IN THE SUPREME COURT

OF THE STATE OF FLORIDA

KENNETH M. TERRY,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO.: 83,002
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE NO.:

TABLE OF AUTHORITIES

Other Authorities:

SUMMARY OF ARGUMENTS

POINT 1: The cases cited by Appellee deal with the omission of information, not the inclusion of recklessly false information which tainted the entire affidavit and neutral magistrate process.

POINT 2: This issue was preserved. There was obvious tampering and the trial judge's order was wrong.

POINT 3: This issue was preserved. Appellant was deprived of information which would support his defense.

POINT 3, 4, and 5: These errors are not harmless beyond a reasonable doubt.

POINT 8: This issue is preserved. The only objection withdrawn was to Mr. Damore's testimony.

POINT 10: Audrin Butler was not "equally available" to the defense and State.

POINTS 11, 12, AND 13: These issues are properly preserved; further objection would be futile.

POINT 16: The trial judge ignored nonstatutory and mitigating circumstances which were established by a preponderance of the evidence.

POINT 17: The appropriate arguments regarding the constitutionality of the death penalty statute are included as requested by Appellee.

POINT 18: As this court has recently held in two cases, the death penalty here is not proportionate to other similarly situated defendants.

POINT 1

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO THE SEARCH WARRANT IN VIOLATION OF THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLES I, SECTION 12 OF THE FLORIDA CONSTITUTION.

Appellee restates the facts and argues generalizations, but the only cases cited which even remotely address the issue are Esty v. State, 642 So.2d 1074 (Fla. 1994); Power v. State, 605 So.2d 856 (Fla. 1992) and State v. Panzino, 583 So.2d 1059 (Fla. 5th DCA 1991). The issue is whether, considering the recklessly false portion of the search warrant affidavit, there remained probable cause to issue the warrant.

In Esty the trial judge found two material omissions regarding a vehicle leaving the scene; otherwise, there were no other fraudulent or omitted facts. Esty cites to the omission of materials facts, not to the inclusion of recklessly false information that mislead the judge. The issue in Esty was whether there were sufficient facts to constitute probable cause. In the present case, the trial judge attempted to excise the false parts; however, the false parts tainted the entire warrant. This is a classic case of the State trying to un-ring the bell. Power and Panzino also dealt with omitted information, Power at 862; Panzino at 1062. Appellee cites no case which deals with false information being represented to the magistrate, who then issues the warrant based on false information.

POINT 2

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO TAKE APPELLANT'S BLOOD SAMPLE AND PRESENT EVIDENCE REGARDING THAT SAMPLE IN VIOLATION OF THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I §12 OF THE FLORIDA CONSTITUTION.

Appellant objected to the testimony regarding the blood on the tennis shoes at the beginning of Detective Ladwig's testimony (T1122-1127). Defense counsel asked for a standing objection so he did not have to "keep jumping up and down" (T1127). The State agreed to this procedure (T1127). Defense counsel specifically objected to the chain of custody and tampering (T1122-1127). This issue was preserved.

Badger did not testify at the hearing on the motion. The State attempted to introduce Badger's deposition at the hearing on the motion, but Appellant objected (R1188-1189). The deposition was not allowed. This caused an unsurmountable gap in the chain of custody and tampering was obvious. Nancy Rathman tested two samples which she said were "represented to me" as having been removed from a pair of tennis shoes (R1191). The objection to this "representation" was sustained (R1191). There was no basis for the trial judge's ruling on the State's Motion to Take Blood. This error is not harmless beyond a reasonable doubt simply because Charles Badger testified at trial (R1443-1454).[1] State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The ruling was clearly error and once the blood sample was taken from Terry, the harm was

[1]As the State points out, Charles Badger testified at trial that he cut the shoes up (Answer Brief at 20).

irreversible. In fact, Badger's appearance at trial confirms Appellant's argument that tampering was apparent and without Badger's testimony there was no chain of custody.

POINT 3

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL ACCESS TO THE F.D.L.E. ANALYSTS' NOTES WHICH WERE THE BASIS FOR THEIR OPINIONS AT TRIAL.

Appellant requested the F.D.L.E. analyst's notes pre-trial. Although the notes were not used to refresh recollection at trial, and that objection was withdrawn, the issue whether counsel was entitled to those notes to assist in his preparation and defense still stands. Appellee cites no case law to support his position that the issues raised by pre-trial motion were waived.

The State believes that because the F.D.L.E. analysts did not refer to their notes, the problem is cured. Appellant was deprived of access to information which could have assisted in his defense and in cross-examination. He had a right to those notes, just as he does to police reports. Whether the witness uses the information to refresh recollection is not the issue. The issue is Appellant was wrongfully denied access to information.

POINT 4

THE TRIAL COURT ERRED IN DENYING THE MOTION IN LIMINE REGARDING DR. STEINER'S OPINION OF THE POSITION OF MRS. FRANCO AT THE TIME OF THE SHOOTING.

The State contends Appellant has not demonstrated prejudice from Dr. Steiner's testimony regarding the position of the victim.

A kneeling victim is obvious prejudice. It inflames the emotions of the jury. The State claims any error was harmless. Perhaps the State has forgotten the burden for harmless error. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). This case hinged on a co-defendant who had made prior inconsistent statements and a jail-house informant. The kneeling victim was designed to arouse the jury's sympathy and tip the balance in favor of the State.

POINT 5

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR MISTRIAL WHEN DETECTIVE LADWIG INTRODUCED EVIDENCE OF OTHER CRIMES.

The State quotes the trial court's ruling that "everyone was on notice" as to this issue. This is precisely the point. Ladwig was on notice and was attempting, as the Judge discussed, to try to get something in front of the jury he shouldn't have. Ladwig was a hostile witness to the questioner and there is no "invited error" excuse. Even if the question were inaccurately stated, there is no excuse for the answer and the error, "invited" or not, is not harmless. The knowledge Appellant was involved in other robberies was devastating to the defense since Appellant's position was he was not present at this robbery. Having knowledge of other robberies the jury could presume Appellant's presence at this robbery. The State cannot show this error was harmless beyond a reasonable doubt.

POINT 8

THE TRIAL COURT ERRED IN ALLOWING DEMON FLOYD'S TESTIMONY TO BE USED AS SUBSTANTIVE EVIDENCE.

Defense counsel did not "withdraw" his objection to Demon Floyd's testimony being used as substantive evidence. He stated "without waiving any objections" he would agree that Floyd's testimony could be used in lieu of Mr. Damore. When defense counsel stated his previous objections were to Mr. Damore testifying, this did not mean he was waiving the objection to Floyd's testimony. The significance of Floyd's testimony is not that it was admitted as prior inconsistent statements but that it was used as substantive evidence. Floyd's testimony was the only testimony Terry was there and was the triggerman. Without his testimony being used as substantive evidence, the conviction could not stand. State v. Clark, 614 So. 2d 453 (Fla. 1952).

POINT 10

THE TRIAL COURT ERRED IN LIMITING DEFENSE COUNSEL'S CLOSING ARGUMENT REGARDING AUDRIN BUTLER IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND FLORIDA COUNTERPARTS.

The State claims Audrin Butler was equally available for both, yet in the next sentence concedes Butler failed to appear. Butler had been served with a subpoena and did not appear. Apparently he was not available to the defense. It appears, however, he was available pursuant to a state-requested bench warrant which hardly makes him "equally" available.

POINTS 11, 12, AND 13

THESE ISSUES ARE PROPERLY PRESERVED; FURTHER OBJECTION WOULD BE FUTILE.

The instructions issue was argued before the penalty phase (T1932-1940). The trial judge denied the motion right before the penalty phase. Further objection would have been an exercise in futility. See Thomas v. State, 599 So.2d 158 n.1 (Fla. 1st DCA 1992); Webber v. State, 510 So.2d 1210 (Fla. 2d DCA 1987); Goff v. 392008 Ontario Ltd., 539 So.2d 1158 (Fla. 3d DCA 1989).

POINT 16

THE TRIAL COURT ERRED IN FAILING TO GIVE WEIGHT TO THE NONSTATUTORY MITIGATING CIRCUMSTANCES.

Recently in Ferrell v. State, 20 Fla.L.Weekly S74 (Feb. 16, 1995) this Court reiterated its ruling in Campbell v. State, 571 So.2d 415 (Fla. 1990), stating:

> A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. Once established, the mitigator is weighed against any aggravating circumstances. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review. (emphasis supplied.)

Ferrell at S75.

The trial court in the present case did not follow Campbell and this case should be reversed.

POINT 17

SECTION 921.141, FLORIDA STATUTES, IS UNCONSTITUTIONAL.

The death penalty is unconstitutional for the following reasons:

Prosecutorial discretion:

An individual indicted for first-degree murder does not face the death penalty in the State of Florida and in the Seventh Judicial Circuit unless the prosecuting attorney makes a conscious decision to seek the ultimate sanction. Because of the lack of adequate guidelines, the decision to seek a death sentence will depend on the whim of the individual prosecutor. Without legislative enacted guidelines the differences in prosecutors will inevitably lead to arbitrary and capricious actions. While the Supreme Court of Florida reviews all death sentences imposed in this state, the statute may be rendered arbitrary and capricious in its application by the fact that many prosecutors will not request a death sentence, whereas other prosecutors, faced with the same set of facts, will successfully seek a death sentence.

In Gregg v. Georgia, Justice Stewart stated that where discretion is afforded a sentencing body on a matter so grave as the determination as to whether human life should be taken or spared, that discretion must be suitable directed and limited so as

to minimize the risk of wholly arbitrary and capricious acts. Gregg v. Georgia, 428 U.S. 152, 188-189 (1976).

Florida's death penalty statutory scheme contains no directions or guidelines to minimize the risk of wholly arbitrary and capricious action by the prosecutor in his decision to seek a death sentence in a particular case.

The United States District Court, Central District of Illinois, vacated Charles Silagy's death sentence and declared the Illinois death penalty statute to be unconstitutional based upon the precise argument presented above. United States of America ex. rel. Charles Silagy v. Howard Peters, III, et. al., 713 F.Supp. 1246 (C. D.Ill. 1989).[2] In so ruling, the federal district judge pointed out that four justices of the Illinois Supreme Court have joined in writing that statute violates the provisions of the Eighth Amendment of the Federal Constitution. In his order, the federal district judge adopts the rational of Justice Ryan in People v. Cousins, 77 Ill. 2d 5531, 558-69 (1979) (Ryan, J., dissenting) cert. denied 445 U.S. 953 (1980).

Florida's death penalty statute contains no legislative guidelines to aid, direct, and limit a prosecutor's decision to seek results in an arbitrary, capricious, and freakish imposition of death sentences in this circuit and in this state.

Advisory Role of Jury:

It is unconstitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been lead

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[2]Reversed Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990).

to believe that the responsibility for determining the appropriateness of the Defendant's death rests elsewhere. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 2638 (1985).

The Eleventh Circuit Court of Appeals held that the Caldwell rationale applies to Florida's sentencing scheme. Adams v. Wainwright, 804 F.2d 1526, 1529-1530 (11th Cir. 1987). The United States Supreme Court reversed the Eleventh Circuit in Dugger v. Adams, 109 S.Ct. 1211 (1989) solely on the issue of procedural default and did not reach the merits of the issue. Mann v. Dugger, 944 F.2d 1446 (11th Cir. 1988). The Court in Adams granted a petition for writ of habeas corpus, despite the lace of objection. 804 F.2d at 1530-1531.

Cruel and Unusual Punishment:

Death by electrocution is cruel and unusual punishment as prescribed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Punishment must not involve the unnecessary and wanton infliction of pain. Furman v. Georgia, 408 U.S. at 392-393, 92 S.Ct. 2805-2806. The procedure for electrocution followed in Florida, including the "ritual" immediately preceding execution involves unnecessary and wanton infliction of pain, unnecessary mutilation of the body of the accused, and unnecessary and wanton infliction of psychological torture. See Deathwork, James McClendon (1977 J.B. Lippencott Company).[3]

[3]Contra, Buenoano v. State, 565 So.2d 309 (Fla. 1990).

Automatic Aggravator and Burden Shifting:

Section 921.141, as amended by Chapter 79-353 (1979), is unconstitutional in that the addition of a new aggravating factor makes the death sentence the presumptively proper sentence for all murders of the first degree. Premeditated and felony murder are now automatically aggravated offenses. As a result, Florida has created, in essence, a mandatory death sentence for homicides in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9, 16 and 17 of the Florida Constitution. Roberts v. Louisiana, 431 U.S. 633 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976); Shue v. State, 366 So.2d 387, 390 (Fla. 1978); Purdy v. State, 343 So.2d 4, 6 (Fla. 1977); State v. Dixon, 283 So.2d 1 (Fla. 1973).

Additionally, the effect of this death presumption is to place the burden of proof that death is not the appropriate sentence upon the Defendant. This shift in the burden is particularly devastating where the Defendant is indigent and without the funds and resources available to the State of Florida and its police and administrative networks. As a result, the Defendant is denied his right to Due Process of Law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9 of the Florida Constitution. Sandstrom v. Montana, 442 U.S. 684 (1979); Mullaney v. Wilbur, 421 U.S. 684 (1975); Mason v. Balkoom, 669 F.2d 222 (5th Cir. Unit B, 1982); but cf. Arango v. State, 411 So.2d 172, 174 (Fla. 1982) (burden did not shift because of particular instruction given).

Concern over the severity and finality of the death penalty has mandated that any discretion in imposing the death penalty be narrowly limited. Gregg v. Georgia, 482 U.S. 153, 188-189 (1976); Furman v. Georgia, 408 U.S. 238 (1972). The Court in Gregg interpreted the mandate of Furman to impose these severe limits because of the uniqueness of the death penalty.

The Court in Gregg went on to hold that:

> Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

428 U.S. at 189. Thus, it is clear that capital sentencing discretion must be strictly guided and narrowly limited.

The manner by which Florida (like most states) has attempted to guide sentencing discretion is through the propounding of aggravating circumstances. The United States Supreme Court has held that the aggravating circumstances must channel sentencing discretion by clear and objective standards.

In Godfrey, the Supreme Court held that capital sentencing discretion can be suitably directed and limited only if aggravating circumstances are sufficiently limited in their application to provide principled, objective bases for determining the presence of the circumstances in some cases and their absence in others. Although the state courts remain free to develop their own limiting constructions of aggravating circumstances, the limiting construction must, as a matter of Eighth Amendment law, be both

instructed to sentencing juries and consistently applied from case to case. Id. at 429-433. In Godfrey, the Court examined the use of one particular aggravating circumstance. It first found the jury instruction concerning this circumstance deficient for failing to limit the circumstance in any meaningful way. Id. at 428-429. The court then examined the facts of the case and determined that while the Georgia Supreme Court had developed three criteria limiting the application of this circumstance, "[T]he circumstances of this case...do not satisfy the criteria laid out of the Georgia Supreme Court itself..." Id. at 432. Thus, it is clear that an aggravating circumstance must be applied in a consistent, narrow fashion; that is neither arbitrary nor capricious.

In Zant v. Stephens, 462 U.S. 862 (1983) the United States Supreme Court reaffirmed that an aggravating circumstance can be so vague, or arbitrarily applied, that it would: [F]ail to adequately so channel the sentencing decision patterns of the juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur. Zant, 462 U.S. at 877, 103 S.Ct. at 2786.

In McCleskey v. Kemp, 481 U.S. 279, (1987), the Supreme Court again emphasized the constitutional requirement that an opportunity must genuinely narrow the class of persons eligible for the death penalty, according to rational criteria, which are rationally and consistently applied.

> Our decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below

> which the death penalty cannot be imposed. In this context, the state must establish rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case meet the threshold.

McClesky v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 1774 (1987).

It is well established that, although a state's death penalty statute is constitutional, an individual aggravating circumstances may be so vague, arbitrary, or overboard as to be unconstitutional. State v. Chaplin, 437 A.2d 327, 330 (Del. Super. Ct. 1981); State v. White, 395 A.2d 1082 (Del. 1978); People v. Superior Court (Engert), 647 P.2d 76 (Cal. 1982); Arnold v. State, 224 S.E. 2d 386 (Ga. 1976); Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987); Collins v. Lockhart, 754 F.2d 958 (8th Cir.), cert denied, 106 S.Ct. 546 (1985).

POINT 18

> THE DEATH SENTENCE IS DISPROPORTIONATE TO THE FACTS OF THIS CASE THUS VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In addition to the cases previously cited, Appellant cites the following in support of his proportionality argument.

In Thompson v. State, 647 So.2d 824 (Fla. 1994) the only aggravating circumstance was that the murder was committed in the course of a robbery. There was "significant" mitigation in the record. Thompson at 827. In Thompson the nonstatutory mitigation was that Thompson was a good parent and provider and that he had exhibited no violent propensities prior to the killing. Thompson

at 826, n.2. The trial judge had also noted Thompson received an honorable discharge, maintained employment, was raised in the church, had been a good prisoner and had artistic skills, although all this was discounted as mitigation. Thompson at 826 n.2.

In Chaky v. State, 20 Fla. L. Weekly (Fla. March 2, 1994) the only aggravating circumstance was a prior violent felony, an attempted murder. The non-statutory mitigating circumstances were (1.) contribution to society by exemplary work, military and family record and (2.) remorse and potential for rehabilitation and good prison record. In Chaky this court found the death penalty disproportionate, citing Lloyd v. State, 524 So.2d 396 (Fla. 1988); Proffitt v. State, 510 So.2d 896 (Fla. 1987); Caruthers v. State, 465 So.2d 496 (Fla. 1985); and Rembert v. State, 445 So.2d 337 (Fla. 1984). The present case is comparable to Chaky and the above-cited cases in that there is only one, if any, aggravating circumstance, and mitigation exists that was not acknowledged by the trial court.

CONCLUSION

Based upon the cases, authorities and policies cited herein, Appellant requests that this Honorable Court grant the following relief:

As to Points 1 - 10, reverse and remand for a new trial;

As to Points 11, 12, 13, 16, remand for the impositon of a life sentence or, in the alternative, a new penalty phase;

As to Points 14 and 15, remand for a new penalty phase;

As to point 18, remand for the imposition of a life sentence; and,

As to point 17, remand for the imposition of a life sentence or, in the alternative, delcare Florida's Death Penalty Statue to be unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery to Barbara J. Yates, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32399-1050, on this 16 day of May, 1995.

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