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

AMENDED REPLY BRIEF OF APPELLANT

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:

AMENDED REPLY BRIEF OF APPELLANT

STATEMENT OF THE FACTS

Esty relies on The Statement of the Facts presented in his Initial Brief. The State's facts need the following corrections or clarifications:

1. Page 1 (Appellee's Answer Brief). When Esty said that he hated Ramsey and wanted Henry Lusane to get her pregnant, he was joking (R 653).

2. Pages 1-2. The "Mickey Mouse" wrapping paper Lauren Ramsey used to wrap her present to Sean was mostly white with green and red stripes (R 672). The paper found at the scene two weeks after the murder was solidly red with thin green stripes (See Exhibit 20).

3. Page 3. The stab wounds on Ramsey's body did not cause "copious" bleeding. About a half pint of blood came from those injuries, a significant amount, but not a large quantity (R 861).

4. Page 4. The baseball bat was recovered the day after Ramsey's body was found (R 631), and the wrapping paper with

the words "To Sean, love Laura" was not discovered until almost two weeks later (R 625).

5. Page 4. Esty's palm print on the baseball bat had been put there when the paint he had covered it with was wet.

6. Page 5. Esty and his friends had occasionally been cut playing "boffo." (R 1028, 1052)

7. Page 8. When Esty threw the parts of his boffo stick away so it would not hurt anyone else, he did so because he had been cut by a piece of metal that had been taped to it (R 1261).

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.

The problem with the affidavit supporting the probable cause determination in this case comes not so much from what it contained as from what it omitted. The state cries that Esty wanted every conceivable fact the police had discovered about this murder to have been included in their request for a search warrant (Appellee's Brief at p. 23). Not so. What should have been included were those facts that would have enabled the reviewing magistrate to make an informed decision of whether the police had sufficient probable cause to search Esty's house.

Here they used information gained from other suspects without letting the trial court know these people had motives

to lie, reasons to exonerate themselves and accuse the defendant. For all the affidavit reveals, the sources used were disinterested persons who had no motive to deceive. Such was far from true. Wade Wallace was also thought to have been involved in her murder. Surely a magistrate would have wanted to know this.

The state hoped to dismiss this problem on page 23 of its brief by observing that it is "hardly an uncommon occurrence" for the police to include information gained from individuals who "were subject to impeachment." While true, even the United States Supreme Court would reject a finding of probable cause based on uncorroborated information provided by an informant of uncertain or unknown credibility. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 527 (1983). Here, the officers never told the court, for example, that Wallace had been given use immunity for his statements,[1] that he had given inconsistent stories about what he knew of Ramsey's death (R 2014), that he had had sexual

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[1]The state says "appellate counsel finds great significance in the fact that Wallace was given use immunity for each statement which he made, something which is standard procedure." (Appellee's Brief at p. 27) If appellate counsel views that grant of immunity as important it is because the First District Court of Appeal thought it vital to its decision affirming the trial court's ruling in State v. Van Pieterson, 550 So. 2d 1162 (Fla. 1st DCA 1989).

relations with the victim (R 1969),[2] that he had been recently arrested (R 1970), that he commonly carried knives (R 2008), and that not until the police confronted him with his impossible story that he told them the defendant had admitted to him that "he had taken care of his problem." (R 1976) The affidavit also made no mention of Wallace's refusal to take a polygraph examination (R 1979).

The state on pages 26-27 tries to support these deficiencies by claiming that Wallace had "stuck with the same basic story line." (R 2014) A policeman admitted "I do recall throughout the period of the second interview he changed his story. I think I counted six times or added to his story about six times." (R 2014). When asked if this suspect was lying, he replied, "I can't say that those exact words were used, but there were times that we pointed out inconsistencies in his story just based on chronology of time, that sort of thing, that there were impossibilities in his story." (R 2014) None of this impeaching evidence found its way into the affidavit, but it should have been included. Wallace had credibility problems, and the judge, not the police, should have decided his credibility.

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[2]It may have been interesting that the presentence report in included lab reports ruling out Wallace as the father of the victim's baby. (Appellee's brief at p. 26, footnote 1.) That does not eliminate the fact that Wallace could have believed he fathered Ramsey's child.

The state by way of a footnote on page 28 of its brief attacks the First District Court of Appeals' decision in State v. Van Pieterson, 550 So. 2d 1162 (Fla. 1st DCA 1989). It claims that the test of materiality of an omission from an affidavit should be measured by the federal standard articulated in United State v. Colkley, 899 F.2d 297 (4th Cir. 1990). In that case, the court held that the omitted information "must be such that its inclusion in the affidavit would defeat probable cause for arrest." Id. Esty can find little difference in this latter standard from the one used in Van Pieterson: "[A material omission occurs] if a substantial possibility exists that the omission would have altered a reasonable magistrate's probable cause determination." Id. at 1164. Regardless both courts would include the omissions in the affidavit and then use a totality of the circumstances approach to determine if a reasonable magistrate would have still found probable cause. Id., Colkley at 301-302.

Similarly, the state has misapprehended the gravity of Esty's allegations when it relied on State v. Chapin, 486 So. 2d 566, 568 (Fla. 1986). The defendant finds no fault with the police excluding the minutiae of its investigation from the court's view. Nor is he alleging they were guilty of simple negligence in preparing the affidavit. His claim is more serious. They deliberately omitted key facts that could have had no other effect than to mislead the issuing magistrate into finding probable cause. State v. Utterback, 485 N.W. 2d 760 (Neb. 1992) (Consciously omitted information that informant was

an admitted liar was designed to mislead when inference from affidavit was that he was a believable citizen.) This court should 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.

The state made three attempts to defeat Esty's contention on this point: 1) There was no showing Johnson was illiterate. 2) There was no legal authority for excusing an illiterate prospective juror. 3) The trial court cured any error by giving Esty four additional peremptory challenges.

As to Johnson's illiteracy, no one ever challenged Esty's assertion that Mr. Johnson could not read. The state accepted this venireman's disability and the court never disputed defense counsel's assertion (R 534). Without any trial level challenge the state cannot attack Esty's claim now. C.f., Cannady v. State, 620 So. 2d 165 (Fla. 1993).

Regarding the lack of legal authority on whether an illiterate juror can serve, counsel has found no specific case on point. Like trial counsel, he must rely on the "reasonable doubt" standard established by this court in Singer v. State, 109 So. 2d 7, 23-24 (Fla. 1959).

One could reasonably have believed that Johnson would have deferred to the opinion of others because he would have relied on them to read the jury instructions and the written evidence

presented at trial. More significantly, he simply may have been confused by what was read. In the questionaire (which his wife read to him) he admitted that he had no prior knowledge of the case and could be fair and impartial (R 2091). On the other hand he also said he could not put aside the prior knowledge he had and reach a verdict based solely on what was presented at trial. If these simple, straightforward questions confused him, one would have had a reasonable apprehension that the jury instructions would have also.

Rule 3.390 Fla. R. Crim. P. and Rule 1.431(c)(3) Fla. R. Civ. P. also have modified our traditional indifference to a juror's inability to read. The civil rule explicitly, and the criminal one by implication, require literate jurors in a specific case if it requires skill in reading. Esty is not suggesting that (contrary to the state's assertion. Answer Brief p. 35) prospective jurors like Johnson should be automatically, and in every case, excused for cause. He is saying that in a capital trial, which requires the court to give the jurors the written instructions, literacy is a prerequisite. As Justice Overton wrote when he sat on the Fourth District Court of Appeals:

> The sending of written instructions with the jury for use in its deliberations can be a valuable aid in the jury's understanding of the applicable law, particularly in complex situations, and should be used when at all possible and practical.

Maitre v. State, 232 So. 2d 209, 211 (Fla. 4th DCA 1970).

The state argues that whatever error occurred was cured when the court gave Esty four more peremptory challenges (Appellee's Brief at pp. 35-37) Two responses. First, the court not only gave the defendant four additional challenges, it also allowed the state an equal number of additional peremptory strikes (R 545). Most significant, however, even after using those additional opportunities to summarily excuse prospective jurors, Esty still had four members of the venire that he did not want to serve at his trial (R 544). Thus, that the court had given him additional challenges, and even was "extremely liberal in allowing challenges for cause" (Appellee's Brief at p. 36), objectionable members of the venire remained.

Finally, the state tries to shift the argument away from Johnson and focus on Esty's desire to peremptorily excuse Adams. The state may "observe that there was nothing truly objectionable about Mr. Adams," but that misses the point. Esty had problems with him and had tried to have him excused for cause (R 456).

The states reliance on Hall v. State, 614 So. 2d 473 (Fla. 1993) provides no support for its argument on this point. In that case, after the court had given the defendant an additional peremptory challenge (which he used), it refused to give him any more so he could challenge one Cavanaugh. He wanted this prospective juror excused because of the pretrial publicity and he had allegedly heard some jurors talking in the hallway. This court affirmed the trial court's ruling, but the

opinion is strange because Hall should have objected to Cavanaugh for cause, and this court's reference to Singer and its opinion on the matter seems to imply that is how this court viewed it.

That case is factually distinguishable because here Johnson was not the last juror challenged as Cavanaugh was in Hall. To bring it into line with that case, the state therefore argued that Adams was like Cavanaugh. Such comparison is the proverbial "red herring" because the state is seeking to divert this court's attention from the real problem here: Johnson. Esty trusts that it will not be so misled, and if not, it will agree with him that the trial court erred in refusing to excuse Johnson for cause.

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 most serious challenge the state makes on this issue arises from Esty's failure to follow the procedure established in Rule 3.240 Fla. R. Crim. P. to change the venue of his trial. Esty has two responses. First, the rules of criminal procedure can be waived or created as needed, Peede v. State, 474 So. 2d 808 (Fla. 1985) (Defendant can waive personal presence at trial as required by Rule 3.180); State v. Ford, 18 Fla. L. Weekly S595 (Fla. November 10, 1993) (Trial court may create a rule of criminal procedure to further an important

public policy if none exists.) Second, the state never objected to the defendant's failure to abide by the dictates of the rule on motions for a change of venue. It therefore cannot raise it on appeal to defeat this claim. C.f., Cannady v. State, 620 So. 2d 165 (Fla. 1993).

This latter reason thus makes the state's use of Provenzano v. State, 497 So. 2d 1177 (Fla. 1986) inappropriate. Unlike that case, here, the court never asked for a written motion and was content with Esty's oral request for the change. Also, unlike the court in Provenzano, it did rule on the venue question (R 1334).

As to the merits, the state claims "the jury was selected with relative ease." (Appellee's brief at p. 41) From its perspective that may have been so, but not from the defendant's view. Even after the court had granted him several more peremptory challenges, and he had used them, at least four objectionable prospective jurors remained (R 544).

Examining how the defendant used his peremptory challenges only partially exposes the extent of the community prejudice. Esty objected to 22 of the 26 prospective jurors for cause because they had knowledge of the case (R 539), and the court granted 8 of them. Seven of those left knew some of the facts of this case, and three said they had extensive knowledge about the murder (R 539).

Finally, the state makes much of the prospective jurors' assurances that they could be fair and impartial and set aside any prior knowledge of the case. (Appellee's brief at p. 43)

Appellate counsel could make a similar promise in good faith, yet which prosecutor would leave him on the jury?

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 claims that during its case in chief "it would not appear that the state actually introduced. . . . any testimony concerning Esty having sex with the victim in November of 1991." (Appellee's brief at p. 46) As part of his proof the defendant murdered Ramsey, the prosecutor showed that Ramsey was four weeks pregnant when killed (R 803). He also proved that Esty had been caught in her bedroom late at night about a year before the murder (R 814, 823). Finally, after Ramsey's body had been found and he learned she had been pregnant the defendant admitted that he may have been the father of the victim's child (R 705). None of this evidence would have been admitted if the court had granted the defendant's motion in limine.

There is then the claim that this issue was waived because the defendant did not object. (Appellee's brief at p. 47) Esty had filed a Motion in Limine, asking the court to excluded any reference to any sexual conduct between him and Ramsey (R 2078-79). The court considered it immediately after the jury had been chosen and sworn and before opening statements (R 556 et. seq.) The first three witnesses merely told about finding

the body and some of the evidence at the crime scene. Henry Lusane, Susan Primm, and Lisa Bolton testified next, and they provided the circumstantial evidence Esty had had sexual intercourse with Ramsey. His objection immediately before the state opened its case was contemporaneous. Clark v. State, 363 So. 2d 331 (Fla. 1978) and Castor v. State, 365 So. 2d 701 (Fla. 1978).

The state, on page 47 of its brief, claims the evidence was relevant because it provided a motive for the murder. Premarital sex and pregnancies out of wedlock carry little stigma today. Hence, the state has a double problem here. It assumed that a teenager would, in today's promiscuous society, kill to hide a pregnancy. Second, there is no evidence Esty knew before Ramsey's death that she was pregnant. Cases such as Maharaj v. State, 597 So. 2d 786 (Fla. 1992) and Craig v. State, 510 So. 2d 857 (Fla. 1987), thus become essentially irrelevant. In Craig, the defendant killed his victims because he knew they had become suspicious of his cattle theft scheme. In Maharaj, newspaper articles about a lawsuit the victim had initiated against the defendant were relevant to show his motive for the murder. Unlike the situation here, in both cases the defendants obviously knew their victims had some animus against them.

Likewise, Heiney v. State, 447 So. 2d 210 (Fla. 1984) has no persuasive value because there the defendant had fled Texas after shooting a man. Later, he killed another person and stole his credit cards. The Texas shooting was relevant this

court held because it put the entire criminal episode in context and explained why Heiney had left that western state. "He had no transportation, no money, and was running from a possible murder. He was desperate." Id. at 214. There is no similar evidence of Esty's desperation here (R 1263).

As to the hostility Esty allegedly showed toward Ramsey months before the murder, the state says it was harmless because it was not a feature of the trial. (Appellee's brief at p. 49) The state's big problem here was finding a motive for Esty to have killed Ramsey. It provided no direct evidence of it and precious little circumstantial proof explaining his actions. Thus, even if Lusane's testimony of what the defendant had told him months earlier was not a "feature" of the trial, it was a large part of what the jury had to use to find Esty killed with a premeditated intent. Admitting this evidence, therefore, could not have been harmless beyond a reasonable doubt because there was so little of it on that essential element of the murder.

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.

Esty, of course, has a problem with this issue. No one asked the very fundamental question that should have been posed: Did Sean Esty know Lauren Ramsey was pregnant before she was killed? Without the defendant knowing that essential fact, the state had no motive to explain why this murder

occurred. Ramsey's pregnancy became a "facet of the crime" (Appellee's brief at p. 50) only if Esty knew of it. That Esty admitted he had had sexual intercourse with Ramsey when he testified and during his closing argument, of course, does not minimize the error. He certainly would not have brought the matter up if the state had avoided it during its case and argument.

On page 51 of its brief the state asserts that "The fact that Lauren Ramsey was pregnant was not gratuitously admitted for its sensational value." If the state had wanted to admit her condition for that reason, it obviously would have been irrelevant.

Also on page 51, the state asserts that "The victim and the defendant unquestionably had a meeting on the night of December 22, 1991." There were a lot of questions about that fact, and Esty vigorously denied he had met with her then (R 1201-26), or that the murder had even occurred that night (R 1154).

Finally, the state claims that "The fact that the state did not have direct evidence that Esty was aware of the victim's pregnancy prior to the murder is neither dispositive nor particularly significant." (Appellee's brief at p. 52.) First, the state had no evidence he knew she was pregnant. Second, if this evidence was so inconsequential, ignore it. Would this court then affirm the defendant's conviction for first degree murder? More pertinent, would a jury have reasonably returned the same verdict without this crucial

evidence. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). That Ramsey was pregnant and Esty knew it was the lynchpin of the state's case, and it provided the theory on which the prosecution tried the defendant.

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 says it has a hard time following Esty's argument on this issue (Appellee's Brief at 53). Simply put, the prosecutor never had Dr. Sinha establish the validity of the underlying data on which he based his opinion. The trial court, therefore, never ruled on the admissibility of this expert's opinion. Section 90.705(1) Fla. Stats. (1991) allows expert opinion without first laying a predicate or factual basis for it. In cases where no one challenges the basis for witness' conclusion, as for example with fingerprint identification, this rule makes good sense. Why waste time on establishing what no one contests? This does not mean that a predicate is unnecessary whenever an expert offers his opinion. Section 90.705(2) requires evidence of the required foundation whenever the opposing party demands it. Telling him instead to "observe and bear with it" (R 980) fails to substitute for the necessary voir dire.

The state also complains on the same page that Esty cited "absolutely no case law" to support his argument. He did not do so because 1) he found none, and 2) none was needed because the evidence code is so clear on this point. What is more, the state cites no Florida case on point either.

It also says that "The defense filed no pretrial motion seeking to exclude this evidence or to prevent Dr. Sinha from testifying." (Appellee's brief at p. 54) True, but then none is required or even suggested by Section 90.705.

It argues that he objected to this expert's testimony solely on hearsay grounds (Appellee's brief at p. 55) Not so. Defense counsel said the state had laid no predicate for Dr. Sinha's conclusions (R 979).

Finally, we come to People v. Contreras, 615 N.E. 2d 1261 (Ill. App. 2 Dist. 1993). The first thing we should recognize is that this decision came from an Illinois intermediate appellate court. In that northern state apparently the procedure is to admit the scientific evidence and then challenge its reliability on cross-examination. Id. at 1267. It has no similar procedure as we do where the defendant can, on voir dire, attack the basis on which the expert has reached his opinion. Moreover, section 90.705(2) rejects that court's conclusion that "Statistics are admissible as relevant to identification and any challenge to reliability go only to the weight to be given to the evidence. . . . The weight to be given to [the expert's] opinion was properly left to the jury." Id. at 1268 (cites omitted.) Our law excludes the expert's

testimony if he "does not have a sufficient basis for his opinion." In this state, failure to establish an adequate predicate goes to the admissibility of the evidence, not its weight.

ISSUE VII

THE COURT ERRED IN FAILING TO CONDUCT A 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.

If there is a theme to Esty's response it comes from the the several "small" corrections Appellant must make to the state's argument on this point. Individually, they may be unimpressive, but when considered as part of the total picture what emerges is a painting showing Esty procedurally prejudiced by the state's tardy disclosure of Dr. Rodriquez.

On page 63 of its brief, the state implies the defense had knowledge of its witness because, shortly before the prosecutor called a weatherman, Esty's lawyer objected to him, but later withdrew the complaint when he learned who this witness was. Significantly, in doing so, he said "I thought it was one of the entomologists." (R 879)

This latter statement is important for two reasons. First, Dr. Rodriquez is a forensic anthropologist, not someone whose life's passion is bugs (R 1283). Second, if defense counsel was aware of the challenged expert, this statement belies any recognition that he had an expertise in an area

significantly different from that of an entomologist or even a medical examiner. Defense counsel's statement demonstrated an ignorance of the ticking bomb waiting to explode in his face.

On page 63 of its brief, the state then asserts that Esty's examination of his experts was "extremely comprehensive, indicating counsel's familiarity with the subject matter." While counsel may have skillfully used his entomologist and medical examiner, Dr. Rodriquez was another matter. Defense counsel confessed that "I am not knowledgeable enough [of forensic anthropology] to be able to do anything more than what I have already done [with Dr. Rodriquez]." (R 1281)

Then there is the way the state disclosed this expert. Rather than simply list the additional witnesses or other evidence as most prosecutors do, the assistant state attorney here added the names to its original list. Each time it gave the defense new witnesses, it did so by adding the new information onto the first response to the the demand for discovery. Thus, unless counsel realized this was further disclosure, he might, as defense counsel did here, simply file the document without carefully reading it and comparing it with every other disclosure the state had sent it.

This tactic only emphasizes what Esty said in his Initial Brief. The closer the discovery is made to the beginning of the trial, the greater the need for it to have been done so promptly, and, in light of what occurred here, obviously. That is, if the state disclosed its new witness on Thursday, July 16, it was tardy and hidden because Esty's lawyer did not

receive it until late Friday along with several other witnesses (R 1275). Dr. Rodriquez was buried in the third page of the response and was the 78th witness listed. Moreover, until a month before trial, the state had periodically (about once every three weeks) filed an amended response adding more witnesses. It did not make its final disclosure (at which time it revealed Dr. Rodriquez) until four days before trial started.

This is important because Esty had told the state almost two months earlier that he intended to call experts who would dispute the time of Lauren Ramsey's death (R 3941). He disclosed Dr. Arnall on June 17, 1992, and two weeks later he told the prosecutor he intended to call an entomologist (R 3950). Evidently, the state took well over a month to realize the crucial importance of the defendant's strategy, and it literally (according to Dr. Rodriquez) shanghaied the anthropologist off the beach where he was vacationing (R 1312). It then dumped this witness into its ever growing soup of potential witnesses and served it to an unwitting defense counsel.

He ate unawares because the disclosure was not made until four days before trial (barely three days actually), and two of them were a weekend in which this expert would undoubtedly be lounging on the beach, far from his pager and panicked lawyers. Springing this key witness on the eve of trial amounted to an ambush tactic this court has condemned.

Why should the effect of the state's dalliance in finding this expert be foisted on Esty? The response, of course, is that there is no evidence the prosecutor here either inadvertently or through tactical scheming waited until the eve of trial to find this key witness. But that only emphasizes Esty's other point: the court here never conducted a Richardson hearing.

The state says on pages 67-69 that, well, the court did hold the necessary hearing even if no one in the courtroom recognized it as such. Specifically, it noted that the trial judge specifically pressed the defense to show any prejudice he had suffered. Such a demand clearly indicates no Richardson hearing was held. The law requires the state to show the lack of prejudice to the defense. Richardson v. State, 246 So. 2d 771 (Fla. 1971).

Finally, the state says defense counsel conducted an adequate cross-examination, but as argued in the Initial Brief such was not the case.

The state, on page 67 of its brief, claims that Esty should have known, or it should have been obvious to him, that the state would have used an expert to rebut his experts. Yet the facts in the cases it cites for the "should have been obvious" standard it posits show the limited scope appellate courts apply this speculative presumption. Cooper v. State, 336 So. 2d 1133 (Fla. 1976); Banks v. State, 590 So. 2d 467 (Fla. 1st DCA 1991). Cooper and Banks are readily distinguishable from this case. In the former instance,

specific, obvious information or witnesses could have been readily obtained with little effort by defense counsel. If Cooper, for example, knew the state had a ballistics report, he should have realized a ballistics expert prepared it. Such cannot be said here.

There is no evidence the state intended to rely on experts other than the medical examiner to establish the time of death before it disclosed Dr. Rodriquez. There is certainly nothing indicating that they intended to or that Esty should have known it would call a forensic anthropologist. The defendant may have been prepared to face the state's entomologist, Dr. Meek (had he been called), and medical examiner, Dr. Havard, because he had himself used experts in those fields to present his defense. Dr. Rodriquez presented a significantly more difficult challenge because he approached the problem of determining the time of Lauren Ramsey's death from a different perspective. The need to rebut his testimony was especially crucial because he specifically disagreed with Dr. Arnall's findings on the time of death (R 1293).

Thus, the state's tardy response to Esty's demand for discovery, and the trial court's failure to recognize the discovery violation and conduct the appropriate hearing remain error, and this court should reverse for a new trial.

ISSUE VIII

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

Whether the state made an improper comment requiring a new trial will depend largely on the facts or strength of the state's case. (Initial Brief at p. 56) See, Bueonano v. State, 527 So. 2d 94 (Fla. 1988). Relying on the facts found in other cases provides little guidance in resolving the problem presented by the state's admittedly improper closing argument here.

In Darden v. State, 329 So. 2d 287 (Fla. 1976) the prosecutor had referred to the defendant as an animal, which this court did not disapprove. It did not because defense counsel himself had referred to the victim's killer as an animal, a comment which only invited the state to make the obvious connection that, yes, whoever committed the murder was an animal and that person was Darden. Id. at 290.

Esty never made a comment similar to the one defense counsel argued in Darden. He never said that whoever killed Laura Ramsey was a "dangerous, vicious, cold-blooded murderer" or anything close to that in his closing argument. To the contrary, defense counsel claimed his client was innocent in part because "He knew he was a suspect. And what did he do? He acted like a normal kid. Every day he went to work, registered for school, didn't get rid of any evidence." (R 1397)

Also, some of the evidence the state presented supported Esty. The state argued he took Ramsey to the Ft. Pickens area in his car. The tire tracks measured at the crime scene showed a car with a wheel base of 57 inches but Esty's vehicle had a 63 inch wheel base (R 1393).

Unlike the defendants in the cases cited by the state, Esty actively defended himself, providing a detailed scenario of where he was on the night of the murder and the days later. He also called his own expert witnesses who disputed the time of Ramsey's death. Also, this case presents a much closer issue on the defendant's guilt. This court cannot say beyond a reasonable doubt that the court's curative instruction erased the harm caused by the state's improper comment.

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.

On page 78 of its brief, the state says: "To the extent that any further argument is necessary, the state would simply observe that this court has consistently held this jury instruction against constitutional challenge." (cites omitted.) Appellate counsel can easily imagine that the Appellee made the same statement in cases challenging the constitutionality of the standard jury instruction on the "especially heinous, atrocious, or cruel" aggravating factor in cases decided before Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). Rather than wait for the nation's high court to

correct our jury instruction on reasonable doubt, this court should make the necessary changes suggested by the argument in Esty's Initial Brief.

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.

The state never satisfactorily established why Esty killed Lauren Ramsey. The obvious reason, that she was pregnant, fails because there is no evidence he knew of her condition before the murder. This issue only accentuates this difficulty. If Ramsey told Esty, when did she give him the news?

We know that she learned she was pregnant sometime on Friday and that she had until Monday to tell her mother (R 803). By Sunday, December 22, she had not done so, yet her grandmother noticed nothing unusual about her granddaughter that evening (R 816), and the last time any relative saw her alive was shortly after 10 o'clock (R 817). We also know someone bought a knife that may have been used in the murder from an Albertson's grocery store on December 22 at 10:16 p.m (State's Exhibit 46). Thus, if Esty planned to kill Ramsey, the evidence supports his contention that he did not have weeks, days, or perhaps even hours to coldly and with calculation plan his crime. The skimpy record suggests that sometime shortly before 10 p.m. Lauren called Sean and told him she was pregnant (R 816. We are speculating she called Esty).

He agreed to meet with her and on the way to the rendezvous he hatched the plan to kill her. (more speculation) He bought a knife at Albertson's, and used it a few minutes later to murder her, leaving the body at the Fort Pickens Recreation area.

In his Initial Brief Esty suggested that perhaps Ramsey had been killed some where other than at Fort Pickens (Initial Brief at pp 69-70). It was a minor point, but the state responds by noting all the things found around the corpse. While she may have been killed there, it is as likely that she was not, and when the body was left, the paper, glasses, and other items either fell out of the car or were dragged from the vehicle with the body.

The state also makes much of the machete that was "so well hidden in the bushes or growth that [it was] not found until weeks after the murder." (Appellee's brief at p. 81) Yet why would Esty have hidden the murder weapon near the body? More reasonably, he would have left it in the car. What this shows, contrary to the state's argument, is a boy so terrified at what he had done that he threw the weapon away.

Similarly, he would not have left the body at a recreation area in plain view if he had coldly plotted Ramsey's death.

The state using great hindsight, says Esty wore the long black trenchcoat because it "would obviously protect Esty's clothes from bloodstains, and black combat boots would tend to show such blood less readily than white tennis shoes." (Appellee's brief at pp. 82-83) If the defendant's planning was that meticulous, one must wonder why he left so much

incriminating evidence at the murder scene. Moreover, why would he have worn a trenchcoat, which would have more restricted his movement than a T shirt. If he was concerned with bloodstains then surely he would have washed the coat and boots after the crime, but he did not.

This concern with details should not divert this court from the fundamental question "Why would Esty kill Ramsey because he had gotten her pregnant?" Murder simply is not what a rational boy commits when he discovers his former girlfriend is now carrying his child. Had he had more time, the bright but very immature young man would have probably realized this, but he did not, and in an obvious state of panic he made matters far worse than they would have been had he simply denied he was the father or admitted it and lived with the consequences.

Thus, the state and appellate counsel can lob cases at each other supporting their positions, but few have the facts here, of a young, bright but very immature boy, who was overwhelmed by his indiscretions. Thus, in Arbelaez v. State, 626 So. 2d 169 (Fla. 1993); Klokoc v. State, 589 So. 2d 219 (Fla. 1991); Porter v. State, 564 So. 2d 1060 (Fla. 1990); and Turner v. State, 530 So. 2d 45 (Fla. 1987), cited by the state on page 84 of the state's brief, this court held that murders arising out of domestic situations could be cold, calculated, and premeditated. In each of those cases the murderers were adults who had plotted their crimes days before carrying them out. There was, in those cases, a clear sense of deliberation,

of determination to murder that is as plainly absent from this case.

Esty also displayed none of the cunning other defendants have shown in covering up their crimes. Huff v. State, 495 So. 2d 145, 153 (Fla. 1986); Trepal v. State, 621 So. 2d 1361, 1367 (Fla. 1993).

The "common sense" the state urges this court to use, thus suggests that Esty panicked when he learned Ramsey was pregnant and killed her without considering his choices. Contrary to the state's claim on page 83 of its brief, the defendant's immaturity took over, and he killed the victim in an excited rage.[3] Unlike other defendants who had time to calmly reflect on the murders they had decided to commit, Esty had precious little opportunity to consider his options. The murder he committed shows little careful planning, no heightened premeditation, and certainly no cold calculation. Rogers v. State, 511 So. 2d 526 (Fla. 1987).

ISSUE XI

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

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[3]The state implies on page 83 of its brief that Esty was "very calm (R 1493)" on the night of the murder. That reference cite was general description of the defendant and not a specific observation of how he appeared then: "Sean is a fun-loving sort. He's very calm. I mean, to some degree he's hyper, but boys tend to be that way when they are younger. Very calm. I saw him as being very smart." (R 1493)

Despite its heroic efforts, the state nevertheless provided no convincing reasons why this court should affirm the trial court's death sentence. For several reasons, it cannot overcome the presumptions that arise when the jury has returned a life recommendation.

The first, and most compelling argument in favor of reversing the trial court's sentence, is the standard of review this court must use when the representatives of the community vote that Esty should live. This court should reverse a death sentence if it can find a reasonable basis for their choice. Tedder v. State, 322 So. 2d 908 (Fla. 1975). As presented in the Initial Brief, Esty gave the jury several reasons why it should recommend life.

The defendant's sentencing hearing, contrary to the state's claim on page 86 of its brief, did not need to present evidence "in the way of ameliorating Esty's guilt." Certainly, good character, no significant history of criminal activity, and the like did nothing to lessen Sean's guilt, and evidence of such would have been irrelevant in the guilt phase portion of his trial. Evidence of those factors, on the other hand, was relevant in determining the appropriate sentence.

On pages 86-88 of its brief, the state repeats in some detail what the ten witnesses said that Esty called in his behalf. The mere fact that he had so many people provide mitigating evidence for him is significant. Christmas v. State, 19 Fla. L. Weekly S35 (Fla. January 13, 1994).

On page 89 of its brief, the state, like the court, confused intelligence with maturity. On the next page, it then cites two cases for the proposition that "This court has explicitly held that even the presence of valid mitigation does not absolutely preclude a jury override. See Pentencost v. State, 545 So. 2d 861, 863, n.3 (Fla. 1989); Burch v. State, 522 So. 2d 810, 813 (Fla. 1988)." This court reduced the death sentences in each of those cases.

It then cites Zeigler v. State, 580 So. 2d 127 (Fla. 1991) to support its claim that a death sentence may be appropriate even if the defendant had no significant history of criminal history. In that case, the defendant killed his wife so he could collect on the $500,000 insurance policy he had taken out on her. He also murdered three other people as part of his elaborate cover-up plan. In light of the enormity of the evil he had committed, virtually nothing could ameliorate a death sentence.

Esty obviously is not a William Zeigler. He was not a mature adult who calmly plotted not only the murder of his intended victim, but others to cover his foul deeds so he could reap an enormous profit.

The state then, "not wishing to appear unduly harsh," says that Esty may have no significant criminal history because of his "relative youth." (Answer Brief at p. 90) The apparent explosion of violent juvenile crime nationwide well testifies that Esty, if he had so chosen, could have made his criminal

"debut" at a much earlier age. That he had never committed any crime (except for the murder) speaks loudly on his behalf.

On page 91, the state claims that Dr. Larson's finding that Esty was emotionally immature conflicted with other testimony that he was a "normal teenager." Not so. It complimented what other witnesses had said, and gave a fuller, more complete picture of this young man. Similarly, just because he was a near genius that fact alone does not remove him from "the 'norm' of average teenagers his age." (Appellee's Brief at p. 92)

The state then spends the next two or three pages of its brief citing and discussing cases, such as Zeigler, which it thinks are similar to this one. All is in vain because this case is readily distinguishable from them.

Here, Esty, unlike Zeigler, killed only one person, not four, and their is no evidence he tried to cover it up. As argued in ISSUE X, the murder was not committed in a cold, calculated, and premeditated manner. It certainly was not done for any amount of money money, large or small, and was not done to avoid lawful arrest. Esty's crime pales in comparison to what Zeigler willingly did to satiate his greed.

Likewise, Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988) has little persuasive value in this case. True the defendant had an expert testify about the defendant's high intelligence and his great potential for rehabilitation. He was, however, the only one to so speak. Countering this evidence, the trial court found that he had committed another

murder and the murder he was being sentenced on was done during the course of a robbery with a firearm. The defendant here has no other murder conviction, nor was his crime committed during some other violent felony. Instead, Esty's murder falls into those class of cases involving domestic killings. This court usually does not affirm a death sentence in those situations, involving as they often do, irrational thinking and impulsive actions. Porter v. State, 564 So. 2d 1060 (Fla. 1990) (Barkett, dissenting.); Cannady v. State, 620 So. 2d 165 (Fla. 1993).

In Echols v. State, 484 So. 2d 577 (Fla. 1986) the defendant himself contradicted the mitigation that he was a straight arrow middle class citizen. Instead, as this court said, his statements "reveal the appellant boastfully and gleefully recounting his criminal exploits . . . [and] `shows the law-abiding surface character of this fifty eight year-old man to be but a shielding cloak paraded before his family, his legitimate business associates, church and friends; in short, hypocrisy of the highest kind." Id at 577. Esty was not similarly two-faced.

The state, on pages 93-94 of its brief, says that Esty has none of the debilitating characteristics of other defendants who have had their death sentences reduced to life in prison. True enough, but then he never claimed he should receive a lesser sentence because of them. Instead, he was like Perry in Perry v. State, 522 So. 2d 817 (Fla. 1988): a good, decent young man, who committed a murder when faced with (what seemed

to him as) a dead-end choice. Defendants like Perry and Esty, while deserving our condemnation, do not need to be executed for the rash act of a moment.

The state argues that because the jury's "relatively swift return of a recommendation of life in this case could have been unduly influenced by the final portion of the defense closing argument." (Appellee's Brief at p. 94) Nice try. The jury deliberated for about 47 minutes. That is a considerable time since only one non-unanimous vote needed to have been taken on what sentence to recommend. Also, it had already considered much of the mitigating and aggravating evidence in the guilt portion of the trial, so extensive deliberations were unnecessary.

Second, Esty's counsel made no emotional appeal to the jury's sympathy as did the defense lawyers in Francis v. State, 573 So. 2d 672 (Fla. 1985) (References to Easter season may have influenced life recommendation); Porter v. State, 564 So. 2d 1060 (Fla. 1990) (Lurid description of execution). Certainly, if he had whipped the jurors into a frenzy of forgiveness the state would have objected, but it was silent. What he told them was only to follow the law, hardly an emotional appeal (R 1569-70).

The state makes a final effort with a flurry of cases that easily are dismissed. It cites Thomas v. State, 456 So. 2d 454 (Fla. 1984) because this court affirmed a jury override where the defendant was young and had no significant criminal history. It did so, however, because he had killed to people

to eliminate them as witnesses. The facts of this case and the mitigation presented in Esty's behalf compel a different result.

Likewise, in Hoy v. State, 353 So. 2d 826 (Fla. 1977), the adult defendant had murdered two teenagers during the sexual battery of the female victim. In Dobbert v. State, 328 So. 2d 433 (Fla. 1976), the defendant killed two of his children and was convicted of two counts of child torture. If there was any mitigation, it certainly could not have overcome the unrefuted evidence of kicking, choking, torturing, and mutilating this defendant did to those who had a special claim on his protection.

The state, despite a noble effort, has failed to provide any convincing reason the jury's life recommendation should be ignored. This court should therefore reverse the trial court's sentence of death and remand for a sentence of life in prison 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.

The state and Esty have an obvious problem here. It wants to limit this court's ruling in Ellis v. State, 622 So. 2d 991 (Fla. 1993) so that age will be a mitigating factor only if the defendant is a minor as defined by statute. (Appellee's Brief at p. 96) Esty, on the other hand, finds comfort in what this court said in Ellis, that "on the question of young age as a mitigating factor, we are gravely troubled by inconsistencies

in Florida cases involving minors who commit murder." Obviously, this court was concerned with a defendant's youth as mitigation, and it used "minor," not in the legal sense, but as a synonym for "young age." Ellis, therefore, has a broader application than the state desires.

Esty presented unrefuted evidence of his emotional immaturity the court should have recognized. He "boffoed" with his buddies as the urge struck them (R 1212). They called themselves the "War Pigs." (R 684) He had a juvenile fascination with knifes in general and oriental weapons in particular (R 694-95). He had pushed tacks into a black baseball bat, painted them purple, and called it his "purple people beater." (R 687) Then this boy who was fighting for his life laughed at trial, and a juror had to ask the court to tell him to stop (R 2163).

The state has made the mistake of equating intellectual superiority with unusual maturity (Appellee's Brief at p. 97). While those who are brilliant may also be very mature, such is not universally the case.

The state says Esty was merely a normal teenager (Appellee's Brief at p. 97), but that overlooks what most parents of teenagers know: that almost by definition a normal teenager is emotionally immature. It then details how the defendant was normal. Despite these signs, there was no evidence, as this court has required, of any unusual maturity. Ellis, supra.