IN THE SUPREME COURT OF FLORIDA

JOHN C. MARQUARD,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 81,341

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ST. JOHNS COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENTS

POINT I The trial court erred when it granted the State's challenge for cause of juror Robinson where although he stated he was opposed to the death penalty, he could nonetheless listen to the instructions of the court and follow the law. Such an error is in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 22 of the Florida Constitution.

POINT III The trial court erred in permitting the State to introduce irrelevant bad character evidence concerning "silent kills" where no "Williams Rule" notice was given, or the probative value of such evidence was substantially outweighed by the prejudice to the appellant to receive a fair trial.

POINT IV The trial court erred in denying the defense motion for judgment of acquittal of count II of the indictment for armed robbery where any taking of property of the victim

occurred after her murder and was merely an afterthought.

POINT V The trial court erred in sustaining the State's objection to defense counsel's argument in mitigation that it could consider consecutive terms of imprisonment in lieu of a death sentence. Sustaining the objection was an impermissible limiting of mitigation evidence in violation of Lockett v. Ohio, infra, and Jones v. State, infra.

POINT VI The trial court erred in permitting, over objection, improper cross-examination of a State mitigation witness during the penalty phase. The trial court permitted the State to expose the defendant's complete criminal history, including the exact specifications of the charges where the probative value of such information was outweighed by the prejudice to the defendant.

POINT VIII Over objection, the court instructed the jury that, in recommending the appropriate sanction, they could consider whether these murders were especially heinous, atrocious or cruel. As a matter of law, that circumstance is inapplicable. The jury reasonably based their recommendation of death entirely on this faulty consideration, and certainly it influenced their recommendation. The State cannot show that the erroneous giving of this particular unsupported instruction was harmless error, especially where only three other statutory aggravating circumstances were defined by the Court. Accordingly, the death sentence must be reversed and the matter remanded for a new penalty phase.

POINT IX The finding that the murder was committed for pecuniary gain is unsupported by the evidence. It appears that the victim was killed after numerous heated arguments and the defendant was "tired of arguing with her." Because this aggravating circumstance does not apply it should be struck and the matter remanded for resentencing before a new jury.

POINT X The finding that the murder was committed in a cold, calculated and premeditated manner is unsupported by the evidence. The killing lacked "heightened premeditation." The aggravating circumstance must be struck and the matter remanded for resentencing.

POINT I

THE TRIAL COURT VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 22 OF THE FLORIDA CONSTITUTION BY EXCUSING FOR CAUSE ONE QUALIFIED JUROR OVER DEFENSE OBJECTION.

The state contends that Juror Robinson was properly excluded for cause based upon his opposition to the death penalty. The issue on review is not whether Juror Robinson opposed the death penalty, but rather whether his view would "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985).

Juror Robinson expressed his opposition to the death penalty as follows:

> THE STATE: Okay. Probably most people are in the same boat. Let me ask you this way. I don't know if I can simply ask you if you would be willing to follow law. Are you opposed -- do you know whether or not you are opposed to the death penalty?
>
> MR. ROBINSON: I think I would be.
>
> THE STATE: You just don't think it should be used?
>
> MR. ROBINSON: That's right. (R869)

However, on the issue of whether Juror Robinson's opposition to the death penalty would "prevent or substantially impair" the performance of his duties as a juror the state asked:

> THE STATE: Okay. That's fine. You're certainly entitled to that feeling. Well, the question would be, what if the Judge were to tell you this is the law and if certain

> factors outweigh other factors or -- first proven and then outweighed the mitigating factors, you should recommend to the court death. Would you disregard what the judge told you?
>
> MR. ROBINSON: No, I'd be willing to follow orders. (emphasis added) (R870)

Here, Juror Robinson expressly states that he would follow the judges instructions concerning the law and recommend death to the court. This conclusively refutes any contention by the state that Juror Robinson's personal opposition to the death penalty prevents or substantially impairs his ability to perform his duties as a juror.

The linchpin of the state's argument that Juror Robinson was properly excused for cause was the following exchange:

> MR. CANAN [prosecutor]: Okay. Now I put you in the box here because let's say there was a sufficient proof for you to recommend death, but you really are opposed to it. What do you think you would do?
>
> A VENIREMAN [Robinson]: I don't know. I think I wouldn't impose death.
>
> MR. CANAN [prosecutor]: Okay. So no matter what the judge said to you, no matter what the evidence was, I think you are telling me, and correct me if I'm wrong, that you would not and could not vote for the death penalty, no matter what the circumstances?
>
> A VENIREMAN [Robinson]: That's right. (R870)

The state argues that the above exchange disqualifies Juror Robinson from being a juror on a capital case, because he would not under any circumstances impose a death sentence. Examining the states questions and Juror Robinson's answers does not

support the state's assertion.

Question One:

Condition One: "let's say there was sufficient proof for you to recommend death,"

This condition has omitted the essential inquiry as follows: "and the judge instructed you on the law that where there is sufficient proof to make a recommendation for death, then you must vote for death --- could you vote for death under these circumstances"? Without this additional inquiry, the question is not getting to the relevant issue.

Condition Two: "but you are really opposed to it."

This condition is confusing. What is a juror to make of this condition? What is the state really asking here? The confusion was apparent when Juror Robinson initially responded: "I don't know."

Question Two:

Condition One: "So no matter what the judge said to you"

In the context of the previous question this statement is confusing and misleading. It provided no insight to Juror Robinson as to the juror's role in the capital sentencing procedure. No doubt Juror Robinson was interpreting this statement in the context of the previous condition "but you are really opposed to it [death penalty]," and therefore it is no surprise that Juror Robinson was prompted to agree with the

state's suggestion that Juror Robinson would not or could not vote for the death penalty, no matter what the circumstances.

The state's questioning was calculated to emphasize Juror Robinson's opposition to the death penalty, but not whether Juror Robinson could set aside his opposition to the death penalty, and follow the law. The state never made that specific inquiry. Defense counsel asked the relevant question of whether Juror Robinson could perform the Juror's function, that being listening to the judge's instructions on the law and then follow the law:

> DEFENSE COUNSEL: And Mr. Robinson, I think there were a few more questions for you about would -- if the judge -- if there were the situation, the judge were to instruct you on the law on the recommendation of what sentence to impose, could you follow the law, listen to the instructions and follow the law?
>
> MR. ROBINSON: Yes I could.

Juror Robinson expressly stated on two occasions that he could listen to the judges instructions on the law and follow those instructions. He was undoubtedly qualified to be a juror in this case. Appellant asserts that the erroneous exclusion of even one juror is a constitutional error which goes to the very integrity of the legal system and could never be written off as "harmless error". Gray v. Mississippi, 481 U.S. 648 (1987); Davis v. Georgia, 429 U.S. 122 (1976); Chandler v. State, 442 So.2d 172 at 174-175. "Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the constitution." Witherspoon v. Illinois, 391

U.S. 510, 519-523 (1968).

The State intention was to stack the deck against the defendant and thus deprive him of due process of law. Accordingly, the defendant was tried by an unconstitutionally seated jury. The defendant's judgments and sentences must be reversed and the case remanded for new trial before a fair and impartial jury.

POINT III

THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTION TO INTRODUCE IRRELEVANT BAD CHARACTER EVIDENCE.

The appellant argued that testimony by Michael Abshire that appellant discussed with him various ways to kill people with a knife years before the murder should been excluded as improper Williams Rule evidence. See Florida Statutes 90.404 (2)(a) and Williams v. State, 110 So.2d 654, 659, 652 (Fla. 1959). Appellant further argued that this Court has recognized no distinction where the evidence of bad acts or propensity to commit a crime comes from prior statements of the defendant concerning the applicable of the Williams Rule relying on Jackson v. State, 451 So.2d 458 (Fla. 1984).

The state's argument on this point completely ignores this Court's ruling in Jackson. In Jackson, this Court held that the evidence of the fact that the evidence of collateral crimes or bad acts comes from prior statements from the defendant does not exempt it from the Williams Rule. The state made not attempt to distinguish Jackson from this case because it is not distinguishable. In Jackson, the state had the testimony of an eyewitness accomplice but nonetheless introduced testimony that previous to the murder Jackson boasted of being a "thoroughbred killer" from Detroit. In the instant case, the state asked: "Had you ever talked with Mr. Marquard about how to kill somebody with a knife?." After answering in the affirmative, the witness described other conversations concerning "silent kills" and other

methods of killing people through the heart. The state makes no attempt to explain how such evidence is any less prejudicial and inflammatory than the statement made in Jackson, other to state that the "discussions at issue were no more than talk."

The state further argues that the evidence at issue was properly admitted because it was relevant to show appellant's familiarity with a knife. The state cites Medina v. State, 466 So.2d 1046 (Fla. 1985). In Medina, State troopers arrested Medina for being in possession of a stolen automobile believed to be connected with the murder of an Orlando woman. The evidence at trial showed that after killing the victim and taking her automobile, Medina left Orlando and went to Tampa. In Tampa he tried to sell the car to at least two people. While demonstrating the car to one of these persons, Medina stabbed the prospective buyer, who testified as a witness for the state. Prior to this witness' testifying, the court granted Medina's motion directing the state not to question this witness about the stabbing. On the stand, however, the witness blurted out the fact that he had been stabbed. The court denied Medina's motion for a mistrial. This Court held that:

> Similar fact evidence is not admissible if it goes only to show a defendant's bad character or propensity. If, however, such evidence is relevant for any other purpose, it is admissible. (citations omitted) This witness' testimony was relevant to connecting the knife found in the car at Medina's arrest, a knife which the medical examiner testified was consistent with and could have caused the homicide victim's wounds, to Medina and to the homicide victim. The trial court's initial ruling as to the admissibility of

> this testimony, therefore, appears to have been in error. Because this testimony could have been admitted under Williams, any "error" in the witness' unsolicited answers is harmless.

Medina, at 1052.

In Medina, this court focused upon the issue of identity in finding that the bad character or propensity to commit crime evidence was relevant. In the instant case, the appellant's familiarity with knives was not at issue. See Castro v. State, 547 So.2d 111, 115 (Fla. 1989). In fact, the state introduced evidence that Appellant owned numerous knives and routinely carried a knife already showed that appellant was familiar with knives. Moreover, the prosecution's theory in this case was not that Appellant killed Stacey Willets because of his fascination with knives and killing. Rather, the prosecution's theory was that Appellant murdered Stacey Willets after heated arguments and a desire to steal her car. The fact that appellant routinely discussed various ways to kill people with knives years before the murder served no other purpose than to inflame the passions of the jury, and show bad character and propensity.

This error also compromised the reliability of the sentencing recommendation and the judge's sentencing order. The inflammatory testimony no doubt alienated appellant from the jury in their penalty deliberations. Also, the trial court erroneously used this evidence in support of his sentencing appellant to death. In the trial court's sentencing order the

trial court concluded:

> She was killed for three reasons:
>
> (1) Defendant wanted to get rid of her. She argued with him and hadn't found a job and he, Abshire and Stacey were short on money, two people spend less money than three.
>
> (2) Defendant wanted her car, her money and other property. Defendant and Abshire had no transportation without Stacey's car.
>
> **(3) Defendant and Abshire played games. They discussed killing people and how you would kill someone with knives. Defendant wanted to know what it was like to kill someone.** (emphasis added)

(R 543)

The State further argued that if the introduction of this evidence was error, such error was harmless. This argument ignores this Court's holding in Straight v. State, 397 So.2d 903, 908 (Fla. 1981) wherein this court held that the erroneous admission of collateral crimes evidence "is presumed harmful error because of the danger the jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Accord Castro v. State, 547 So.2d 111, 115 (Fla. 1989); State v. Drolett, 549 So.2d 1172 (Fla. 2d DCA 1989); Delgado v. State, 573 So.2d 83 (Fla. 2d DCA 1990).

The test for harmless error is whether an appellate court can say beyond a reasonable doubt that the error did not effect the verdict. State v. DiGuillio, 491 So.2d 1129, 1139 (Fla. 1986). There was no physical evidence whatsoever linking Appellant to the murder of Stacey Willets. The convicted rested solely upon the testimony of Abshire, and statements made by

Marquard. Based on this quantum of evidence, it can't be said that the admission of Appellant's discussion about silent kills and various ways of killing people could not have affected their verdict beyond a reasonable doubt.

POINT IV

THE TRIAL COURT ERRED BY DENYING DEFENSE MOTION FOR JUDGEMENT OF ACQUITTAL ON COUNT TWO ARMED ROBBERY WHERE ANY TAKING WAS AN AFTERTHOUGHT OF THE MURDER.

At the close of the state's case and conclusion of the case, defense counsel moved for a Judgement of Acquittal of Count II of the indictment (Armed Robbery) which was denied each time by the trial court. (R 1368, 1453) Appellant moved for Judgement of Acquittal, contending, inter alia, that there was no competent evidence to support that the killing of Stacey Willets was for the purpose of taking her property.

The state argues that the proof that the taking Stacey Willets' car was not a mere afterthought is stronger than in other cases decided by this court. The state cites Tafero v. State, 403 So.2d 355 (Fla. 1981) as its sole authority. Appellant asserts that the state's reliance on Tafero is misplaced. In Tafero, State Troopers approached a car parked at a rest stop on Interstate 95. As one Trooper looked into the car, he noticed a gun. Eventually the Trooper ordered Tafero out of the car, and, as Tafero exited through the driver's door, he and a Trooper began to scuffle. Eyewitness accounts vary as to what occurred next, but both Troopers were shot dead and Tafero fled in the patrol car. **Later, the Tafero commandeered another car and took its owner hostage. He was finally apprehended at a police roadblock.** (emphasis added)

In Tafero, two cars were taken by the defendant, one at

the scene of the shooting and one later at gunpoint when he commandeered another car and took a hostage. However, Tafero was charged with only one count of armed robbery and one count of kidnapping. The record is silent as to which car robbery Tafero was charged. If it was the later where Tafero took the hostage (which is more likely), the state's reliance on Tafero is misplaced.

POINT V

THE TRIAL COURT VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY RESTRICTING DEFENSE COUNSEL'S ARGUMENT TO THE JURY CONCERNING THE CONSEQUENCES AND APPROPRIATENESS OF SENTENCES OF LIFE IMPRISONMENT.

In Lockett v. Ohio, 438 U.S. 586, 604, 57 L.Ed.2d 973, 990 (1978), the United States Supreme Court concluded that the Eighth and Fourteenth Amendments require that:

> The sentencer ... not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record in any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

See also Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. So. Carolina, 476 U.S. 1 (1986). In Jones v. State, 569 So.2d 1234 (Fla. 1990) this Court concluded:

> Counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences in each of the two murders. The potential sentences are relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering.

Jones v. State, at 1240.

The state argues that Jones is distinguishable because in that case defendant sought to argue that the defendant could receive two consecutive life sentences for his two murder convictions. In the instant case the state contends there is only one murder and it is the murder conviction that is the subject of the penalty phase, not any underlying felonies.

The state's argument misses the rationale for why this court held that it was proper to argue consecutive life sentences. Due process as explained by Lockett and Jones, requires that counsel be given wide latitude in making argument to a jury that life is an appropriate sentence. Included in this range of argument for a life sentence adopted by Jones is the statement by counsel to the jury that they should consider that the defendant will in all likelihood spend the rest of his life in jail.

The state further argues that this court's subsequent holding in Nixon v. State, 572 So.2d 1336 (Fla. 1990) differs from Jones, and to the extent that they differ Nixon supersedes Jones. In Nixon, the trial court refused to give a **requested instruction** (emphasis added) informing the jury of the maximum sentences for kidnapping, robbery, and arson which has nothing to due with counsel arguing mitigation during closing argument. Moreover, the state neglected to mention that in Nixon when the trial court denied the request for jury instruction the trial court expressly noted that defense counsel was entitled to argue in mitigation that Nixon stood convicted of the other serious felonies. In fact, the jury was aware of the noncapital offenses for which Nixon was convicted, and counsel in fact urged those convictions as mitigation, and the jury was instructed that the factors which it could consider in mitigation were unlimited.

Counsel for appellant is at a loss to understand the state's position that Jones and Nixon differ on the issue of

arguing lengthy incarceration in mitigation of a death sentence. On the contrary, Nixon reaffirms this Court's ruling in Jones. Apparently, the state has confused the issue of penalty phase jury instructions and what is proper argument in mitigation of a death statement by counsel in closing statement.

POINT VI

THE TRIAL COURT ERRED IN PERMITTING CROSS-EXAMINATION INTO APPELLANT'S CRIMINAL HISTORY DURING THE PENALTY PHASE.

The state argues that based upon the holding of Jones v. State, 612 So.2d 1370 (Fla. 1993) that the defense counsel opened the door to questioning of appellant's criminal history because of appellant's mental health expert's reliance on such information in forming his opinion. Appellant concedes that once a mental health expert makes an opinion based on the defendant's past, the fact that there is a criminal history is relevant. However, this evidence like any other is subject to relevancy grounds[1] and undue prejudice and/or confusion.[2]

The state argues that criminal history is "fair game for cross-examination." All cross-examination is constrained by relevancy and whether the evidence sought is so prejudicial that the prejudice outweighs its relevance. The state's contention was that appellant suffered from anti-social personality disorder. The fact that appellant had a criminal history is relevant to suggest that his dominant personality disorder is anti-social personality disorder, and is proper cross-examination of the defense expert in an effort to discredit his diagnosis.

---

[1] Evidence tending to prove or disprove a material fact under section 90.401 of the Florida Evidence Code.

[2] Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence under section 90.403 of the Florida Rules of Evidence.

However, the introduction during cross-examination of the particulars of appellant's arrests and convictions (especially sexual battery and taking liberties with a minor) was not relevant to disprove Dr. Krop's diagnosis.[3]

Moreover, there is no more prejudicial evidence in this case than to disclose that the Appellant was charged with sexual battery (Appellant's a rapist), and taking liberties with a minor (Appellant's a child molester). Undoubtedly, in this particular case the prejudice that such evidence has on a layman juror while considering the life or death of a human being **substantially** must outweigh its probative value. The state does not have a blank check when inquiring in these matter as they would have this court believe. Accepted evidence principles of relevance and prejudice still apply in the context of a penalty phase proceeding.

---

[3] Appellant argues that the broad sweep of the Jones holding that expert testimony "opens the door" should be modified and guidance given to the trial courts. Appellant recommends that where the criminal history of a defendant is relevant the cross-examination should be limited to the following questions: Was defendant ever arrested for a felony? How many times? Was defendant ever convicted of a felony? How many times? Was defendant ever convicted of a crime involving dishonesty? How many times, etc.?

POINT VIII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND FINDING THE AGGRAVATING CIRCUMSTANCE OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER.

In an attempt to support a trial court ruling, the state claims that a "fair reading" of all the evidence is sufficient to show the murder was heinous, atrocious and cruel. In reply, a fair reading of all the evidence shows that both the physical evidence and testimony of Abshire is inconclusive, and that the state is merely pyramiding circumstances to support their version of events.

The state claims that Marquard's contention that the victim lost consciousness immediately is self-serving interpretation of the evidence. The state further claims that taking the physical evidence and Abshire's testimony together supports the trial court's finding. The physical evidence showed injury to the neck and stab wound to the chest area in the vicinity of the heart. The accomplice Michael Abshire testified that Marquard grabbed the victim from behind and stabbed her at least once, and then threw her to the ground and pretty much just looked at her, and then saw she was still alive and put her face under the water till she quit breathing (R 1125). Taking the evidence in the best light for the state, there is no showing that the victim was conscious when appellant put the victim's face in the water. Abshire stated that she appeared to be still alive, which under the circumstances was speculative on his part

in light of the fact that the victim was likely initially stabbed in the heart. (R1012) After state prompting to elicit further details of the victim's suffering, Abshire testified that when he initially saw the victim stabbed he went into shock and from the time he stabbed the victim and threw her on the ground he was in a daze. (R 1154)

The state's argument that this murder was per se heinous, atrocious and cruel is a conclusion not supported by the evidence. There was no testimony that the victim was aware of her impending death. Furthermore, there was no testimony that the victim suffered any pain as a result of the initial knife wounds. In fact, based on the statements of Marquard and the testimony of Abshire, immediately after being stabbed there was no evidence whatsoever presented as to what was the reaction of the victim to the assault, other than she may still been alive. It is fair to conclude due to the lack of evidence that Stacey Willets lost consciousness immediately upon being attacked.

Although the state did not answer to this argument, appellant must reiterate that the trial court should not have found this aggravating circumstance. In the trial court's sentencing order it stated:

> Chopping and stabbing and attempting to drown a defenseless, unsuspecting 22 year old women, with a bowie knife, a dagger and attempting to cut of her head with a Kukri head knife is extremely wicked and shockingly evil. Such conduct is designed to inflict a high degree of pain with indifference to the suffering of Stacey Ann Willets. Marquard cut Stacey's throat, stabbed her in the chest, attempted to drown her and attempted to behead her. Marquard threw her to the ground after cutting her throat and stabbing her. He

> held her face under water until she stopped breathing. Abshire stabbed her at Marquard's instruction then Marquard struck the back of her neck with his Kukri head knife. Abshire did the same with his bowie knife....Marquard had one hand over her mouth and a knife in the other hand cutting her throat and stabbing her in the chest. (emphasis added)

(R 539, 540) Appellant submits that the trial court erred by finding beyond a reasonable doubt that the conduct of Marquard was "designed to inflict a high degree of pain with indifference to the suffering of Stacey Ann Willets." The state presented no evidence that the victim suffered any pain at all. Appellant further submits that the trial court erred in finding beyond a reasonable doubt that the victim's throat was slit by Marquard first before giving the fatal blow to the chest. Again the state presented no evidence other than that the first and fatal blow was to the chest of the victim. The trial court's finding that Marquard attempted to behead appellant is irrelevant in light of Abshire's testimony that such action occurred after the victim was dead.

POINT X

THE TRIAL COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION WHERE THE FINDING IS UNSUPPORTED BY THE EVIDENCE.

The state's reply appears to have missed the thrust of appellant's argument. The evidence is uncontroverted that Marquard had numerous heated arguments with Willets. After each heated argument Marquard would confide to accomplice Abshire that he was going to kill Willets. These statements were no doubt made in the heat and passion of the moment following an argument and any further discussion of murdering Willets was abandoned. The state would have this court believe that from Marquard's first statements in North Carolina to statements made in Florida days before the murder were all part of one planned scheme to murder Willets. This conclusion is not supported by the evidence.

The murder was premeditated in that hours before the murder, and following another heated argument, Marquard again discussed murdering Willets. Then hours later at the time of the murder scene it was Abshire's testimony that they had got lost on the trial and decided to return to the car, thereby abandoning the murder. For unknown reasons, Marquard suddenly grabbed Willets and stabbed her to death. The state fails to grasp that "heightened premeditation" is required to prove that the aggravating circumstance exists beyond a reasonable doubt. Such

a showing was not made in this case.

CONCLUSION

Based on the foregoing cases, argument and authorities, Appellant respectfully requests this Honorable Court to:

As to Points I through III and XI, vacate the convictions and sentences and remand for a new trial;

As to Point IV, vacate the conviction and sentence as to armed robbery and remand for discharge, and reverse and remand for a new penalty phase;

As to Point V through X, reverse and remand for a new penalty phase;

As to Point XII, vacate the death sentence and remand for imposition of a life sentence or, in the alternative, declare Section 921.141, Florida Statutes unconstitutional.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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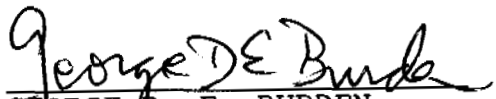
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to John C. Marquard, #122995 (44-1225-A1), Union C. I., P. O. Box 221, Raiford, FL 32083, this 18th day of February, 1994.



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