portion of the trial, recommended the court impose a life sentence on the defendant without the possibility of parole for 25 years (R 2209).

The court rejected that verdict. In sentencing Esty to death, it found in aggravation:

> 1. The murder was committed in an especially heinous, atrocious, and cruel manner.
>
> 2. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(R 2379-80).

In mitigation, the court found:

> 1. The defendant had no significant history of prior criminal activity.

(R 2380).

The court, in an extensive sentencing order, rejected all the equally extensive evidence Esty offered to mitigate a death sentence (R 2380-2396).

This appeal follows.

STATEMENT OF THE FACTS

Lauren Ramsey, a fifteen year old high school student, was found dead about 1 p.m. on December 24, 1991 at Langdon Battery, a World War II gun emplacement which was part of a federal recreation area in Pensacola (R 1017). At the subsequent trial of Sean Esty for her murder, a significant dispute arose about whether she had been dead 24 or 36 hours when her body was discovered (R 1141, 1164, 1294).

At that time, Sean was 18 years old and had graduated from Pensacola High School the previous spring (R 1199, 1457). He and Lauren had been in an ROTC unit at the high school, and during the year before her death, the two had become friends. Actually they were more than that because on at least one occasion, they had had sexual intercourse (R 1244). The boy had also been caught in Lauren's bedroom in December 1990, fully clothed (R 814, 823). At another time, Lauren disappeared and her mother called Esty's mother who found her at her home. She drove the girl back to her house (R 822).

In time, Sean's interest in Lauren waned, but hers did not (R 651, 667). Actually, it did or at least she found other boys to chase. In particular, she became interested in one of Sean's friends, a Wade Wallace (R 1103-1104). Wade, however, had a girl-friend, Angela, but this pair had a lot of fights, and during the time between their spats, Wade would go to Joy Williams, a friend of Lauren, for solace (R 1089). This on again, off again relationship put a lot of strain on Lauren and Joy, so during English class they passed notes hatching plots

to get Wade and Angie to break up (R 1088, 1104). Although excluded at trial, the substance of the plot Lauren liked best was that she would sleep with Wade then claim she was pregnant by him (R 1094-95, 1101). Anyway, Joy gave Wade a note on Halloween when she saw him at a shopping mall (R 1105), and he became upset after reading it (R 1201).

One day about the middle of November 1991, Sean was driving about Pensacola, and during his wanderings he saw Lauren walking along side the rode (R 1244). He picked her up, they talked for a while about old times, and eventually they had sex (R 1245). He felt guilty about this, having promised himself that he would not "let that happen again." (R 1246)

A month later, Lauren, not feeling well, went to her doctor. On Friday, December 20, she learned she was pregnant, and the physician warned her that if she had not told her mother of her condition by Monday, he would (R 803). She was very angry at him probably because she did not want her parent to learn of the pregnancy (R 804). She was last seen alive about 9 p.m. on Sunday December 22 when she went to bed at her grandmother's house (R 816).[1] As mentioned, her body was found almost two days later.

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[1]Her grandmother lived almost next door to Lauren and her mother, and she would frequently spend the night with her relative (R 814-15).

Sean Esty had recently been an honors student at Pensacola High School (R 1510-1512).[2] Although bright, he was emotionally immature and very insecure (R 1455). He had several friends his age who called themselves the "War Pigs," (R 684) and they would get together often and play "boffo." This was a swordfighting sort of game. Each player made a padded "sword" from PVC pipe and using that instrument, the boys would go at each other (R 685). They played regularly and almost spontaneously whenever the mood struck them (R 1212). As might be expected, they occasionally were cut, bruised, and scratched during these matches (R 686). The youths also collected various sorts of knives (usually large), swords, and oriental defense weapons (R 694-95).

Sean got off work from his job at a steak house about two p.m. on December 22, 1991 (R 1205). For the next several hours he wandered about. He went home, took a shower, played "Dungeons and Dragons" with his friends, drove about town, and took Lisa Bolton, a girl he knew, to a teen club (R 1206-1208). At some point, he picked up Wade Wallace, and the pair went to a waffle house where Angela, Wallace's girlfriend, worked. They got the keys to her apartment from her, and then went outside where the boys "boffoed" for about fifteen or twenty minutes (R 1211-12). During this play, he was cut on the back

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[2]During the penalty phase portion of his trial, a psychologist testified that the defendant had an IQ 123 but more probably of about 143 (R 1454).

of his hand (R 1213). Wrapping an old shirt around the wound to stop the bleeding, he got in his car and drove about town some more. Wade had taken Angela's car and left Esty (R 1212). Shortly after midnight, he returned to the club to pick up Lisa, and while there he ran into Wallace (R 1216). Esty took her home, talked with her for a while, then returned to Angela's apartment about 2 a.m. and found Wade playing Nintendo (R 1218-19). Sean asked to "crash" on the couch, and he slept there for a couple of hours or until Wade woke him at 5:30 a.m. (R 1218-19). The defendant finally went home about 6:00 a.m. where he slept for several more hours.

Later that day, he took Lisa to her doctor, and Sean himself also went to a physician to have the wound he had received the night before taken care of (R 1222). He spent the next couple of days finishing his Christmas shopping, visiting friends, and staying at home. During Christmas dinner, Wade Wallace called Esty and asked to borrow a pair of his ROTC boots (R 1227). Sean placed them on the front porch (R 1227), and a short time later, his mother found a pair on the side of the house (R 1228). Those boots had blood stains on them consistent with Lauren Ramsey's blood type (R 933).[3]

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[3]Forty percent of the general population have the same enzyme in their blood as that found in the blood on the boot (R 934).

Ramsey had been severely beaten about the head with a blunt object (R 857, 878). She had also been stabbed once through the chest, puncturing a lung but missing the heart (R 860). Found near the body was a broken baseball bat that had belonged to Esty (R 615, 714). A butcher knife was also discovered close to Ramsey (R 602). When the police searched the defendant's car, they found a sales receipt from a grocery store for a butcher knife (R 746). The police also seized a trench coat from Esty's bedroom, and on its bottom were several blood spots which when tested were of the same type as Ramsey's blood (R 979).[4]

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[4]Although the police searched the crime scene area when they found Lauren's body, they did not seize the bat until the next day (R 631). Also, they did not find a piece of Christmas wrapping paper which had the words "To Sean love Lauren" written on it. That was found some time in January by a civilian (R 636). The police, sometime after the murder, found a machete in the brush near the murder (R 757).

SUMMARY OF THE ARGUMENT

Esty presents 9 guilt phase issues and 3 penalty phase arguments for this court to consider.

Issue I. The police applied for and obtained a warrant to search Esty's home. The supporting affidavit, however, failed to include several facts, some of which the trial court acknowledged should have been included. When that information was included there would have arisen a substantial possibility that a reasonable magistrate would not have probable cause to issue the search warrant.

Issue II. Esty challenged prospective juror Johnson because he could not read. The court erred in not excusing him because in a capital case, the ability to read is virtually required. That is, because Rule 3.390 Fla. R. Crim. P. requires the jurors be given the written instructions in capital cases, Johnson's independence as a juror could not have been assured. Rather than reading what the law said, as the rule contemplates, he would have had to rely on what others said it was. Such a disability in a capital cases was too significant to ignore, and the court erred in not excusing this prospective juror for cause.

Issue III. The defendant was arrested in January 1992 for the murder of Lauren Ramsey that had occurred only weeks earlier. He went to trial barely six months later. In the interim, there apparently was a significant amount of publicity about the case because 76 percent of the venire had heard about it. Such knowledge, while not being enough by itself to justify a

change of venue, when coupled with the short time between the murder and trial, the inherently inflammatory nature of the crime, the incorrect recollection of the facts by several members of the venire, and defense counsel's dissatisfaction with his jury, required that the trial court move the trial to a different community.

Issue IV. Finding a motive for why Esty would want to kill Ramsey posed a problem for the state. It decided that he wanted her dead because he had gotten her pregnant, and her mother would be upset. To prove this reason, the state presented evidence that Esty had had sexual intercourse with Ramsey a month before her death. It also had a witness tell the jury that several months earlier Esty had wanted him to sleep with her out of spite. None of this bad character evidence had any legitimate relevance to this case, having occurred either a month or several months before the murder. None of the evidence was naturally or inextricably connected with the homicide because there is no proof Esty knew Ramsey was pregnant (at least not before her death). Without such knowledge, Esty had no explainable reason for killing Ramsey, so all the testimony concerning his sexual activity with Ramsey or what he wanted done to her had no relevance except to exhibit his bad character.

Issue V. As just mentioned, there was no evidence Esty knew Ramsey was pregnant, or at least he did not know she was until after her death. Hence, that fact had no relevance to this case and only emphasized the defendant's bad character.

While defense counsel did not object to this testimony, it was nevertheless fundamental error to admit it. That Ramsey was pregnant permeated this entire trial and gave the state's case the motive it otherwise would not have had. Without it the prosecutor would have had an exceedingly difficult time proving to the jury's satisfaction that Esty killed her, or if he did, he committed the homicide with a premeditated intent.

Issue VI. Over defense objection, the court let the state elicit testimony from its DNA expert that only 2 percent of the population had a blood type similar to that found on the coat seized from Esty's room. Lauren Ramsey was within that small number of people. The court erred in letting this expert give this evidence because it refused to let the defendant conduct the voir dire examination of the witness as required by Section 90.705(2) Fla. Stats. That is, when Esty challenged the expert's conclusion because he had not laid a proper predicate for his testimony, the court should have required the state to establish the basis for his conclusion. Because it never did, this witness' testimony may have been given more weight than it deserved. It was therefore error for the court to have admitted it.

Issue VII. The state wanted to call as a rebuttal witness an expert who would have disputed the defense contention that Ramsey had been dead for less than a day before her body was found. Defense counsel objected to this witness testifying because the state had not promptly disclosed him as required by Rule 3.220 Fla. R. Crim. P. The court, rather than conducting

the appropriate inquiry, simply told counsel to talk with the expert. Counsel objected to that solution because while he could certainly do as the court asked, without his expert he would not know what questions to ask. The court, therefore, erred by forcing counsel to continue with the trial and particularly to examine this expert without affording him a realistic opportunity to prepare to meet the state's case.

Issue VIII. During its closing argument, the state told the jury that Esty was a "dangerous, vicious, cold-blooded murderer and in our society the police cannot protect us from people like that and the judges cannot protect us and the prosecutors cannot protect us." Although the court sustained the defendant's objection, its curative instruction was too weak given the tenuous nature of the state's circumstantial case. Besides, as this court has recognized, such emergency guidance to the jury is notoriously ineffective.

Issue IX. Over defense objection, the court gave the standard jury instruction on reasonable doubt. That was error because the jurors could have, based on that guidance, have convicted Esty of murder when they had a reasonable doubt of his guilt but nevertheless had an abiding belief he had committed the charged crime.

Issue X. The court found that Esty committed the murder in a cold, calculated and premeditated manner without any moral or legal justification. Most of the facts it used to support this finding, however, have no basis in the record and reflect more

the sinister vision conjured by the trial court than what the evidence proves.

Issue XI. The jury recommended that Esty spend the rest of his life in prison but the court overrode it and sentenced him to death. It erred in doing so because there was an abundant amount of evidence presented that reasonably justified the jury's verdict. Esty is an unusually bright young man who had uniformly excelled at whatever he attempted. His friends and neighbors liked him, his teachers viewed him as a bright capable student, and political and military leaders congratulated him on his meritorious achievements. Contrary to the court's deliberate efforts to ignore the wealth of mitigating evidence, this court should reverse the trial court's sentence and remand for imposition of a life sentence.

Issue XII. Under this Court's decision in Ellis v. State, 18 Fla. L. Weekly S417 (Fla. July 1, 1993) the court erred when it summarily rejected the defendant's age of 18 as of any mitigating value. It compounded that error when it failed to further consider the uncontradicted evidence that Esty was emotional immature and very insecure for his age. When in a stressful situation, these weaknesses would manifest themselves in inappropriate emotional responses and behavior.

ARGUMENT

ISSUE I

THE COURT ERRED IN DENYING ESTY'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT, IN VIOLATION OF HIS FOURTH AMENDMENT RIGHTS.

Shortly after Esty's arrest, the police applied for and obtained a warrant to search his house (R 1818-25). As a result, they seized a pair of his boots and a black coat (R), which proved crucial in establishing the state's case against him. Before trial, he asked the court to suppress fruits of that search, and after a hearing and argument on the matter, the court denied the motion (R 2058). The court did, however, recognize some omissions and inaccuracies in the affidavit in support of the warrant, which will be discussed later.

For purposes of this issue, the key part of the affidavit relevant to the probable cause determination is found on (R 1810-14). To focus Esty's argument, he has summarized those findings and placed them into two groups:

Group A

1. At the murder scene was found a knife (Ecko brand) with no blood on it, and a baseball bat handle (painted black with pink markings).

2. A Stephen Joy saw a small gray vehicle speed away from the crime scene about 11 p.m. on the night of the murder without its lights on.

3. On December 22, 1991 Lauren Ramsey told her current boyfriend that she was going to meet with an ex-boyfriend, the

father of the child and discuss the possibility of obtaining an abortion. She did not tell him who the father of her child was.

4. Esty and Ramsey had had sexual relations six weeks before December 23, 1991.

5. Whips, knives, handcuffs, and a baseball bat painted black with pink markings on it were seen in Esty's car.

6. When angry, Esty could not control himself. On one occasion, he had punched his fist through a glass window. Weapons had also been seen in his silver/gray Mazda 626. Esty had also in the past made life threatening telephone calls to his former girlfriend.

7. About 12:15 a.m. on December 23rd, Esty picked up Lisa Bolton, his current girlfriend, from Seville Quarter. She notice that he had a large cut on the back of his hand, and there was blood on his boot. When the defendant had dropped Bolton off several hours earlier he had been wearing tennis shoes. Esty said he had cut his hand "boffoing" with Wade Wallace.

8. Ramsey had purchased a small "Troll" doll as a Christmas present for Esty on November 28, 1991 and had wrapped it in a Mickey Mouse paper. A torn sheet of such paper was found at the crime scene with the words "To Sean Love, Lauren" written on it.

9. Esty had admitted having sexual relations with Ramsey. He also had a bad temper and had once grabbed her by the neck and slammed her against his car when she had scratched it.

Group B.

1. Wade Wallace was a close friend of Esty's. A week before the murder he said the defendant had told him that Ramsey was pregnant and he was concerned he might be the father. He also said he did not know how to handle Ramsey but that he would take care of the situation.

2. Some time later, Esty said that he needed to meet with Ramsey, but had not done so.

3. About 9:30 p.m. on December 22, 1991, Wallace and Esty had a boffo match. He saw no injury on Esty. Later, he saw Esty's car going to the beach. Two hours later, he saw the defendant at the Seville with a cut hand, which he claimed he got while having the boffo match with Wallace.

4. Esty told Wallace that he had "taken care of his problem."

The information in the affidavit has been broken into two groups because the statements comprising Group A, while arguably suggesting that Esty was involved with Ramsey's, do not provide sufficient probable cause to lead a person of reasonable prudence to believe he had murdered her. The crucial information comes from Wallace's statements, and that is found in Group B. When Wallace reported that Esty knew Ramsey was pregnant several days before her death, that he would "take care of the situation," and that he had in fact had done so, then even a defense lawyer would have to admit the state had established the requisite level of suspicion to justify issuing a warrant.

The problem with the affidavit, though, is that the police made some crucial misstatements, some of which the court recognized, and some which it should have but did not. Had it done so, as the law requires, there would have arisen a substantial possibility that the issuing magistrate would have found that the police had failed to provide sufficient probable cause to search Esty's house.

Specifically, the police failed to tell the court when it asked for the warrant that Wade Wallace had severe credibility problems. He was, in fact, inherently such a non-credible witness that the state never called him at trial, even though, if the statements attributed to him in the affidavit are true, he would have provided the most damning evidence against Esty.

The law in this area was neatly summarized by the First District Court of Appeal in State v. Van Pieterson, 550 So. 2d 1162 (Fla. 1st DCA 1989). In that case, the police applied for and obtained a search warrant authorizing them to search the defendant's house for evidence that would link him with the death of a third person who had taken a fatal drug overdose. The affidavit supporting the probable cause determination, related that a Jeff Neal, a person with " a prior arrest history of drug related drug arrests," had purchased cocaine from the defendant previously and had bought the drug from him that caused the victim's death. The affidavit, however, omitted the crucial facts that before Neal made his incriminating statement regarding Van Pieterson the police had given him a grant of immunity. They also had promised, after

they had gotten Neal's story, that they would not charge him with murder if he helped them make a controlled buy from the defendant. Neal agreed, but the defendant was never at home when they tried to make the transaction.

The trial court granted Van Pieterson's motion to suppress, and the First District affirmed. It did so because the affidavit had not mentioned anything about the promises of immunity and non arrest for murder. It also failed to include the conflicting versions Neal had given regarding the victim's death. Such omissions were significant because the court found that "had the magistrate been apprised of these omissions from the warrant affidavit, [there was a substantial possibility] he would not have found that the affidavit provided sufficient probable cause for issuance of the warrant because of the lack of sufficient corroboration of Neal's statements." Id. at 1164.

The appellate court also found that the good faith exception did not apply in that case because "Neal's conflicting statements to Officer Barton regarding his knowledge of the circumstances surrounding Sharon's death should have given the policeman reason to doubt Neal's veracity. Furthermore, simply naming Neal as the informant without some independent corroboration was insufficient to establish his credibility and reliability." The court reached this result by relying on a Third District case which had held that the "good faith exception [was] inapplicable to a case where the affidavit for search warrant contained no information

regarding the informant's credibility and no facts showing independent police corroboration." Vasque v. State, 491 So.2d 297 (Fla. 3d DCA 1986).

In this case, the court considered, as material omissions, that:

1. Ramsey had told her current boy friend that she was going to see her ex-boyfriend who was the father of her child and who had been in jail for two days or had been in trouble with the law. Esty had neither been in jail or in trouble with the law (R 2055).

2. The Mickey Mouse wrapping (which had the words "To Sean, love Laura" written on it) had been found by a civilian several days after the police had searched the murder scene rather than a law enforcement officer (R 2056).

The court rejected Esty's other points as having been "either a knowing or willful fraud on the Court or an omission of such evidence that was so material as to affect the outcome of the Court's determination of probable cause." (R 2057) In light of Van Pieterson, that conclusion was error.

It was error because omitting the evidence casting doubt on the veracity of Wallace's testimony created a substantial question of whether the issuing magistrate would have found probable cause justify the search of Esty's house. That is, the police never included in their affidavit that Wallace had been given use immunity for his statement virtually damning the defendant as Ramsey's murderer. It likewise never included the fact that Wallace had given inconsistent stories about what he

knew about Ramsey's death, that he had had sexual relations with Ramsey (R 1969), that he had been recently arrested (R 1970), that he had gotten in trouble with the law for carrying a baseball bat, that he had committed acts of vandalism (R 2019-20), that he commonly carried knives (R 2008), and that it was not until the police confronted him with his inconsistent stories that he told the police that Esty had told "him that he had taken care of his problem." (R 1976) The police also never mentioned that Wallace had refused to take a polygraph test (R 1979).[5]

The police, of course, said what Wallace told them was corroborated by other people, but that was deceptive. For example, he said he had not caused Esty's hand injury, which Lisa Bolton verified at least to the extent that she saw the defendant's injury. How he got it, however, remained unverified.

The case also was more muddied than the state alleged. Others beside Esty had hit or bruised Ramsey (R 1971-72, 1987, 1998). She was promiscuous (R 1973). She had a reputation for lying (R 1973), which apparently led the police to believe, without any reason on their part or hers, she was covering for

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[5]One would think that in light of what the state alleged Wallace said in the affidavit that he would have been the state's star witness at Esty's trial. It never called him, suggesting that even the state had such strong doubts about his credibility that it rather risked relying solely on circumstantial evidence to convict the defendant than the very damaging statements Wallace supposedly made.

Esty (R 1970). In fact, she probably was protecting someone other than him because she said she was going to see an ex-boyfriend who had just gotten out of jail (R 1969).[6]

The police also never corroborated Steven Joy's important statement that on the night of the murder he "was in a motor vehicle which leads towards the crime scene [and that] he saw a small grey vehicle leaving the scene which turned its lights out and drove away at a high rate of speed." (R 1810) The police, in fact, never talked with him and we have no idea why they believed him except that it tended to support their case against Esty (R 1962).

In short, the police talked to a lot of people in this case who apparently believed Esty was the father of Ramsey's child (R 1969). As might be expected among teenagers, rumor, innuendo, and gossip was the source of much of what the police heard. Few details were confirmed. For example, one of the officers who drafted the affidavit explained why he had not included the fact that Wallace had had sex with Ramsey. "But he [Wallace] wasn't alleged to be the father as other people had said Mr. Esty probably was." (R 1969) The truth, or rather corroborated facts, was as thin as gossamer. The affidavit, reveals more the law officer's bias to make the "situation cohesive" against Esty than it was to present all the evidence

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[6]That, of course, may have been a lie. She may not have been going to meet anyone.

they had gained, favorable or not, to the magistrate for him or her to weigh and consider. Uncorroborated school house chatter was established as fact, with the police rather than the magistrate determining its validity and weight. That was error.

In short, they crafted their case against Esty to make it appear as strong, or as they said, cohesive, as they could at the expense of disclosing the underlying uncertainty in their information and conclusions. The officers knowingly omitted information that precluded the magistrate here from making an independent probable cause determination. Had they included all the evidence, the court may have refused to issue the warrant. A complete picture, warts and all, would have given rise to a substantial possibility that the magistrate would have changed its probable cause determination. Van Pieterson, at 1164.

In light of the material omissions the court found and those it should have recognized, the affidavit supporting the police request for a search warrant does not. The good faith exception, moreover, cannot save it. As the First and Third Districts have recognized in other cases, facts which the police knowingly omitted that could have had an impact on the magistrate's duty to independently determine probable cause, cannot have been made in good faith. Id. at 1164-65. This court should reverse the trial court's order denying Esty's motion to suppress, reverse the trial court's judgment and sentence, and remand for a new trial.

ISSUE II

THE COURT ERRED IN DENYING ESTY'S CAUSE CHALLENGE OF PROSPECTIVE JUROR JOHNSON BECAUSE HE COULD NOT READ, IN VIOLATION OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A TRIAL BY JURY.

This issue involves a peculiarity of capital cases that normally would not arise in any other criminal trial. During voir dire, one of the prospective jurors, a Mr. Johnson admitted that his wife had completed a questionnaire for him that the court had required all prospective jurors to answer (R 9-11, 266). Esty challenged him for cause because the jury would be given written instructions, and since he could not read, he would have to rely on someone else to tell him what the law in the case was (R 533-34). The court denied the challenge (R 536). That was error.[7]

A slight detour into the law will set the tone for this issue. Esty, of course, is entitled to a fair trial, which almost by definition means that the jury must be qualified and impartial. Duncan v. Louisiana 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). The jurors, in turn, are charged with the duty of rendering a verdict which, on the one hand, is the

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[7]After exhausting his peremptory challenges, Esty twice asked for more peremptory challenges. The court gave him and the state two more each time, but when he asked for more the third time the court refused (R 545). Moreover, at the end of the voir dire, defense counsel said there were at least four more prospective jurors that he would like to peremptorily challenge (R 544). Thus, Esty has preserved this issue for appeal as required by this court's opinion in Trotter v. State, 576 So. 2d 691 (Fla. 1990).

decision of the body as a whole, and on the other, is also the verdict of each individual member of this panel.

In the United States and particularly in Florida, the jurors listen to the evidence, accord it the appropriate weight, and determine the credibility of the various witnesses who testified for the state or the defense. They are the judges of the facts, and having determined them, apply the law given by the court to the evidence and render a verdict accordingly.

Underlying the validity of whatever decision the jury reached is the assumption that each juror could competently comprehend the evidence and understand the law. Peters v. Kiff, 407 U.S. 493, 501 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) (Due process requires that jurors be mentally competent during the trial.) If he or she could not, then whatever verdict that body returned would not have been unanimous. If, for example, a juror was blind, and an issue at trial involved comparing drawings with photographs to identify the perpetrator of a crime then the court should grant a cause challenge of that particular member of the jury. Commonwealth v. Susi, 477 N.E.2d 995 (Mass. 1985) See, also, 48 ALR 4th 1145: "Jury: Visual Impairment as Disqualification." "A mere description of the physical evidence would not have conveyed adequately the subtleties which would be apparent on a visual comparison." Id.

On the other hand, where some specific disability is not particularly relevant to a case, the threshold level of

acceptability is remarkably low. Thus, jurors who have a limited education, Rollins v. State, 148 So. 2d 274 (Fla. 1963), or low intelligence, Spencer v. State, 615 So. 2d 688 (Fla. 1993) can competently serve as jurors. Similarly, merely because a prospective juror has difficulty understanding English does not mean that he should have been excused for cause. Cook v. State, 542 So. 2d 964 (Fla. 1989). Only if there exists a reasonable doubt about a juror's ability to serve, should the trial court exercise its broad discretion and excuse him or her. Crosby v. State, 90 Fla. 381, 106 So. 741 (1926); Singer v. State, 109 So. 2d 7, 23-24 (Fla. 1959); Christopher v. State, 407 So. 2d 198 (Fla. 1981).

Yet, this law has a deceptive air about it. The grounds for objection in the cited cases often had little bearing on the issues the jury was expected to resolve. For example, in Rollins that one of the prospective jurors had a limited education had no bearing on whether he could consider the facts and reach a verdict. Afterall, juries of essentially illiterate people have been doing so for hundreds of years. On the other hand, one would think that an understanding of English was a prerequisite to sitting as a juror. Yet in Cook, this court rejected the claim that one of the venire should have been excused because he did not understand English. In that case, the trial court properly exercised its discretion after it had determined that "Mr. Sergio's [the challenged juror's] answers to several other questions showed a high degree of perception." Id. at 970. In short, the evidence did

not support the claim that this citizen did not understand English.

Moreover, Justice Barkett, in a separate opinion in Cook noted that while a trial court has almost unlimited discretion in excluding a prospective juror, it has a much more circumscribed right to retain jurors. Id. at pp. 971-72. Parties have no inherent or constitutional right to any particular juror, so they have suffered no prejudice if the court dismisses a prospective juror. On the other hand, as in this case, if the trial judge improperly keeps a member of the venire that it should have excused for cause, the defendant has the delimma of accepting an unqualified juror or exercising a peremptory challenge on him or her. Thus, trial courts more easily abuse their acknowledged discretion in matters of jury selection when they refuse to excuse objectionable prospective jurors from service than when they have improperly excused a competent citizen.

This observation has particular resonance in this case. The evidence of Mr. Johnson's inability to read was uncontested (R 267, 533-34), so the only question was whether, such a limitation sufficiently justified Esty's cause challenge.

As mentioned above, in a "routine" criminal case it would not. Capital trials, however, provide an exception to that general rule. It finds no application in this narrow class of cases because Rule 3.390 Fla. R. Crim. P. requires that in all capital cases the jury instructions shall be in writing. Accordingly, in this case, as the court read the law, the jury

had the written instructions so they could follow (R 1411). Moreover, they may have used them during their deliberations.

Thus, because Mr. Johnson was illiterate, he would have been at a disadvantage had he served on Esty's jury. While the other jurors could have read what the judge told them and perhaps have reviewed the law later, Johnson could only have listened and relied on his memory. Everyone but him would have had the law explained to them in two ways. Johnson would have had only one. Of course, he could have asked the instructions to have been reread, but having to ask another member of jury or the judge to do so would have affected the independence of his vote. Rather than exposing this embarrassing deficiency, he may very well have deferred to another's opinion regarding what the law was and how it applied to the facts of the case. More basic, without that additional means of reinforcing the instructions, this prospective juror may have been unaware that he did not understand or that he had misunderstood the court's guidance. In any event, Johnson's inability to read became a significant liability in cases where a defendant is tried for his life. The court had a reasonable basis for doubting that Mr. Johnson could have rendered an impartial and independent verdict in this case, and it clearly or manifestly abused its more limited discretion in refusing to grant Esty's cause challenge for Mr. Johnson.

On the other hand, even in a non capital trial, this prospective juror's inability to read could have been a sufficient reason to disqualify him. In a civil context, Rule

1.431(c)(3) Fla. R. Civ. Pro. permits a member of the venire who cannot read to be challenged for cause if "the nature of any civil action requires a knowledge of reading. . . to enable the juror to understand the evidence to be offered." In Esty's case, the state relied on writings allegedly from Lauren Ramsey to prove its case against the defendant. It introduced a piece of paper found at the crime scene several days after the police had searched it with the words "To Sean, love Laura" written on it. It also introduced a sales receipt for a knife similar to the one found near the victim's body (R 636, 746). Two birthday type cards found in Esty's car were introduced that allegedly had writing on them matching Ramsey's (R 835).

Finally as part of its case, the state introduced a log the defendant had written detailing his activities for the time immediately surrounding when it was thought Ramsey had been killed (R 903, 1236-37).[8] Hence, unlike many criminal trials, this one was unusual in the amount of reading a juror would have to do in reaching a conclusion regarding the defendant's guilt. Without the ability to read, juror Johnson could not have understood at least some of the evidence offered.

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

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[8]The prosecutor also asked the court to give the jury some time to view the exhibit (R 1236).

ISSUE III

THE COURT ERRED IN DENYING ESTY'S MOTION FOR A CHANGE OF VENUE BASED ON THE EXTRAORDINARY NUMBER OF PROSPECTIVE MEMBERS OF THE VENIRE WHO HAD PRIOR KNOWLEDGE OF THE FACTS OF THIS CASE, IN VIOLATION OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The defendant was arrested in the early part of January 1992, and he went to trial barely six months later (R 2202). The case apparently generated a lot of publicity,[9] and to make at least a preliminary determination of the extent to which the members of the venire had been infected by the press, the court had them complete a questionnaire (R 2083). It asked, among other things, 1) Whether they were familiar with the case (Question 1), 2) If they had formed an opinion about Esty's guilt or innocence (Question 3). 3) If they would have concerns about their fairness if chosen as a juror (Question 4), and 4) If they could put aside any prior knowledge they might have if chosen to sit on Esty's jury (Question 5).

There were 80 questionnaires completed, and the following table summarizes the responses:[10]

	Yes/%	No/%	Total
Question #1	61/76	19/24	80
Question #3	19/24	59/76	78

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[9]There was apparently an article written in the local paper about Esty's case on the first day of his trial (R 87).

[10]While there were 80 questionnaires returned, appellate counsel could not determine the responses of some of the prospective jurors to certain questions.

Question #4	11/22	66/78	77
Question #5	66/78	11/22	77

At trial, of the 80 members of the venire, 59 were individually questioned because of their answers. Of those 59, Esty challenged 26 for cause. Significantly 22 of those 26 were objectionable because of what they had learned from the media.[11] Finally, of those 22 challenged by the defendant, the court excused 8.[12]

At the end of the voir dire, when the state and Esty were making their final selections, the defendant was forced to use nine of his ten initial peremptory challenges on people whom he believed the court should have excused for cause because of their exposure to the pretrial publicity (R 539). The court granted an additional two more peremptory challenges to both sides, and the defendant promptly used his (R 539-540). It then gave another two more challenges to both sides, and again Esty used them and asked for more (R 541). The court, obviously averse to summarily excusing more members of the venire, asked defense counsel if one more challenge would be sufficient, to which he said that "There's still at least four jurors on that I consider with significant knowledge of the

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[11]Of the remaining four, one was challenged based on his death penalty beliefs (R 337), and the remaining three had personal problems (R 403, 432, 442).

[12]These numbers are accurate to the best of appellate counsel's ability to reconstruct what occurred at trial.

case." (R 544) Another peremptory would have been inadequate, so the court denied the request (R 545). While it should have granted additional challenges, the fundamental problem was that it should have changed the venue of the trial. Esty had asked the court to do so (R 44), but it refused (R 1334). That was error.

At the outset Esty acknowledges that winning this issue will be extraordinarily difficult. Appellate courts have given the trial judges considerable discretion in granting or denying a motion for change of venue. Only if the court manifestly or clearly abused that power in light of the evidence before it will this court order a new trial. Gaskin v. State, 591 So. 2d 917 (Fla. 1991) (No new trial unless the trial court palpably abused its discretion.)

While merely being exposed to news accounts of a crime does not inherently prejudice a jury, such bias will presumptively arise when the publicity pervades the community where the trial is to be held. Noe v. State, 586 So. 2d 371 (Fla. 1st DCA 1991). For example, in Rideau v. Louisiana, 373 U.S. 723, 88 S.Ct. 1417, 10 L.Ed.2d 663 (1963) the defendant's confession to a bank robbery and murder were seen by thousands of people in the community where these crimes occurred. While only three jurors who served at Rideau's trial actually saw the televised statements, "Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." Id. at 726. On the other hand, when the publicity occurred years before the trial occurred,

prejudice is not presumed, Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) (Retrial occurred four years after murder). Nor is it assumed if the nature of the defendant's crimes are not inherently inflammatory. Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975) (burglary and robbery).

In this case, Esty was brought to trial about six months after his arrest. There was extensive media coverage of the murder because at least 75% of the venire had read or heard something about the murder, and what they recalled often was inaccurate. For example, one juror said the victim had been raped and bludgeoned (R 234). Another claimed that a knife had been found in the car, but he could not remember if it had blood on it (R 471). Finally, a third prospective juror thought that Esty "had gotten [Ramsey] pregnant and she was trying to make him marry her. . . [H]e got mad at her and carried her off and killed her, so they said." (R 493)

As seen by these responses, what the members of the community recalled differed from the facts established at trial. While most of those individually questioned said they could set aside what they had learned from the media, defense counsel accented the latent problems that arise when a community has been exposed to extensive press coverage of a sensational crime, "The knowledge she has, Your Honor. It's simply not going to go away." (R 336) "He's one of those persons that probably is the most frightening to me of all, that they have all this knowledge that they don't have any

specific memory, but it can well come flooding back when they start hearing it at trial, and I think he's one of the most dangerous type of jurors and though not intentionally so." (R 304)

Defense counsel used nine of the ten peremptory challenges allotted him to excuse members of the venire he had wanted removed because of their knowledge of the case. In fact, Esty objected to 22 of the 26 prospective jurors because they had knowledge of the case.[13] (R 539) Seven of those left knew some of the facts, and three said they had extensive knowledge about the murder (R 539).

Even after the court had given him four more peremptory challenges and he had used them, Esty still had at least four members of the venire who were unacceptable to him because of their pre-trial knowledge of the case (R 544). Counsel here, unlike the lawyer in Gaskin, supra, was obviously dissatisfied with the jury, and that is perfectly illustrated by his repeated requests for more peremptory challenges until the court finally cut him off (R 545). With nothing else to do, defense counsel had to accept a jury the law said was too tainted by the media to afford his client a fair trial.

The evidence, in short, clearly showed that Esty could not have gotten a fair trial in Escambia County, and this court

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[13]Eight of those were granted.

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

ISSUE IV

THE COURT ERRED IN ADMITTING EVIDENCE THAT 1) ESTY HAD HAD SEXUAL INTERCOURSE WITH RAMSEY A MONTH BEFORE HER DEATH, AND 2) AT LEAST FIVE MONTHS BEFORE RAMSEY'S MURDER THAT ESTY HAD TOLD A FRIEND THAT HE (THE FRIEND) SHOULD GET RAMSEY PREGNANT.

The state should have had a big problem finding a motive, a reason for Esty to have killed Lauren Ramsey. Sloppy logic and inadequate inferences, however, provided it with an easy solution. The defendant had had sexual intercourse with the victim about five weeks before her murder, and the Friday before her death he learned she was pregnant. Ramsey's mother had no love for Esty because of the late night escapades he had had with Lauren. If the defendant was persona non grata for what he had done earlier, Mrs. De La Rue definitely would not have rolled out the red carpet when she learned her daughter was pregnant by him. So he killed Lauren.[14]

To bolster this theory, the state presented evidence that sometime between five and ten months before Ramsey's death, Esty, in a joking, spiteful manner (R 652, 653), had asked a friend to have sex with her (R 652). The court, over defense objection (R 649-650), admitted this evidence and the evidence of the intercourse (R 557-560). It erred in doing so, however,

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[14]Actually, the state wanted to establish a stronger motive. It sought, but failed, to establish evidence that Esty knew that having sexual intercourse with 15 year old Lauren Ramsey was a crime. That motive never materialized because the defendant denied knowing such was a crime, and to the contrary, he believed he had committed nothing illegal (R 1263).

and more fundamentally it erroneously admitted evidence Esty had engaged sexual intercourse with Ramsey a month before her death.

Error arises because what the state presented only denigrated the defendant's character, an impermissible reason for admitting evidence of other crimes, wrongs, or acts as defined in Section 90.404(2)(a) Fla. Stats. (1991). That section provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

This court refined this codification of the rule announced in State v. Williams, 110 So. 2d 654 (Fla. 1959) in Drake v. State, 400 So. 2d 1217 (Fla. 1981) by requiring that the collateral crimes evidence must be unusual or unique so that it amounts to a fingerprint unerringly pointing to the defendant.

On the other hand, and somewhat conflicting, evidence of other crimes, regardless of their nature, is admissible if it is relevant to the charged crime. Bryan v. State, 533 So. 2d 744 (Fla. 1988). As this court said in Ashley v. State, 265 So. 2d 685 (Fla. 1972):

> So long as evidence of other crimes is relevant for any purpose the fact that it is prejudicial does not make it inadmissible. All evidence that points to a defendant's commission of a crime is prejudicial. The true test is relevancy.

Id. at 694.

If relevancy is the test of admissibility why the requirement that collateral crimes be uniquely similar to the one for which the defendant is being tried? The answer has to do with time.

As one tries to reconstruct the events leading up to and part of some crime, there often occur other crimes or bad acts that help explain or put the charged offense in its proper context. For example in Bryan, supra, the defendant stole a boat and later killed a night watchman with a shotgun. The state introduced evidence of the theft because it was "close enough in time to the crimes to give the jury a full and accurate picture of how appellant came into contact with the victim and the full context of the crimes." Id. at 747-48. On the other hand this court held that the trial court had erred (though harmlessly) in admitting evidence that the defendant had used the murder weapon to rob a bank three months before the homicide.

In other cases, this court has approved evidence of other crimes when it was necessary to put the chronological events of the day in which the charged offense occurred in context or the bad acts were inextricably wound together with the crime which the defendant was being tried. Jackson v. State, 522 So. 2d 802 (Fla. 1988); Henry v. State, 574 So. 2d 66 (Fla. 1991).

On the other hand, evidence of a bad act that occurred years, or as in the case of Bryan, months earlier, should have been excluded unless there were significant similarities between the crime charged and the collateral acts. Common

sense dictates that time cools the passion of the moment. The white hot fury that burned out of control at the moment will, days or months later, be only a charred, cold remnant. See, Crowell v. State, 528 So. 2d 535 (Fla. 5th DCA 1988). In Garron v. State, 528 So. 2d 353 (Fla. 1988), the defendant had allegedly sexually abused his two step daughters two years before he killed one of them and their mother. At the defendant's trial, the state sought to admit evidence of this earlier collateral crime as proof Garron intended to commit first degree murder.

This court ruled the trial court erroneously admitted the evidence of the earlier sexual misconduct because "the alleged sexual misconduct in no way resembles the act for which appellant was convicted. Moreover, the prior acts are far too remote in time to support any allegation that they could have provided appellant with a motive for the killings." Id. at 358. (emphasis in opinion.) Because the Williams rule evidence had ostensibly happened so long ago, this court required it to have distinctive similarities with the charged crime to justify its admission. Without them, the evidence proved only the defendant's bad character and propensity to commit crime.

A. The sexual intercourse in November 1991.

Here, the court made the same mistake as the court in Garron. The sexual intercourse in November in no way resembled the act for which Esty was convicted. It was also too far removed in time to have any relevance other than to show the defendant's bad character.

The state, of course, wanted this evidence introduced because "the sexual aspect of their relationship [was] technically a violation of the law." (R 556) Thus, according to the prosecutor, the defendant murdered the victim to prevent her from reporting his crime. This theory needed more evidence, however, to make it work. To provide a motive for the murder, the state also had to show that Esty knew what he had done was illegal, that he knew Ramsey knew it also, and that she would report it. When the prosecutor cross-examined the defendant he tried, but failed, to establish the first layer of the pyramid of inferences resulting in the conclusion that the defendant killed Ramsey to keep her quiet:

> Q. You didn't think it would be against the law to have sexual relations with a 15 year old?
>
> A. To my understanding to have sex relations with a minor and it to be illegal the person having sex with the minor would also have to be not a minor or an adult. At the time when our relationship started I was 16 and I was only 17 the last time we ever had sex.
>
> Q. So you didn't think it was against the law?
>
> A. I did not think it was against the law, no.

(R 1263).

Without the crucial concession that Esty knew he had committed a crime or any other evidence which would have reasonably supported an inference of such knowledge, all the state proved was the defendant having had sexual intercourse with Ramsey, a month before her death. Such evidence had no

relevancy to this case because, as the defendant said, he did not believe he had done anything illegal.[15] Also, there is no evidence he knew she was pregnant (R 707). Thus the evidence had relevance only to show his immoral character, which, of course, was improper.

Moreover, if we concede that Esty knew having sex with Ramsey was illegal the remaining inferences did not necessarily follow. That is, there is no evidence suggesting she knew he had committed a crime, and there is nothing but speculation to support the conclusion she would have reported Esty to the police. In the past, this court has consistently rejected theories based on the pyramiding or concatenation of inferences. Decidue v. State, 131 So. 2d 7 (Fla. 1961). Where circumstantial evidence supports conclusions of fact as it did here, and they are susceptible of more than one interpretation, as they were here, the resulting framework collapses. C.f., Hall v. State, 500 So. 2d 661 (Fla. 1st DCA 1986); Benson v. State, 526 So. 2d 948 (Fla. 2d DCA 1988).

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[15]Esty was correct when he said he did not believe it was illegal to have sex with Ramsey. Section 794.011 Fla. Stats. (1991) proscribes unconsented sexual acts if the victim is over 12. Thus, if Ramsey agreed to have sex with the defendant, he would not have committed a sexual battery against her. On the other hand, Section 800.04 punishes lewd and lascivious conduct (including sexual intercourse) on a victim 16 years old or younger regardless of his or her consent. Thus, the state was also correct, and the jury would probably have given the state's view on the law more weight than this teenage defendant.

So, here, where the inferences were based on the state's speculative wishes rather than evidence, the pyramid collapses. There was, therefore, no reason to admit the evidence of Esty's sexual activity with Ramsey a month before her death other than to show his bad character.

B. The suggestion that a friend get Ramsey pregnant.

The evidence that Esty wanted a friend to get Lauren Ramsey pregnant likewise had no inextricable connection with her murder. The state could very well have proved its case, or rather have presented evidence of the events surrounding her death without having this evidence presented to the jury. Nor, did the testimony put the homicide in context, another legitimate reason to admit bad acts evidence that has no striking similarities with the charged crime.

The alleged conversation, on the other hand, occurred several months before the murder, and as Garron held, it in no way resembled the act for which the defendant was convicted. That lack of similarity is crucial because the prior act was simply too far removed in time to otherwise justify its admission at Esty's trial.

In short, all the evidence did was exhibit the defendant's bad character, which of course is an impermissible reason to admit the testimony that Esty wanted Ramsey pregnant to spite her. The trial court therefore erred in admitting this evidence. Because the error is presumed harmful, the state has an especially heavy burden to carry in proving beyond a reasonable doubt it had no effect on the jury's verdict. If

this court in Garron could not find the evidence of the sexual misconduct harmless even though one of the step daughters lived to testify against the defendant, then this court cannot say the bad character evidence here was harmless.

We cannot do so because the state presented no evidence of why Esty wanted to kill Ramsey. Of course, it argued that he had murdered her because she was pregnant with his child, but the state never proved the defendant knew that. To the contrary, Lisa Bolton, a friend of the defendant, expressly said he did not know she was pregnant until some time after her death (R 705, 707). The jury, therefore, may have latched onto what Esty had said months before the homicide occurred as proof he had committed the murder and had done so with a premeditated intent. The bad acts evidence, therefore, contributed to his conviction was not harmless beyond all reasonable doubts. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE V

THE COURT COMMITTED FUNDAMENTAL ERROR IN ADMITTING EVIDENCE THAT LAUREN RAMSEY WAS PREGNANT, IN VIOLATION OF ESTY'S RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Why would Sean Esty want to murder Lauren Ramsey? That was the fundamental problem the state had in this case. It answered that question within seconds of starting its closing argument:

> The defendant in this case had a relationship with Lauren Ramsey. The defendant had sexual relations with her about five weeks prior to her murder. Lauren Ramsey went to Dr. Montgomery and found out that she was pregnant. Dr. Montgomery gave her a deadline of Monday, December 23rd to tell her mother about her pregnancy. Sean Esty was not welcomed around the Ramsey household. He had been helping Lauren Ramsey sneak out. He had gone to her window and snuck out with her before. He had gone in the window and been caught in the room with her before and consequently he was not exactly welcome. And he knew, he knew that he would be in grave trouble if Lauren told her mother that she was pregnant by Sean Esty. So Sean Esty had a problem.

(R 1373).

Esty may have "had a problem" but the state presented no evidence he knew it, a crucial omission in the circumstantial case against the defendant. If he was ignorant of Ramsey's condition he would have had no motive (weak even if he had known) to kill her. The state would then have had to argue he killed her for no reason at all, a decidedly unpalatable choice and one which makes no sense.

In Manuel v. State, 524 So. 2d 734 (Fla. 1st DCA 1988), the state charged the defendant with grand theft. As evidence of his guilty knowledge, it sought to introduce evidence of witness tampering. One witness had received a telephone call from "Clarence" (the first name of the defendant) with a veiled threat implicit in his request to "Look out for me." He never identified that Clarence as being the defendant. Failing to make that connection created only a suspicion without any factual basis that the caller was Manuel. It was, therefore, insufficient to make the evidence of witness tampering relevant to the defendant's case.[16]

Similarly, in this case, the state never established the necessary predicate that Esty knew Ramsey was pregnant. Yet, that fact was absolutely crucial and fundamental to the state's case. Without such knowledge, the carefully constructed circumstantial evidence it produced implicating the defendant achieved a much less convincing color.

Of course, one might assume Ramsey would have told Esty she was pregnant sometime after she had learned of her condition. Yet, Lisa Bolton, a friend of Esty said he did not know that until after her death (R 707), and the state never rebutted that testimony.

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[16]The First District cast the issue in terms of the prosecution's failure to lay a proper predicate.

The only problem is whether the court's mistake in admitting evidence of Ramsey's pregnancy was fundamental error. Such error goes to the foundation of the state's case. Farrow v. State, 573 So. 2d 161 (Fla. 4th DCA 1990). Here, as mentioned, without evidence of Ramsey's pregnancy, the state would have had an exceedingly difficult time explaining why Esty would have killed her. Because motive shows intention, without having any reason explaining why the the defendant may have committed this homicide, the jury may have either acquitted him completely, or more likely, found him guilty of only a second degree murder. In this case, Lauren Ramsey's pregnancy so dominated this trial that without evidence of it, the jury would probably have returned a different verdict that it did with the evidence. The interests of justice require that this court reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VI

THE COURT ERRED IN REFUSING TO REQUIRE THE STATE'S EXPERT ON BLOOD IDENTIFICATION TO PROVIDE THE PROPER PREDICATE FOR HIS OPINION AS REQUIRED BY SECTION 90.705(2), FLORIDA STATUTES (1991), THUS DENYING HIM A FAIR TRIAL AND THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state's case against Esty was purely circumstantial, and up to a point it was not particularly compelling. It became significantly stronger, however, after Dr. Sudhir Sinha testified. This witness is a chemist and president of a company that does DNA comparisons of blood samples sent to it. In this case, he had been asked to compare known samples taken from Esty and Ramsey with that of some blood spots taken from a coat found in Esty's room during a police search of the house where he lived.

Dr. Sinha said that the stain from the coat matched the "genetic type of Lauren V. Ramsey." (R 979) That was not particularly enlightening, so the state asked:

> Q. (By Mr. Patterson) Doctor, with regard to when you say there is a match between the blood on the cutting from the coat and Lauren Ramsey, can you tell me, for example, in what frequency in the population you would expect to find that kind of genetic code?

(R 979).

At that point, defense counsel objected because "There has been no predicate laid for him to testify on this." More specifically, he objected because "he (Dr. Sinha) has done no population studies and the populations studies he has done from

another source and none of these population studies have been done from any of the work that these people have done." (R 980) The court overruled the objection, asking counsel to "just observe and bear with it. . . " (R 980) Thus, despite Esty's objection, the court accepted this expert's conclusions without ever determining if the basis or the validity of underlying data on which he based his conclusions had any justification. That was error.

Resolution of this issue is simple. Section 90.705(1) Fla. Stats. (1991) allows an expert to give his opinion without first disclosing the facts or data on which he based his conclusions:

> (1) Unless otherwise required by the court, an expert may testify in terms of opinion or inferences and give his reasons without prior disclosure of the underlying facts or data. On cross-examination he shall be required to specify the facts or data.

Subsection 2 of 90.705, however, qualifies the witness's privilege to withhold the basis for his conclusions:

> (2) Prior to the witness giving his opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying factors or data for his opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for his opinion, the opinions and inferences of the expert are inadmissible unless the part offering the testimony establishes the underlying facts or data.

In this case, Dr. Sinha went into mind numbing detail about the process he used in determining whether the blood found on Esty's coat matched that of Ramsey. He gave, on the

other hand, no similar detailed explanation of how it was determined "what frequency in the population you would expect to find that kind of genetic code." (R 979) That, of course, was the crucial question because even though the blood may have matched that of the victim's, it may have also had the same characteristics as 10%, 20%, 50%, or 100% of every other human being's blood who had ever lived. Yet, on that vital link in this witness's testimony and the state's case, the court sluffed off counsel's objections, telling him to merely "bear with it." (R 980) If the population studies which apparently formed the basis for this expert's conclusion were of white Eskimos living in the Bahamas, we might have some obvious reservations of the result's validity. Similarly, if the data base was of a wide sampling of the United States population, we would still have some reservations because we do not know if the population of Escambia county mirrors that population. It may, for example, have an unusually large number of white Eskimos who do not like the Bahamas. The point is that without a voir dire to test the underlying validity of Dr. Sinha's application of whatever population data base he had to this case, the court and ultimately the jury may have given his testimony far more weight than it deserved.

Defense counsel's cross-examination bolsters this last point. Apparently this expert based his figures on population studies done involving only "about 6 or 700 people." (R 992) One group tested came from Canada and California and another sample came "from all over the United States." Dr. Sinha,

could not, however, further identify the geographical distribution of this sample, and for all we know, it could have been taken of people at a flea market in San Diego. This last point has particular resonance because this witness also disclosed that some populations, such as those from Indonesia and New Guinea, may have been grossly over represented in the sampling, being almost 20% of the total number in the test group (R 992-93) so, there are some inherent questions Dr. Sinha should have answered before the court admitted this evidence. While his techniques were perhaps beyond questioning, being hidden in the catacombs of scientific wizardry, the population studies were not, and they should have been exposed to the court first so it could make a preliminary finding of reliability and relevancy as required by 90.705. Because the trial court failed in this regard, Esty was denied the fair trial guaranteed by the 14th amendment to the United States Constitution. Also without being able to conduct the voir dire examination of this witness, trial counsel could not fulfill his 6th Amendment obligation to render Esty effective assistance.

The trial court, therefore erred in refusing to allow defense counsel to question Dr. Sinha about the population studies he used which formed a key part of his conclusions. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VII

THE COURT ERRED IN FAILING TO CONDUCT AN RICHARDSON INQUIRY AFTER THE STATE FAILED TO PROMPTLY DISCLOSE 1) A REBUTTAL WITNESS AND 2) HIS REPORT AS REQUIRED BY RULE 3.220(B)(1)(j), FLA. R. CRIM. P., IN VIOLATION OF ESTY'S RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The case against Esty rested largely on circumstantial evidence. The defendant, countering the state's proof that he had killed Lauren Ramsey, called a forensic entomologist and a forensic pathologist to prove that Ramsey had probably died from 12-24 hours before her body was found about noon on December 24, 1991 (R 1130, 1149). This evidence was important because the medical examiner who had performed the autopsy on Ramsey said she had died from 24-36 hours earlier (R 868).

Esty's recollection of the events of the those several days was largely uncorroborated regarding what he had done from midnight to noon on the 23rd (R 1205-1219). On the other hand, he had strong corroboration of his activities after that time (R 1219-1226). Thus, the state's case against the defendant became significantly weaker after the defense expert said the murder must have happened at least a day later than the state alleged.

Realizing its plight, the state called as a witness a Dr. Rodriquez, to rebut what Esty's expert had established. It had, however, not revealed the expert until July 16, a Thursday, with trial starting the following Monday (R 1281).

The court asked one of Esty's lawyers about what efforts he had made to "determined the nature of Dr. Rodriques' testimony." (R 1280) Counsel responded that although the office had received the additional discovery on the 16th, he had not seen it until late on the 17th. More significantly, he complained that he had been "inundated" with new witnesses (R 1275) immediately before trial and had not noticed the expert among the flurry of last minute additions to the discovery list (R 1280-81).

Although Esty wanted the expert's testimony excluded from the trial, the court properly told defense counsel that he could talk with the expert before he testified (R 1281). Counsel objected to that solution to his delimma because his expert, who had already testified, had not only left the courtroom, he had left town, and counsel needed him to effectively cross-examine the state's new witnesses (R 1280, 1282). The court in essence overruled counsel's objection and allowed the state's rebuttal evidence to be presented to the jury (R 1281). That was error because the court never conducted the hearing required by Richardson v. State, 246 So. 2d 771 (Fla. 1971).

Rule 3.220 Fla. R. Crim. P., of course, and this court's decision in Richardson require the state to disclose all the relevant evidence in its possession. Such discovery often means little if it is delayed, so the necessary corollary to the rule is that discovery must be prompt. Moreover, what

amounts to prompt disclosure varies inversely with the time remaining until trial.

> As the trial date nears, a prosecutor has the duty under Rule 3.220(f) to "promptly disclose" previously unidentified witnesses and material. A delay of days might be sufficiently prompt where several months remain before trial, but where a complex trial involving a human's life was scheduled to begin in one week, immediate disclosure is dictated by the Rule.

Cooper v. State, 336 So. 2d 1133 (Fla. 1976).

Thus, the state has violated the discovery rule as much when it makes late discovery as when it makes none at all.

In Neimeyer v. State, 378 So. 2d 818 (Fla. 2d DCA 1980), the defendant was charged with manslaughter and at trial he claimed he had killed the victim in self-defense. During the discovery process, the state disclosed Dr. Newab, an assistant medical examiner, who had performed the autopsy on the body. Before trial she admitted she had found nothing inconsistent with the defendant's theory of defense, but on the morning of the trial, the prosecutor told defense counsel that she would testify that one of the several bullets fired into the victim could have severed the his spinal chord, paralyzing him. Significantly, the state had known of this information for at least six or seven days. Relying on this court's language in Cooper, the Second District ruled that the delay in telling the defendant of this crucial evidence violated the rules of discovery.

In this case, there is no evidence the state had just learned of Dr. Rodriquez, and immediately disclosed this

damning witness to Esty. Instead of trying to determine if a discovery violation had occurred because the state had delayed revealing this witness, the trial judge was more concerned with providing a solution to the delimma it then faced. While one cannot really fault the court for trying to equitably resolve this problem, it failed in the first instance to adequately define it as the Richardson inquiry dictates. The failure to conduct even the "functional equivalent" of this test, however, only underscores the more basic failing of the court. It never determined if a discovery violation had occurred.

The court never asked the prosecutor how long he had known of this prospective witness and his testimony. That is important because the trial court has some discretion in determining if the state has violated the discovery rules. See, Justus v. State, 438 So. 2d 358 (Fla. 1983). Obviously, if the state had learned of the witness shortly before trial and had immediately disclosed him or her to the state, the "late" discovery nevertheless is prompt. See, Johnson v. State, 416 So. 2d 1237 (Fla. 4th DCA 1982). The court can exercise that freedom when it has made an adequate inquiry into all the surrounding the circumstances. Zeigler v. State, 402 So. 2d 365 (Fla. 1981).

Here the court made no inquiry similar to that made in Neimeyer where the court learned the prosecutor had known about the change in the medical examiner's testimony for several days before trial. Neither this court or the trial court know how long the state was aware of the expert's testimony before it

disclosed it to Esty. The trial court never asked the state if it had promptly, meaning immediately, revealed the witness when it became aware that he had relevant evidence. The trial court failed to inquire of the state with sufficient detail for it to had gained enough information to have intelligently exercised its discretion. It therefore abused its power in simply ignoring the possibility that a discovery violation had occurred.

Reconstructing as best as possible what a Richardson hearing would have disclosed reveals that Esty suffered a significant level of procedural prejudice from the state's tardy disclosure of Dr. Rodriquez. First, we do not know if the delay was inadvertent or deliberate. Second, from this expert's subsequent testimony, it was obvious that the violation was substantial.

Dr. Rodriquez inflicted severe damage to the defense case by directly contradicting Esty's expert. Specifically, he concluded that Ramsey had been dead for at least 36 hours when her body was discovered (R 1294). He also supported his conclusion with an extensive discourse on how a body decays and the indicators he used to narrow the time a person died (R 1295-1304). He discussed how the cool temperatures affected bodily decay, its lividity, and other signs of decomposition (R 1305). He even went so far as to claim that the defendant's expert's conclusions about the time of death supported him (R 1309).

Counsel's cross-examination contained no probing inquiry into this witness' conclusions. Instead, it was a general inquiry about subjects a layman might inquire about. What effect did the weather have on the body (R 1313)? Did he talk with the pathologist who performed the autopsy? (R 1312) How much blood was lost? (R 1314-16) Is rain warm or cool (R 1318)? We find no detailed questioning of the details of this expert's conclusions for the good reason, as counsel admitted, he "was not knowledgeable enough to be able to do anything more than what [he had] already done." (R 1281) With his expert flying home, he was ignorant of the weaknesses of Dr. Rodriquez' conclusions and could not effectively have cross-examined him. The late discovery substantially prejudiced Esty in presenting his case. The trial court should have either excluded Dr. Rodriquez (an admittedly severe sanction) or have continued the case until the defendant had a chance to consult with his own people who the requisite expertise.

ISSUE VIII

THE COURT ERRED IN DENYING ESTY'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR MADE AN IMPROPER COMMENT DURING ITS CLOSING ARGUMENT IN THE GUILT PHASE PORTION OF THE TRIAL.

During the final closing argument and near its end, the state said the following:

> Sean Esty is a dangerous, vicious, cold-blooded murderer and in our society the police cannot protect us from people like that and the judges cannot protect us and the prosecutors cannot protect us.

(R 1407-1408).

Esty objected to this comment, and the court sustained the objection but refused to grant the mistrial he requested (R 1408). It did, however, tell the jury to "disregard the last comments of the State attorney. You shall not consider that in any way whatsoever in your deliberations." (R 1409) The court should have declared a mistrial.

When the state makes an improper comment, as it did in this case, the court has two choices. It can give a curative instruction and hope the jury disregards what was said, or it can order a new trial. Obviously, the former course is preferred, and a mistrial is appropriate only when the comment is so prejudicial that it vitiates the fairness of the trial. Duest v. State, 462 So. 2d 446 (Fla. 1985). What comments destroy the objective search for the truth ultimately depend on the specifics of the case, so few rules, other than those just mentioned, have any universal application. In close cases, where the state has to struggle for a conviction, improper

comments obviously have far more impact than one in which the defendant confessed and several eyewitnesses testified against him.

In Richardson v. State, 604 So. 2d 1107 (Fla. 1992) the defendant shot the woman he had lived with for several years. He did so as several of her children watched. Also when arrested, he confessed to killing her. During its closing argument, the state asked the jury to show Richardson as much pity as he showed his victim. Although that was improper, this court found the error, in light of the devastating amount of evidence showing that the defendant killed his girlfriend, harmless. Accord, Rhodes v. State, 547 So. 2d 1201 (Fla. 1989).

During the penalty phase closing argument in Bertolotti v. State, 476 So. 2d 130 (Fla. 1985) the prosecution urged the jury to send a message to the community at large:

> Anything less in this case would only confirm what we see running around on the bumper stickers of these cars, and that is that only the victim gets the death penalty.

Id. at 133, f.n. 3

This court condemned this appeal to the emotions and fears of the jurors, but it refused to order a new sentencing hearing because of it. The evidence supporting the jury's recommendation of death was so strong that the improper comment had no effect on what they decided.

Rather than reverse, this court in Bertolotti cast the prosecutor's emotional appeal as an ethical problem, and it

believed the better way to handle such over zealousness was through disciplinary proceedings:

> This Court considers this sort of prosecutorial misconduct, in the face of repeated admonitions against such overreaching, to be grounds for appropriate disciplinary proceedings. It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office. Nor may we encourage them to believe that so long as their misconduct can be characterized as "harmless error," it will be without repercussion.

Id. at 133.

Undeterred by this court, the state in Garron v. State, 528 So. 2d 353 (Fla. 1988) inflamed the jury during closing argument, and this court again "expressed its displeasure" with the state's violation of its ethical duty. Unlike earlier cases Garron's judgment and sentence were reversed because

> [W]e believe a mistrial is the appropriate remedy here in addition to the possible penalties that disciplinary proceedings could impose upon the prosecutor.

Id. at 360.

As evident by this case, the threat of Bar discipline has failed to deter errant prosecutors. Only suppressing statements and new trials will do that. This court, in short, has abandoned the rationale of Bertolotti and adopted the more sure method of deterrence.

In this case, a new trial is warranted for two reasons. First, Esty was denied a fair trial by the state's egregious

comment, and second, a new trial will bring to the prosecutor's attention the seriousness of his error.

Of course, this assumes that the court's curative instruction failed to ameliorate the prosecutor's blunder. In Bertolotti and other cases only telling the jury to disregard the state's efforts to inflame their fears and passions may have sufficiently cured the problems because the evidence supporting the verdicts was crushingly conclusive. Not so in this case. Here the evidence of Esty's guilt was entirely circumstantial and not particularly compelling. The blood spots found on the defendant's coat proved the most damning because it was the same type as Lauren Ramsey. Yet the state's experts conceded that two percent of the white population had the same blood type as that found on the garment. If Pensacola has a population of about 100,000 people then 2,000 of them could have had the same blood type as the victim, an uncomfortably large number of people to justify any confidence that whatever error occurred was harmless beyond a reasonable doubt.[17]

Of course there was the broken baseball bat that had belonged to Esty found near the body as well as a knife and

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[17]Esty Further undermined the reliability of the state's expert's conclusions by questioning whether Ramsey "fit the Caucasian group." The expert assumed she did, but he admitted at trial that he did not know and had not studied her background
(R 996).

wrapping paper. Those items, while arguably linked to the defendant nevertheless did so only circumstantially and weakly at that. The blood stains, however, significantly strengthened the state's case, yet the state's case, in comparison to Bertolotti, Rhodes, and others was far from overwhelming. Watts v. State, 593 So. 2d 198 (Fla. 1992).

Moreover, this court has questioned the efficacy of curative instructions.

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

Thus, we have a weak case in which the court gave a weak instruction to ignore the prosecutor's egregious argument.[18] Murder trials inherently and easily arouse our sympathy for the victim and anger towards the defendant. Such emotions are natural, yet because of the very ease with which they are inflamed, trial and appellate courts should make every effort

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[18]Instead of merely telling the jury to disregard the state's improper comment, as the court did here, it should have affirmatively rebuked "the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by the improper argument." Williamson v. State, 459 So. 2d 1125 (Fla. 3rd DCA 1984); Deas v. State, 119 Fla. 839, 845, 161 So. 729 (1935).

to eliminate their appearance, if possible. Anything which tends to open the lid the courts try so hard to keep on the Pandora's box of emotion should bear close scrutiny. Rather than risk affirming a conviction based on an inflamed response given its head by an improper argument, this court should reverse and remand for a new trial.

ISSUE IX

THE COURT ERRED IN INSTRUCTING THE JURY ON REASONABLE DOUBT AS THAT TERM IS DEFINED IN THE STANDARD JURY INSTRUCTIONS FOR CRIMINAL CASES, IN VIOLATION OF ESTY'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

During the charge conference at the end of the guilt portion of this trial, Esty objected to the trial court instructing the jury on reasonable doubt. Specifically he said, ". . . I must indicate an objection to the definition of reasonable doubt. The first two sentences, Your Honor, I do not believe are a correct statement of the law . . . " (R 1341-42) The court overruled that objection (R 1342) and gave the jury the standard instruction on reasonable doubt. That was error.

The Constitution requires proof of the defendant's guilt beyond a reasonable doubt in criminal cases. The reasonable doubt standard is "indispensable" because it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In Cage v. Louisiana, 111 S.Ct. 328 (1990), the Court unanimously reversed a first degree murder conviction and death sentence where the trial court defined reasonable doubt for the jury as follows:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt

> beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

A. General law governing jury instructions.

The trial court judge has a duty to instruct the jury on the law. Rule 3.390(a), Florida Rules of Criminal Procedure, provides in pertinent part: "The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel." Due process requires instructions as to what the state must prove in order to obtain a conviction. See Screws v. United States, 325 U.S. 91, 107, 65 S.Ct. 1031, 89 L.Ed.2d 1495 (1945) (willfully depriving person of civil rights; jury not instructed as to meaning of "willfully": "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial."). It is fundamental error to fail to instruct the jury correctly as to what the state must prove in order to obtain a conviction. State v.

Delva, 575 So. 2d 643 (Fla. 1991), Sochor v. State, 580 So. 2d 595 (Fla.).

The federal and state constitutional rights to trial by jury carry with them the right to accurate instructions as to the elements of the offense. In Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (1945), the court wrote in reversing a conviction where there was an incorrect instruction on self-defense:

> There is much at stake and the right of trial by jury contemplates trial by due course of law. See Section 12, Declaration of Rights, Florida Constitution .... We have said that where the court attempts to define the crime, for which the accused is being tried, it is the duty of the court to define each and every element, and failure to do so, the charge is necessarily prejudicial to the accused and misleading. [Cit.] The same would necessarily be true when the same character of error is committed while charging on the law relative to the defense.

"Amid a sea of facts and inferences, instructions are the jury's only compass." U.S. v. Walters, 913 F.2d 388, 392 (7th Cir. 1990) (refusal to give theory of defense instruction required reversal of conviction). Arguments of counsel cannot substitute for instructions by the court. Taylor v. Kentucky, 436 U.S. 478, 488-489, 92 S.Ct. 1930, 56 L.Ed.2d 468 (1978).

B. Florida's standard jury instruction on reasonable doubt.

The source of the standard jury instruction on reasonable doubt is unclear. Decisions of the Florida Supreme Court preceding the promulgation of the standard instructions are contradictory and confusing. In Haager v. State, 83 Fla. 41,

90 So. 812, 816 (1922), the court disapproved of an instruction that a reasonable doubt could not be "a mere shadowy, flimsy doubt," writing:

> Attempts to explain and define what is meant by "reasonable doubt" often leave the subject more confused and involved than if no explanation were attempted. The instruction may be given in such a manner, and with such an inflection of voice, as to incline the jury to believe that there is sufficient doubt to almost require an acquittal, and, in other instances, may be so give as to make the jury feel that they would be guilty of a dereliction of duty if they entertained any doubt of the prisoner's guilt.
>
> In the charge complained of, the court undertook to differentiate between "a mere shadowy, flimsy doubt" and "a substantial doubt." The jury may have understood the distinction, but we are unable to grasp its significance. Every doubt, whether it be reasonable or not, is "shadowy" and "flimsy," and it would be better if judges would give the usual charge on the subject of reasonable doubt without attempting to define, explain, modify, or qualify the words "reasonable doubt."

But in Smith v. State, 135 Fla. 737, 186 So. 203, 206 (1939), the court approved of an instruction using the "shadowy, flimsy doubt" versus "substantial doubt" phraseology without analysis and without any mention of Haager.[19] In any event, as shown below, definition as a "reasonable doubt" as "a substantial

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[19]For whatever reason, West Publishing Company assigned no key number to the discussion in Haager, which may explain this oversight in Smith.

doubt" (and thus not a "shadowy, flimsy doubt") is unconstitutional.[20]

C. Pre-Cage federal cases on reasonable doubt instructions.

In Dunn v. Perrin, 570 F.2d 21 (1st Cir. 1978), the court, in reversing the petitioners' state court convictions, condemned the following jury instruction "reasonable doubt":

> It does not mean a trivial or a frivolous or a fanciful doubt nor one which can be readily or easily explained away, but rather such a strong and abiding conviction as still remains after careful consideration of all the facts and arguments...

The court wrote that the instruction "was the exact inverse of what it should have been." Id. at 24. Although it is proper to instruct the jury that a reasonable doubt cannot be "purely speculative," a court is "playing with fire" when it goes beyond that. U.S. v. Cruz, 603 F.2d 673, 675 (7th Cir. 1979). It is improper to instruct that the government need to prove guilt "beyond all possible doubt." U.S. v. Shaffner, 524 F.2d 1021 (7th Cir. 1975). Further, an instruction equating a reasonable doubt with "a real possibility" has been condemned because it may "be misinterpreted by jurors as unwarrantedly

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[20]The Florida Supreme Court upheld the standard instruction without analysis in Brown v. State, 565 So. 2d 304 (Fla. 1990). The cases cited in Brown are also lacking in analysis. The court has never directly addressed the issues raised in this motion.

shifting the burden of proof to the defense." U.S. v. McBride, 786 F.2d 45, 51-52 (2nd Cir. 1986).

Jury instructions equating reasonable doubt with substantial doubt have been "uniformly criticized." Monk v. Zelez, 901 F.2d 885, 889 (10th Cir. 1990). It is improper to define a reasonable doubt as "substantial rather than speculative." U.S. Rodriguez, 585 F.2d 1234, 1240-1242 (5th Cir. 1978) (affirming conviction, but noting that a trial court using such an instruction "can reasonably expect a reversal.") An instruction that a reasonable doubt is a "substantial doubt, a real doubt" has been condemned as confusing by the Supreme Court. Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978).

C. Discussion.

In view of the foregoing, the definition of "reasonable doubt" in the standard instructions is unconstitutional. Although negative in its terms, it essentially equates the word "reasonable" with such condemned terms as "substantial" and "real." (What else can "not possible" mean? It is obvious from cases such as U.S. Rodriguez that "not speculative" is equivalent to "substantial.") All doubts, whether reasonable or unreasonable, are necessarily founded on speculation and possibility. See Haager. As the Court pointed out in Winship, the Constitution requires "a subjective state of certitude" before the defendant can be convicted. The absence of such a degree of certitude necessarily involves a degree of speculation and consideration of possibilities. The standard

instruction forbids a not guilty verdict on the basis of a "possible" or "speculative" doubt, although possibilities and speculation can be reasonable and prevent the "subjective state of certitude" required by Winship.

Further, the sentence "Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt." could reasonably be taken by jurors to mean that they should convict even where a reasonable doubt is found, so long as they have "an abiding conviction of guilt." Where a jury instruction is challenged, the question is not what the court thinks the instruction means "but rather what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307, 315-316, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) (emphasis supplied); Cage. Since the jury could have taken the "abiding conviction of guilt" standard as supplanting the requirement of proof beyond a reasonable doubt, the standard instruction is improper on that ground also. C.f. Dunn, 570 F.2d at 24, n. 3 (court will not expect jury to "intuit a more sensible meaning, at least not when so crucial a concept as reasonable doubt is our focus").

In view of the foregoing, the trial court gave an erroneous instruction relieving the state of its burden of proving guilt beyond a reasonable doubt. Accordingly, this Court should order a new trial.

ISSUE X

THE COURT ERRED IN FINDING THIS MURDER TO HAVE BEEN COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In sentencing Esty to death the court found that he had committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (R 2377-78). It found the following evidence supported this conclusion:

> 1. The murder was committed in a secluded area with which the Defendant was personally familiar and where he felt safe.
>
> 2. Before picking up Lauren he changed clothes into his overcoat and combat boots, purchased the butcher knife at Albertson's, and brought the baseball bat and machete with him.
>
> 3. Donning the black trench coat and combat boots was almost a ritual.
>
> 4. The murder was committed in a thorough and methodical manner.

Id.

Discussing the law on cold, calculated murders is unnecessary because most of the evidence the court presented supporting its finding of this aggravating factor really was speculation.

1. The murder was committed in a secluded area. There was, first of all, no evidence Ramsey was killed at the Langdon Battery area of the Gulf Islands National Seashore at Fort Pickens, the place where her body was found. Second, how really secluded was the recreation area that was open to the

public? On December 21 and 22, approximately 80 people camped in the area, and that figure did not include the many sightseers who visited the National Seashore (R 1013). On nice days it attracted many retired people who liked to camp and use the bicycle paths. It was, in short, a popular spot for people to wander about, and hardly the place one would either want to commit a murder or leave a body.

2. Before picking up Lauren, he changed clothes, etc. While Esty may have changed clothes, there is no evidence he did so to facilitate the murder of Ramsey. There is, likewise, no evidence he made any special effort to bring a baseball bat or machete to commit the crime. Several witnesses said the defendant carried a "knife or two" in his car along with a baseball bat and machete and perhaps other weapons (R 647, 656, 687). They simply could have been available.

Of course, a butcher knife was found in the vicinity of Ramsey's body, and there was evidence Esty had bought one on the day of the murder. It was also shown that some of the wounds on her body could have been made by a knife (R 857-60). There was, however, no blood on the knife that was found near Ramsey's body (R 937), and as is obvious by now, Esty owned several knives and could have used one of the ones in his car to commit the homicide. Moreover, merely procuring a weapon does not mean this aggravating factor applies.

In Cannady v. State, 18 Fla. L. Weekly S277 (May 6, 1993), the defendant's wife claimed that a third person, Gerald Boisvert, had raped her. Two months later she was still

depressed. Cannady got a gun, cleaned it, then shot her. He also murdered Boisvert a short time later. This court rejected a trial court finding that the defendant had killed his wife in a cold, calculated, and premeditated manner. Even though he got his pistol, calmly cleaned it, then shot his wife, this aggravating factor did not apply. "There was no evidence of any threats against her and no showing of prior intent to kill her."

Similarly, here, even if Esty had bought a butcher knife the night Ramsey was killed, there is no evidence he had any animosity towards her.

3. The ritual donning of the trenchcoat. There is no evidence Esty changed into some sort of "Dungeons and Dragons" costume as part of his preparation for killing Ramsey. Lisa Bolton, the state's witness who saw him on December 22, said that when he dropped her at a teen club about 6 p.m. he was wearing a T-shirt, pants and white tennis shoes (R 701). When he returned to pick her up at midnight, he was wearing his trench coat and boots (R 701). This change however is not so surprising because it was, afterall, December, and at that time of the year, after the sun goes down so does the temperature. Moreover, Esty changed his shoes because he had gotten his tennis shoes wet when he stepped into a puddle of water (R 1209). The court relied on the "ritual donning" to give this murder more drama and satanic evil than the evidence supported.

4. This was a thorough and methodical killing. It could have as easily been a frenzied murder. The state speculated that Esty killed Ramsey because she was pregnant and would claim he was the father.[21] Assuming Esty knew she was pregnant, the question is when did he find out. That is important because Ramsey could have met with the defendant on the evening of the 22nd to tell him the news. When he learned of it and realized that her mother would have been "quite outraged" (R 1265) among other things, he might have killed her in an emotional outburst.

That the killing occurred during an emotional frenzy draws support from the psychologist who said that while Esty was very bright, he was also emotionally immature and prone to act or react inappropriately when under stress (R 1456).[22] It is likely that Ramsey met with Esty on the 22nd, gave him the ugly Troll doll, and told him she was pregnant. By December, his feelings towards her had cooled (R 651-53), so when faced with

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[21]There is no evidence Esty knew, before the murder, that Ramsey was pregnant (R 691, 707). He claimed, to the contrary, that it was not until after her death that he learned of her condition (R 1248, 1266).

[22]Esty displayed this immaturity during his trial as became evident when a juror asked the court to tell the defendant not to laugh (R 2163). This puerile attitude also demonstrated itself through his fascination with weapons, especially with knifes, swords, "renaissance weapons, and so forth." (R 1463) That an 18 year old college student could still play swords with his friends also suggests that Esty was immature for his age.

this sudden revelation and what it implied, this immature boy, this member of the "War Pigs," may have overreacted by brutally stabbing and beating Ramsey. The murder was "thorough and methodical" as a rage killing can be. In Mitchell v. State, 527 So. 2d 179 (Fla. 1988) the victim had been stabbed 110 times and bitten once. Also, his pants pockets had been emptied, and his pants undone and pulled down. Mitchell claimed the murder was the result of a homosexual rage. This court, rejecting the trial court's finding that the murder was cold, calculated, and premeditated, held that that aggravating factor was inapplicable to a rage killing.

So here. The circumstantial evidence shows with a clarity the state cannot blur that Esty committed this murder during an emotional frenzy. In Douglas v. State, 575 So. 2d 165 (Fla. 1991), the defendant got a rifle, tracked down his former lover, then forced her to have sex with her new husband. After, he bludgeoned and shot him as his wife watched. Although these events lasted four hours, this court refused to find that Douglas committed the murder in a cold, calculated, and premeditated manner. It was certainly, calculated and premeditated, but the defendant's violent emotions, which fueled his mad acts, prevented the murder from being "coldly" executed. Indeed, as this court said, "There was no deliberate plan formed though calm and cool reflection, . . . only mad acts prompted by wild emotion." Santos v. State, 591 So. 2d 160, 163 (Fla. 1991).

Thus, even if we concede what the court found to support this aggravating factor and accept the speculation that Esty knew she was pregnant, the aggravating factor would still be inappropriate for this case. While the defendant may have bought the knife to kill Ramsey, ritually donned the black trench coat and combat boots, and thoroughly and methodically killed Ramsey, the murder was nevertheless driven by his immature, even childish reaction to her revelation. It was not a coldly plotted plan to do away with her. Maulden v. State, 617 So. 2d 298 (Fla. 1993)(defendant, overwhelmed by emotions, did not kill his former wife and her boyfriend in a cold manner); Padilla v. State, 18 Fla. L. Weekly S181 (Fla. March 25, 1993)(revenge killing after being beaten not cold though calculated.); Cannady, supra. (murder of man defendant believed had raped wife may have been calculated but not cold.)

The evidence established at trial fails to show what drove Esty to kill Lauren Ramsey or how he committed the homicide. Even if we accept the trial court's findings justifying the finding that the murder was committed in a cold, calculated, and premeditated manner, what the defendant did was calculated but it was not coldly done. As such, in either instance, this murder was not committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

ISSUE XI

THE COURT ERRED IN OVERRIDING THE JURY'S LIFE RECOMMENDATION AND SENTENCING ESTY TO DEATH.

The jury recommended that Sean Esty spend the rest of his life in prison. The court rejected that verdict and sentenced this young man to death. It erred in doing so because the abundant evidence presented at the guilt and penalty phases of the trial clearly showed that the jurors had a reasonable basis for recommending life.

This court has repeatedly articulated the law in this area. A trial court should impose a life sentence when the jury has recommended that punishment and they had a reasonable basis for it. Tedder v. State, 322 So. 2d 908 (Fla. 1975). Accordingly, on appeal, this court does not determine if the trial court abused its discretion in imposing capital punishment. Instead, it reviews the record (and not simply the court's sentencing order) for any possible reasonable basis the jury could have used for returning a life verdict.

In recent years, relatively few life override cases have come before this court, and of those, even fewer have been affirmed. Where death sentences have been approved, despite a jury recommendation of life, a pattern has emerged which sharply distinguishes those cases from ones that this court has remanded for imposition of a life sentence. In the affirmed life overrides, the defendants tended to have a particularly noteworthy history of one sort or the other.

The may have committed committed murders that, at least on an emotional level, strike one as being the ones for which only death would be an appropriate punishment. For example, the defendants Coleman, Robinson, and Williams either ordered the execution of or murdered four people who had stolen $10,000 worth of the defendants' cocaine. They recovered the drugs but killed the thieves anyway. Two of the female victims had been raped and their throats had been cut, and all had been shot in the back of the head after being bound. They were murdered apparently for no other reason than as punishment for having stolen the drugs and to serve as a warning to others. Coleman v. State, 610 So. 2d 1283 (Fla. 1992); Robinson v. State, 610 So. 2d 1288 (Fla. 1992); Williams v. State, 18 Fla. L. Weekly (Fla. April 22, 1993).

With facts this horrible, this court concluded that the only basis on which the jury could have recommended a life sentence was one of rough justice. The victims somehow deserved what they got. Such a reason, however, could not reasonably justify a life sentence for the defendants, and in other cases this court has consistently rejected similar defense arguments. Marshall v. State, 604 So. 2d 799 (Fla. 1992); Torres v. State, 524 So. 2d 403 (Fla. 1988).

On the other hand, the recent cases which have been returned for life sentences tend to have defendants who have abused childhoods, or severe emotional or mental problems. Scott v. State, 603 So. 2d 1275 (Fla. 1992); Brown v. State, 526 So. 2d 903 (Fla. 1988). They generally have no significant

history of criminal activity, Wasko v. State, 505 So. 2d 1314 (Fla. 1987), or have a good character. Id., Perry v. State, 522 So. 2d 817 (Fla. 1988). The murders they commit, in short, are a total aberration from an otherwise productive, law abiding life. These cases stand in stark contrast to the other ones which also had a life recommendation but were affirmed on appeal. In Wasko, for example, the defendant killed a child, an "especially despicable" crime as this court recognized. Id. at 1318. Nevertheless, it ordered imposition of a life sentence because the jury could have reasonably recommended that punishment because of his lack of significant criminal history, and his good character, employment record, and family background.[23]

In Perry, the defendant broke into the victim's home and tried to rob her, but murdered her instead. Perry beat, strangled, and stabbed her as she struggled to avoid being killed. After finding the defendant guilty of murder, the jury recommended he live, and this court agreed with that decision. For years Perry had been kind and good to his family. He had never displayed any signs of violence, but had been helpful. He wanted to get ahead in life and was motivated to do so. Life, however, had turned sour for this young man, so that after three years he saw himself as a complete failure. He did

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[23]The jury may have also questioned role Wasko played in the murder as compared with that of the co-defendant.

not have a job, his wife was pregnant and they had no place to live.

Even though Perry had committed a violent attack on a girl two weeks before the murder, this court agreed with the jury's life recommendation. The jury had a reasonable basis to recommend life because they "may have considered the evidence of Perry's character, his psychological stress and his relatively young age of twenty-one years to counterbalance the aggravating factors." Id. at 821.

So, where in this spectrum does Esty appear? Is he the mobster seeking revenge or the young man of good character who, except for this single explosion of total criminality, has led a decent, productive life? The answer is obvious, and surprisingly the trial court's sentencing order provides the reasonable basis for the jury's life recommendation. Rather than minimizing the force of the substantial mitigation presented, as the trial court did, the jury could have reasonably concluded that this very bright teenager was not so much different than most youth today and did not deserve to die.

As found by the court, Sean has no significant history of prior criminal activity (R 2280). He had no juvenile or adult record, and only two traffic citations (one for speeding, of course, and the other for running a stop sign) blot his otherwise spotless record (R 2228). The absence of any criminal tendencies should be expected because he was very motivated to achieve and make something of himself.

This characteristic emerges in two ways. First, his native intelligence and drive demonstrated itself by the several certificates and letters Sean received for academic excellence. Duke University, for example, recognized him as one of a select few who were mathematically and verbally gifted (R 2305-2306). He received a Science Award, a "Presidential Academic Fitness Award for Outstanding Academic Achievement," and a "certificate of recognition/achievement" for participating in a regional science fair (R 2303, 2310). Former United States Senator Paula Hawkins wrote him a letter in 1986 congratulating him on his "outstanding performance" on the Scholastic Aptitude Test (R 2311). Additionally, the schools he attended quickly recognized that he was an exceptional child and young man because they placed him in special programs for the intellectually gifted (R 1461). In high school he was an honors student and earned high grades (R 1512).[24]

Second, while in high school, he was very active in the Junior ROTC program at Pensacola High School. He received a certificate of successful completion of three years of Air Force Junior ROTC in 1991 (R 2201). During that time, he was further recognized for his outstanding competence in military science (R 2299), he received a "Citation for Outstanding

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[24]He did not like to do homework, but as explained by one of his teachers, "that's pretty much par for the course with most of the kids I taught that year." (R 1512)

Leadership," (R 2302) and he was selected as the outstanding cadet for the month of September 1989 (R 2304). Regarding this last achievement, Major General Robert Patterson, President of the Eglin Chapter of the Air Force Association, wrote him a letter congratulating him on this recognition (R 2311).

On another level, Sean was consistently described as being a loving child (R 1488, 2386), considerate and gentle (R 2386-88), a typical teenager (R 1490, 1524), and non-violent (R 1494). After graduating from high school, he enrolled at the University of West Florida. He also had a job at a local restaurant and had worked there for almost 18 months (R 2232).

Is Sean Esty an Albert Einstein, Isaac Newton, or Robert Oppenheimer? Is he a Norman Schwarzkopf or Douglas MacArthur in embryo? A Mother Theresa or Sam Walton? Probably not. Instead, he is like many of the best of America's youth: bright, hard working, and enthusiastic. As Senator Hawkins said in her letter to Sean, "It is our young people that serve as the backbone and source of tomorrow's great strength. I know that our country will stand strong in the years to come because of special youngsters like you." (R 2311) But now, ah, such a waste. The jury, with far greater insight, wisdom, and compassion than demonstrated by the trial court, recognized the great tragedy of this case. A young woman with life unfolding before her had been murdered by a boy who had everything to live for, who could have been anything he wanted, and who could have become a valued member of society. Certainly he should pay for his crime, as the defendants in Perry and Wasko must

do, but with greater justification than in those earlier cases, society does not demand his life. In no sense can this defendant be likened to the drug dealing mobsters in Coleman, Robinson, and Williams for whom rape, torture, and murder were merely tools of their trade. Here we have an immature and very insecure (R 1455) but bright teenager (18 as compared to Perry's 21) who, when under pressure, tended to act inappropriately (R 1456), who killed a girl who may have become pregnant by him. He never suggested that the victim somehow deserved to die, as was done in the drug dealing cases, and the jury could have reasonably concluded Sean should spend the rest of his life in prison.

Except for the conclusions drawn by the trial court, its sentencing order could serve as a model. The court, often at great lengths, considered all the mitigation Esty presented in the way he asked that it be viewed. The court erred, however, in what it then did with the mitigation. Rather than asking if the evidence, either in part, or in whole, reasonably supported the jury's life recommendation, it dismissed it entirely as being either of no mitigating value or as being of little or no weight.

For example, the court several times rejected what the defendant offered because "there is nothing extraordinary," there was nothing "at all unique or exemplary about him," there was not "exemplary behavior which exceeds the bounds society expects of any good citizen," or there was nothing "unique" about what Esty had done (R 2385, 2386, 2390, 2394).

This court, however, has never required a defendant to somehow be more than a mere mortal, a man among men, or a paragon of virtue. To the contrary, in light of the large numbers of truly vicious criminals whose death sentences this court has considered, that the defendant is an "ordinary" citizen speaks volumes loudly in his behalf.

Thus, the court's rejection or diminishing of all the mitigation Esty offered appears, not as reasoned analysis, but as mean. For example, the court detailed for well over three pages the uniform high esteem everyone had of Esty. He was "sweet, caring," he helped children learn to swim, he painted a pregnant mother's house, he was "wonderful, caring, considerate," who had never done anything malicious. The worst that was said of him was that he was "fairly typical of the average teenagers today."

Rejecting this character evidence, the court said that it "does not reveal any penchant for charity or generosity to others or exemplary behavior which exceeds the bounds society expects of any good citizen or above what would be expected for a typical, normal young man." (R 2390)

The court similarly treated the extensive evidence presented of the defendants school, civic and ROTC achievements. It summarily rejected several of them because "this Court is not able to determine the date of issuance" for several of the certificates awarded to Esty. As to the majority of items, it simply said, "There is no indication for the meaning or significance" of the awards or certificates (R

2394). What explanation is necessary for a "Citation for Outstanding Leadership," a Certificate of successful completion of three years of the Air Force Junior ROTC program," or a "Certificate of Distinction"? Certainly the words "Most Valuable Player," "Silver Star," and "Dean's List" have no inherent indication of any meaning or significance, yet as a society we do not need more to admire the skilful athlete, honor the courageous soldier, or respect the academically gifted. So, here the court should have respected Esty's accomplishments rather than simply rejecting them out of hand.

The court's order, in short, exposed the court as being bent on sentencing this defendant to death regardless of what the evidence showed. Rather than being a demonstration of reasoned judgment recognizing the jury's recommendation, the court's sentencing order exhibits a trial court exercising its unfettered, unreasonable and uncontrolled discretion.

Perhaps some day, Esty the man will be able to return to society and realize the potential he had so obviously demonstrated as a youth. The jury, accepting the mental health expert's judgment that Sean had a "good rehabilitation potential" (R 1457), could have so viewed him.[25] They certainly had a reasonable basis for their life recommendation.

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[25]This conclusion has more force than the trial court's bizarre reasoning that Esty cannot be rehabilitated because "the Defendant is already at the state to which rehabilitative techniques might seek to take him." (R 2392)

This court should reverse the trial court's sentence of death and remand for imposition of a life sentence without the possibility of parole for twenty-five years.

ISSUE XII

THE COURT ERRED IN FAILING TO FIND ESTY'S AGE OF 18 AT THE TIME OF THE MURDER AS MITIGATING A DEATH SENTENCE.

Esty asked the trial court to consider his age of 18 as mitigating a death sentence. The court, however, rejected it:

> The age of the Defendant at the time he murdered Lauren Ramsey was 18 years and is not a factor. Although he resided in his mother's home, he came and went as he pleased, he had his own telephone, an he had a job and was attending college. Defendant is an exceptionally intelligent adult, completely capable of understanding the criminality of his act.

(R 2382).[26]

The court erred in refusing to find the defendant's age as mitigation.

This court's opinion in Ellis v. State, 18 Fla. L. Weekly S417 (Fla. July 1, 1993) controls this issue. In that case, this court said,

> We believe the proper approach in cases involving murders committed by minors is that used in LeCroy [v. State, 533 So. 2d 750 (Fla. 1988)]. Whenever a murder is committed by one who at the time was a minor, the mitigating factor of age must be found and weighed, but the weight can be diminished by other evidence showing unusual maturity. It is the assignment of weight that falls within the trial court's discretion."

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[26]Esty turned 18 less two weeks before Ramsey's death (R 1803).

In this case, the trial court rather than acknowledging Esty's youth, simply rejected it as of any mitigating value. It should have found it as required by Ellis, then given it whatever weight it believed it deserved.

Of course, the retort is that the court, by whatever route it took, would have reached the same result. As a practical matter, Esty's age would have not tipped the scales, in this court's mind, in favor of life. Yet, there was more the court should have considered which is not reflected in its order.

True, as the court found, Esty "came and went as he pleased, he had his won telephone, and he had a job and was attending college." The court, on the other hand, failed to consider here (as it would do later (R 2384-85)) the defendant's emotional immaturity and underlying insecurity. Such weaknesses often expressed themselves "with a lot of clowning around or drawing attention to themselves or being theatrical or being cavalier or kind of indifferent and sometimes it's a lot of what we call inappropriate emotion or inappropriate affect such as under pressure, under stress instead of showing a lot of anxiety and fear, which is what the underlying motive might be, there may be laughing for example or even laughing to the point of hysteria." (R 1455-56) This inappropriate behavior would manifest itself most readily when the person was under stress (R 1455).

Thus, whatever evidence of superior maturity Esty may have demonstrated as the court found, is countered by the underlying weakness in his emotional makeup. Of course, the court may

have given it little weight, but it should have at least recognized it in its analysis of the mitigating value that Esty's age was worth. That it summarily rejected age as a mitigating factor was error that the court only compounded when it failed to consider all the evidence that bore on weight this mitigation should have been given.

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

CONCLUSION

Based on the evidence, law, and argument presented above, the appellant, Sean Esty, respectfully asks this honorable court to either 1) reverse the trial court's judgment and sentence and remand for a new trial, 2) reverse the trial court's sentence and remand for resentencing, or 3) reverse the trial court's sentence and remand with directions that the trial court impose a life sentence without the possibility of parole for twenty-five years.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
Assistant Public Defender
Fla. Bar No. 271543
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Carolyn Snurkowski, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, SEAN PATRICK ESTY, #220722, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this 24TH day of August, 1993.

DAVID A. DAVIS