IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,349

F.W. CUMMINGS-EL,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

The appellant was the defendant, F.W. Cummings-El, and the appellee was the prosecution, State of Florida, in the lower court. The parties will be referred to as they stood in the lower court. The record will be referred to by the letter "R". The trial transcripts will be referred to by the letter "T". All emphasis is added unless otherwise indicated.

STATEMENT OF THE CASE

The defendant was charged by indictment with the crimes of first degree murder and armed burglary. (R. 4).

The state filed of notice of intent to rely on evidence of other crimes, wrongs, or acts. (R. 51).

The defendant was found guilty as charged. (R. 55-56).

After the jury's verdicts, the state filed a notice of state's intention to seek enhanced penalty pursuant to Florida Statutes 775.084. (R. 83).

At the penalty phase of this case, the jury returned its advisory sentence voting 8 to 4 to impose the death penalty. (R. 84).

The trial court thereupon entered its judgment (R. 88) and sentencing order (R. 94-98) sentencing this defendant to death.

This appeal follows.

STATEMENT OF THE FACTS

At the trial of this cause, the following was elicited:

Metro Officer Deiffenbach received a dispatch and proceeded to the deceased's house. (T. 469). He found Michael Adams outside the house:

He was uttering he killed her. The boyfriend killed her. Why weren't we going after him? Whey weren't we going to do something and that he was going to go get him. (T. 471).

Michael Adams never saw the face of the assailant. (T. 487, 510). Adams only saw a subject leaving the room. (T. 499). Adams saw "an outline of the back of the person." (T. 501). Adams said it "looked like" "Fred". (T. 510).

The officer found the deceased, Kathy Good, outside a bedroom fallen in the hallway. (T. 472). The officer recalled "that it was dark" in the bedroom where the stabbing took place. (T. 494).

The officer found a restraining order. (T 478). The investigation then focused on the defendant. (T. 479). Anyone whose name was on the restraining order "would have automatically become a suspect just by virtue of that restraining order." (T. 512). He found the restraining order before he spoke to the deceased's son, T.W. (T. 491).

T.W. "told me he was in bed with his mother, the victim and that he saw the subject punching his mother. (T. 482). T.W. "didn't say he actually saw the person's face. He said he was awake and that he thought his mother was being punched and that it was Fred the ex-boyfriend. (T. 504). T.W. was "never asked for a clothing description, height, weight or physical characteristics of anybody."

(T. 495).

Daphne, Michael and T.W. mentioned the name "Fred". (T. 484). Daphne "said that she was asleep. She didn't see anything." (T. 489).

During the questioning of the people in the house, "at times they were together and then at times they were seperated." (T. 497).

During his conversation with the deceased's mother Daisy, the officer received the impression that she hasn't seen anything. (T. 495).

The officer was "unable to determine for sure where the point of entry was." (T. 497). No one said that they saw the man leaving the house. (T. 498).

Detective Miller was the lead detective. (T. 515). He targeted the defendant as the subject. (T. 518). He obtained a search warrant for the defendant's mother's house. (T. 527). From the defendant's sister's house he seized items. (T. 527). The murder weapon (knife was found at the scene as was a towel. (T. 528).

There was "nothing of any evidence of value ever found in this case." (T. 529). There were "no prints, no matches of blood or anything like that." (T. 529). There was "nothing to link physically Mr. Wooden or anyone else to that matter to this crime." (T. 529).

Detective Melgarejo impounded items from the scene. (T. 539). He took fingernail scrapings from the deceased. (T. 546). he found two pieces of a knife blade found on the deceased's bed fit together

(T. 555) and with a handle found outside in the yard. (T. 556). He tried to develop latents from several areas at the scene (T. 549, 551) but no latent prints were identified. (T. 556). The pieces of the knife blade were never processed for fingerprints. (T. 559). Nothing of any value was ever found that would link the defendant to the homicide. (T. 510).

Criminalist David Rhodes testified that the pieces of the knife and handle appeared to match up (T. 570) and, in his opinion, they were one knife. (T. 571).

Teresa Merritt of the Metro Crime Lab analyzes blood and bodily fluids. (T. 572). She did an analysis of the fingernail scrapings (T. 574), tested the knife blade (T. 576) and tested the hand towel. (T. 578). The blood found was consistent with the deceased's blood. (T. 582).

Tadarius Williams, the deceased's son testified. (T. 588). The night of the incident, he was sleeping with his mother (T. 590) after his mother had come home with friends after celebrating a friend's birthday. (T. 590). Daphne and Michael came into the bedroom with her. (T. 591). He and his mother and Daphne lay on the bed while Michael laid on the floor. (T. 592). T.W. later saw a man whom he identified as the defendant in the room doing like a punching motion. (T. 594). The man was in the room just a few seconds. (T. 613). He wasn't able to see much in the room. (T. 602). He only saw the man's face for "a second or two" as he ran

out the door. (T. 614). The man had no shirt, brown pants and a towel in his back pocket. (T. 601). When the person initially came into the room, he thought that the person was his grandmother. (T. 603). His mother screamed (T. 605), Daphne woke up and the man ran. (T. 606).

Deborah Griffin lived near the deceased. (T. 616). She testified as to a prior incident on August 27, 1991 in which she was talking to Kathy Good on her porch (T. 616) when the defendant arrived and an argument between Kathy Good and the defendant ensued ending in the defendant hitting Ms. Good. (T. 621). Ms. Good and the defendant had dated. (T. 623). Ms. Good did not tell her that she had lived with the defendant. (T. 625).

Ellen Thompson knew that Ms. Good and the defendant lived together (T. 634) and that the defendant had moved out. (T. 635). The defendant had threatened Ms. Good with a gun on a prior occasion. (T. 636). When asked to leave, the defendant did so. (T. 639). Ms. Thompson testified to hearing the defendant tell Ms. Good that if eh couldn't have her, no one could. (T. 639, 642). Ms. Thompson didn't like the defendant. (T. 651).

Dt. Mittleman, the medical examiner, testified that Ms. Good died from multiple sharp edge wounds. (T. 681). Ms. Good died from punctured lungs. (T. 681). A person "could become unconscious within seconds." (T. 682). The point of consciousness would be very short. (T. 691).

Lee Michnewicz was the records custodian of Deering Hospital. (T. 698). She had the emergency room records of Kathy Good from August 27, 1991 which indicated that Kathy Good had been x-rayed and a fracture located. (T. 700).

Jerry Adams was Kathy Good's nephew. (T. 701). He testified that the defendant had dated Kathy Good (T. 701) but that the couple had broken up. (T. 702). When before her death, Ms. Good had argued with the defendant and told the defendant to leave, the defendant left. (T. 704).

The night of Kathy Good's death, a party had gone to the nightclub, Luke's. (T. 706). When they returned, Adams lay on the bedroom floor (T. 707) and dozed off. (T. 711). He lay facing a dresser. (T. 732). He could not see the door. (T. 733). Kathy's scream woke him up. (T. 713). He jumped up and saw a body exit the room. (T. 713). He saw the man's back. (T. 714). The man hit Ms. Good's mother, who fell over. (T. 714). The man ran out the back door. (T. 714). He was 15-20 feet away from the man. (T. 715). He saw the person about 50 seconds as the man ran through the house. (T. 719). He recognized the person as the defendant "based on seeing his body and seeing the side of his face." (T. 720).

Daisy Adams was Ms. Good's mother. (T. 750). She knew Ms. Good and the defendant had lived together. (T. 751). Ms. Good had moved home. (T. 751).

The evening of the incident, she watched television as Ms. Good went out with her friends. (T. 753). She remembered when the group

returned. (T. 755). Ms. Adams then fell back asleep. (T. 756).

Ms. Adams awake to Kathy's screams (T. 756):

> My daughter said Mama, Mama, he hurting me. He hurting me. That's when I jumped up and I ran out my bedroom door.

(T. 757).

Ms. Adams saw a person coming out of her daughter's bedroom:

> He was in the doorway and I was in the doorway. That's why he had to shove me out of the way to get out of the way. (T. 715).

and,

> Yes, I asked him what was he doing in my house and he did like this, shoved me and I went over backwards. (T. 715).

She identified the defendant was the man she saw. (T. 717). The man ran out the back door. (T. 764).

Kathy then came out of the bedroom. She said Fred, Fred and fell into Ms. Adams arms. (T. 770).

The trial person to exit the bedroom was Michael who ran after the man. (T. 779). Ms. Adams saw the person for just a second before he ran out the door. (T. 733).

The state rested. (T. 746).

The defendant's motion for judgment of acquittal (T. 746) was denied.

At the penalty phase of the case, Ms. Adams recounted her story of seeing the defendant exit Ms. Good's bedroom. (T. 929-931) and Kathy falling into her arms. (T. 932).

Jerry Adams recounted his testimony of being awoken by Kathy

(T. 937) and Kathy walking out of the bedroom, then falling. (T. 938). Kathy had said that she was "cut". (T. 938, 941).

Clerk of Court Jim Cleek presented documents to show that the defendant had previously been convicted of aggravated battery. (T. 951).

Laura Friar, a records clerk from the North Carolina Department of Corrections (T. 957) presented records indicating that the defendant had been convicted of two counts of robbery with a dangerous weapon. (T. 959).

Fingerprint technician Janet Lew testified that she had taken the defendant's fingerprints (T. 965) and found those prints to be of the same person as the fingerprints from the North Carolina records. (T. 968).

Janet St. Fleur, the defendant's sister (T. 1004) testified that the defendant had four children. (T. 1006):

> He has treated them five. You know, he is protective of his family, always have been, of his mother, hi sisters, mother, brothers, and his children."

She also testified that the defendant was honest (T. 1008) and that she didn't find him to be a violent person. (T. 1008).

Catherine Covington was the defendant's sister. (T. 1017). The defendant was one of 12 children (T. 1018):

> As a sister, Fred treats me very nice, nicely

> and also he is very nicely to all his family. Not just his family, to other people as well. (T. 1019).

She also testified that the defendant was honest (T. 1019) and not violent. (T. 1019).

This appeal follows.

POINTS ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN STRIKING JURORS KOZAKOWSKI AND OSHINSKY FOR CAUSE ON THE BASIS THAT THEY COULD, UNDER NO CIRCUMSTANCES VOTE TO IMPOSE THE DEATH PENALTY?

II

WHETHER THE TRIAL COURT REVERSIBLY ERRED BY COMMENTING TO THE JURY ON THE DEFENDANT'S BURDEN OF PROOF AND UPON HIS RIGHT TO REMAIN SILENT?

III

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS TO THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS OR CRUEL?

IV

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE AGGRAVATING FACTOR OF "HEINOUS, ATROCIOUS AND CRUEL" APPLIED TO THE FACTS OF THIS CASE?

V

WHETHER THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING FACTOR OF "COLD, CALCULATING AND PREMEDITATED"?

VI

WHETHER THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY?

SUMMARY OF THE ARGUMENT

The trial court erred in striking two potential jurors for cause on the grounds that they could never vote to impose the death penalty. Their responses during voir dire indicate that while they would not readily recommend the death penalty, they could do so.

The trial court reversibly erred by commenting to the jury, "It's possible that the Defense does not utter a word through the whole trial. Although it wouldn't happen, It shouldn't happen."

The trial court erred in instructing the jury as to the aggravating factor of "heinous, atrocious and cruel" by not providing a specific jury instruction as to how that factor must be used.

The trial court erred in finding that the aggravating factor of "heinous, atrocious, and cruel" applied to a situation where the defendant quickly stabbed his former lover, who was sleeping, then ran.

The trial court erred in finding that the aggravating factor of "cold, calculated and premeditated applied to a situation where the defendant quickly stabbed his former lover, who was sleeping, then ran.

The trial court erred in finding that, in this case, the death case was proportionally warranted, where, in similar cases, a life sentence was imposed.

ARGUMENT

I

THE TRIAL COURT ERRED IN STRIKING JURORS KOZAKOWSKI AND OSHINSKY FOR CAUSE ON THE BASIS THAT THEY COULD, UNDER NO CIRCUMSTANCES VOTE TO IMPOSE THE DEATH PENALTY

At the trial of this cause, when prospective juror Kozakowski was struck for cause, the proceedings were:

The Court: Number eleven is excused. Number thirteen, Kozakowski.

Mr. Honig: Kozakowski is another gentlemen who would require a much higher standard.

Mr. Mastos: I thought he had descended from that position.

Mr. Honig: He said that he was leaning towards life imprisonment already. That he had, he would have to be totally and irrevocably convinced.

The Court: Number thirteen gone. Who else?

(T. 121-122)

The conversations with potential juror Kozakowski upon which these opinions were formed and ruling made were:

Mr. Honig: Because Mr. Kozakowski -- my other problem is read my my own handwriting. Would you need to be totally and

irrevocably convinced?

Mr. Kozakowski: Convinced, yes.

(T. 44-45).

and,

(Prosecutor): Mr. Kozakowski, I made you a promise and I'm going to stick to it. I don't remember what I'm going to ask though. If you find the defendant guilty of first degree murder, you and eleven other people on the jury, when we get to the second part, are you already going to have your mind made up? What do you think you're going to do? Are you going to be able to listen and follow the law? It's like another trial. You have to start with a clean slate. Do you think that you will be able to do that?

Mr. Kozakowski: I'm afraid, in my own conscience, that I would go for the imprisonment rather than the death penalty.

Mr. Honig: If the judge tells you, well, you can't. You have to clean it up and start from scratch could you do that or are you still going to be starting from one side to the other? You're still going to be starting, going towards imprisonment?

Mr. Kozakowski: I'm very skeptical of the death penalty. I'll always agree I didn't hear the evidence or it's right or this wasn't enough evidence that would linger in my mind.

(T. 68-69)

and,

Mr. Honig: For example, Mr. Kozakowski said he could think of it, where a child is a case --

Mr. Kozakowski: Child or some defenseless person who's preyed upon.

Mr. Honig: Are making that distinction as to the kind of victim or you better prove it to me.

Mr. Kozakowski: You better prove it to me.

Mr. Honig: Mr. Kozakowski, if it's not a child or a helpless victim, is the death penalty possible in your mind?

Mr. Kozakowski: In my mind, I think the law provides for death penalty as long as they're convicted, yes.

Mr. Honig: Could you do that?

Mr. Kozakowski: In those cases, I'll have no objections to the death penalty. In some cases, in my mind, I might have reservations for the death penalty.

(T. 72-73)

and,

Mr. Honig: Does anybody have a different feeling between husband and wife? Anybody in the back row? Anybody, anywhere? How about boyfriend/girlfriend, exboyfriend/exgirlfriend. You think that domestic relationship makes a difference?

I'm asking this because some people are going to look at who the victim is. Does anybody feel that they're more likely to vote for the death penalty if the victim was a woman or a man or that women are more helpless. Something in them, a woman that's not right. That's just more right that really bothers me.

Mr. Kozakowski: I'm more likely to vote for a woman.

Mr. Honig: You're talking about the helplessness. Do you think if the victim was a woman it might strike you a helpless?

Mr. Kozakowski: Yes, I would consider that a helpless case then I would have to know the circumstances. I mean I'm divorced. I'm prowoman. My wife got married again after living with a man for twenty years. So, I'm not too fond for protecting woman either.

(T. 77)

and,

Mr. Honig: Some people had talked earlier, people talked earlier and some people had said that they didn't feel that the death penalty is appropriate only in certain situations. I believe it was Ms. Rodriguez and Mr. -- I'm going to mess it up again, Mr. Kozakowski who had brought up children as victims and somebody else mentioned about a woman.

Mr. Kozakowski, he would include woman as a helpless victim and he had talked about children and that's where the conversation led off talking whether it's guilt or not, but remember we're starting at the very end here. It's very odd at the very beginning, we start at the very end and we start in the middle where that will make you lean one way or whether the victim was a woman or if the crime was required to be more close up?

Mr. Kozakowski: Doesn't make any difference.

(T. 83-84)

and,

Mr. Honig: Mr. Kozakowski, it took me so long to get the name right. I want to use it now. I think you're the one who initially started talking to us about helplessness of a victim.

Mr. Kozakowski: Yes, I believe that some people are currently helpless and when they're murdered, I think that's in my mind more of an offense than just somebody that shoots somebody.

Mr. Honig: You're talking about age or sex or gender, a child or a woman?

Mr. Kozakowski: Anybody, everybody.

Mr. Honig: What about the situation of a person not so much their age or their gender, something else that might also be considered whether they were handicap or whether they were awake, versus asleep. Would those be things that would effect you?

Mr. Kozakowski: I would have to know the relationship between the murderer and the person who was murdered. If there was any relationship or just spur of the moment murder, that would make a difference.

Mr. Honig: In what way?

Mr. Kozakowski: The person who knew somebody would be more guilty than somebody who did it haphazardly.

(87-88)

and,

Mr. Honig: I'm trying to get, Mr. Kozakowski, helplessness would that make a difference to you?

Mr. Kozakowski: Yes.

Mr. Honig: In what way?

Mr. Kozakowski: Well, it depends how violent the crime was, but if the person is awake and they're physically attacked with a knife, again, that requires a lot more anger or rage of violence than just a person that's asleep. They're expecting that person to have a chance to fight back. They're equally as bad, I think.

Mr. Honig: Because --

Mr. Kozakowski: One side of the equation, you're taking advantage of the helplessness of a person, but on the other side, you've built --

Mr. Honig: It's a higher level of violence?

Mr. Kozakowski: Exactly.

(T. 91)

Mr. Kozakowski said that he had to be convinced (T. 44) of the defendant's guilt. The "totally and irrevocably" were the prosecution's words which were <u>never</u> <u>actually</u> confirmed by Mr. Kozakowski. While Mr. Kozakowski leaned towards life imprisonment, he could and did particularize situations where he would have <u>no objections</u> to the death penalty. The defendant submits that it was error, on this Record, to strike Mr. Kozakowski for cause.

At the trial of this cause, when prospective juror Oshinsky was struck for cause, the proceedings were:

The Court: All right. Next on Lopez' row.

Mr. Honig: Doctor Lopez, Mr. Oshinsky and Ms. Rosenthal for those reasons, we could address the other two for other reasons.

Mr. Mastos: Here's a man who's a cardiologist. Here's a man who's an attorney. Both of these people again indicated -- he came down from holding the State to a higher burden of proof, but wants to be sure in the death penalty phase. I don't think he's met threshold to be excused.

The Court: I believe he wanted to go beyond a reasonable double.

Mr. Honig: Also on that row --

The Court: Eighteen, nineteen and twenty-one.

(T. 371-372)

The conversations with potential juror Oshinsky leading to his exclusion for cause were:

The Court: Anybody else in the forth row, Mr. Oshinsky and Ms. Rosenthal? Mr. Oshinsky, would your belief against the death penalty effect you in determining whether someone was guilty or not guilty?

Mr. Oshinsky: I don't think so, your Honor. I think I could separate those issues.

The Court: Could you think of any case possible in which you would be able to apply the --

Mr. Oshinsky: I assume that is -- only with very great difficulty. I don't see that it serves any social purpose whatsoever.

The Court: Will you be able to listen to the evidence in Phase I and Phase II if you were a member of the jury?

Mr. Oshinsky: I believe so, you Honor.

(T. 321-322)

Mr. Honig: I'm going to try to, if we get to the second phase, if we get to the question of the death penalty, you're already leaning one way, was that fair?

Mr. Oshinsky: Uh-huh.

Mr. Honig: If we have to prove to you that death is the appropriate punishment, are you going to make us prove it by a burden of proof higher than reasonable doubt because you have such strong feelings?

Mr. Oshinsky: I'm not sure what the tests are. That is, I don't practice criminal law as the other laws. I'm not sure what is your proof or what the standard of law is to permit or recommend for the death penalty.

Mr. Honig: We'll get to that in a moment.

(T. 332-333)

and,

Mr. Honig: Okay. I appreciate that.

How about Mr. Lopez, Dr. Lopez' row, Mr. Oshinsky?

Mr. Oshinsky: In response to the Judges question, before I

indicated that I thought, no withstanding my belief, that I could follow the law. Posing it the way you posed it and perhaps that enlightens what happens in the second phase, that gives me some pause and if it's strictly a recommendation that comes from my belief in the entire content, than I would have to tell you that my recommendation would have to be at best life in prison on a finding of guilty. And whether or not there is some circumstances that would push me beyond that, I can't imagine what that is, but I can't say that that couldn't be presented.

Mr. Honig: So you're feeling already that if the defendant would be found guilty, you most likely vote life in prison; is that a fair summary?

Mr. Oshinsky: It's a fair summary.

The Court: There is no sense in talking with Mr. Weiser or with a number of other people, sir. We have to move on.

Mr. Honig: I just don't want to cut them off.

The Court: There are certain people here that we know are going to be excused right now. You don't have to ask Mr. Mastos. There's about ten people right now. Let's get to those that we can and if not, let move on. Let's give them a chance to get this jury so it can be selected in the next hour.

Mr. Honig: Mr. Lopez, Mr. Oshinsky and Ms. Rosenthal, we know how you feel. Is there anybody else on that row who feels like --

Mr. Oshinsky: Which are you asking about, the reasonable doubt?

Mr. Honig: Yes.

Mr. Oshinsky: Well, that hasn't been asked of me.

The Court: It's not needed to at this time.

Mr. Honig: On this row, anybody that feels that because of the charge they will require the State to prove the case even more?

(T. 343)

The standard for determining whether a juror is qualified to sit on a capital case in which death is a possible penalty, is whether the juror's view on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Darden v. Wainwright, 744 U.S. 165, 106 S.Ct. 2464 (1986); Wainwright v. Wiff, 469 U.S. 412, 105 S.Ct. 844 (1985); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521 (1980). Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968).

The standard applies to jurors who show bias both for and against the death penalty. Randolph v. State, 562 So.2d 331 (Fla. 1990); Hill v. State, 477 So.2d 533 (Fla. 1985). A single improper exclusion of a juror is reversible error per se. Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987).

Both jurors stated that they held a personal opinion against the imposition of the death penalty. Prospective jurors may not be excluded for cause "simply because they voiced general objections

to the death penalty or expressed conscientious or religious scruples against its infliction." Lockhart v. McCree, 476 U.S. 162, 176 (1986); Witherspoon v. Illinois, 391 U.S. 510, 522 (1968); Randolph v. State, 562 So.2d 331 (Fla. 1990). Prospective jurors who believe the death penalty is unjust may serve as jurors and cannot be excluded for cause because of that belief. Randolph, at 335. However, if that belief prevents them from applying the law and discharging their sworn duty, the trial court is obligated to excuse them for cause. Id. at 335.

Witherspoon is not a ground for challenging any prospective juror, but rather a limitation on the State's powers to exclude. If prospective jurors are barred from jury service because of their views about capital punishment on "any broader basis" than inability to follow the law or abide by their oaths, the death sentence cannot be carried out. Adams v. Texas, 448 U.S. 68, 102 S.Ct. 2525 (1980). In this case, the record reflects that neither prospective juror had any qualms about his ability to follow the trial court's rulings and instructions.

Neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of a juror to follow the court's instructions and obey his oaths, regardless of his feelings about the death penalty. Adams v. Texas, at 52. Under Witherspoon, neither a deep reluctance to assess the death penalty, short of an absolute refusal to do so, nor a belief that it should be assessed only in an extreme set of circumstances is a ground for

exclusion of a prospective juror for cause. O'Bryan v. Estelle, 714 F. 2d 365 (5th Cir. 1983).

In the case of Grey v. Mississippi, 107 S.Ct. 2045 (1987), a potential juror was excused for cause by the trial court. In reversing that defendant's conviction, the United States Supreme Court stated:

In Witherspoon, this Court held that a capital defendant's right under the Sixth and Fourteenth Amendments, to an impartial jury prohibited the exclusion of venire members "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. 391 U.S. at 522, 88 S.Ct. at 1776. It reasoned that the exclusion of venire member must be limited to those who were "irrevocably committed... to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," and to those whose views would prevent them from making an impartial decision on the question of guilt.

(p. 2051)

and,

Although Davis was not cited in the Mississippi Supreme Court's majority opinion in the present case, this Court in Davis surely established a per se rule requiring the vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who

nevertheless under Witherspoon is eligible to serve, has been erroneously excluded for cause.

(p. 2052)

This Honorable Court has also addressed the same question of exusals for cause in a capital case.

In Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983), this Court noted:

> "A man who opposes the death penalty, no less then the one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as juror." Witherspoon v. Illinois, supra (emphasis added). Witherspoon requires that veniremen who oppose the death penalty be excused for cause only when irrevocably committed before the trial to voting against the death penalty under any circumstances or where their views on capital punishment would interfere with finding the accused guilty. We find that the same standard should be applied when excusing for cause a veniremen who is in favor of the death penalty. A judge need not excuse such a person unless he or she is irrevocably committed to voting for the death penalty if the defendant is found guilty of murder and is therefore unable to follow the judge's instructions to weigh the

aggravating circumstances against the mitigating circumstances.

(p. 1076)

It is evident that potential jurors Kozakowski and Oshinsky were not so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty. The court in Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399 (1976), established a per se rule requiring the vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under Witherspoon is eligible to serve, has been erroneously excluded for cause. Id. at 123-134. The case at bar provides a clear example of an erroneously applied Witherspoon standard and requires vacation of the death sentence in accordance with the principles of Davis. What citizen would "prefer" to sit on a jury and sit in judgment as to whether someone should live or die?

The jury composition in this case, as in all death cases, was critically important. It cannot be overlooked that the advisory verdict was 8 to 4. If potential jurors Kozakowski and Oshinsky were not unjustly excused, it is conceivable that their presence and argument to the other jury members may have changed the advisory verdict sufficiently to result in a recommendation for a life sentence.

In this case, on these facts, the appellant submits that it was error to excuse potential jurors Kozakowski and Oshinsky for "cause" and that his sentence, if not his conviction and sentence, must be Reversed and this Cause remanded for appropriate proceedings.

II

THE TRIAL COURT REVERSIBLY ERRED BY COMMENTING TO THE JURY ON THE DEFENDANT'S BURDEN OF PROOF AND UPON HIS RIGHT TO REMAIN SILENT

The Record reflects that during jury selection in this cause, the trial court commented to the jury:

The Court: Folks, the only side, the only side of this case who has to go forward and prove anything is the State side. The Defense does not have to prove anything. The burden of proof of coming forward with the evidence, of coming forward with the witnesses, coming forward with the exhibits, all that.

The Defense is not required to prove anything. They're not required to disprove anything and that burden of proof of coming forward with the evidence is beyond and to the exclusion of every reasonable doubt. So that would not be a requirement. I just want to make sure everybody understands for the defendant to prove that he had a twin, in order for the State to prove the case, they have to bring to you all the evidence.

It's possible that the Defense does not utter a word through the whole trial. Although it wouldn't happen. I shouldn't happen. We need to try to get on, if we can but go ahead.

(T. 247-248)

The defendant respectfully submits that when the trial court commented "It's possible that the defense does not utter a word through the whole trial. Although it wouldn't happen. I shouldn't

happen.", the trial court improperly commented upon the defendant's Burden of Proof and Right to Remain Silent.

In Mc Clain v. State, the Court addressed the question of whether a trial judge could commit error by so commenting upon a defendant's failure to testify and stated:

> Notwithstanding absence of objection by the defendant, the clear comment of the judge on the failure of the defendant to have testified in his own behalf at the trial impels reversal for new trial. While the criminal procedure rule admonishes against such a comment by a prosecutor, it is equally impermissible for it to be made before a jury by the judge who is presiding at the trial. Diccidue v. State, 131 So.2d 7,9 (Fla. 1961); Young v. State, 330 So.2d 235 (Fla. 2d DCA 1976). In fact, the degree of prejudice to an accused from such a prohibited comment is greater when it is made by the judge than when made by the prosecutor, due to the great weight which jurors tend to give any such comment when made by the judge. Young v. State, supra.
>
> (p. 1217)

Additionally, Danford v. State, 492 So.2d 690 (Fla. 4th DCA 1986), the Court considered the same question and, in reversing that Defendant's conviction stated:

> Although the provisions of rule 3.250 expressly apply to prosecutorial comments, the rule has been extended to include comments by judges to a jury, see

McClain v. State, 353 So.2d 1215, 1217 (Fla. 3d DCA 1977), and to the comments of an attorney of a co-defendant, Sublette v. State, 365 So.2d 775 (Fla. 3d DCA 1978), cert. dismissed, 378 So.2d 349 (Fla. 1979). As specifically pointed out in Sublette at page 778, "it is the fact of comment rather than the source of comment that effects denial of the right to remain silent."

(p. 691)

Likewise, in the case of Love v. State, 553 So.2d 371 (Fla. 3d DCA 1991), the Court considered a situation in which the trial court told the jury, "I'm going to tell you the defendant does not have to testify, will probably not testify, you will not hear both sides of the story."

In reversing the defendant's conviction the Court stated:

> Love contends that the judge's statement constituted an impermissible comment on his right not to testify. We agree that the judge's comment -- "you will not hear both sides of the story" -- is "fairly susceptible' of being interpreted by the jury as referring to a criminal defendant's failure to testify..." David v. State, 369 So.2d 943, 944 (Fla. 1979); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); State v. Kinchen, 490 So.2d 21 (Fla. 1980), see Diecidue v. State, 131 So.2d 7 (Fla. 1961);

Danford v. State, 492 So.2d 690 (Fla. 4th DCA 1986); McClain v. State, 353 So.2d 1215 (Fla. 3d DCA 1977), cert. denied, 367 So.2d 1126 (Fla. 1979).

(p. 371)

The defendant submits that the trial court's comment, in this case, called the jury's attention to it's opinion that the defendant would testify ("it wouldn't happen") and should testify ("it shouldn't happen").

As this defendant did not testify, the trial court's admonitions that he would testify, should testify, can only be regarded as a prejudicially adverse comment upon his failure to testify from the supposedly neutral arbiter/judge/referee in the trial court. If this neutral party (trial judge) believes that the defendant would testify/should testify, what other conclusion can the jury arrive at other than that the defendant's ultimate failure to testify is a factor which it should seriously consider/allow to dictate its decision as to this defendant's guilt or innocence, and, the appropriate penalty to be imposed in the event of a conviction?

On the facts of this Record, the trial court's comments constituted Reversible Error and this cause must, accordingly be Reversed for appropriate proceedings.

III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS TO THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS OR CRUEL

The Record reflects that the defendant did object to the jury instruction as to the aggravating factor of "Heinous, Atrocious or Cruel" (T. 978). The Record also reflects that the defense was concerned about the language of the standard jury instruction as it stated:

So her time of consciousness was very, very short. But the language, and this is just not applicable. What additional act is there that shows this was conscienceless or pitiless was unnecessarily torturous. There is nothing to support that.

(T. 979)

The defendant would submit that this objection that the language of the standard jury instruction is not applicable to the instant case without a showing of an additional act demonstrates defense counsel's concern for the vagueness of the standard jury instruction and how it might be applied/misapplied by the jury. The defendant submits that counsel's objection is sufficient to raise an Espinosa claim (Espinosa v. Florida, 1125 Ct. 2926 (1992)) to the standard "heinous, atrocious and cruel" jury instruction.

See, Lambrix v. State, 19 Fla. L. Weekly S330 (Fla. 1994). As the Espinosa claim was properly raised and as the standard jury instruction as to "heinous, atrocious and cruel" was unconstitutionally vague, the defendant's Death sentence must be Vacated.

IV

THE TRIAL COURT ERRED IN FINDING THAT THE AGGRAVATING FACTOR OF "HEINOUS, ATROCIOUS AND CRUEL" APPLIED TO THE FACTS OF THIS CASE

The facts of this case and the testimony of the witnesses show that the killing of Kathy Good happened quickly and suddenly. She was asleep in her bed, then suddenly stabbed.

Dr. Mittleman, the medical examiner testified that a person "could become unconscious within seconds" (T. 682) and that the point of consciousness would be very short (T. 691).

In Kampoff v. State, 371 So.2d 1009 (Fla. 1979), this Court held that the aggravating factor of "heinous, atrocious and cruel" did not apply to a situation where the defendant shot his ex-wife after spending three years brooding over his divorce. This Court stated:

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> (p. 1010)

In Lewis v. State, 377 So.2d 640 (Fla. 1979), the Court considered this factor and stated:

It is apparent that all killings are heinous - the members of our society have deemed the intentional and unjustifiable taking of a human life to be nothing less. However, the legislature intended to authorize the death penalty for the crime which is "especially heinous" - the "conscienceless or pitiless crime which is unnecessarily torturous to the victim" (emphasis supplied).

(p. 646)

In Maggard v. State, 399 So.2d 973 (Fla. 1981), this Court considered that factor and stated:

> "we defined heinous to mean "extremely wicked or shockingly evil"; atrocious to mean "wicked and rule"; and cruel to mean "inflection of a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others."

(p. 977)

The state's evidence was that the defendant stabbed Kathy Good while she was sleeping. There was no evidence of an intent to inflict a high degree of pain. There was no evidence of an enjoyment of her suffering. As soon as he stabbed her, the assailant ran. The state's evidence shows that the defendant, mentally distraught over his breakup with Kathy Good, and unable to bear losing her, stabbed her. There is no argument that the act was wrong. It just wasn't "heinous, atrocious or cruel".

In Herzog v. State, 439 So.2d 1372 (Fla. 1983), this Court held this factor not applicable in the face of facts "that the defendant beat the victim, suffocated her with a pillow and then strangled her with a telephone cord" (p. 1379 of Opinion).

In Santos v. State, 591 So. 2d 160 (Fla. 1991), this Court considered a situation in which the defendant shot his long-time lover and their child. In considering the instant factor, this Court stated:

We also agree that this crime was not heinous, atrocious or cruel. As we recently explained in Cheshire v.State, 568 So.2d 908 (Fla. 1990), this factor is approximate in torturous murders involving extreme and outrageous depravity. A murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. Id. at 912. The torture-murder in Douglas, which involved heinous acts extending over four hours, illustrates a case in which this factor was appropriately found. Douglas, 575 So.2d at 166. The present murders happened too quickly and with no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victims. Accordingly, the trial court erred in finding this factor to be present.

(p. 163)

In the case of Bonifay v. State, 626 So.2d 1310 (Fla. 1993), the Court considered this factor in a situation in which the victim

was shot to death after begging for his life. In finding this factor not present, the Court stated:

> The record fails to demonstrate any intent by Bonifay to inflict a high degree of pain or to otherwise torture the victim. The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that Bonifay intended to cause the victim unnecessary and prolonged suffering.
>
> (p. 1313)

As in Bonifay, the record fails to demonstrate any intent by the defendant to inflict a high degree of pain or to otherwise torture Kathy Good. As in Bonifay, this aggravating factor is not present.

In Elam v. State, 19 Fla. L. Weekly S175 (Fla. 1994), this Court considered this aggravating factor and stated:

Elam claims that the trial court erred in finding aggravating circumstances applicable here. We agree. We find the aggravating circumstance that the murder here was especially heinous, atrocious, or cruel inapplicable. Although the defendant was bludgeoned and had defensive wounds, the medical examiner testified that the attack took place in a very short period of time ("could have been less than a minute, maybe even half a minute"), the defendant was unconscious at the end of this period, and never

regained consciousness. There was no prolonged suffering or anticipation of death.

(p. S176)

The facts of this case show that Kathy Good was rapidly stabbed, the assailant fled and she quickly expired. There was no torture. There was no evidence of an intent to inflect a high degree pain. The defendant respectfully submits that the facts of this case cannot substantiate a finding that Ms. Good's murder was "heinous, atrocious or cruel". As the jury recommendation was 8 to 4, this factor could have made the difference in the jury's recommendation in this case. The defendant must be resentenced.

V

THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING FACTOR OF "COLD, CALCULATING AND PREMEDITATED"

The trial court, in sentencing the defendant to Death, applied the aggravating factor of "Cold, Calculating and Premeditated." The defendant submits that that factor is not present in the instant case, that the trial court erred in considering it when sentencing this defendant and, accordingly, this defendant must be Resentenced.

The state proved that the defendant and Kathy Good had had a personal relationship, at one time living together. The state proved that the defendant and Ms. Good had a tumultuous relationship. The state proved that the defendant was tremendous upset about Ms. Good leaving him. The state did not prove that the defendant had ever previously threatened Ms. Good with a knife.

In the case of Garrow v. State, 528 So.2d 353 (Fla. 1988), this Court considered the "cold, calculated and premeditated" factor in a case in which the defendant shot his wife and step-daughter. In finding this factor inapplicable, this Court stated:

The final aggravating factor, that the offense was committed in a cold, calculated and premeditated manner, is also without support. There is no evidence of heightened premeditation with respect to the shooting of Tina Garron. While it is true that appellant hid the gun in a towel before he shot Le Thi, he did not

do so when he shot Tina. It appears the shooting of Tina was a spontaneous reaction. As the state admits in its brief, the heightened premeditation aggravating factor was intended to apply to execution or contract-style killings. This case involves a passionate, intra-family quarrel, not an organized crime or underworld killing.

(p. 360-361)

In the case of Douglas v. State, 575 So.2d 165 (Fla. 1991), this Court considered this factor in a case where the defendant killed his former lover's husband after forcing them to perform sexual acts at gunpoint. In finding this factor not present, this Court stated:

> This aggravating factor normally, although not exclusively, applies to execution-style or contract murders. McCray v. State, 416 So.2d 804 (Fla. 1982). The passion evidenced in this case, the relationship between the parties, and the circumstances leading up to the murder negate the trial court's finding that this murder was committed in a "cold, calculated, and premeditated manner without any pretense of moral or legal justification."
>
> (p. 167)

In the case of Santos v. State, supra, the Court considered this factor in a case in which the defendant was convicted of killing his lover and their daughter and stated:

Here the record discloses that the State failed to prove beyond a reasonable doubt that the present murder was cold, calculated and premeditated. We acknowledge that the evidence shows that Santos acquired a gun in advance and had made death threats - facts that sometimes may support the State's argument for cold, calculated premeditation.

However, the fact that the present killing arose from a domestic dispute tends to negate cold, calculated premeditation.

(p. 162)

This tragic incident was not a contract killing. It arose out of a domestic situation gone horribly awry. On this record, relying upon the above cases, the defendant submits that the trial court erred in finding the aggravating factor of "cold, calculated and premeditated. The defendant's sentence must be vacated.

VI

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY

As this is a capital case, this Honorable Court must conduct a proportionality review of the ultimate sentence that was imposed in an effort to foster uniformity in death-penalty law. See, Tillman v. State, 591 So.2d 167 (Fla. 1991). Frederick Cumming-El respectfully submits that pursuant to such a proportionality review, his sentence of death is not warranted.

The defendant's act was the tragic culmination of an obsession concerning Kathy Good. They had lived together. There was a romantic relationship that ended, but which ending his mind just could not accept. Kathy Good was stabbed because the defendant could not bear to think that she would be with someone else.

The defendant was not robbing anyone. This was not a "home invasion" in the "normal" sense of the term. The defendant didn't hate Kathy Good and try to torture her. He didn't even remain to see the results of his act, but ran quickly away. The defendant killed Kathy Good because he loved her, loved her too much to see her with anyone else. It may have been an extreme aberration of the word "love". But, call it what you will, it was not such an act as the State of Florida, speaking through the decisions of this Court, have deemed sufficient to sustain the imposition of the ultimate penalty, that of death.

In the case of Wilson v. State, 493 So.2d 1019 (Fla. 1986) when considering whether, proportionately, death was warranted, this court, in a submittedly similar (domestic) situation, stated:

> We find it significant that the record also reflects that the murder of Sam Wilson, Sr. was the result of a heated domestic confrontation and that the killing, although premeditated was most likely upon reflection of a short duration. See, Ross v. State, 474 So.2d 1174. Therefore, although we sustain the conviction for the first degree, premeditated murder of Sam Wilson, Sr. and recognize that the trial court properly found two aggravating circumstances while finding no mitigating circumstances, we conclude that the death sentence is not proportionately warranted in this case.
>
> (p. 1023)

In the case of Blakely v. State, 561 So.2d 560 (Fla. 1990), this considered a situation in which a defendant killed his wife and stated:

> Elaine's death occurred as the result of a long - standing domestic dispute.
>
> (p. 561)

and,

> This Court has stated that when the murder is a result of a heated domestic confrontation, the death penalty is not proportionally warranted. Garron v. State, 528 So.2d 353, 361 (Fla. 1988).
>
> (p. 561)

and,

> The killing resulted from an on-going and heated domestic dispute and was factually comparable to that in Ross v. State, 474 So.2d 1170 (Fla. 1985), wherein the husband bludgeoned the wife to death with a hammer or other blunt instrument. We reversed the death penalty there on proportionality grounds.
>
> (p. 561)

In Farinas v. State, 569 So.2d 425 (Fla. 1990), this Court considered a case which was factually quite similar to the instant case, and, in finding that the death penalty was not warranted, stated:

> During the two-month period after the victim moved out of Farinas' home he continuously called or came to the home of the victim's parents where she was living and would become very upset when not allowed to speak with the victim. He was obsessed with the idea of having the victim return to live with him and was intensely jealous, suspecting that the victim was becoming romantically

involved with another man. See, Kampoff v. State, 371 So.2d 1007 (Fla. 1979). We find it significant also, that the record reflects that the murder was the result of a heated, domestic confrontation. Wilson v. State, 493 So.2d 1019 (Fla. 1986). Therefore, although we sustain the conviction for the first-degree murder of Elsidia Landin and recognize that the trial court properly found two aggravating circumstances to be applicable, we conclude that the death sentence is no proportionately warranted in this case. Wilson Ross v. State, 474 So.2d 1170 (Fla. 1985).

(p. 431)

The defendant submits that the record in this case shows that his obsession with Kathy Good impaired his judgment and that Kathy Good's death resulted from a domestic situation gone awry. The instant murder was an emotion-charged offense of misplaced passion. After comparing the facts of the instant case to those prior cases with similar facts, the defendant submits calm reflection will reveal that the death penalty was not proportionally warranted in this case and that his death sentence must be vacated.

CONCLUSION

Based on the above facts, arguments and authorities, the appellant submits that his conviction and sentences must be Reversed and this case remanded for appropriate proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to the office of the Attorney General at 401 N.W. 2nd Avenue, Miami, Florida 33128, on this 1st day of November ~~October~~, 1994.

Respectfully submitted,

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