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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This is a capital case arising out of Escambia County. Judge Nicholas Geeker sentenced Derek Thompson to death for the murder of a store clerk. The record on appeal consists of three volumes, which will be referenced by the usual "R".

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Escambia County on May 26, 1992 charged Derek Thompson with one count of first degree murder and one count of armed robbery (R 487). He apparently pled not guilty to those charges because he subsequently filed several motions, the following of which are relevant to this appeal:

1. Motion to Strike Aggravating Circumstances (R 437). Denied (R 483).

2. Two Motions to Dismiss Aggravating Circumstances as Unconstitutional (R 440-43). Both were denied (R 483).

3. Motion in Limine to Prohibit Use of Victim Impact Evidence (R 487-88). Denied (R 323).

4. Motion to Exclude Evidence or Argument Designed to Create Sympathy for the Deceased (R 493-511). Denied (R 323).

Thompson proceeded to trial before Judge Nicholas Geeker and was found guilty as charged on both counts (R 534-35). His motion for new trial was denied (R 538, 541).

The jury, after hearing further evidence in the penalty phase of the trial recommended death (R 537). The court followed that decision and sentenced Thompson accordingly. Supporting that punishment, it found in aggravation that:

1. Thompson was under sentence because he was on community control when he committed his crimes.

2. The murder was committed during the course of a robbery.

3. It was done for the purpose of avoiding or preventing a lawful arrest.

> 4. It was done in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R 580-82).

The court found that none of the statutory mitigation applied, and it rejected most of the nonstatutory evidence Thompson offered as not being of any or much weight. It did agree however, that the defendant was a good parent and provider and that he was a non-violent person (R 584-85). This proof did little to ameliorate a death sentence.

This appeal follows.

STATEMENT OF THE FACTS

Marilyn Coltrain was hungry. Sometime after midnight on May 3, 1992 she stopped at a Subway Sandwich Shop in Pensacola. She went inside, bought a sandwich, and returned to her car and began to eat (T R 163). As she did so, she saw Derek Thompson, a "pleasant-looking" man who "looked happy" go inside, talk briefly with Carl Lenzo, the attendant, and then shoot him (R 164). Coltrain quickly left but as she drove away she saw the defendant leap over the counter (R 165). She stopped at a nearby store and reported the shooting. The police were called and this witness returned to the shop where she saw a young man who told her that Thompson had apparently pointed the gun at him as the defendant stuck it in his pants and ran around a corner (R 165-66).

A policeman was within blocks of the sandwich shop, and when alerted to the homicide, he immediately drove to the crime scene. Enroute, he saw the defendant walking along a street, and because he matched the description given over the radio, the officer stopped him (R 210). Thompson, who had his back to the law enforcement officer, hesitated briefly, raised his hands, and went to where the officer stood (R 211). A 9 millimeter magazine and $108 in cash were found on him (R 211). A 9 millimeter gun was found where Thompson had stopped when arrested (R 214).

He was returned to the crime scene where Coltrain and the young man identified him (R 169, 203).

Lenzo died instantly from a single shot to the head (R 193, 194).

SUMMARY OF THE ARGUMENT

Derek Thompson presents five issues for this court to consider: one guilt phase and four penalty phase questions. ISSUE I. During closing argument the state told the jury that the gun it had introduced at trial had been available for anyone to test. Defense counsel objected to that comment as a comment on his right to remain silent. It was so because it was fairly susceptible of being interpreted by the jury as telling them that Thompson could have tested the weapon if he had wanted to do so. This argument is but the latest in a long line of comments on defendants' rights to remain silent, which this court has repeatedly warned prosecutors they should not violate. The evidence fairly shouts that they have ignored these admonitions and have continued to do as they please. This court should reverse, not only because the court erred in not granting Thompson's motion for a new trial, but to also send a message to the prosecutor's around the state to stop this practice.

ISSUE II. The court found this murder to have been committed in a cold, calculated, and premeditated manner without any moral or legal justification. The facts it found justifying this aggravator do not. This court has required proof that the murder was carefully planned, it was deliberately committed before it will approve applying this aggravating factor to a particular case. Here the state failed to carry its burden. This was a "stripped down" murder with none of the frills that

distinguish a routine felony-murder from the ones for which a death sentence is appropriate.

ISSUE III. The court also found Thompson killed Lenzo to avoid or prevent a lawful arrest. Again, the facts supporting this conclusion hardly do so. What we have, instead, is an example of the trial court speculating about what it believed must have been the motivating reason for the killing. Because the evidence does not support its conclusion it should not have found this aggravating factor applied.

ISSUE IV. The court admitted evidence at the sentencing portion of Thompson's trial that he was on community control when he killed Carl Lenzo. That was error because his community control had been illegally extended as a trial court later determined. He was, in short, not on community control at the time he committed his latest crimes.

ISSUE V. This simply is not a death case. The murder was about as simple as can be imagined. There is nothing so unusually evil about Thompson or what he did that tags this case as one for which death is appropriate. To the contrary, Thompson comes from a decent background, had honorably served in the navy, was married and had two children, held two steady jobs, and had never shown any violent propensities. The murder he committed is within the norm of capital felonies for which a death sentence is inappropriate.

ISSUE VI. Over defense objection, the court allowed the victim's mother to tell the jury about her son's background and the effect his murder had had on her and her family. That was

error because Section 921.141(7) Fla. Stat. (1992), under which the court admitted this victim impact evidence, was unconstitutionally applied in this case. That section is not an aggravating factor, nor does it genuinely narrow the class of defendants eligible for a death sentence. Moreover, while the language of the section has a nice humanitarian ring to it, it defies application in death sentencing. Also, even if the statute passes constitutional muster, it was improperly applied here because there was no evidence of Lenzo's uniqueness or how his loss affected the community. Finally, applying this section to Thompson violated state and federal ex post facto proscriptions.

ARGUMENT

ISSUE I

THE COURT ERRED IN DENYING THOMPSON'S MOTION FOR MISTRIAL WHEN THE STATE, DURING ITS CLOSING ARGUMENT, SUGGESTED THAT THE DEFENDANT HAD THE BURDEN TO PROVE HIS INNOCENCE, IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

During its closing argument, the state told the jury:

> 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--

(T 284).

At that point, defense counsel objected to what the state had argued and moved for a mistrial (T 284). "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 are going to read that." (T 284)

The court overruled the objection, denied the motion for mistrial, but gave a curative instruction that Thompson was not required to prove anything (T 286). Immediately after, the prosecutor repeated the objected to testimony, "The expended shell and the gun are available for anyone to see and test and examine that wants to. And they were not destroyed in testing." (T 286) Thompson renewed his objection and motion. "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." (T 289) The court again denied his request

(T 289). It should have granted the motion and ordered a new trial.

Trial courts, as a matter of practical necessity, have a considerable amount of discretion regarding whether to grant motions for new trial based on prosecutorial statements made at closing. That freedom has limits, however, and this court has ruled that argument which is fairly susceptible of being interpreted as a comment on a defendant's right to remain silent can be the basis for a mistrial. State v. Kinchen, 490 So. 2d 21 (Fla. 1985). Argument, directly or by inference, that shifts the state's burden of proof from its shoulders to the defendant's back are one form of this type of improper comment. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). In Kramer, the prosecutor called on the defendant to produce the knife he alleged the victim had assaulted him with and to explain away the evidence which tended to show that the victim was passive when killed. This court said the state had "danced perilously close to an improper argument," but it refused to grant a new trial. It did note, however, that "The wiser approach would be not to make the argument at all." Id.

If past is prologue, the prosecutors of this state will ignore that advice. This court in 1985 was

> "deeply disturbed as a Court by the continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases. . . . This Court considers this sort of prosecutorial misconduct, in the face of repeated admonitions against such overreaching, to be grounds for

> appropriate disciplinary proceedings. . . Nor may we encourage them to believe that so long as their misconduct can be characterized as `harmless error,' it will be without repercussion.

Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985).

Undeterred the state in Garron v. State, 528 So. 2d 353 (Fla. 1988) inflamed the jury during closing argument, and this court again "expressed its displeasure" with the state's violation. This time, however,

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

Id. at 360.

Undeterred, the state in Taylor v. State, 583 So. 2d 323 (Fla. 1991) improperly relied on jury sympathy for the victim in its closing argument during the penalty phase of the defendant's trial. This court disapproved of it and ordered a new sentencing proceeding.

Undeterred, the state in Watts v. State, 593 So. 2d 198 (Fla. 1992) in its closing in the guilt phase portion of the capital trial told the jury "We are here today because [the victim's] life will never be the same." This court agreed with the defendant that the state's comment was improper but harmless.

Undeterred, the state in Richardson v. State, 604 So. 2d 1107 (Fla. 1992) asked the jury to show Richardson as much pity as he showed his victim. Again, this court condemned what the state had said, but once more it found the error harmless.

Obviously, the threat of disciplinary proceedings has done nothing to stem the state's continued flaunting of the law. Equally obvious, this court has approved this impropriety by repeatedly finding such deliberate violations of the law harmless. As long as it continues to do so, so will the state, unrepentant and unashamed continue to violate the defendant's rights to remain silent and to a fair trial.

There comes a time though when enough is enough. If threats of discipline remain only that, and repeated violations of the law have no cost to the state, then this court should reverse regardless of the harmlessness of the error. If this court really wants to correct the sloppy practices of the state in its closing arguments, it should reverse in this case, and let the prosecutor here as well as those around the state know that they had better listen to what this court has said and obey it.

This court should, therefore, reverse the trial court's judgment and sentence in this case and remand for a new trial.

ISSUE II

THE COURT ERRED IN FINDING THAT THOMPSON COMMITTED THIS MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY MORAL OR LEGAL JUSTIFICATION.

In sentencing Thompson to death, the court found he had committed the murder in a cold, calculated, and premeditated manner without any moral or legal justification. In support of that finding, it concluded:

> 1. Thompson as a community controllee was supposed to stay at home, and if found beyond those bounds could be sent to jail.
>
> 2. He committed the robbery at night when the victim was alone.
>
> 3. The victim was never aware of any danger.
>
> 4. He did nothing to provoke the killing.
>
> 5. He was shot in the top of the head at point blank range.
>
> 6. The shooting occurred before any money was taken.
>
> 7. The weapon was concealed.
>
> 8. A round had to be chambered and the gun cocked before it could be fired.
>
> 9. Thompson had prepared his plan before entering the shop.

(R 581-82).

Rogers v. State, 511 So. 2d 526 (Fla. 1987) is the leading case defining this aggravating factor. See, also, Amoros v. State, 531 So. 2d 526 (Fla. 1988). Focussing on the level of calculation required to qualify for it, this court said, "`Calculation' consists of a careful plan or prearranged

design." Rogers at 533. The evidence must show there was more than a careful plan to rob or commit some other felony. It must prove the defendant had deliberately plotted a murder. Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984). (A planned robbery cannot support this aggravating factor.) In short, this aggravating factor was intended to apply to executions, contract murders, or homicides to eliminate witnesses. Green v. State, 583 So. 2d 647, 652 (Fla. 1991).

Of course, a defendant who murdered someone during the course of a robbery could have had the necessary elevated premeditation, but there is usually some additional evidence exhibiting the cold deliberation required. In Jones v. State, 569 So. 2d 1234 (Fla. 1990), the defendant had discussed killing the victims so he could steal their truck. In Haliburton v. State, 561 So. 2d 248 (Fla. 1990), the defendant broke into the victim's house while he slept and killed him. He did it, he said, to see if he could kill. In both cases, the murders were committed in the course of a felony, and bother were cold, calculated, and premeditated.

Likewise, in Johnson v. State, 608 So. 2d 4, 11 (Fla. 1992) (which the court in this case used to justify its finding of this aggravating factor) Johnson, before going on an all night killing spree, announced to friends that he wanted to rob someone so he could get more drugs, and he would shoot someone if he had to. Repeatedly he deceived his victims into helping him for which they were shot. This night of successful robberies and murders culminated in the execution of a

policeman with whom he had fought and incapacitated with two gunshot wounds. Those murders were committed in a cold, calculated, and premeditated manner.

In contrast to Johnson and similar to this case, Michael Lawrence robbed a convenience store and killed the clerk in a store room. Lawrence v. State, 18 Fla. L. Weekly S147 (Fla. March 11, 1993). Although the trial court found that he had committed the murder in a cold, calculated, and premeditated manner, this court rejected that finding. The evidence showed only that the defendant had obtained a gun and intended to rob the store. "The state, however, failed to present sufficient evidence of the heightened premeditation needed to support finding this aggravator." Id. There was, as this court said elsewhere, no evidence Lawrence had a conscious intention to murder when he decided to rob. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988). So here, the state presented nothing showing Thompson's unlawful plan to kill, any discussions expressing that intent, or any proof that this murder was anything more than a "simple" felony-murder.

Moreover, the court used the nine facts listed above to justify finding Thompson committed the murder in a cold, calculated, and premeditated fashion, and they hardly do so. For example, factors 3, 4, 7, and 9 have no evidentiary support and are speculative. The state presented no evidence Lenzo was unaware of any danger, that he did nothing to provoke his death, that the weapon was concealed, or that the defendant had prepared his plan before entering the shop. Marilyn Coltrain,

the eyewitness in the best position to see and hear what happened, was busily eating her sandwich. She never saw or heard what happened immediately before the shooting (R 164).

Also, there is nothing to support the court's conclusion Thompson murdered Lenzo late at night because the victim would be alone. That thinking applied with equal force to the robbery and the state presented no evidence proving that Thompson waited until dark to kill (rather than rob) his victim. If anything, the state's case established that the time of day had little to do with the defendant's motive to kill. Immediately before the shooting, two young men had come into the store, and of course, so had Ms. Coltrain. Moreover, after leaving the store, she sat in her car in front and ate her sandwich (R 163). The store itself had a large window and the area around the building was well lit (R 163).

That Lenzo was unaware of his impending peril has no probative value and remained unproven in any event. Consciousness of imminent death applies more appropriately to the question of whether the murder was especially heinous, atrocious, or cruel. See, Lucas v. State, 613 So. 2d 408 (Fla. 1992). Likewise, that the gun had to be loaded and cocked before being fired proves nothing worth noting relevant to this aggravating factor. There is no evidence Thompson loaded the weapon or when he did so, and every firearm has to be cocked to be fired.

The only fact having any conceivable bearing dealt with Thompson's community control status. In Lawrence, like here,

the defendant was under sentence of imprisonment when he committed his murder. This court, however, did not rule that his sentence justified finding the murder to have been done in a cold, calculated, and premeditated manner. In the abstract, of course, the defendant's status could support this aggravating factor, but there should be some evidence that he coldly killed his victim because he was under some sentence of imprisonment. See, e.g., Tafero v. State, 403 So. 2d 355 (Fla. 1981) (The defendant killed to avoid returning to prison.) Here, the trial court had to speculate that Thompson killed Lenzo because the former was on community control. There was no evidence that a fear of being sent to prison if caught for the robbery motivated the defendant to do what he did. Moreover, if he was going to be sent to prison it more than likely would be because he had committed a robbery rather than violating his community control.

From the evidence presented at trial, or from the court's sentencing order, this court can only conclude that the murder was not committed in a cold, calculated, and premeditated manner.

ISSUE III

THE COURT ERRED IN FINDING THAT THOMPSON COMMITTED THIS MURDER TO AVOID OR PREVENT A LAWFUL ARREST.

In sentencing Thompson to death the court found that he had committed the murder for the purpose of avoiding lawful arrest. In support, it concluded that:

> 1. Thompson was a community controllee who was supposed to stay at home, and if found beyond those bounds could be sent to jail.
>
> 2. He committed the robbery at night when the victim was alone.
>
> 3. The victim was never aware of any danger.
>
> 4. He did nothing to provoke the killing.
>
> 5. He was shot in the top of the head at point blank range.
>
> 6. The shooting occurred before any money was taken.

In enacting Section 921.141, Florida Statutes (1988) the legislature intended that the aggravating factor "to avoid lawful arrest" would apply primarily to the killings of police officers. White v. State, 403 So. 2d 331 (Fla. 1981). It can have wider application, but to be found for the murders of those other than law enforcement officers, this court has said the dominant motive for the killing must have been to avoid arrest, Menendez v. State, 368 So. 2d 1278 (Fla. 1979), and the proof of the killer's intent must be very strong. Riley v. State, 366 So. 2d 19 (Fla. 1979). That someone is dead does not justify finding this aggravating factor. Id. Neither does the lack of provocation or the senselessness show that the

dominant motive was to avoid arrest. The state must prove by positive evidence that the defendant committed the murder to eliminate the victim as a witness. It cannot be assumed this factor applied because the court could not find any other reason for committing the murder.

At its peril, the state proved Thompson was on community control when he committed this murder (R 330-31) (See Issue IV.) What the state never established was that he murdered to avoid prison. Merely because Thompson was on community control when he killed Lenzo does not mean this aggravating factor applies. If it then all persons similarly situated who commit a first degree murder would be eligible for a death sentence, a result implicitly rejected by the United States Supreme Court. Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987).

In Lawrence v. State, 18 Fla. L. Weekly S147 (Fla. March 17, 1993), the defendant robbed and murdered a convenience store clerk. He was also on parole when he did so. Although the trial court said the defendant committed the murder to avoid arrest, this court rejected that finding. It should do so in this case as well.

The other pieces of evidence the court used similarly have little persuasive value. For example that the victim was unaware of his "impending peril," that he did nothing to provoke his death, or that he was shot at point blank range contributes nothing to show that the dominant motive for the killing was to avoid arrest. This evidence shows more the

victim's situation than it proves the defendant's mental state. Likewise, that he committed his crimes late at night when the victim was alone is contradicted by the evidence. Marilyn Coltrain, the eyewitness, had bought a sandwich only minutes before Thompson entered the store, and she sat in her car and virtually witnessed the shooting (R 164).

The proof presented by the court fails to establish that Thompson's dominant motive was to avoid arrest and it was was not, in any event, very strong that such was his reason for killing Lenzo.

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

ISSUE IV

THE COURT ERRED IN FINDING THAT THOMPSON WAS UNDER SENTENCE OF IMPRISONMENT OR COMMUNITY CONTROL, AS SUBSEQUENT TO THE SENTENCING IN THIS CASE IT WAS DETERMINED THAT HE WAS ILLEGALLY ON COMMUNITY CONTROL AT THE TIME HE COMMITTED THE MURDER IN THIS CASE.

Immediately before the sentencing proceeding in this case began, counsel for Thompson informed the court that his client had been illegally continued on community control at the time he committed the murder for which he was ultimately charged with and convicted of committing (R 317). His Motion to Dismiss (R 626) detailed how a 1987 probationary period had been illegally extended and infected a later, 1991, probation. The upshot of the lawyer's request was that Thompson was not on community control when he committed the murder of Carl Lenzo.

When he told the court that he had filed the Motion to Dismiss in the cases for which he had been placed on community control, he also asked the court to not consider Thompson's probationary status when it deliberated on what sentence to impose (R 317-18). Thompson also did not want the jury told this.

The court denied the motion at least to the extent that the state could use the 1991 probation but not the 1987 probation (R 323). In sentencing Thompson to death, the court ignored its ruling, and found:

> 1. The capital felony was committed by a person under sentence and placed on community control. Defendant was under a community control sentence in two different cases, Number 87-1401 and Number 91-1720, when these offenses were committed.

(R 580).

The court erred in finding Thompson was on community control at the time of the murder because several months after the capital sentencing another trial judge granted the Motion to Dismiss, agreeing that he had been illegally continued and placed on community control (R 630).

This issue is easily resolved. In Long v. State, 529 So. 2d 286, 289 (Fla. 1988) this court

> expressly held that a conviction used as an aggravating circumstance, which is valid at the time of the sentence but later reversed and vacated by an appellate court, results in an error in the penalty phase proceeding.

Accord, Oats v. State, 446 So. 2d 90 (Fla. 1984).

The message of Long and Oats is that sentencing courts in capital cases use crimes whose legitimacy is in question at their own risk when they consider them in justifying death sentences. In this case, the situation is more extreme because Thompson's condition of being on community control was illegal at the time he was sentenced, and the defendant told the court of that fact before the sentencing phase of the trial began. Long, if anything, should apply with a vengeance.

The trial court, therefore, erred in admitting evidence that Thompson was on community control at the time of the murder. It compounded the mistake when it instructed the jury that it could consider his status in recommending a sentence. It then made matters worse when it not only considered this illegal "sentence" in justifying a death sentence but used the

1987 probationary period which even it had acknowledged was illegal.

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

ISSUE V

UNDER A PROPORTIONALITY REVIEW, THOMPSON DOES NOT DESERVE A DEATH SENTENCE.

As part of its review of capital cases, this court compares the case at hand with those involving similar facts to determine if a death sentence is proportionally warranted:

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

Porter v. State, 564 So. 2d 1060 (Fla. 1990). As to the last sentence of this quote, this court later said:

> While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional. . . we nevertheless are required to weigh the nature and quality of those factors as compared with other similar reported death appeals.

Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). Proportionality review has several state constitutional bases, but the fundamental rationale for undertaking such an unusual task arises from the notion that in capital sentencing, uniformity should have a predominate consideration in this court's review. Tilman v. State, 591 So. 2d 167, 169 (Fla. 1991).

Some defendants have had their sentences reduced who had stabbed or beaten their victims to death but who also had no history of violent criminal activity. Proffitt v. State, 510

So. 2d 896 (Fla. 1987); Nibert v. State, 574 So. 2d 1059 (Fla. 1990). On the other hand, defendants who committed similar crimes had their death sentences affirmed because they had violent criminal backgrounds and continued their rampage after having murdered someone. Mason v. State, 438 So. 2d 374 (Fla. 1983). That the defendant had essentially no significant history of criminal activity, particularly of violent crime, has been an important consideration in proportionality review. Proffitt, supra. Lloyd v. State, 524 So. 2d 396 (Fla. 1988). The murder for which the defendant faces a death sentence thus becomes an aberration, an "explosion of total criminality" that does not warrant the extinction of life.

In this case, the controlling question this court must answer is "If this is a death worthy case, what robbery-murder is not?" How does this case differ from the norm of capital felonies? This court has affirmed death sentences supported by only one aggravating factor "only in cases involving either nothing or very little in mitigation." Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Deangelo v. State, 18 Fla. L. Weekly S236 (Fla. April 8, 1993). In this case, the nature and quality of the aggravation is so mild and the mitigation so compelling that this simply is not a death case.

Of course, Thompson committed the murder during the course of a robbery, but there was nothing in the latter crime to distinguish it from other robbery-murders. It was, to the contrary, about as stripped down and simple as one can be. We have, for example, no beating of the victim, no prolonged

torture, no taking to a room in the rear or to a remote location. Thompson shot his victim only once, not several times. The defendant was stopped within minutes of the homicide, and when approached by the police he surrendered immediately and without any resistance or efforts to flee.

Moreover, while Thompson may also have been under community control, a form of imprisonment, it was one of the least restrictive limits. That is, he did not commit the murder while in prison, Muhammad v. State, 494 So. 2d 969 (Fla. 1986) while trying to escape from jail, while on parole, nor with the intent to avoid returning to prison, Tafero v. State, 403 So. 2d 355 (Fla. 1981).

Perhaps most who commit a capital murder are not under some legal constraint as Thompson arguably was. Yet community control is significantly less onerous than jail or prison, and the state never produced any evidence linking the defendant's status of being on that form of restriction to this murder. All the sentencing court could do was speculate that Thompson had killed Lenzo because the defendant knew he could be sentenced to prison if it was discovered he had violated a presumed condition of his community control.

This case stands in stark contrast to Tafero v. State, 403 So. 2d 355 (Fla. 1981) in which the defendant killed two police officers who had discovered a pistol in his car. Tafero murdered them because he was on parole and a fugitive from justice. He also told friends that he would never go back to

prison. The defendant's status as a parolee in that case had a significant causal connection to the murder.

On the other hand, in Songer v. State, 544 So. 2d 1010 (Fla. 1989), this court gave the defendant's status of being under sentence of imprisonment little consideration because he had simply walked away from a work-release center rather than breaking out of jail.

Here, Thompson presumably was not even under that mild type of confinement. For all we know, he may simply have left his house for an evening walk, or he may have been going to or coming from work. There is nothing in this record indicating that he had somehow violated a condition of his community control by being on the streets late at night. Thus, even more so than in Songer, the nature and quality of this aggravating factor is so slight that it should be ignored as being of little consequence.

Thompson has argued the evidence failed to prove he committed the murder to avoid lawful arrest or that it was committed in a cold, calculated, and premeditated manner. Even if this court rejects those claims, what he said there, augurs well that this court should give these aggravators little weight.

On the other hand, the defendant presented an abundance of mitigation, which paints a consistent picture of a person who has been a faithful and responsible parent, husband, son, citizen, and employee. This portrait hangs well next to those dozens of other death sentenced killers who have extensive

history of simply taking what they want by any means (usually violent) without any regard to others.

Moreover, the court did find that Thompson was a good father and provider and was a non-violent person (R 584-84). The trial court was extremely stingy in the weight it gave what the defendant presented, requiring instead that he have been more than human but some sort of "man among men." For example, the sentencer recognized that Thompson had served in the navy, but it refused to give that service any weight because "there is nothing presented of an exemplary nature which would warrant its consideration as an established mitigating factor." (R 583) It similarly dismissed his good employment record because there was nothing "unique or exemplary about his job performance that distinguished his work history." (R 583-84) He was a good parent and provider, but that finding deserved "little weight since the evidence fails to disclose any exemplary behavior which exceeds the bounds society expects of any caring or concerned parent." (R 584) Thompson was raised a Christian and had strong religious beliefs, but again, it had little weight because "there was no evidence of any contributions made as an adult to his church of an exception or exemplary nature other than attending church occasionally with his wife." (R 585) Thompson was a varsity, high-school athlete, but that was dismissed as mitigation because "The evidence fails to establish that the defendant excelled to such an extent that he distinguished himself as an athlete or received any athletic scholarships." (R 586) Like a cruel parent's impossible

expectations of its child, the trial court's standard of acceptable mitigation was so high that one suspects that Thompson's achievements, however noteworthy, would never have been good enough. This court, however, has never demanded defendants to have been Mother Theresa, Douglas MacArthur, Bo Jackson, or Robert Young[1] to merit recognition for being kind, a veteran, an athlete, or a good parent.

Even though the evidence may have shown Thompson to have been nothing exceptional as middle class society defines excellence, he certainly stands out among those who have been sentenced to death. How many cases has this court considered in which the defendant was a good father and provider and had a non-violent nature? How many defendants have had stable work histories? honorable military service? normal childhoods? When measured against the average, law abiding citizenry in America today, perhaps Thompson is nothing special.[2] But proportionality review compares him, not with his next door neighbor, but with those on death row. When stood next to them, Thompson easily towers over their little, criminal heads.

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[1]The actor who played the father on the old television series "Father Knows Best." He was also "Marcus Welby."

[2]And Thompson challenges that even among law abiding people he is unexceptional. He says this in light of the large number of "dead beat dads" who fail to pay child support, the frightening amount of child sexual and physical abuse that occurs in middle class America, and the rising number of married couples who divorce.

This court should order the trial court sentence him to life in prison without the possibility of parole for twenty-five years.

ISSUE VI

THE COURT ERRED IN ADMITTING EVIDENCE OF 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 1, SECTION 17 OF THE FLORIDA CONSTITUTION.

Before trial, Thompson filed a motion "To Exclude Evidence or Argument Designed to Create Sympathy for the Defendant." (R 493-511) Specifically, he contended that the United States Supreme Court's recent case of Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991) did not permit the jury to consider "Victim Impact" evidence. Similarly, Section 921.141(7) Fla. Stat. (1992) did not authorize such proof. In a separate motion, he also asked that victim impact evidence be excluded on ex post facto grounds (R 487-88).

The court apparently denied both motions. Immediately before the penalty phase portion of the trial, the defendant again objected to the victim impact evidence, which the court allowed (T 323). Accordingly, the victim's mother told the jury that at the time of his death her son was 22 years old. He had graduated from a local high school where he had been a "C student," and not until he got to college did he decide to do better. He was also a romantic (T 332-33). Mrs. Lenzo then described the affect Carl's death had on her family.

> We have all felt his loss so deeply. I see such a difference in everyone in our family. We don't trust the way we did trust. We are not open to people the way we were. We have a huge wound in our hearts that will never heal.

Q. Was Carl married?

A. Yes. Carl met his wife when they were in high school and they waited five years to get married, and he had been married for six months when he was killed. He had just found out three weeks before his death that his wife was pregnant, and they were so excited about that baby.

Q. Has that child subsequently been born.

A. Yes. Her name is Amber and that's the name that Carl picked for her. He wanted a daughter.

(T 333-34).

This evidence was admitted under Section 921.141(7) Fla. Stats. (1992), but that section did not authorize what the court did in this case, and it is, in any event, unconstitutional for several reasons.

THE CONSTITUTIONAL PROBLEMS WITH SECTION 921.141(7)

In Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), the United States Supreme Court modified its recent opinion in Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) that prohibited Victim Impact Statements from being considered in capital sentencing. The Payne court, rather than erecting a per se Eighth Amendment ban on such evidence, left the matter to the states:

> if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Payne, at 111 S.Ct. 2609.

The Florida legislature responded to that invitation by enacting section 921.141(7) Fla. Stat. (1992). That addition to the laws of Florida significantly differed from what the nation's high court permitted in Payne. Rather than allowing members of the victim's family to testify about the effect the murder had on them, that section permits evidence of only a generalized loss to the community:

> (7) VICTIM IMPACT EVIDENCE.- Once the prosecutor has provided evidence of the existence of one or more aggravating circumstances as describe in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as part of victim impact evidence.

(Emphasis supplied.)

This court, when presented with the issue of the admissibility of victim impact evidence, has noted that Payne at least partially overruled Booth. Further, the evidence in the cases raising this issue was appropriately considered by the jury under Payne. Hodges v. State, 595 So. 2d 929 (Fla. 1992); Burns v. State, 609 So. 2d 600 (Fla. 1992). Notably absent from this court's reasoning was any consideration of its earlier decisions explicitly excluding victim impact evidence

or any discussion of the effect section 921.141(7) has on the relevance of state proffers of victim's losses.[3]

Moreover, beyond the confines of this case, section (7) has serious state law flaws that undermine the very foundation on which this court's decisions in death penalty cases have been built.

If we go back to the very first cases of this court and the United States Supreme Court that approved this state's death penalty sentencing scheme, there emerges the central, controlling idea that capital sentencing discretion must be somehow controlled or "channelized" to be legitimate. For example, in Proffitt v. Florida, 432 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the court found

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner.

Id. at 252-53.

This court had reached a similar conclusion in State v. Dixon, 283 So. 2d 1, 7 (Fla. 1972):

> Thus, if the judicial discretion possible and necessary under Fla. Stat. Section 921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of Furman v. Georgia, [408 U.S. 238, 92 S.Ct.

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[3]In fairness, to this court, it has probably not considered section 921.141(7) because it became law on July 1, 1992. As best as appellate counsel knows, this is the first case challenging the legality of that section that has come before this court.

2726, 33 L.Ed.2d 346 (1972)] has been met.

Later cases that the U.S. Supreme Court examined moved beyond the broad examination of Florida's (and other state's) capital sentencing schemes, and focussed instead on the mechanisms devised to separate those who were eligible for execution from those who were not. Although the nation's high court occasionally disagreed with how this court or a trial court may have applied our death sentencing statute, See, Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), it has steadfastly accepted Florida law that the aggravating factors, as defined in Section 921.141(5), were vitally important in selecting the few who should die from the many who should not.

This court's long experience with death sentencing has left the unmistakable message that this court takes its obligation seriously to ensure that death sentences are imposed in a rational and controlled way. While required to follow the law as declared by the United States Supreme Court in many instances, this court has occasionally refused to follow it when its rulings have failed to comport with what this court believes is just. That is, state law, whether it is found in our constitution or in statute, has frequently mandated more selective application of the death penalty than approved by the fundamental law of the United States. The best, most relevant example of this independence, comes from this court's ruling that the list of aggravating factors articulated in section

921.141(5) is the exclusive list of what the state can prove to justify a death sentence. Miller v. State, 373 So. 2d 882 (Fla. 1979). In Barclay v. Florida, 463 U.S. 939, 966, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), it was mentioned that the list of what could aggravate a first degree murder conviction was not exclusive. Zant v. Stephens, 462 U.S. 103, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

This court has, however, refused to follow that decision, and instead continued to adhere to follow Miller. Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988). In fact, in Grossman, this court explicitly held that "victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence." Id. Thus, trial courts have erred when they admitted evidence at sentencing hearings demonstrating that the victim was a decent person. For example, in Jackson v. State, 498 So. 2d 906, 909 (Fla. 1986), this court rejected a trial court's findings that a murder was especially heinous, atrocious, or cruel because the victim had been married, ran a store by himself, had led a good and honest life, and would be missed by the community. These factors were, as this court said, "patently improper." Id. They were so because the only issues relevant at sentencing trials focus exclusively on the aggravating and mitigating factors relevant to a particular case. Victim impact evidence raised matters outside those concerns. Taylor v. State, 583 So. 2d 323 (Fla. 1991); Jackson v. State, 522 So. 2d 802 (Fla. 1988). Until Payne, this court

consistently adhered to its strict policy of allowing only evidence relevant to the mitigating or statutory aggravating factors.

If this court intends to continue this policy how does section 921.141(7) fit into Florida's capital sentencing scheme? As Grossman, the two Jackson cases, and the Taylor case make clear, victim impact evidence and argument have no relevancy to the aggravators. Perhaps, however, victim impact evidence, as authorized by this section, amounts to a new aggravating factor.

That clearly is not so because the legislature did not list it as one under section 921.141(5). Moreover, that section introduces what the legislature considers appropriate to justify a death sentence by saying "Aggravating circumstances shall be limited to the following." Certainly, if they had wanted to include victim impact as an aggravating factor they could have done so. That they did not, can only mean it was not intended to be considered as such.

More significantly, victim impact evidence never significantly limits the type of person eligible for a death sentence. As the Supreme Court held in Zant, supra, aggravating factors

> must genuinely narrow the class of person eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant, supra. at 877.

In Godfrey v. Georgia, 446 U.S. 420, 428-29, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the court struck Georgia's equivalent "Heinous, atrocious, or cruel" aggravating factor because it did not create any "`inherent restraint on the arbitrary and capricious infliction of the death sentence' sentence because a person of ordinary sensibility could find that almost every murder fit that stated criteria." Zant, supra. at 878. A death sentence runs the risk of becoming arbitrarily imposed when it could apply to any number of other persons who are not sentenced to death. Spaziano v. Florida, 468 U.S. 447, 460, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

Victim impact evidence has the same problem as that identified in Godfrey. "[A] person of ordinary sensibility could find that almost every murder fit the stated criteria." Zant, supra. As argued below every individual is unique, and every death in some measure is a loss to the community. Victim impact evidence does nothing to genuinely narrow the class of death worthy defendants, nor does it reasonably justify a more severe sanction when compared to others found guilty of murder. Nothing in section 921.141(7) limits or narrows the class of those who are death eligible.

Until Payne, the U.S. Supreme Court carefully insured that state death sentencing statutes minimized the risk of arbitrary and capricious inflictions of death sentences. The cases cited above, Barclay, Zant, Spaziano, and others demanded that states imposed death rationally, that sentencing discretion was controlled. Significantly, the court in Payne simply ignored

this long and rich history of judicial concern because nowhere in either the majority or the concurring opinions are the principles of those cases cited. Nowhere does the court consider, as Thompson has, the effect Victim Impact Statements will have on the fragile balance reached in death penalty sentencing.

This court should, as it has done before on other issues, reject the Supreme Court's widening of the death penalty net. As you have said, our state constitution provides greater protections than those afforded by the United States Constitution, Traylor v. State, 596 So. 2d 357 (Fla. 1992), and this is one instance where it should be invoked. The nation's high court was politically correct in Payne, but this court has worked too hard to perfect section 921.141 to allow popular expediency to wreck it.

So, unless this court is willing to reverse Miller and a host of other cases following it and to ignore the legislative mandate that aggravating factors "shall be limited to the following" this court must find victim impact evidence, under Florida Law, irrelevant in a capital sentencing proceeding.

THE UNIQUENESS OF THE INDIVIDUAL AND THE LOSS TO THE COMMUNITY

Section 921.141(7) has further difficulties in that what it seeks to allow the state to prove defies proof or more seriously, it violates Article 1, Section 2 of the Florida Constitution. If this section survives this court's scrutiny, victim impact evidence will have relevance if the state can prove two things:

1. The victim was unique as an individual human being.

2. Because of that distinctiveness, the members of the community suffered a loss.

The first "element" amounts to a truism of western society. Payne (Stevens, dissenting. "The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support.") We believe everyone is unique. Like snowflakes, among the billions of people who are alive now, who have ever lived, and who will yet breath, there is none like any other. The combination of genetics, experience, and culture, combine in such bewildering variety that no one truly has an identical twin somewhere.

What the legislature must have meant was that the victim was sufficiently distinguished from the rest of humanity that he or she was distinct or unusual. But saying that we are all different of necessity forces us to consider in what way and to what extent our differences define us. Perhaps we should focus on the physical, moral, or mental aspects of a person's makeup, or some combination of them. Do victims then have to have been an Arnold Scwharzeneger, a Mother Theresa, or an Albert Einstein to be "unique?" If not Einstein, for example, maybe it would be sufficient if they had a Phi Beta Kappa key If that was too strict, perhaps he or she had graduated from college. Or finally, maybe they were merely literate. If people are unique there must be some objective standard by which victims can be measured in which some will emerge as sufficiently unusual to be considered further and others will remain with

the great unwashed. Yet, if we distinguish them we violate the provisions of Article I, Section 2 of the Florida Constitution which provides "All natural person are equal before the law . . . " Clearly when we say Einstein's murder murder was a greater loss than appellate counsel's there is created a disparity anathema to our fundamental law.

Moreover, as Justice Stevens recognized in his dissenting opinion in Payne, there arises the ominous possibility that prosecutor's may seek death for some defendants based solely on unacceptable reasons such as the race of their victims. While the Supreme Court rejected the proof of that theory in McClesky v. Kemp, 481 U.S. 279 (1987) for capital cases, race is a proven factor in non-capital sentencing in Florida.[4] Some defendant's may face a death sentence simply because, as in this case, the victim was white and the defendant black.

The problem of distinctiveness is more complex. What of children, whose murders easily raise our greatest outrage. Few of them sufficiently standout to the degree that society can justify letting the jury hear about what their deaths meant.

Then what of the "second" element, the loss to the community? John Donne, the seventeenth century metaphysical poet expressed this sentiment best:

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[4]See, An Empirical Examination of the Application of Florida's Habitual Offender Statute (Economic and Demographic Research Division, Joint Legislative Management Committee, The Florida Legislature, August 1992).

> No man is an island, entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friends or if thine own were; any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.

Devotions XVII

In the practical, legal world, there are, however, problems with this approach. If the death, or the murder, of any person diminishes us, the real question must be how much have we lost? Answering that question inevitably leads to another grading of human life, which means that some people are more important to the community than others. How do we objectively measure the loss to the community? For example, assuming that a six month old baby is recognizably distinct, the community will likely have suffered no specific loss by his or her death? Likewise, the homeless wino murdered while laying in the gutter will probably not be missed.

Perhaps this court has already solved this problem. In Coleman v. State, 610 So. 2d 1283 (Fla. 1992) and Williams v. State, 18 Fla. L. Weekly S405 (Fla. April 22, 1992) this court refused to accept, as a reasonable basis for the jury's life recommendation, that the several victims in that case somehow "deserved" to be executed because they had stolen several thousand dollars worth of cocaine from the defendants who not only wanted it back but also intended to make an example of them. If the murders of these victims, whose character and value to the community in truth were perhaps only a shade less

black than the defendants, remained reprehensible then whose death is not? We then must fall back to Donne's conclusion that every death diminishes us. If so, this court must then reconcile this loss with the United States Supreme Court's requirement that a capital sentencing scheme must "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano, supra, at 460.

On the other hand, perhaps the juries in Coleman and Williams acknowledged the community's loss but simply felt it was too slight to justify a death sentence. If so, then this court has refused to let what the state can establish as aggravation be used to mitigate a death sentence.

There are, moreover, other legal problems that ooze from this quagmire. In Cannady v. State, 620 So. 2d 165 (Fla. 1993), the defendant murdered his wife and her alleged rapist. In sentencing him to death, the court found only two aggravating factors applied, but on appeal this court rejected both of them. What would have happened, though, if there had been evidence of either or both factors, but the jury had given them little or no weight. By current law, it should have returned a life recommendation. Nevertheless, it may have recommended death because the victim impact evidence (had it been introduced) convinced it to do otherwise. Clearly, to sustain this decision, this latter proof would amount to a nonstatutory aggravating factor.

If so, then the rules applicable to capital sentencing would bear on victim impact evidence. For instance, the state would have to prove beyond a reasonable doubt that the victim was unique and that there was an accompanying community loss. How does one do that without having a mini trial on what is essentially a collateral issue? Afterall, until Payne, sentencing hearings focussed exclusively on the defendant's character and the nature of the crime he committed. Spaziano at 352, f.n. 7. Zant, supra, at 879.

Finally, there is the problem of what is the "community." Consider for example, the recent murders of tourists from Germany and England. Their communities were in those countries, not in Miami or Jefferson County. Neither Florida location has objectively "lost" anything by their shocking deaths. Moreover, if these Florida locations are the relevant focus, what have they lost and for how long? How do we measure, in an objective manner, loss to the community occasioned by the murder of a transient?

In short, though the United States Supreme Court in Payne allowed victim impact evidence because it believed such proof somehow balanced the scales, the risk of imposing death in an arbitrary and capricious manner that was identified in Booth remains. Victim impact evidence, as shown above, creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner. Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989).

APPLYING 921.141(7) TO THIS CASE.

In this case, there was no evidence about the impact of Lenzo's death on the community. Nor was there any evidence of the victim's "uniqueness as an individual human being." Instead, what his mother told the jury was the loss she and her family, as real and poignant as it was, suffered. No one mentioned any loss the community felt beyond that which we would expect when anyone dies.

Lenzo, of course, did not deserve to die, and any right thinking person is outraged at his murder. But, as required by the statute, we must ask, what evidence was presented to show his "uniqueness as an individual human being." And the answer must be, none. Even that which the state introduced does not. This young man was part of the great "silent majority" that President Nixon so fondly relied on. He was "John Q. Public." There was nothing special about him except that he and countless millions of good, honest, hardworking men and women form the rock upon which our nation has been built.

His mother could not provide the gross distinctions the statute contemplates. She said that he was only a "C" student in high school but did better in college. Likewise, there was nothing especially notable about his job, or that he had a father, mother, brother, and wife who loved him.

Of course, every mother sees her child as a special creation, and they are, but to the community at large, we must very coldly ask, as the statute requires, how was he unique? And the answer again is that he was not.

Along the same line, we must ask what substantial loss the community suffered by his death. The only evidence presented was the family's tragedy. The state presented nothing to show that the impact of Lenzo's death transcended the circle of his loved ones to involve the community (however defined). Thus for this reason as well, the court erred in letting Mrs. Lenzo's testify.

EX POST FACTO APPLICATION HERE

Finally, applying Section 921.141(7) to this case violates the Ex Post Facto prohibitions found in the United States and Florida Constitutions.

Under the federal constitution, a legislative act will violate Article I, Section 9 if it is applied retroactively, and it adversely affects the defendant. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987).[5]

In this case section 921.141(7) became effective on July 1, 1992, and the crimes Thompson was charged with occurred on May 3, 1992. The only question is whether the victim impact statute "disadvantages" him. Obviously it did. The likelihood that Thompson would receive a death sentence substantially increased for the very reasons the statute was enacted: so the jury and sentencer could learn more about the victim's

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[5]A law is retrospective if it "changes the legal consequences of acts completed before its effective date." Weaver, supra, at 31.

individuality and how his death has adversely affected the community. He is plainly substantially disadvantaged by the increased probability that he will receive a death sentence. See, Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937).

Article X section 9 of the Florida Constitution likewise prohibits application of this law to Thompson. It provides that

> Repeal or amendment of a criminal statute shall not affect prosecution for any crime previously committed.

In Castle v. State, 330 So. 2d 10 (Fla. 1976) this court held, relying on this constitutional provision, that the defendant could not benefit from a change in the law that reduced the penalty for arson because the new law decreasing the punishment had been passed after Castle committed his arson.

Applying the Castle rationale to this case, the victim impact statute should not have "affected the prosecution" for the crimes Thompson faced. See, Ellis v. State, 18 Fla. L. Weekly S417 (Fla. July 1, 1993) (Kogan, concurring).

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

CONCLUSION

Based on the arguments raised above, the appellant, Derek Thompson, respectfully asks this honorable court to reverse the trial court's judgment and sentence and remand for a new trial, reverse the trial court's sentence and either remand for resentencing by the court or for a new sentencing hearing before a new jury or with instructions to sentence him to life in prison without the possibility of parole for twenty-five years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Carolyn Snurkowski, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, DEREK TODD THOMPSON, #212336, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 13th day of October, 1993.

DAVID A. DAVIS