OA 6-8-94

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IN THE SUPREME COURT OF FLORIDA

EDWARD CASTRO,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

CASE NO. 81,731

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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	)	
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REPLY BRIEF OF APPELLANT

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.

In the initial brief, Appellant argued that the state did not address the relevant inquiry under Witt[1] and Witherspoon[2] for determining the impartiality of Juror Strayer to serve on a capital jury. The Appellant argued that Juror Strayer was not asked whether he could set aside his religious beliefs and consider the instructions of the court and follow the law as instructed. Rather, the state's question was on the collateral matter of whether "based upon" his religious beliefs could their

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[1] Wainwright v. Witt, 469 U.S. 412 (1985).

[2] Witherspoon v. Illinois, 391 U.S. 510 (1968).

be capital punishment. Simply demonstrating that a prospective juror's religious beliefs run contrary to capital punishment does not demonstrate that such beliefs impair their ability to serve on the jury. The voir dire by defense counsel made the relevant Witt/Witherspoon inquiry:

> DEFENSE: Are you saying here today that if you listen to all of the evidence that was presented here, evidence of reasons why Eddie should live, evidence from the State as to why the death penalty is appropriate, that you could not go back and think about those factors and deliberate carefully and follow the law?
>
> STRAYER: I could make a decision based on what I believe to by my conscience level of what would be appropriate or what is not appropriate, or that sort of thing. Yeah.
>
> DEFENSE: But you would try to follow the law as it's set out?
>
> STRAYER: According to my knowledge of what it is. I guess that is true.
>
> DEFENSE: Let me explain this to you. The jurors don't have to go back and deliberate and guess about what the law is. The Court's function, part of the Court's function is to provide jurors with instructions and, in fact, those would be allowed to go back to the jury room. So you would be asked to consider and deliberate based on, again, the evidence that you heard in the courtroom about reasons to save Eddie's life and reasons that you may want to consider to decide whether or not the death penalty was appropriate, but you would be given direction. Do you think you could follow those guidelines, read them, and make a decision in accordance with the law?
>
> STRAYER: **According to what I was told, yeah, as far as if I'm given some kind of guidance as to what that is.** (emphasis added) (R393,394)

The above responses to the relevant Witt\Witherspoon inquiry demonstrates that although Juror Strayer's religious

belief's are against the death penalty, Juror Strayer as an individual citizen would perform his civic duty and listen to the evidence, follow the court's instruction, and make a decision based upon the law.

In their answer brief, the state contends that subsequent statements by Juror Strayer stating in effect that he could not think of a circumstance where he would vote for death (T397-399) negates his previous unequivocal statement that he could follow the law. Appellant asserts that these comments were premised on Juror Strayer's initial response that without knowing the facts of the case it was impossible for him to say whether he could vote for a death sentence:

> STRAYER: It's kind of -- very difficult to say, because I don't really know any of the details of anything. I mean I don't see any way of making that kind of a judgment based on what you are asking me right now. I don't have any knowledge. (R395)

The above response by Juror Strayer demonstrates that after being given a short explanation of how jurors arrive at their recommendation by defense counsel, he is having difficulty applying a hypothetical to that process. Note, the response "based on what you are asking me now" refers to his newly found understanding of the capital punishment sentencing process as explained by defense counsel.

Juror Strayer's subsequent reluctance to hypothetically vote for death no way shows that his ability to act impartially is impaired. Rather, he expressed that his religious beliefs were an "ingrained" part of his life, but nonetheless he could

follow the judge's instructions and could obviously consider a death recommendation if warranted by the evidence and the law.

The erroneous exclusion of even one juror in violation of the Adams[3]-Witt-Gray standard is 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, 391 U.S. 519-523.

The State is not permitted to so 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.

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[3] Adams v. Texas, 448 U.S. 38 (1982).

POINT II

THE TRIAL COURT ERRED IN REFUSING TO STRIKE JURORS FOR CAUSE WHERE THE JURORS WERE EXPOSED TO PREJUDICIAL PRE-TRIAL PUBLICITY, WOULD AUTOMATICALLY PRESUME THAT DEATH IS THE APPROPRIATE PENALTY AND OTHERWISE EXPRESSED THEIR DOUBT ABOUT THEIR ABILITY TO BE FAIR AND IMPARTIAL DUE TO THEIR SUPPORT OF THE DEATH PENALTY.

Prior to jury selection, it was brought to the attention of the trial court that the local newspaper ran an article the day before detailing prejudicial information about the instant case.[4] As a result, the court agreed to an individual voir dire concerning what each juror knows about the case.

The defense challenged for cause eight prospective jurors either because of their exposure to prejudicial pre-trial publicity, their expressed presumption that death was automatically the appropriate penalty, or other factors related

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[4] The article was prejudicial because it contained the following: "The killer's fate to be decided third time." Also in a box highlighted within the article it stated: "Edward Castro, 42, has twice been sentenced to die in Florida's electric chair." It reads: "Edward Castro, 42, has twice been sentenced to die in Florida's electric chair for killing Austin C. Scott during a robbery in '87, but both sentences were overturned on appeal, though his first-degree murder conviction still stands. Jury selection for the penalty phase begins at 8:30." Another article states: "The process of sentencing of convicted murderer Edward Castro for the third time will begin Monday. Castro, 42, has twice been sentenced to die in Florida's electric chair for killing Austin C. Scott during a robbery in '87. Both sentences were overturned on appeal, though his first-degree murder conviction still stands. Jury selection for the penalty phase trial starts at 8:30 a.m. Circuit Judge Thomas Sawaya."

to their support of the death penalty that raised doubt about their ability to be fair and impartial. The defense exhausted their preemptory challenges and requested additional preemptory challenges. (R653) The request for additional preemptory challenges was denied. (R654) The defense stated that had they had the opportunity, they would have used a peremptory challenge on Juror Milam. (R653) Also, Juror Bell remained on the jury after the motion to excuse for cause was denied. (R325)

JUROR BELL & JUROR MILAM

Juror Milam & Bell read the prejudicial newspaper article and was aware that Mr. Castro had previously been convicted of first degree murder.

In their answer brief, the state contends that both Juror Bell & Milam stated that they did not recall much of the media coverage during voir dire. Moreover, the state argues that there answers concerning the death penalty passed capital jury selection muster. First, Appellant submits that the defense was in the unenviable position of not being able to ask the right questions to make a record of the extent of Juror Bell or Milam's recollection of the prejudicial article. For example, the defense could not ask "do you recall the part of the article that stated has been sentenced to death twice for this charge already." Second, the defense had to use numerous peremptory challenges on jurors (See Point II Initial Brief) that the court would not remove for cause and clearly were not qualified to sit on a capital jury. As a result, defense counsel was put in the

position of having to use peremptory challenges to remove those jurors. After exhausting the defense peremptory challenges, Castro's defense counsel moved for additional peremptory challenges which was denied.

This Court in the last Castro[5] opinion encouraged the granting of additional peremptory challenges:

> ...[W]e caution trial judges to scrutinize with care assertions that jurors cannot be fair. It is much easier to grant additional peremptory challenges when necessary than it is to retry a capital case.

Appellant submits that with the negative pre-trial publicity, this was a case where seating a jury in Marion County was going to be difficult, and the trial court should have been more sensitive to the assertions of defense counsel concerning the possible bias of the jurors.[6] Nonetheless, the trial court chose to ignore this Court cautioning with the result that the jury seated in his re-trial was biased.

It is respectfully submitted that the refusal of the trial court to strike Juror Bell for cause and/or grant an additional peremptory challenge to strike Juror Milam was a denial of due process and the right to a fair jury recommendation under the Fifth, Sixth, and Fourteenth Amendments to the United

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[5] 597 So.2d 259, 261 (Fla. 1992)

[6] Remember, the defense team had their hands tied in trying to questions prospective jurors about what specifically they had read in the Sunday paper. For example, just the question did you read this part of the part of article where it states that Mr. Castro was already sentenced to death twice on this charge would poison them from further participation in the trial.

States Constitution and Article I, Sections 9 and 22 of the Constitution of Florida. Further, it is respectfully submitted that the presence of Bell and Milam on the jury rendered the jury recommendation unreliable under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 17 of the Florida Constitution. This is especially true where the recommendation of death was a vote of eight to four. A change of two votes would have resulted in a life recommendation. The death sentence should accordingly be reversed and the matter remanded for a new penalty phase.

POINT III

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

In their answer brief, the State contends that the fact that Appellant procured a weapon before the murder supports the heightened premeditation requirement for cold, calculated and premeditated. In support of this contention the State cited Brown v. State, 565 So.2d 304 (Fla. 1990); Lamb v. State, 532 So.2d 1051 (Fla. 1988); Huff v. State, 495 So.2d 145 (Fla. 1986); and Eutzy v. State, 458 So.2d 755 (Fla. 1984).

In Brown, this Court focused on the testimony of the psychologist who testified that Brown had made a statement that he considered shooting the victim before he went to her residence. Brown at 308, 309. Moreover, the psychologist conceded during testimony the homicide may well have been pre-planned rather than impulsive. Brown at 309. In the instant case, the Appellant made so such admission to anyone that prior to his encounter with the victim he had a plan to kill him.

In Lamb, this Court focused in on the fact that after Lamb had completed his burglary and dissatisfied with its results stayed in the house armed with the weapon waiting for the victim. Lamb at 1053. Moreover, this Court emphasized the fact that the companion to the murder in Lamb wished to call for an ambulance for the victim, however Lamb stopped the companion from doing so.

In the instant case, Appellant wanted to get the victim's car. Clearly, the armed robbery of the car was premeditated in that the Appellant lured the victim into the apartment to have drinks to prepare for the robbery. Only moments before the actual homicide, Appellant armed himself, and then during the struggle to steal the car, murdered the victim.

In Huff, this Court focused on the fact that Huff knew well in advance that he would be riding with his victims in their car on the day of the murder, knew they would be going to a suitable location to commit the murder and planned "well in advance" to have the murder weapon with him. In the instant case, the Appellant did not plan well in advance to have a weapon or, for that matter, to steal the car. On the contrary, facts support that Appellant was on a drunken binge and decided that he had to leave the area and in a matter of minutes set the actions in motion to commit the robbery and then minutes after that committed the robbery and actual murder. This does not meet the language in Huff of "planned well in advance."

In Eutzy, this Court focused on the fact that Eutzy procured the gun in advance and the victim was shot once in the head without struggle. As argued above, the murder weapon in this case was not procured "in advance" and the murder itself was a direct result of a struggle between Appellant and the victim.

The Appellant intended to kill his victim in this case as determined by the verdict of guilt of premeditated murder. The Appellant asserts, however, that more is required to prove

that the aggravating circumstance exists beyond a reasonable doubt. There is simply insufficient proof that the murder could fall under the definition of this statutory aggravating factor. Based on the evidence that Appellant was under the influence of alcohol and may have had some sort of mental disorder, it is likely that this murder was done simply as an impulse relating from the struggle to rob the victim's car. Accordingly, this aggravating circumstance should be struck, death sentence vacated and the matter remanded for resentencing.

POINT IV

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

POINT V

THE JURY RECOMMENDATION AND DEATH SENTENCE ARE INVALID BECAUSE THEY ARE BASED ON AN IMPROPER STATUTORY AGGRAVATING CIRCUMSTANCE; CONSIDERATION OF THIS FACTOR IS BARRED BY THE DOCTRINES OF RES JUDICATA, LAW OF THE CASE, DOUBLE JEOPARDY AND FUNDAMENTAL FAIRNESS.

POINT VI

UNDER FLORIDA LAW, THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THIS CASE.

POINT VII

THE TRIAL COURT VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY REJECTING DEFENSE COUNSEL'S REQUESTED JURY INSTRUCTION CONCERNING THE CONSEQUENCES AND APPROPRIATENESS OF A SENTENCE OF LIFE IMPRISONMENT.

POINT VIII

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE STATEMENTS CASTRO MADE WHILE INTOXICATED BECAUSE ANY WAIVER GIVEN BY CASTRO WHILE INTOXICATED WAS NOT KNOWING, INTELLIGENT OR VOLUNTARY.

POINT IX

CASTRO WAS DENIED A FAIR TRIAL BY THE UNNECESSARY PRESENTATION OF GRUESOME AUTOPSY PHOTOGRAPH MADE OF THE VICTIM'S ARM.

POINT X

THE STATUTORY AGGRAVATING FACTOR OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER IS UNCONSTITUTIONALLY VAGUE UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION.

POINT XI

SECTION 921.141, FLORIDA STATUTES (1987) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Appellant replies to Points I, II and III herein, and relies on his Initial Brief for the remainder of the points as listed above.

CONCLUSION

Based on the argument and authority previously set forth, this Court is respectfully asked to provide the following relief:

POINTS I - V; VII-XI: To reverse the death sentence and to remand for a new penalty proceeding before a new jury.

POINT VI: To vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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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, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118 in his basket at the Fifth District Court of Appeal and mailed to Mr. Edward Castro, #110488 (43-2126-A1), P.O. Box 221, Raiford, FL 32083, this 4th day of May, 1994.

GEORGE D.E. BURDEN
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