IN THE SUPREME COURT OF FLORIDA

DEREK TODD THOMPSON,

Appellant,

v. CASE NO. 81,304

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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STATUTES AND CONSTITUTIONS

STATEMENT OF THE CASE AND FACTS

Appellee accepts Thompson's Statement of the Case and Facts with the following additions.

Marilyn Coltrain testified that sometime after midnight, May 3, 1992, she went to the Subway sandwich shop to get something to eat (TR 161). When she arrived she saw a car pull up with two young men inside. She observed that one got out and went into the sub shop and immediately thereafter, she did the same (TR 161-162). She testified the sub shop attendant watched the young men carefully (TR 163). The two men ultimately left the restaurant. Ms. Coltrain ordered a sandwich and, after paying for it, returned to her car, locked her doors and started to eat (TR 163). She testified she was parked right in the front of the well-lighted sub shop and had a good opportunity to see into the restaurant (TR 163). As she ate, she observed a pleasant looking, happy young man enter the Subway sandwich shop and started talking to the clerk. She turned away for a moment and then suddenly heard a "pop". When she looked up she saw the man standing over the clerk (TR 163-164). Ms. Coltrain testified that the armed man in the sub shop looked at her and she thought he was going to shoot her (TR 164). She froze for a moment and then started her car and drove off to the Circle K store nearby to report what she saw to the police (TR 165). Thompson looked right at her and smiled at her as she backed up and got away from the sub shop (TR 165). At the Circle K. She reported what she saw. Edward Faulk, who was in the convenience store, then left and went over to the sub shop to see what was happening (TR 165-

166). When Coltrain returned to the sub shop, she Faulk, who told her that the armed man had pointed the gun at him but did not shot. She saw Thompson running away (TR 166), and pursued, keeping the police informed as to where she last saw Thompson (TR 168). She was able to positively identify Thompson as the man who shot Carl Lenzo, the sub shop clerk (TR 169, 178). On redirect, Coltrain testified that she never saw Thompson in a car or drive up in a car (TR 181).

Dr. David Nicholson, the medical examiner, performed an autopsy on Mr. Lenzo on May 4, 1992 (TR 192). The cause of death was due to a gunshot wound to the head. The bullet entered Lenzo's head, traveled through the brain causing massive brain damage (TR 193). Although Mr. Lenzo did not die immediately, the medical examiner testified on cross-examination that he probably lost consciousness immediately (TR 194).

Edward Faulk was at the Circle K convenience store on May 3, 1992, talking to his friend, John, when a woman drove up and said that there had been a shooting (TR 201). Mr. Faulk went outside and went over to the Subway shop to see what happened. As he approached within fifteen to twenty feet of the shop, he saw Thompson come out of the shop carrying a gun (TR 201). Thompson saw him, stood there, started to point the gun and then took off running (TR 202). Mr. Faulk testified that he had a good look at Thompson and was able to identify him by his haircut and his clothing (TR 202-203). Mr. Faulk positively identified Thompson as the man who he saw at the Subway sandwich shop (TR 204).

Officer Jimmy James received a call on May 3, 1992, about a shooting at a sandwich shop (TR 209). He ultimately stopped Thompson and as a result of a search, found a .9 mm magazine in Thompson's left front pocket and one hundred and eight ($108.00) dollars in his right pocket (TR 212). A .9 mm weapon was subsequently found near the spot where Thompson was arrested (TR 215, 217). Edward Love, a ballistics expert, positively matched the bullet taken from Mr. Lenzo's wound and the gun found near where Thompson was arrested (TR 221).

The defense called Sky Madison, a correctional officer, who testified that on or about May 2/May 3, 1992, at approximately 1:30 or 1:25, a.m., he went to the sandwich shop and used rusty-colored dollar bills to pay for a sandwich (TR 245). On cross-examination, however, Mr. Madison was not able to state whether the bills used could not have been used in further commerce after he left the store (TR 247).

At the penalty phase of Thompson's trial held December 16, 1992, the defense argued that Thompson was not properly on community control and therefore the sentence of community control for a probation violation in Case No. 87-1401, and for the subsequent imposition of community control for Thompson's conviction of forgery and uttering a forged instrument and grand theft in Case No. 91-1720, could not be used as a basis for an aggravating factor (TR 319-321). As a result of said discussion, the State argued that it would only present to the jury the fact that Thompson was on community control for the 1991 conviction and would not mention the older case (TR 323).

Defense counsel also stated that he was renewing previous motions regarding the use of victim impact evidence (TR 323). The trial court ruled that based on the pretrial motions, the court stated: "I think that its a matter of essential and fundamental fairness that the jury hear both sides." (TR 323-324).

The State first called Robert Nathan, a probation officer, who testified that on May 3, 1992, Thompson was his client being on supervised community control in Case No. 91-1720 (TR 329-330).

Carolyn Lenzo, the victim's mother, was next called to testify. She stated that she was a teacher at Lakeview Center in the Escambia County School Board District. She was married and had four children, one of which was Carl Lenzo (TR 332). She testified that her son would have been twenty-three in June and was twenty-two at the time of his death. Her son had grown up in Escambia County and had attended Milton High School (TR 332). She testified that her son was a C student, was a romantic and artistic. Her son had taken first place in the Escambia County Arts Festival or Santa Rosa County Arts Festival, and had coauthored a book with his brother (TR 333). She had last seen her son the day of his death, because they had celebrated her husband's birthday. She testified that she really felt the loss of her son (TR 333). Mrs. Lenzo testified that her son had been married about six months prior to his death and that Carl and his wife had just found out that they were going to have a baby. Carl's daughter Amber was born after his death. Mrs. Lenzo testified that Carl had wanted a daughter (TR 334).

[No objection was raised at this point regarding Carolyn Lenzo's penalty phase testimony].

The defense first called Reverend Raymond Thompson, the defendant's father. Reverend Thompson testified that he was fifty-three years old and had fathered six children. He was the defendant's father and that Derek was right in the middle of the six children. His daughter, Natasha, was thirty years old; Brian was twenty-eight years old; Barry was twenty-seven years old; Raymond, Jr., was sixteen years old and Stephanie was twenty-three years old (TR 335-336). Reverend Thompson testified that his daughter Natasha was a student getting her degree in computer sciences, was married and had one child. His son Brian was in the Navy in Virginia; his son Barry lived in Melbourne and was employed by North American Moving and Storage Company and that his daughter Stephanie was a dental assistant and a student. His youngest son, Raymond, Jr., was a junior in high school (TR 336). Reverend Thompson testified that he was employed and Lockheed Missile and Space Company and had a degree in electrical engineering. He had worked in the aerospace industry for twenty-six years and had top security clearance from the government. He had had top security clearance in the Air Force and continued to maintain top security clearance in his present job (TR 336-337). He was also the pastor of the New Mt. John Baptist Church in Milton, Florida, and had been a pastor for seven years (TR 337). Reverend Thompson testified that the family had been living in Melbourne when his son Derek was born and that Derek had no childhood problems (TR 338-339). Reverend Thompson detailed how

Derek had three uncles in Melbourne, and on his wife's side, he had two uncles, one of which was a pastor of a church. Derek was brought up in the church and had been "blessed" as a baby (TR 339). As a youth, church was all of Derek's life, he was in youth groups and in the choir and would work around the church doing all sorts of projects (TR 340). At twelve years old, Derek worked in the neighborhood grocery store as a stock clerk and would cut lawns for the neighbors (TR 341). Derek also worked at a fried chicken franchise as a short order cook and did maintenance-type jobs at Harris' Semi-Conductors (TR 342). Reverend Thompson testified that when they bought their home in Melbourne, they purchased it near an activity center so that it would be a gathering place for all the kids in the neighborhood. He observed that his son Derek liked to draw and was very artistic (TR 343). The Reverend identified a card that Derek had drawn for him, and testified that Derek was always helping everybody and remembering their birthdays and special days (TR 344). He recalled that his family was an affectionate family and that Derek would hug his family members and say that he loved them all the time. Derek always made homemade special cards for special days for family members (TR 345). Reverend Thompson testified that he was never called to get Derek out of any trouble and Derek never fought with his brothers and sisters (TR 345-346).

When Derek graduated from high school, he joined the Navy and had his basic training in Chicago and then became a corpsman in San Diego (TR 346). Derek finally ended up in Pensacola.

While working at the Pensacola Naval, Derek met his wife, Benita (TR 347). They married and had a son, Derek, Jr., and later had a second and third child (TR 347-348). Reverend Thompson testified that Derek was a good student and lettered in basketball. Derek's school records were admitted into evidence (TR 348-349). The family would spend vacations together. For example, they would rent a mobile home and go to the mountains. Reverend Thompson brought in photographs of the vacations (TR 350). When Derek got out of the Navy, he started working two jobs, one of which was at T.G. Friday's as a short order cook (TR 351). Reverend Thompson testified since Derek has been in jail he had continued to write letters to the family (TR 352).

On cross-examination, Reverend Thompson testified that Derek was an advantaged child and that he had tried to teach his son right from wrong. Derek was the same person today as he had always been. Although Reverend Thompson knew that Derek had gotten into trouble and was on community control, he "really didn't know about the entire incident" (TR 354). Derek was never abused as a child (TR 355).

James Davis, a staff sergeant in the United States Air Force, twenty-seven years old, next testified that he and Derek were friends since grade school (TR 356). Mr. Davis said that Derek was an excellent young man and that when they were in school together he, Mr. Davis, would go to Derek's house. Derek lived near a park and they had a swimming pool (TR 356-357). He never knew Derek to be a violent person and never saw him fight (TR 357). Mr. Davis testified that Derek always walked away from

fights and that he was very athletic and had lettered in basketball (TR 357). Derek's nickname was "Scratch" because he dunked the basketball. It was Mr. Davis' belief that Derek was liked by his friends, liked by his family and well respected (TR 357-358). Mr. Davis did not know about Derek's legal problems but he believed Derek had always been honest with him. Derek was like a brother to him and would give him the shirt off his back (TR 358). It was not in Derek's character to commit this crime. Mr. Davis did not understand why this happened (TR 359).

On cross-examination, Davis admitted that he had not stayed in touch with Derek all the time (TR 360). Mr. Davis testified that he did not know that Derek was under house arrest nor did he know anything about his legal problems (TR 361).

Louis Brown, a thirty-one year old acquaintance from church, next testified that he saw Derek at church and socially at the Emmanuel Baptist Church. Mr. Brown believed that Derek was a meek, humble person and never knew him to get into a fight. He believed Derek was family-oriented and over the five years he had known him, he had seen Derek at church with his wife and children (TR 363). Mr. Brown testified that Derek had told him he feared God and believed in Jesus. He knew Derek was a cook (TR 364). On cross-examination, Mr. Brown testified that he had no knowledge of Derek's problems with the law and did not know anything about a house arrest or community control (TR 365).

The defense next called Rozel Milbry, a twenty-eight year old junior tech at the Melbourne Post Office (TR 366). Mr. Milbry testified that he grew up in Melbourne and he knew Derek

while he was in school and growing up (TR 366). Mr. Milbry testified that Derek was well-mannered, athletic and he had never seen him get into trouble or in a fight. He believed that Derek was a Christian and he knew that Derek's mother was a good cook because he had stayed over at there house previously (TR 367). He recalled that Derek's family's home was a gathering place for everyone because they had a swimming pool and a they played basketball. They would say blessings before every meal (TR 368).

Shawn Landon, a twenty-five year old electrician at Data and Electronics Services, worked with Derek at the Holiday Inn four months prior to his arrest (TR 369). Derek and he worked interior construction remodeling rooms at the Holiday Inn (TR 370). He was around Derek a lot and it appeared to Mr. Landon that Derek did not like violence and he was in fact very passive. He had talked to Derek about religion and knew that Derek thought that there was too much violence in movies and he was concerned about his children seeing that kind of stuff (TR 371). Mr. Landon opined that it appeared Derek loved his children, his wife and his family and that Derek seemed to be a hard worker (TR 371-372). Mr. Landon testified that he grew up in Gulf Breeze and he had lived there most of his life and had never had a lot of black friends before (TR 372). He believed, as a black person, Derek was quite different from other black men from Pensacola, and that they treated each other as equals (TR 372). Mr. Landon could not ever recall Derek expressing unhappiness about anything but he also knew that Derek had been in trouble with the law. Mr. Landon did visit Derek in jail (TR 372-373). It was Mr. Landon's

belief that Derek did not have the personality to commit this crime and he did not believe Derek did it (TR 373). On cross-examination, Mr. Landon admitted that he only knew Derek for four months and that he did know that Derek was on probation. Mr. Landon was confused about the difference between probation and house arrest (TR 374).

The defense next called Stephanie Thompson, Derek's twenty-five year old sister (TR 375). She testified that her brother was two years older than she and he acted more like a father to her and a protector than a brother. Derek was always telling her the difference between right and wrong (TR 375). They were very religious in their upbringing and they never fought at home. Stephanie testified she has never saw her brother fight with anybody and that they all had a close relationship (TR 376). It was her view that Derek always helped and tried to make everyone do the right thing (TR 377).

Benita Thompson, Derek's thirty-one year old wife, next testified that she married Derek October 24, 1984 (TR 377-378). They have three children and that when they were first married, Derek was in the Navy as a corpsman in the medical field (TR 378). Benita testified that Derek provided well for his family while they were in the Navy and worked several jobs besides his Navy job (TR 379-380). Their first son was born in 1985 and they subsequently had two other children (TR 381-382). Benita testified that Derek was always trying to get a better job and that he usually worked two jobs which he was doing in Pensacola (TR 383). Prior to the homicide, Derek was working at the

Holiday Inn Vista Host at Gulf Breeze. Benita testified that Derek had always provided well for his family and was a hard worker. He was neither violent nor abusive towards her or the children and did not have a violent temper (TR 384). The family went to church together (TR 385).

At this point, defense counsel asked the court to allow Derek's children to be squired into the courtroom to be identified. Benita identified her three children as Broderick Thompson, age three; Shakebia Thompson, age four, and Derek, Jr., age six. Photographs of the children were also admitted into evidence (TR 385). Benita testified that she did not know why Derek was convicted of murder (TR 386).

On cross-examination, Benita testified that she never had any marital problems with her husband and although they were separated for short times, it was because they had moved from Melbourne to Pensacola, or back (TR 386-387). Derek had been honorably discharged from the Navy (TR 387-388). On re-cross, Benita admitted that Derek was going out when he was supposed to be on house arrest and that was how he got into more trouble (TR 390).

The defense finally called Dorothy Thompson, Derek's fifty-three year old mother. Mrs. Thompson testified that she had six children, Natasha, thirty-one; Brian, twenty-nine; Barry, twenty-eight; Derek, twenty-seven; Stephanie, twenty-five, and Raymond, Jr., sixteen. She testified that Derek was a good son, a caring and nice person who would send special cards to her (TR 391). Derek was never violent and the current legal problems that Derek

was having were "a nightmare for her family" (TR 392). She testified that she felt as if she has lost her son (TR 392).

The defense admitted a number of exhibits thereafter and then rested (TR 392).

The State argued in closing argument that there were five aggravating factors that had been proven beyond a reasonable doubt. Specifically, that Thompson had been on community control; house arrest when he killed Carl Lenzo; that Thompson had been engaged in a robbery at the time he killed Carl Lenzo to get money; that the murder was done to avoid arrest or detection; that the murder was committed for financial gain, Lenzo died for a hundred and eight dollars, and finally that the murder was committed in a cold, calculated and premeditated manner without any legal or moral justification (TR 400-401). The prosecution, in his closing remarks, observed that Thompson had a criminal history (TR 402), and although Thompson's family testified that Thompson had everything as a child and as an adult, that did not stop him from committing this horrible crime. The prosecutor opined that although he was sorry for Thompson's family, that did not change anything. The fact remained that Carl Lenzo was dead and that he left a child who would not see him (TR 405). The prosecutor observed that there was only one person responsible for this tragedy and that was Derek Thompson, and as a result, the death penalty should be imposed (TR 405).

Defense counsel, at closing, argued that the jury had heard from Thompson's family members that he was a good son, good provider, not violent, had strong family ties, was raised as a

Christian and was twenty-seven years old (TR 408). Defense counsel admitted to the jury during his closing remarks that the defendant was on community control. He stated, "I submit to you, yes, there has been a murder, that this murder occurred while Derek was on community control. . . ." (TR 408). Defense counsel also argued that the murder was committed during the course of a robbery, however, the jury should not double up that the murder was committed during a robbery and for pecuniary gain (TR 408). In closing, defense counsel argued that the cold, calculated and premeditated aggravating factor was not valid and that there was no evidence to suggest the murder was committed to prevent arrest or affect an escape (TR 409). Defense counsel asked for mercy, saying it was deserved and then proceeded to talk of Judeo-Christian ethic:

> . . . We learn the eye for an eye in the same book that we hear that the law is to be fulfilled. That we are to forgive those who hurt us.
>
> The every first instance of Cain in the Bible when he murdered his brother. Did God put him to death? No. He was banished. He had the instance of King David sending Uriah into battle because he wanted his wife. Uriah died a very torturous, atrocious death in battle over King David's lust. Did God put him to death? No.
>
> Did Jesus teach that we are to avenge evil? No. Other religions, Gandhi, an eye for an eye leaves everybody blind.
>
> So I submit that to you to consider in terms of mercy in this case. Death is a unique punishment. It's final. Your decision is irrevocable. You can't visit this again. You have a very serious responsibility. . . .

(TR 410.

Defense counsel then continued, stating that Derek's father, a top engineer and reverend, raised six kids and raised his family. They said grace at breakfast, lunch and dinner (TR 411). They lived near a community center and played basketball and swam (TR 411). Derek was a shy, non-violent person who now stands convicted of an abhoration, something that is completely out of his character (TR 411). Defense counsel then stated that although the jury heard some victim impact evidence and that his heart goes out to the family of the victim, there is "victim impact evidence" on the other side of the courtroom, too. Defense counsel argued that this large, loving Thompson family would see three young children who would not have the benefit of their father (TR 412). These children would not have the benefit of their father even if he spent twenty-five calendar years in prison (TR 412). Defense counsel argued that life imprisonment was harsh punishment (TR 412).

Closing arguments ceased, the court instructed the jury (TR 412-418), at which point no objection was raised as to the instructions given (TR 418). Following deliberations, the jury returned a death recommendation by a 9-3 vote (TR 421). A presentence investigation report was ordered (TR 426).

The defense provided a penalty phase memorandum of law regarding the appropriate aggravating and mitigating factors to be applied in the instant case. Contained therein was a list of mitigating factors the defense submitted were available and applicable in the instant case (TR 542, 548). Listed therein were: (1) Derek had been honorably discharged from the Navy; (2)

Derek had a good employment record and had been gainfully employed; (3) Derek was a good parent and a good family man; (4) Derek had good potential for rehabilitation while incarcerated; (5) Derek was a Christian and had strong religious beliefs; (6) Derek was a non-violent person; (7) Derek was artistic; (8) there was an absence of any evidence that Derek would be a problem if incarcerated for twenty-five years, and (9) Derek had been a team player in high school and had lettered in basketball.

On February 5, 1993, the trial court pronounced sentence and submitted its written findings. At said proceedings, Derek Thompson addressed the court and stated he was innocent of the crime (TR 563). Thompson further observed that he felt sorry for the family, "out of a sense of feeling guilty about it, which, you know, at the time I don't think you can ever play down lightly the fact that this young man here will never be able to -- as I understand his wife had a kid and everything and he will never be able to be there with the baby and be a father or nothing like that. But, I pray for the family, you know, I'm sorry. I'm the one in this situation." (TR 564).

The trial court, in his sentencing order dated February 5, 1993, found four aggravating factors: (1) that Derek was on community control in Case No. 87-1401 and Case No. 91-1720; (2) the murder was committed during the course of a robbery; (3) the murder was committed to avoid arrest or witness elimination, and (4) that the murder was cold, calculated and premeditated, citing Johnson v. State, 608 So.2d 4 (Fla. 1992) (TR 579-581).

With regard to mitigation, the trial court found no statutory mitigating factors applicable, however, the court, in minute detail, reviewed each of the non-statutory mitigating factors submitted in defense counsel's memorandum. The court concluded as to many of the nine non-statutory mitigating factors, little or no weight should be given or that the mitigation had not been proven. With regard to the two non-statutory mitigating factors that he gave "greater" weight to, (1) that Derek was a good parent and provider, and (2) that he appeared to be a non-violent person, the court observed that both could only be given "little" weight. The court concurred with the jury's recommendation and sentenced Derek to death (TR 586).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING THOMPSON'S MOTION FOR MISTRIAL DURING THE STATE'S CLOSING ARGUMENT, WHEN THE STATE SUGGESTED THAT THOMPSON HAD THE BURDEN TO PROVE HIS INNOCENCE, IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL

During closing argument, the State, in referring to Mr. Love's testimony, stated:

> Mr. Love testified that the gun that is in evidence that was at the defendant's feet is the murder weapon. He also indicated that the bullet, the shell and the gun are available for testing, anyone can repeat my test to determine whether or not . . .

(TR 284).

At this point, defense counsel objected, asserting that a mistrial was in order because said statement constituted a

comment on Thompson's right to remain silent, "in that we do not have to prove anything. By saying that he's indicating to the jury that we should have had to prove something, we should have had to go and get a ballistics expert, and that's how they're going to read that." (TR 284).

The State replied that it was merely repeating the witnesses testimony and the State had not argued anything beyond what had been said at trial, that the materials were available to be reinspected or tested (TR 385).

The court denied defense counsel's motion for mistrial, but agreed to give the following curative instruction:

> . . . The court is overruling the objection, but I will remind you as you will hear in the course of the instructions, the defendant is not required to prove anything in the case. The burden is always on the State to prove its allegation. So please keep that in mind when you retire to deliberate and as you listen to the remainder of the argument here. . . .

(TR 286).

Although no objection was raised with regard to the nature of the curative instruction given, defense counsel, at the close of the State's remarks, renewed its motion for mistrial, stating that:

> . . . When Mr. Patterson went back there rather than indicating the testimony was uncontroverted, that he again just made a bold statement about ability of the defense to go and get the weapon and have it tested, and he made the same statement that he had previously when we objected and you overruled it. He did not alter it in the way you asked him for, and we feel a curative instruction would not even be sufficient at this time since it was the same verbiage used the second time as the first time.

(TR 289).

In response, the court observed that it was not going to grant a motion for mistrial and further noted that the court had given a curative instruction. The court also reminded defense counsel that it was also going to give an instruction "pursuant to 2.04(d)," which "contains the same admonition to the jury." (TR 289).

Following the curative instruction by the trial judge, the State stated, "the extended shell and the gun are available for anyone to see and test and examine that wants to, and they were not destroyed in testing." (TR 286).

Both the initial comment and the subsequent comment made by the prosecution properly referred to testimony that occurred at trial during the testimony of Mr. Love.. The record reflects at (TR 234) that under further examination by the State without objection, the following occurred:

> BY MR. PATTERSON:
>
> Q: The test that you performed on all of these items, can they be reproduced?
>
> A: Certainly.
>
> Q: Another examiner wanted to come in and look at them, could he reproduce your results?
>
> A: Yes, sir.

In Kramer v. State, 619 So.2d 274, 277 (Fla. 1993), this Court observed that the State is entitled to highlight inconsistencies in evidence and testimony and highlight testimony that was brought out at trial. The court further concluded that prosecuting attorneys may risk error when they start calling upon the defense to prove something. It is the State that bears the

burden of proof, not the defense. In the instant case, however, no line was even touched upon let alone crossed. In fact, the statements made by the prosecutor regarding whether others could have performed the tests (bullets came from the .9 mm gun), was exactly the testimony that Mr. Love gave at trial. Wide latitude is permitted in arguing to the jury, logical inferences that may be drawn and counsel is permitted to advance all legitimate arguments. Breedlove v. State, 413 So.2d 1 (Fla. 1983). See United States v. Norton, 867 F.2d 1354 (11th Cir. 1989); White v. State, 377 So.2d 1149 (Fla. 1979), and State v. Sheperd, 479 So.2d 106 (Fla. 1985). Unlike Kramer, the prosecutor did not "call upon the defense to produce the knife Kramer alleged the victim had pulled on him immediately prior to the murder and to explain evidence tending to show that the victim was passive when killed." 619 So.2d at 277. Rather, the prosecutor merely recounted that Mr. Love's tests could be repeated and that Mr. Love had testified to same. Because the trial court properly instructed the jury on the burden of proof, not only based on the curative instruction but the subsequent instructions given to the jury, Thompson is without a meritorious claim. Haliburton v. State, 561 So.2d 248 (Fla. 1990). See Craig v. State, 510 So.2d 857 (Fla. 1987).

Terminally, even if this Court determines that the prosecutor's statements may be have been characterized as error, the error was harmless error beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). There was absolutely no question at trial that Derek Thompson was the

perpetrator of the murder and robbery. Nor was there any question that the bullet that killed Carl Lenzo came from any other gun other than the .9 mm weapon that was seen in Thompson's possession. Nor was there any doubt that the bullet which matched the bullets in the magazine that was found in Thompson's possession at the time he was arrested.

Thompson has provided neither case authority nor legal argument that would warrant reversal as to his first point. All relief should be denied herein.

POINT II

THE TRIAL COURT DID NOT ERR IN FINDING THOMPSON COMMITTED THIS MURDER IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY MORAL OR LEGAL JUSTIFICATION

Thompson next argues that the trial court erred in finding he committed the murder in a cold, calculated and premeditated manner without any moral or legal justification. The trial court found in its order that "the victim was shot in the top of the head execution-style at point-blank range; the shooting occurred before the defendant attempted to take any money or property from the premises to eliminate the victim as a witness and to avoid any resistance from him once the robbery was in progress." (TR 581). The court further observed:

> In addition to those circumstances recited above, the Court notes these additional facts: the defendant entered the shop with a weapon concealed from the victim; the ballistics expert testified the semi-automatic pistol is activated or cocked by sliding the upper panel of the pistol back so that a bullet is ejected from a clip in the handle into the firing chamber; that this action is audible and apparent; that this

> weapon did not have a sensitive trigger susceptible to accidental firing; the victim Carl Lenzo was not aware the defendant was armed or that he had readied the pistol to be fired because Carl Lenzo never looked up or was aware that he was going to be shot; the defendant executed his plan through purposeful preparation taken beforehand to the premises where Carl Lenzo was working. These circumstances establish this aggravating factor beyond a reasonable doubt. Johnson v. State, 608 So.2d 4, 11 (Fla. 1992).

(TR 581-582).

The instant case is the typical execution-type murder found in Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984); Lamb v. State, 532 So.2d 1051 (Fla. 1988); Huff v. State, 495 So.2d 145 (Fla. 1986); Burr v. State, 466 So.2d 1051 (Fla. 1985); Asay v. State, 580 So.2d 610, 613 (Fla. 1991); Parker v. State, 458 So.2d 750 (Fla. 1984), and Hargrave v. State, 366 So.2d 1, 5 (Fla. 1979), characterized as an execution-style murder. In Eutzy v. State, supra, the court observed:

> Appellant disputes the finding that the murder was committed in a cold, calculated and premeditated manner. However, the evidence that Eutzy procured the gun in advance, that the victim was shot once in the head, execution-style, and that there was no sign of struggle . . .

458 So.2d at 757.

Here, the trial court, in minute detail, reviewed the scenario which took place. To the extent Thompson now asserts that the trial court's colloquy is inaccurate because there is no evidentiary support for said assertions, Thompson is in error. For example, both the testimony of Marilyn Coltrain and the medical examiner's pertaining to the wound which occurred reflect

that the victim was never aware that he was in danger. Moreover, the record bares out the fact that the victim did nothing to provoke the killing. Marilyn Coltrain testified that as she looked into the window of the Subway sandwich shop and saw the defendant smiling and talking merrily to Carl Lenzo. Within a second she heard a "pop" and saw Carl Lenzo no more, as Thompson leaped over the counter and then turned towards her and looked at her. With regard to the weapon being concealed, the record reflects Marilyn Coltrain saw Thompson standing there talking to Carl Lenzo and she did not see the gun. Her first observation of the weapon was after she heard the "pop" and then saw Thompson with the gun looking at her. Terminally, the .9 mm weapon was Thompson's. When apprehended within minutes of the murder/robbery, he had possession of the ammunition and magazine and had the comparable amount of money in his front right hand pocket that was taken from the Subway shop.

The instant case is clearly unlike Rogers v. State, 511 So.2d 526 (Fla. 1987), wherein this Court clarified what was intended by this aggravating factor. The fact scenario in Rogers is distinguishable from the instant execution-type shooting. Moreover, the instant case is distinguishable from Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988), wherein this Court observed that the cold, calculated and premeditated aggravating factor was inapplicable where Hamblen had not formulated the intent to kill at the time he entered the lingerie store. Likewise, in Lawrence v. State, 614 So.2d 1092, 1096 (Fla. 1993), this Court merely found that the State failed to present

sufficient evidence of the heightened premeditation necessary to support the cold, calculated and premeditated factor. In Lawrence, the evidence showed that Lawrence intended to rob the store and did procure a gun for that purpose but, there was no evidence that Lawrence deliberately plotted a murder. In Green v. State, 583 So.2d 647, 652-653 (Fla. 1991), this Court opined that to prove that a murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, the murder must be characterized as an execution or contract murder or one involving the elimination of witnesses, citing Bates v. State, 465 So.2d 490 (Fla. 1985): "Proof of this aggravating circumstance requires evidence of calculation prior to the murder." 583 So.2d at 653.

In the instant case, while there was no testimony as to what transpired in Thompson's mind prior to this execution-style murder, the record does reflect what Marilyn Coltrain saw at the time just prior to the murder. She saw a pleasant-looking individual enter the Subway sandwich shop and exchange what appeared to be pleasantries with Carl Lenzo. Without a moment's notice, Thompson drew his gun and, at close range, placed a bullet in the top of Carl Lenzo's head, causing massive brain damage and immediate loss of consciousness. Thompson then, and only then, jumped over the counter and took the money from the register. When Edward Faulk ran up, Thompson leveled the gun at him, however Thompson heard sirens and ran off. It is submitted that the instant case is exactly the kind of killing that constitutes the execution murder or those involving the

elimination of witnesses. As such, the trial court's findings support the conclusion that the murder was committed in a cold, calculated and premeditated manner without moral or legal justification.

Terminally, the record reflects that Thompson was on community control and that, whether rightfully or wrongfully, his community control had been revoked because he had not abided by the conditions and requirements of his conditional release. While the instant case may not have been as clear cut as Tafero v. State, 403 So.2d 355 (Fla. 1981) (where Tafero killed to avoid returning to prison); the record reflects there was ample evidence to support the fact that Thompson was in a restrained status and the very first thing he did when he went to the Subway sandwich shop was not try to disarm or rob the store, but rather he totally eliminated Carl Lenzo and, then, robbed the store.

Based on the foregoing, the State would urge that this aggravating factor has been proven beyond a reasonable doubt.

POINT III

THE TRIAL COURT DID NOT ERR IN FINDING THAT THOMPSON COMMITTED THIS MURDER TO AVOID OR PREVENT A LAWFUL ARREST

The trial court found in support of this aggravating factor:

> This factor is otherwise described as 'witness elimination'. Preston v. State, 607 So.2d 404 (Fla. 1992). The State may establish this aggravating factor by showing that the sole or dominant motive for the murder was the elimination of the witness. Id. The pivotal facts this Court has considered surrounding commission of this offense and establishment of this factor beyond a reasonable doubt are: the defendant was a community controlee who was supposed to

> be confined to his residence; if apprehended or identified for violation of his community control he faced likelihood of imprisonment; defendant chose to commit the robbery late at night when the victim was alone in the shop and no other witnesses were thought to be present; the victim was looking down at the counter fixing defendant's sandwich unaware of any impending peril; the victim did absolutely nothing to provoke or incite defendants violent conduct; the victim was shot in the top of the head execution-style at point-blank range; the shooting occurred before defendant attempted to take any money or property from the premises to eliminate the victim as a witness and to avoid any resistance from him once the robbery was in progress. The sum total of these circumstances convinces this Court beyond a reasonable doubt that Carl Lenzo was killed to eliminate him as a witness. Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985); Oats v. State, 446 So.2d 90 (Fla. 1984).

(TR 580-581).

Citing Lawrence v. State, 614 So.2d 1092 (Fla. 1992), Thompson asserts the trial court erred in finding that Thompson committed the murder to avoid arrest, thus this Court should reject that finding. In Lawrence, supra, this Court cryptically held that "the State did not prove beyond a reasonable doubt that the dominant motive for the murder was to avoid or prevent arrest." 614 So.2d at 1096. In the instant case however, except for the robbery, the only explanation for Carl Lenzo's death is witness elimination. That is exactly what the trial court concluded. The instant case is indistinguishable from Remeta v. State, 522 So.2d 825 (Fla. 1988); Kokal v. State, 492 So.2d 1317 (Fla. 1986); Johnson v. State, 442 So.2d 185 (Fla. 1983); Pope v. State, 441 So.2d 1073 (Fla. 1983); Wright v. State, 473 So.2d 1277 (Fla. 1985); Swafford v. State, 533 So.2d 270 (Fla. 1988).

Based on the foregoing, this aggravating factor has been proven beyond a reasonable doubt.

POINT IV

THE TRIAL COURT DID NOT ERR IN FINDING THAT THOMPSON WAS UNDER SENTENCE OF IMPRISONMENT OR COMMUNITY CONTROL

Before the sentencing proceeding in this case, Thompson asserted that he was not lawfully sentenced to community control for a violation of probation in Case No. 87-1401 (TR 320). Defense counsel further argued that the community control sentence imposed for forgery and uttering a forged instrument and grand theft in Case No. 91-1720 should not have been imposed because the trial court was "influenced by the probation violation case" which was before the court for sentencing at the same time on September 4, 1991 (TR 320-321). The prosecution asserted that it would not utilize the 1987 community control sentence but rather only the 1991 sentence for which Thompson stood convicted of forgery and uttering a forged instrument and grand theft (TR 321). Therefore, the jury was only informed of this 1991 conviction. The trial court, however, in its sentencing order, referred to both numbers in finding that Thompson committed the murder while under sentence or while placed on community control (TR 580). Citing Long v. State, 529 So.2d 286 (Fla. 1988), and Oats v. State, 446 So.2d 90 (Fla. 1984), Thompson argues that error occurred when the trial court utilized Case No. 87-1401 in factoring in whether this aggravating factor applied. While the trial court may have erred in including Case No. 87-1401 in assessing whether this

aggravating factor existed, such error is harmless beyond a reasonable doubt since (a) the jury was never informed of the one year sentence for community control in Case No. 87-1401, and (b) Thompson was legitimately on community control based on the sentence imposed in Case No. 91-1720, which was not infirmed.

Subsequent to the filing of the notice of appeal in the instant case, Circuit Judge Parnham granted Thompson's motion to dismiss the violation of community control affidavit filed in Case No. 91-1720 (TR 630). As such, it is unclear based on this record what sentence has been imposed with regard to Case No. 91-1720. Should this case be remanded for resentencing, clarification will be necessary in order to assess what sentence remained with regard to the September 4, 1991, sentencing.

Thompson is in error, however, in suggesting that the trial court erred in admitting evidence that Thompson was on community control for Case No. 91-1720, at the time of sentencing. The jury properly was informed that he was only on community control for the 1991 sentence and, as such, their recommendation was not in any way skewed by the possible misapplication of a community control sentence on Case No. 87-1401. Should remand occur for any reason, a new sentencing hearing before a new jury is not warranted.

POINT V

UNDER A PROPORTIONALITY REVIEW, THOMPSON'S DEATH SENTENCE IS WARRANTED

Thompson next argues that the death penalty is not appropriate, citing Porter v. State, 564 So.2d 1060 (Fla. 1990). Because the numbers of aggravating and mitigating circumstances

are not important but rather what weight is given each aggravating and mitigating circumstance, death is an appropriate sentence herein. Even assuming that all of the aggravating factors found by the trial court will not survive appellate scrutiny, the very nature and quality of the aggravating factors so far outweigh the "dirth" of mitigation sub judice that death is appropriate. The trial court, in the sentencing order, with care to the dictates of Campbell v. State, 571 So.2d 415 (Fla. 1990), meticulously reviewed each and every non-statutory mitigating factor presented by Thompson. In addressing each of those factors, the trial court gave little weight to those non-statutory mitigating factors or no weight where he concluded that no evidence existed to support a particular piece of mitigating evidence (TR 583-586). Citing Preston v. State, 607 So.2d 404 (Fla. 1992), the court concluded that the aggravation far outweighed the non-exceptional factors that Thompson was a good parent and provider and that he had been a non-violent person prior to this point. This murder was committed for the purpose of robbery and witness elimination. It was done in a cold, calculated and premeditated execution-style manner and it was done at a time when Thompson was legitimately on a restrainted status for convictions of forgery or uttering a forged instrument and grand theft. Under no stretch of the imagination can it be concluded that the death penalty is not proportionate to other cases similarly circumstanced based on the aggravation and mitigation existing. See Randolph v. State, 562 So.2d 331 (Fla. 1990); Mendyk v. State, 545 So.2d 846 (Fla. 1989); Remeta v.

State, 522 So.2d 825 (Fla. 1988); Swafford v. State, 533 So.2d 270 (Fla. 1988); Garcia v. State, 492 So.2d 360 (Fla. 1987); Hargrave v. State, 366 So.2d 1 (Fla. 1978); Shriner v. State, 386 So.2d 525 (Fla. 1980), and Carter v. State, 576 So.2d 1291 (Fla. 1989). Based on the foregoing, the State would urge death is appropriate in the instant case.

POINT VI

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE IMPACT THE VICTIM'S MURDER HAD ON HIS FAMILY, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION

Pretrial, Thompson filed a flurry of motions challenging the constitutionality of Florida's death penalty and the aggravating factors that might be utilized in his case. Additionally, Thompson filed a Motion In Limine To Prohibit Use Of Victim Impact Evidence (TR 487-488), arguing that since Fla.Stat. §921.141(7), took effect only July 1, 1992, and the murder occurred on or about May 3, 1992, any attempt to retroactively apply §921.141(7), Fla.Stat., to "the case at hand" was an ex post facto application. Thompson also filed a Motion To Exclude Evidence Designed To Create Sympathy For The Deceased (TR 493-511), wherein he asserted a number of theories as to why evidence portrayed as victim sympathy or victim impact evidence was either irrelevant to any statutory aggravating factor or unconstitutional based on several general theories. (Vague and overbroad or in violation of the authority of the Florida Supreme Court to regulate procedures and practices and a violation of

Florida Constitution, Article I, Section 2, 9, 17 and 21, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution). Thompson also filed a Motion To Prohibit Application Of Fla.Stat. §921.141(7), in violation of the ex post facto clause of the Florida Constitution and the United States Constitution. (Asserting that evidentiary rulings with regard to victim impact evidence was a substantive change rather than a procedural change regarding the admission of evidence) (TR 512-514).

Prior to the commencement of the penalty phase on December 16, 1992, counsel did not reargue his motions regarding victim impact but rather, stated "Judge, we would also ask, again, that this victim impact evidence not be considered by the jury for the reasons stated in the previous motions." (TR 323).

The State then moved forward with the penalty phase, presenting the testimony of Robert Nathan (TR 329-331), and Carolyn Lenzo (TR 331-334). The State rested (TR 334), and at no point did defense counsel object to the testimony of Carolyn Lenzo, Carl Lenzo's mother. Having failed to object and identify what testimony of Carolyn Lenzo constituted impermissible victim impact evidence, Issue VI has not properly been preserved for appellate review. In Lawrence v. State, 614 So.2d at 1094-1095, this Court reaffirmed that a contemporaneous objection rule applies to evidence even if "a prior motion in limine has been denied, the failure to object at the time collateral crime evidence is introduced waives the issue for appellate review. Correll v. State, 523 So.2d 562, 566 (Fla.), cert. denied, 488

U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988)." 614 So.2d at 1094.

Whether failing to timely object to the admission of collateral evidence or "purported victim impact evidence", a timely objection pursuant to Correll and Lawrence, is required. In the instant case, as reflected by the State's lengthy recital of the penalty phase facts, Carolyn Lenzo's testimony, when compared to the testimony of Thompson's witnesses, presented nothing more or less than background evidence generated by everyone of Thompson's penalty phase witnesses. Without a timely objection as to the basis for the inappropriateness of Carolyn Lenzo's testimony, the trial court, as well as this Court, is without opportunity to weigh whether any violation resulted. In fact, in reviewing the very wording of this point on appeal, the only reference to "victim impact" which may be gleaned is Mrs. Lenzo's remark that she "felt her son's loss greatly" (TR 333). At closing, the prosecutor's sole reference to "any impact" was that Carl Lenzo left a child who would not know him.

Ironically, the defense introduced what more readily could be argued as victim impact evidence. Thompson's mother testified that Thompson's legal problems resulted in a nightmare for her family (TR 392). Defense counsel, in closing, talked about the Bible and forgiveness (TR 410), and emphasized that although the jury heard "victim impact" evidence regarding Carl Lenzo's family, "victim impact" was a two-sided street and the Thompsons were suffering also (TR 411-412). Lastly, Thompson personally expressed his sorrow for the Lenzo family, especially the fact

that Carl Lenzo would not be around to see his baby, but stated that he, Thompson, was in this situation (TR 563-564).

In light of the failure to object to any specific testimony introduced by the State and the nature of the defense's presentation, clearly any "error" regarding "victim impact" evidence was harmless beyond a reasonable doubt. Grossman v. State, 525 So.2d 833 (Fla. 1988); Daugherty v. State, 533 So.2d 287 (Fla. 1988); Eutzy v. State, 541 So.2d 1143 (Fla. 1989); Adams v. State, 543 So.2d 1244 (Fla. 1989); Stewart v. State, 549 So.2d 171 (Fla. 1989); Parker v. Dugger, 550 So.2d 459 (Fla. 1989); Smith v. Dugger, 565 So.2d 1293 (Fla. 1989); Carter v. State, 576 So.2d 1291 (Fla. 1981); Porter v. Dugger, 559 So.2d 201 (Fla. 1990); Engle v. Dugger, 576 So.2d 696 (Fla. 1991); Sochor v. State, 580 So.2d 595 (Fla. 1991); Stein v. State, ___ So.2d ___ (Fla. January 13, 1994), 19 Fla.L.Weekly S32.

To the extent a major portion of Thompson's argument concerns the applicability of §921.141(7), Fla.Stat. (1992), to his case, the State would again submit the issue as to ex post facto application or the constitutionality of §921.141(7), Fla.Stat. (1992), has not been preserved for appellate review. The record reflects, as previously noted, that defense counsel pretrial raised the spectre that the application of §921.141(7), Fla.Stat. (1992), was either an ex post facto application or unconstitutional on its face. Defense counsel, in a cursory fashion, renewed his previously filed motions prior to the penalty phase (TR 323), however, no objection was raised either as to relevance, ex post facto application or constitutionality

when the State presented the testimony of Robert Nathan or Carolyn Lenzo. Based on the plethora of caselaw that requires a timely and specific objection to the admission of any evidence, defense counsel was on notice that he should object to those admissions by witnesses which he believed to be erroneous. As such, Thompson's multifaceted argument with regard to the constitutionality of victim impact evidence is not properly before the Court.

To the extent this Court may entertain any of Thompson's "constitutional" arguments, the only issue which may be subject to review is Thompson's ex post facto argument. The record reflects that the crimes for which Thompson was charged occurred on May 3, 1992, approximately two months prior to the effective date of §921.141(7), Fla.Stat. (1992). To the extent Thompson is arguing that the admission of testimony relating to Carl Lenzo's life constitutes an ex post facto admission of evidence during the penalty phase of Thompson's trial, such argument is groundless.

The offense of murder and its constituent elements were and are the same before the enactment of §921.141(7), Fla.Stat. (1992), and now after its effective date. Section 921.141(1), specifically provides:

> . . . In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in §§(5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary

> rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. . . .

Whether §921.141(7), Fla.Stat. (1992), ever existed is of no moment since it is within the trial court's discretion to allow any such evidence which the court deems to have probative value. While the State is not unmindful that this Court, in Grossman v. State, 525 So.2d 833, 842 (Fla. 1988), held that "victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a sentence of death", it cannot be discerned that all evidence regarding a victim, if heard by the sentencer, is the only basis upon which the death penalty is justified.

In Payne v. Tennessee, 501 U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the United States Supreme Court concluded that both Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), "were wrongly decided and should be, and now are overruled." The Court went on to observe that the misreading of its prior decision in Booth, supra, had unfairly weighted the scales in a capital trial -- virtually no limits are placed on irrelevant mitigating evidence a capital defendant may introduce regarding his circumstances, but, the State was barred from offering a glimpse of the life the defendant chose to extinguish or demonstrate the loss to the victim's family and society. The Court observed that victim

impact evidence was designed to show the uniqueness of the victim as an individual:

> Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of general type long considered by sentencing authorities. We think the Booth court was long in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases and in this case, victim impact evidence serves entirely legitimate purposes . . .
>
> * * * * *
>
> We are now of the view that a state may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant . . . By turning the victim into a faceless stranger . . ., Booth deprives the state of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first degree murder.

115 L.Ed.2d at 735.

The Court continued:

> We reaffirm the view expressed by Justice Cardoza in Snyder v. Massachusetts, 291 U.S. 97, 122 (1934): 'Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained until it is narrowed to a filament. We are to keep the balance true.'

115 L.Ed.2d at 736.

Herein, the testimony of Carolyn Lenzo, when compared with the testimony of the defense's witnesses, cannot be singled out as the basis upon which the death penalty was imposed. In fact,

the prosecution, except for a fleeting comment, made no reference to any victim impact. It was the defense that continually reminded the jury of victim impact evidence suggesting that victim impact evidence went both ways, not only for the victim's family but also for the accused's family. Why was it any more important to know that Thompson's sister, Natasha, was a student getting her degree in computer sciences, was married and had one child, or that Thompson's brother, Brian, was in the Navy and was twenty-eight years old, or that Thompson's brother, Barry, lived in Melbourne, was twenty-seven years old and worked for the North American Moving and Storage Company, or that one of Thompson's uncles on his mother's side was a pastor? The aforenoted was not any more important nor any more relevant than the fact that at the time of Carl Lenzo's death, he had just found out his wife was pregnant!

In Dobbert v. Florida, 432 U.S. 282 (1977), the United States Supreme Court held that Dobbert's complaint, about the subsequent application of the Florida's death penalty statutory scheme to the 1971 murder of his children, was not an ex post facto application of law. The Court explained that even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto. See also Hopt v. Utah, 110 U.S. 574 (1984) (change in law permitting a convicted felon to be called as a witness implicating defendant in the crimes); Thompson v. Missouri, 171 U.S. 380 (1898) (change in law permitting previously inadmissible evidence to be admitted in defendant's retrial), and Glendening v. State, 536 So.2d 212, 214-215 (Fla.

1988) (application of Fla.Stat. 90.803(23), did not violate ex post facto prohibition).

In Glendening, 536 So.2d at 215, the court observed:

> Relying primarily upon the portion of the formulation of the scope of ex post facto laws from Miller which is set forth above, Glendening contends that §90.803(23), alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense. He further contends that because he was disadvantaged by the retrospective application of the exception, admission of the out of court statements of the child victim pursuant to §90.803(23), in his case violated the prohibition against ex post facto laws.

The court, following a discussion of Hopt v. Utah, supra, and Thompson v. Missouri, supra, concluded:

> The same reasoning which resulted in the Supreme Court's determination that the statutes in Hopt and Thompson were procedural leads to the conclusion that §90.803(23), Fla.Stat., is also procedural and that the statute does not effect 'substantial personal rights'. As in Hopt, '[t]he crime for which the present defendant was indicted, the punishment proscribed therefore, and the quantity or the degree of proof necessary to establish his guilt, all remains unaffected' by the enactment of §90.803(23). (cite omitted). As in Thompson, §90.803(23), 'left unimpaired the right of the jury to determined the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the state . . . must overcome the presumption of his innocence, and establish his guilt beyond a reasonable doubt.' (cite omitted). Accordingly, we conclude that the district court below correctly held that the application of §90.803(23), in the present case does not violate the prohibition against ex post facto laws.

536 So.2d at 215.

Thompson is simply not disadvantaged in the sense prohibited in Bouie v. Columbia, 378 U.S. 347 (1964), or Marks v. United States, 430 U.S. 188 (1977), wherein the Court concluded those defendants were left unaware of what conduct was proscribed at the time they committed the offense. In the instant case, no such confusion could have resulted since §921.141(1), Fla.Stat., specifically provides that the rules of evidence are relaxed at the penalty phase of a given trial and, laced throughout the rules of evidence are specific provisions that allow for the admission of evidence of a character of the victim. See, for example §90.404(1)(b)(i), Fla.Stat., which permits evidence of a character of a victim, ". . . A pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the trait". Or Fla.Stat. §90.404(1)(b)(ii), which provides, "Evidence of a character trait of peacefulness of the victim offered by the prosecution a homicide case to rebut evidence that the victim was the aggressor."

§921.141(7), Fla.Stat. (1992), merely codified what the United States Supreme Court observed in Payne v. Tennessee, supra, that the uniqueness of the victim is equally important as the uniqueness of the defendant in providing a "full picture" for sentencing.

Terminally, the State would reiterate that no timely objection was made at the time of the admission of Carolyn Lenzo's testimony regarding "victim impact evidence" and as such, the issue is not preserved. However, even assuming for the moment review might be entertained, the issue is not an ex post

facto application of victim impact evidence, but rather, whether the admission of evidence concerning Carl Lenzo was relevant. If it was not relevant, then was said admissions harmless error beyond a reasonable doubt. Any error which occurred was harmless beyond any reasonable doubt.

No relief should be granted as to this claim.

CONCLUSION

Based on the foregoing, Appellee would suggest that no relief is warranted and Thompson's conviction for first degree murder and subsequent sentence of death should be affirmed in all respects.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. David A. Davis, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 26th day of January, 1994.

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