IN THE SUPREME COURT OF FLORIDA

JAMES MILTON DAILEY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 83,160

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The appellant, James Milton Dailey, was indicted for the first-degree premeditated murder of Shelly Boggio which occurred on May 5 or 6, 1985, by the Pinellas County Grand Jury on January 22, 1986. (R 7-8)[1] Defense counsel moved to dismiss the indictment (R 15-22) on the grounds, inter alia, that the avoid arrest, heinous, atrocious, or cruel (HAC), and cold, calculated, and premeditated (CCP) aggravating circumstances were unconstitutionally vague and overbroad, making it impossible for the trial judge to instruct the jury in a manner that was not unnecessarily discretionary. (R 17-18) The court denied the motion. (OR 1594)

Dailey was tried by jury, convicted, and sentenced to death in accordance with the jury's unanimous recommendation in 1987. (R 38-53) Defense counsel renewed all prior motions, and the court again denied them, at the close of the State's case, at the close of all the evidence, and at the conclusion of the guilt phase jury instructions. (OR 1197, 1226, 1316) At the beginning of the penalty phase, defense counsel objected to jury instructions on the HAC aggravating factor without further argument, on the avoid arrest aggravating factor because of insufficient evidence, and on the CCP aggravating factor because of insufficient evidence that the crime was cold and calculated. (OR 1327-28, 1330-31) The

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[1] References to the record on appeal are designated by "R" and the page number. References to the original record on appeal in Case No. 71,164 are designated by "OR" and the page number. References to the appendix to this brief are designated by "A" and the page number.

court overruled the objections and gave instructions on all three factors, as well as felony murder and prior violent felony conviction. (OR 1328, 1331-33, 1426-27) Defense counsel moved for a new trial on several grounds, including that the court erred in instructing the jury during the penalty phase. (OR 157) The trial court found all five aggravators to apply. (OR 233-37) The original sentencing order is reproduced in full in the appendix to this brief. (A 1-8)

On appeal in Case No. 71,164, this Court affirmed the conviction, but reversed the death sentence, and remanded for resentencing by the trial court. (R 55-67) This Court's opinion in that appeal, Dailey v. State, 594 So. 2d 254 (Fla. 1991), is reproduced in full in the appendix to this brief. (A 9-14) This Court held that the trial court erred by finding two aggravating circumstances which were not supported by the evidence, avoid arrest and CCP. (R 65; A 14) This Court also held that the trial court erred by giving no weight to numerous mitigating circumstances and by considering evidence from the trial of Dailey's co-defendant, Jack Pearcy, which was not introduced in Dailey's trial. (R 65-66; A 14)

Following the remand, defense counsel moved to disqualify the sentencing judge, the Honorable Thomas E. Penick, on the ground that he had a fixed opinion as to the appropriate sentence as shown by his prior consideration of the evidence from Pearcy's trial, his improper consideration of aggravating factors, and his improper rejection of mitigating factors, so Dailey feared that he would not receive a fair sentencing hearing. (R 159-62, 164-65) Judge

Penick denied the motion on the ground that it was legally insufficient. (R 254-55, 267-71)

Defense counsel moved for a new penalty phase trial on the grounds that the original jury recommendation of death was invalid because the jury was improperly instructed on two aggravating factors for which there was insufficient evidence, avoid arrest and CCP, and that the jury instruction on the HAC aggravating factor was unconstitutionally vague. (R 207-09, 310-21, 338-47) The court denied the motion on the grounds that prior defense counsel failed to state any basis for his objection to the HAC instruction at the original penalty phase trial, and that the error was harmless because the facts were so indicative of HAC there was no reasonable possibility that the instruction influenced the jury. (R 214-16)

The court conducted a resentencing hearing on December 9, 1993. (R 281-307) Defense counsel filed a sentencing memorandum identifying several mitigating factors, including Dailey's service in the Air Force with three tours of duty in Vietnam, a subsequent drinking problem for which he received treatment, his rescue of two drowning victims when he was in high school, that he was a good husband and father, impaired capacity and mental or emotional disturbance because he was drunk on the night of the offense, and testimony by Oza Dwaine Shaw that Dailey did not go with Pearcy and Shaw when they left Dailey's house with the victim. (R 231-35, 283-84) He argued that the court's order denying his motion for a

new penalty phase trial relied on evidence from Pearcy's trial and renewed the motion. (R 285-86)

Dailey read a written statement asserting his innocence. (R 236-37, 287-92) He complained about the trial errors found to be harmless on appeal. (R 236, 287-88) He denied that he had ever talked to State's witness Paul Skalnik. (R 236, 288) He explained that he was not requesting the death penalty but preferred to die rather than serve a life sentence for a crime he did not commit. (R 236, 289) He explained that he was not a drifter but had served honorably in the United States Air Force for 12 1/2 years with three tours in Vietnam and had worked for 6 1/2 years for four companies in Kansas. (R 236, 289-90) He complained because the court denied his motions to disqualify and for a new penalty phase trial but was still relying on evidence from Pearcy's trial. (R 237, 290-91) He presented a copy of an excerpt from the transcript of his own trial in which Skalnik testified that Dailey said Pearcy also stabbed the victim and Pearcy held her under. Dailey asserted that this was the only evidence at his trial that anyone held her under water to drown. (R 237-38, 291-92)

The prosecutor argued that three aggravating factors remained valid, Dailey's prior conviction for aggravated battery in Arizona in 1977, commission during the course of an attempted sexual battery, and HAC. (R 295-98) He argued that the mitigating circumstances did not outweigh the aggravators and that the court should give great weight to the jury's unanimous death recommendation. (R 298-302)

Defense counsel responded that there was no evidence that Dailey drowned the victim nor that he was present when it occurred and that the jury's recommendation was flawed by its consideration of unproven aggravating factors. (R 302-05) He asserted that since Pearcy was sentenced to life, Dailey should also be sentenced to life. (R 305)

On January 21, 1994, the court resentenced Dailey to death. (R 242-53, 349-65) The court's written resentencing order is reproduced in full in the appendix to this brief. (A 15-21) The court found three aggravating factors, prior conviction of a violent felony, commission during an attempt to commit sexual battery, and HAC. (R 247-49, 352-55; A 15-17) The court found no evidence to support the mitigating factors of mental or emotional disturbance, minor participation in the offense, extreme duress, substantial domination of another, impaired capacity, history of alcohol abuse, intoxication at the time of the offense, nor that someone else committed the homicide. (R 249-52, 356-62; A 17-19)

The court found that the evidence did establish several mitigating factors, including: (1) Dailey served in the Air Force and three tours of duty in Vietnam, which the court gave "some weight," (2) Dailey was good to his family and helpful around the home, which the court gave "weight," (3) Dailey was not violent towards his family, which the court gave "little weight" because of his prior violent felony, (4) Dailey saved two young people from drowning while he was in high school, which the court gave "some weight" while also finding that it did not mitigate the offense of causing

the death of another young person by drowning, and (5) Dailey and the victim had been partying and visited some bars together on the night of the offense, which the court gave some, but not much weight. (R 250-52, 360-62; A 19-20)

Defense counsel filed a notice of appeal on January 21, 1994. (R 257)

STATEMENT OF THE FACTS

This Court found the following facts in its prior decision on appellant's case, Dailey v. State, 594 So. 2d 254, 255-56, 258 (Fla. 1991):

On May 5, 1985, fourteen-year-old Shelly Boggio, her twin sister Stacey, and Stephanie Forsythe were hitchhiking near St. Petersburg when they were picked up by James Dailey, Jack Pearcy, and Dwaine Shaw. The group went to a bar and then to Pearcy's house, where they met Gayle Bailey, Pearcy's girlfriend. Stacey and Stephanie returned home. Shelly, Gayle, and the men went to another bar and then returned to Pearcy's house about midnight. Shelly left in the car with Dailey and Pearcy, and when the two men returned without Shelly several hours later, Dailey was wearing only a pair of wet pants and was carrying a bundle. The next morning, Dailey and Pearcy visited a self-service laundry and then told Gayle to pack because they were leaving for Miami. Shelly's nude body was found that morning floating in the water near Indian Rocks Beach. She had been stabbed, strangled, and drowned. (R 56-57; A 10-11) Shelly had rebuffed Dailey's advances earlier that evening. She had been stabbed both prior to and after removal of her shirt. Her underwear was found 140 feet from her other clothing, with a trail of blood leading from the clothing to the underwear. (R 64; A 13) Dailey and Pearcy were charged with her death. (R 57; A 11)

Pearcy was convicted of first-degree murder and sentenced to life imprisonment. At Dailey's subsequent trial, three inmates from the county jail testified that Dailey had admitted the killing

to them individually and had devised a plan whereby he would later confess when Pearcy's case came up for appeal if Pearcy in turn would promise not to testify against him at his own trial. Pearcy refused to testify at Dailey's trial. Dailey presented no evidence during the guilt phase. (R 57; A 11) During the penalty phase, the court qualified Detective Halliday as an expert in homicide and sexual battery and allowed him to testify that because the victim's body was found nude and her clothing scattered, it was highly likely that a sexual battery or attempt had occurred. (R 63; A 13)

Appellant respectfully requests this Court to consider the following additional facts developed during the original trial:

Dailey had a drinking problem. (OR 966) On the day preceding the offense, Dailey, Pearcy, and Shaw spent the entire day, beginning at 8:00 a.m., riding around drinking beer and wine coolers. (OR 995, 1002) They continued drinking after they picked up the girls. (OR 996, 1002-03) When they went to Pearcy's house, the men and the girls smoked marijuana. (OR 901-02, 973-75, 1003-04) Stacey Boggio testified that they had four joints. (OR 907-08) Stacey could not remember whether they drank at the house, nor whether they smoked more marijuana in the car when they took Stephanie and Stacey to Stephanie's house, but she could tell that everyone in the car was "buzzed." (OR 908-09) Gayle Bailey said they did not drink at the house. (OR 967, 973) Shaw said they were drinking beer at the house. (OR 996-97) Shaw was drinking "pretty heavy" that day, and Dailey and Pearcy were drinking about the same amount. (OR 1003) Shaw did not pay much attention to the

others' level of sobriety; he passed out drunk on the couch. (OR 1003-04, 1009) The next day, Bailey found beer cans and bottles in her car. (OR 961)

Dailey and Mary Kay Dollar began dating in high school in Manhattan, Kansas, in 1962. (OR 1364-65) At a high school graduation party, Dailey saved a young couple from drowning. (OR 1371) Dailey enrolled at Kansas State College, but he left school due to emotional and financial problems after his father died. His mother had to provide for his two brothers and his sister. (OR 1366) Dailey worked in electronics for awhile, then joined the Air Force in 1965. Dailey and Mary were married at the age of twenty in 1966. (OR 1365-66) Dailey was stationed in Tucson, Arizona, at that time. He worked in electronics and became a staff sergeant. He was very good at his job. (OR 1367) Dailey served in Vietnam three times, and he was also stationed in Germany, Korea, and the Philippines. (OR 1369-70) Dailey was very talented at carpentry, played guitar, sang in a church choir, and taught Sunday school. (OR 1373)

The Daileys had two children, James Michael and Stacey Ray. (OR 1368-74) Dailey was a very good husband and father when he was sober; he never abused Mary or the children. (OR 1370) However, after his first tour in Vietnam, he developed a drinking problem which became progressively worse. (OR 1370, 1374-75) Dailey was twice admitted for treatment for his drinking while in the Philippines. (OR 1375) Dailey's drinking resulted in their divorce after ten years of marriage. (OR 1366-67, 1375) Mary

married Richard Dollar, one of Dailey's Air Force friends, in 1978. (OR 1368)

Mary had never seen Dailey get into a fight except to defend a woman. In 1970, a friend had asked him to look after his family while he was overseas. One night Dailey stopped by the house and discovered the man's daughter having an argument with her boyfriend. When Dailey intervened, the boyfriend stabbed him eleven times; Dailey nearly died. On two other occasions, Dailey got into scuffles with men who were bothering women. (OR 1371-72)

Richard Dollar met Dailey and Mary while they were stationed in Arizona in 1966. (OR 1377-78) Dailey was an airborne communication specialist, a radio technician. (OR 1378) Dailey was very good at his job; Dollar relied upon his expertise. They served together in Vietnam twice. Dailey did exceptionally well in the service. "He was a recruiter[']s dream." (OR 1379) Dollar could not state with certainty that Dailey developed a drinking problem in the service, but they drank together numerous times; drinking is more or less a part of service life. (OR 1379-80) Dailey was very fond of his children. He permitted Dollar to adopt them after Dollar and Mary were married. (OR 1382)

Dailey had a loving relationship with his daughter Stacey, who was eighteen at the time of the trial. They had remained in contact following the Daileys' divorce. During one of his visits, he sang a song he had written for her. He sent her birthday cards expressing his love for her. (OR 1383-88)

Dailey also had a loving relationship with his mother, Grace Davies. He was the oldest of four children. He was "so sweet and loving and kind-hearted and he always thought of all of these things to do for people and he's so tender hearted." He always remembered his mother's birthday. (OR 1389-90, 1392) Dailey was a talented singer who starred in two musicals in high school and sang in the church choir. (OR 1391) He made end tables and headboards for twin beds which his mother still used. (OR 1392) His father died suddenly when Dailey was eighteen; it took a long time for the family to adjust to his death. (OR 1390-92) Dailey was in his second semester of college and was working in a theater. His mother could not afford to keep him in school after his father's death. (OR 1392) Dailey went into the Air Force and served three tours in Vietnam. When he returned, he had changed. He also served in Korea, the Philippines, and Germany; he had been to 26 countries and 48 states. (OR 1393)

Regarding Dailey's prior conviction for aggravated battery, Dailey told Mary Dollar and his mother that the other man threatened him with a pool stick before Dailey hit him, either with the pool stick or his fist. (OR 1376, 1394) The other man suffered an eye injury. (OR 1394)

SUMMARY OF THE ARGUMENT

I. The trial court erred by denying Dailey's motion for a new penalty phase trial and by relying upon an invalid jury death recommendation in resentencing Dailey to death. The death recommendation was invalid because the jury instructions on the HAC, avoid arrest, and CCP aggravating factors were unconstitutionally vague in that they failed to inform the jury of the limiting constructions of those factors. Espinosa v. Florida, 505 U.S. __, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992); Jackson v. State, 19 Fla. Law Weekly S215 (Fla. April 21, 1994). Also, this Court had ruled on Dailey's appeal that the evidence did not support the avoid arrest and CCP aggravating factors. Dailey v. State, 594 So. 2d 254, 259 (Fla. 1991). Florida law prohibits jury instructions on aggravating factors which are not supported by the evidence. Padilla v. State, 618 So. 2d 165, 170 (Fla. 1993); Archer v. State, 613 So. 2d 446, 448 (Fla. 1993). The trial court's reliance upon the tainted death recommendation was fundamentally unfair and violated his constitutional rights requiring due process of law and prohibiting cruel and unusual punishment. This Court must vacate the death sentence and remand for a new penalty phase trial with a new jury.

II. One of the reasons this Court reversed Dailey's original death sentence was the trial court's failure to weigh any of the mitigating circumstances established by the evidence. Dailey, 594 So. 2d at 259. The sentencer in a capital case must consider all

relevant mitigating factors. Eddings v. Oklahoma, 455 U.S. 104, 113-14, 102 U.S. 869, 71 L. Ed. 2d 1 (1982); U.S. Const. amends. VIII and XIV. The trial court must find and weigh every mitigating circumstance supported by a reasonable quantum of competent, uncontroverted evidence. Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). Yet the trial court expressly rejected two recognized mitigating factors established by the evidence at trial, Dailey was under the influence of alcohol and marijuana on the night of the offense and had a history of alcohol abuse. The court also ruled that Dailey's prior act of saving a young couple from drowning was not mitigating. The court failed to expressly consider other mitigating circumstances established by uncontroverted evidence: Dailey's character trait of trying to rescue others at substantial risk to himself was shown not only by the prior drowning incident, but also by his defense of a young woman in a dispute with a young man who repeatedly stabbed Dailey with a knife, and his intervention when other men were bothering women. Dailey's potential for rehabilitation was shown by his excellent work record as an Air Force radio technician, his talent for carpentry and music, and his capacity to form loving relationships with his mother and daughter. This Court must vacate the death sentence and remand for resentencing.

III. Trial before an unbiased judge is essential to due process of law under the state and federal constitutions. Johnson v. Mississippi, 403 U.S. 212, 216, 91 S. Ct. 1778, 29 L. Ed. 2d 423 (1971); Crosby v. State, 97 So. 2d 181, 184 (Fla. 1957). When the

accused has reasonable grounds to fear that the judge is not impartial, the judge must grant his motion to disqualify. The test for determining the legal sufficiency of the motion is not whether the judge is actually biased, but whether a reasonably prudent defendant would fear that the judge was not impartial. Rogers v. State, 630 So. 2d 513, 515 (Fla. 1993). Dailey reasonably feared that Judge Penick could not be impartial at resentencing because he had improperly considered evidence from Pearcy's trial, relied upon unproven aggravating factors, and rejected established mitigating factors in sentencing Dailey to death. The court's denial of the motion to disqualify violated due process and was a structural defect in the proceedings which is not subject to harmless error review. Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). This Court must vacate the death sentence and remand for a new penalty phase trial with a new jury and a different judge.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR A NEW PENALTY PHASE TRIAL BECAUSE THE JURY'S DEATH RECOMMENDATION WAS BASED ON INVALID JURY INSTRUCTIONS ON THREE OF FIVE AGGRAVATING FACTORS, HAC, AVOID ARREST, AND CCP, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE FLORIDA CONSTITUTION.

This Court reversed Dailey's original death sentence because of several errors in the sentencing order, including the trial court's findings of two aggravating circumstances, avoid arrest[2] and cold, calculated, and premeditated[3] (CCP), which were not supported by the evidence. Dailey v. State, 594 So. 2d 254, 259 (Fla. 1991). (R 65-67; A 14) The Court remanded for resentencing before the trial judge. Id.

Defense counsel moved for a new penalty phase trial on the grounds that the original jury recommendation of death was invalid because the jury was improperly instructed on two aggravating factors for which there was insufficient evidence, avoid arrest and CCP, and that the jury instruction on the heinous, atrocious, or cruel[4] (HAC) aggravating factor was unconstitutionally vague. (R 207-09, 310-21, 338-47) The court denied the motion, (R 214-16) and relied upon the original jury's death recommendation in

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[2] § 921.141(5)(e), Fla. Stat. (1985).

[3] § 921.141(5)(i), Fla. Stat. (1985).

[4] § 921.141(5)(h), Fla. Stat. (1985).

resentencing Dailey to death. (R 247-52, 351-63; A 15-21) The court's reliance upon the improperly instructed jury's death recommendation violated Dailey's state and federal constitutional rights requiring due process of law and prohibiting cruel and unusual punishment. U.S. Const. amends. VIII and XIV; Art. I, §§ 9 and 17, Fla. Const.

Due process of law requires the court to properly instruct the jury on the law applicable to the case; in particular, the court must define each essential element of the offense charged. Screws v. United States, 325 U.S. 91, 107, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945); State v. Delva, 575 So. 2d 643, 644 (Fla. 1991); Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (Fla. 1945). In a capital case, due process and the prohibition against cruel and unusual punishment require the court to properly instruct the jury on the essential elements of the aggravating circumstances upon which the State relies in seeking the death penalty. See Espinosa v. Florida, 505 U.S. __, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992); Jackson v. State, 19 Fla. Law Weekly S215 (Fla. April 21, 1994).

The weighing of an invalid aggravating circumstance violates the Eighth Amendment. Espinosa, 120 L. Ed. 2d at 858. An aggravating circumstance is constitutionally invalid if it is so vague that it leaves the sentencer without sufficient guidance for determining the presence or absence of the factor. Id. When the jury is instructed that it may consider such a vague aggravating circumstance, it must be presumed that the jury found and weighed an invalid circumstance. Id., at 858-59. Because the sentencing

judge is required to give great weight to the jury's sentencing recommendation, the court then indirectly weighs an invalid circumstance. Id., at 859. The result of this process is error because it creates the potential for arbitrariness in imposing the death penalty. Id.

Under Florida law the same potential for arbitrariness in imposing the death penalty is created by instructing the jury on an unproven aggravating circumstance. As a matter of state law, it is error to instruct the jury on aggravating factors which are not supported by the evidence. Padilla v. State, 618 So. 2d 165, 170 (Fla. 1993); White v. State, 616 So. 2d 21, 25 (Fla. 1993); Archer v. State, 613 So. 2d 446, 448 (Fla. 1993). In all three cases, this Court vacated the death sentence. In Padilla and Archer, the Court remanded for a new sentencing proceeding with a new jury because of the erroneous instruction. In White, the Court found that death was disproportionate and remanded for a life sentence.

In Sochor v. Florida, 504 U.S. __, 112 S. Ct. 2114, 119 L. Ed. 2d 326, 340 (1992), the Supreme Court stated that it would not presume that a properly instructed jury relied upon an unproven aggravating factor, reasoning that "although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by the evidence." But in Dailey's case, as in many other capital cases reviewed by this Court, the prosecution persuaded the sentencing judge to rely upon unproven aggravating circumstances. Given the judge's legal training and experience, it is more likely than not that the prosecutor also

persuaded the jury to rely upon the unproven aggravators. Thus, due process and the prohibition of unusual punishment under Article I, sections 9 and 17 of the Florida Constitution require evidentiary support for jury instructions on aggravating factors, and this Court should presume that when the sentencing judge relied upon unproven aggravators, the jury also relied upon those factors in recommending death.

Moreover, the Sochor presumption that the jury did not rely on unproven factors does not apply to Dailey's case because the jury was not properly instructed on the HAC, avoid arrest, and CCP aggravating factors. The court failed to inform the jury of the limiting constructions placed upon the otherwise vague statutory factors. This Court has ruled:

> A vagueness challenge to an aggravating circumstance will be upheld if the provision fails to adequately inform juries what they must find to recommend the death penalty and as a result leaves the jury and the appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

Jackson, 19 Fla. Law Weekly at S216.

The HAC jury instruction held to be unconstitutionally vague in Espinosa was "especially wicked, evil, atrocious or cruel." Id., 120 L. Ed. 2d at 858. The exact language used in this case, "especially heinous, atrocious or cruel," (OR 1426) merely repeated the statutory aggravator provided by section 921.141(5)(h), Florida Statutes (1985), and was held to be unconstitutionally vague in

Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988).

The avoid arrest jury instruction in this case was that the offense "was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." (OR 1426-27) Again, the instruction mirrored the statutory aggravator provided by section 921.141(5)(e), Florida Statutes (1985). This instruction suffered from the same constitutional defect as the HAC instruction, it failed to provide sufficient guidance for the jury to determine the presence or absence of the factor because it failed to inform the jury of this Court's limiting construction of the otherwise vague aggravator:

> To establish this factor, the evidence must show that the "dominant motive" for the murder was the elimination of a witness. White v. State, 403 So. 2d 331, 338 (Fla. 1981), cert. denied, 463 U.S. 1229, 103 S. Ct. 3571, 77 L. Ed. 2d 1412 (1983).

Dailey, 594 So. 2d at 259. (R 65; A 14)

The CCP instruction also mirrored the statutory factor provided by section 921.141(5)(i), Florida Statutes (1985), that the offense "was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." (OR 1427) In Jackson, 19 Fla. Law Weekly at S216-17, this Court ruled that this standard CCP jury instruction is unconstitutionally vague because it does not inform the jury of the limiting construction this Court has given the CCP factor:

> Thus, in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of

> cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold),...and that the defendant had a careful plan or prearranged design to commit the murder before the fatal incident (calculated),...and that the defendant exhibited heightened premeditation (premeditated),...and that the defendant had no pretense of moral or legal justification....Certainly these requirements call for more expansive instructions to give content to the CCP statutory factor. Otherwise, the jury is likely to apply CCP in an arbitrary manner....[Citations and footnote omitted.]

The trial court denied Dailey's motion for a new penalty phase trial on the grounds that prior defense counsel failed to expressly object to the vagueness of the HAC instruction at trial and the error was harmless because the facts were so indicative of HAC that there was no reasonable possibility that the instruction erroneously influenced the jury. The court gave no reason for denying the motion in regard to the avoid arrest and CCP factors. (R 214-16)

While it is true that counsel did not state a reason for his objection to the HAC instruction during the penalty phase charge conference, (OR 1374) counsel had moved to dismiss the indictment prior to trial (R 15-22) on the grounds, inter alia, that the avoid arrest, HAC, and CCP aggravating circumstances were unconstitutionally vague and overbroad, making it impossible for the trial judge to instruct the jury in a manner that was not unnecessarily discretionary. (R 17-18) The court denied the motion. (OR 1594) Defense counsel renewed all prior motions, and the court again denied them, at the close of the State's case, at the close of all the evidence, and at the conclusion of the guilt phase jury instructions. (OR 1197, 1226, 1316) At the beginning of the

penalty phase, defense counsel objected to jury instructions on the HAC factor without further argument, on the avoid arrest factor because of insufficient evidence, and on the CCP factor because of insufficient evidence that the crime was cold and calculated. (OR 1327-28, 1330-31) The court overruled the objections and gave instructions on all three factors. (OR 1328, 1331-33, 1426-27) Defense counsel moved for a new trial on several grounds, including that the court erred in instructing the jury during the penalty phase. (OR 157) Thus, Dailey had raised the issues of the vagueness of the instructions and the lack of evidentiary support for avoid arrest and CCP during the original trial proceedings.

Even if Dailey's motions and objections concerning the HAC, avoid arrest, and CCP instructions were insufficient to preserve the issues for appeal or collateral review of the original death sentence, that sentence was reversed before the court denied Dailey's motion for a new penalty phase trial. Because the court had not yet imposed a lawful death sentence, Dailey's motion was sufficiently timely to give the trial court the opportunity to correct the jury instruction errors by empaneling a new jury and conducting a new penalty phase trial. While this process might have been costly and time consuming, judicial inconvenience is no excuse for arbitrarily accepting an unreliable jury recommendation of death. It was fundamentally unfair for the court to give great weight to a death recommendation tainted by unconstitutionally vague instructions on three of five aggravating factors, especially

when two of those factors were factually unsupported and inapplicable to the case.

Because there is a particular need for reliability in determining whether to impose the death sentence, Zant v. Stephens, 462 U.S. 862, 884-85, 103 S. Ct. 2733, 72 L. Ed. 2d 235 (1983), the court's error in relying upon a constitutionally invalid death recommendation by the jury cannot be found harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The jury's recommendation must have been affected by invalid instructions on three out of five proposed aggravating factors. "If the jury's recommendation, upon which the trial judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987). The Eighth and Fourteenth Amendments require that capital punishment be imposed fairly, or not at all. Eddings v. Oklahoma, 455 U.S. 104, 114, 102 U.S. 869, 71 L. Ed. 2d 1 (1982). The death sentence must be vacated, and this case must be remanded for a new penalty phase trial with a new jury.

ISSUE II

THE TRIAL COURT FAILED TO FIND AND WEIGH MITIGATING CIRCUMSTANCES SHOWN BY THE EVIDENCE AND NOT REFUTED BY THE STATE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE FLORIDA CONSTITUTION.

One of the reasons this Court reversed the original death sentence imposed by the trial court was the court's refusal to weigh any of the mitigating factors presented by Dailey: "In its sentencing order, the trial court recognized the presence of numerous mitigating circumstances, but then accorded them no weight at all. This was error." Dailey v. State, 594 So. 2d 254, 259 (Fla. 1992). (R 66; A 14) In the trial court's order resentencing Dailey to death, the court again rejected or failed to recognize the presence of mitigating circumstances established by a reasonable quantum of competent, unrefuted evidence. (R 249-52; A 17-20) This Court must again reverse and remand for resentencing.

The Eighth and Fourteenth Amendments prohibit the State from precluding the sentencer in a capital case from considering any relevant mitigating factor, and they prohibit the sentencer from refusing to consider, as a matter of law, any relevant mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 113-14, 102 U.S. 869, 71 L. Ed. 2d 1 (1982); U.S. Const. amends. VIII and XIV. The sentencer must be allowed to consider and give effect to mitigating evidence relevant to the defendant's background and character precisely because the punishment should be directly related to the

personal culpability of the defendant. Penry v. Lynaugh, 492 U.S. 302, 327-28, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

Moreover, the Eighth and Fourteenth Amendments require that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddings, 455 U.S. at 114. To ensure fairness and consistency, this Court must conduct a meaningful independent review of the defendant's record and cannot ignore evidence of mitigating circumstances. Parker v. Dugger, 498 U.S. 308, 321, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991).

To ensure the proper consideration of evidence of mitigating circumstances, this Court has ruled that the trial court must expressly evaluate each mitigating circumstance to determine whether it is supported by the evidence and whether nonstatutory factors are truly mitigating in nature. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). The court must find that a mitigating circumstance has been proved if it is supported by a reasonable quantum of competent, uncontroverted evidence. Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). The trial court is obligated to consider all mitigating circumstances shown by the record, even when the defendant expressly asks the court not to consider any mitigating evidence. Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993). "Once established, a mitigating circumstance may not be given no weight at all." Dailey, 594 So. 2d at 259.

This Court has repeatedly held that a history of alcohol abuse and/or being under the influence of alcohol or drugs at the time of

the offense are mitigating circumstances. E.g., Knowles, 632 So. 2d at 67; Kraemer v. State, 619 So. 2d 274, 277-78 (Fla. 1993); Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1992); Downs v. State, 574 So. 2d 1095, 1099 (Fla. 1991); Nibert, 574 So. 2d at 1062-63; Buford v. State, 570 So. 2d 923, 925 (Fla. 1990).

In this case, the State's evidence during the guilt phase of the trial established that Dailey was under the influence of alcohol and marijuana on the night of the offense. Gayle Bailey testified that Dailey had a drinking problem. (OR 966) Dwaine Shaw testified that he, Dailey, and Pearcy spent the entire day, beginning at 8:00 a.m., riding around drinking beer and wine coolers. (OR 995, 1002) They continued drinking after they picked up the girls. (OR 996, 1002-03) When they went to Pearcy's house, the men and the girls smoked marijuana. (OR 901-02, 973-75, 1003-04) Stacey Boggio testified that they had four joints. (OR 907-08) Stacey could not remember whether they drank at the house, nor whether they smoked more marijuana in the car when they took Stephanie and Stacey to Stephanie's house, but she could tell that everyone in the car was "buzzed," a slang term for intoxicated. (OR 908-09) Bailey said they did not drink at the house. (OR 967, 973) Shaw said they were drinking beer at the house. (OR 996-97) Shaw was drinking "pretty heavy" that day, and Dailey and Pearcy were drinking about the same amount. (OR 1003) Shaw did not pay much attention to the others' level of sobriety; he passed out drunk on the couch. (OR 1003-04, 1009) The next day, Bailey found beer cans and bottles in her car. (OR 961)

During the penalty phase, Dailey's former wife, Mary Kay Dollar testified that after his first tour of duty in Vietnam, Dailey developed a drinking problem which became progressively worse. (OR 1370, 1374-75) Dailey was twice admitted for treatment for his drinking while in the Philippines. (OR 1375) Dailey's drinking resulted in their divorce after ten years of marriage. (OR 1366-67, 1375) Richard Dollar, Dailey's Air Force friend and Mary's second husband, could not state with certainty that Dailey developed a drinking problem in the service, but they drank together numerous times; drinking was more or less a part of service life. (OR 1379-80)

Despite this unrefuted evidence, the trial court rejected any mitigating circumstance based upon Dailey's history of alcohol abuse and his consumption of alcohol and marijuana on the day of the offense:

> However, the record is void of any creditable evidence that the defendant had an alcohol problem, let alone an alcohol problem directly attributable to battle stress or clinically labeled "Viet Nam Syndrome". Thus, this mitigating factor does not exist in this case.

(R 251; A 19)

> Again the defendant asked this court to consider that the defendant was under the influence of extreme mental or emotional disturbance and suffering from an alcohol problem as both a statutory mitigating factor and a non-statutory mitigating circumstance. The crux of this non-statutory mitigating factor is that the defendant's use of alcohol resulting from his tours in Viet Nam and over a period of time has taken a toll on the defendant's mind and body. In this case the defendant has not shown these circumstances to exist. The witnesses who testified about the

> defendant's appearance and condition when he returned home the night of the capital felony did not describe him as being intoxicated, under the influence of any substance or suffering from any mental or emotional condition. Fellow inmates who testified at the defendant's trial testified that defendant's recollections of the circumstances on the night of the homicide were clear and detailed, not confused or unbelievable.

(R 252; A 20)

Dailey's former wife also testified that he saved a young couple from drowning at their high school graduation party. (OR 1371) Furthermore, Mary had never seen Dailey get into a fight except to defend a woman. In 1970, a friend had asked him to look after his family while he was overseas. One night Dailey stopped by the house and discovered the man's daughter having an argument with her boyfriend. When Dailey intervened, the boyfriend stabbed him eleven times; Dailey nearly died. On two other occasions, Dailey got into scuffles with men who were bothering women. (OR 1371-72)

Surely Dailey's propensity to try to rescue others from danger, even when his efforts resulted in danger or severe injury to himself, was an aspect of his character which ought to be found mitigating under Eddings, Penry, and Campbell. Yet the court ignored the evidence of this personality trait, other than the rescue of the drowning couple, and found that incident was not mitigating:

> The court gave some weight to the mitigating factor that the defendant saved two young people from drowning when he was in high school. However, the saving of two people from drowning does not alleviate the serious-

> ness or mitigate the subsequent criminal act of causing the death of a young person by drowning.

(R 252; A 20)

The court's findings are particularly puzzling because the court first said it gave some weight to this mitigating factor, then said it was not mitigating. In Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990), this Court ruled that the trial court's findings must be of unmistakable clarity. The Court reversed Lucas's sentence and remanded for reconsideration and reweighing of the findings of fact because the sentencing order was unclear regarding the court's findings on statutory mitigating circumstances and because the order did not mention the nonstatutory mitigating circumstances shown by the record. Id., at 23-24. The resentencing order in this case suffers from the same defects. The order is not clear regarding the court's findings about the drowning rescue and does not mention other relevant mitigating evidence.

Other mitigating circumstances were shown by the evidence and not mentioned in the resentencing order. While the court gave some weight to Dailey's military service, (R 251; A 19) the court ignored evidence that Dailey was a radio technician who was so good at his job that his colleague, Richard Dollar relied upon his expertise and described Dailey as a recruiter's dream. (OR 1367, 1378-79) Having a good work record is mitigating because it demonstrates the potential for rehabilitation. Stevens v. State, 552 So. 2d 1082, 1086 (Fla. 1989); Holsworth v. State, 522 So. 2d 348,

354 (Fla. 1988); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987).

In addition to his electronic skills, Dailey had other abilities showing his potential for rehabilitation. He was talented in carpentry and music--he made furniture, played the guitar, sang in the church choir, starred in two high school musicals, and wrote and performed a song for his daughter Stacey. (OR 1373, 1384-85, 1391-92) Beyond being "good to his family" as found by the court, (R 251; A 19) Dailey had demonstrated the capacity to form loving relationships with his mother and daughter. (OR 1383-92) The capacity to form loving relationships is a recognized mitigating factor. Scott, 603 So. 2d at 1277; Harmon v. State, 527 So. 2d 182, 188-90 (Fla. 1988).

The trial court's failure to expressly identify, evaluate, find, and weigh the unrefuted mitigating circumstances established by the evidence was reversible error requiring remand for a new sentencing hearing. Nibert, 574 So. 2d at 1062; Campbell, 571 So. 2d at 419.

ISSUE III

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BY DENYING HIS MOTION TO DISQUALIFY THE SENTENCING JUDGE BECAUSE APPELLANT HAD REASONABLE GROUNDS TO FEAR THAT THE JUDGE COULD NOT BE IMPARTIAL AT RESENTENCING.

In Dailey v. State, 594 So. 2d 254, 259 (Fla. 1991), this Court held that the trial court erred by finding two aggravating circumstances which were not supported by the evidence, that the murder was committed to prevent a lawful arrest and was cold, calculated, and premeditated (CCP). (R 65; A 14) This Court also held that the trial court erred by giving no weight to numerous mitigating circumstances and by considering evidence from the trial of Dailey's co-defendant, Jack Pearcy, which was not introduced in Dailey's trial. Id. (R 65-66; A 14)

Following the remand, defense counsel moved to disqualify the sentencing judge, the Honorable Thomas E. Penick, on the ground that he had a fixed opinion as to the appropriate sentence as shown by his prior consideration of the evidence from Pearcy's trial, his improper consideration of aggravating factors, and his improper rejection of mitigating factors, so Dailey feared that he would not receive a fair sentencing hearing. (R 159-62, 164-65) Judge Penick denied the motion on the ground that it was legally insufficient. (R 254-55, 271)

Appellant acknowledges that this Court has held that prior adverse rulings by the trial judge are legally insufficient to require his disqualification. Provenzano v. State, 616 So. 2d 428,

432 (Fla. 1993); Gilliam v. State, 582 So. 2d 610, 611 (Fla. 1991). This Court has also held that the judge's consideration of evidence from another trial or the fact that the judge has heard the evidence several times before are legally insufficient to require disqualification. Jackson v. State, 599 So. 2d 103, 106-07 (Fla.), cert. denied, __ U.S. __, 113 S. Ct. 612, 121 L. Ed. 2d 546 (1992); Engle v. Dugger, 576 So. 2d 696, 703 (Fla. 1991); Walton v. State, 481 So. 2d 1197, 1199 (Fla. 1985). This Court has even held an allegation that the judge has formed a fixed opinion of the defendant's guilt is generally legally insufficient to require disqualification. Jackson, at 107; Dragovich v. State, 492 So. 2d 350, 352-53 (Fla. 1986). Nonetheless, appellant respectfully requests this Court to consider his motion to disqualify Judge Penick at resentencing in light of the constitutional requirement of judicial neutrality, the policy favoring disqualification to avoid even the appearance of judicial bias, and the particular facts of this case.

Trial before an unbiased judge is essential to due process of law under the Fourteenth Amendment. Johnson v. Mississippi, 403 U.S. 212, 216, 91 S. Ct. 1778, 29 L. Ed. 2d 423 (1971); U.S. Const. amend. XIV. Without the basic protection of trial before an impartial judge, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence,... and no criminal punishment may be regarded as fundamentally fair." Rose v. Clark, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). This Court has declared that it

> "...is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question."

Crosby v. State, 97 So. 2d 181, 184 (Fla. 1957), quoting State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613, 615 (1939).

Moreover, because justice must satisfy the appearance of justice, due process may bar trial by a judge who has no actual bias and who would do his best to weigh the scales of justice equally between the parties. Liljeberg v. Health Services Corp., 486 U. S. 847, 864-65 & n. 12, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988); Aetna Life Insurance Co. v. LaVoie, 475 U.S. 813, 825, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986). Thus,

> the inquiry must be not only whether there was actual bias on [the judge's] part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused."

Taylor v. Hayes, 418 U.S. 488, 501, 94 S. Ct. 2697, 41 L. Ed. 2d 897 (1974).

Similarly, this Court has ruled that the "judge's neutrality should be such that even the defendant will feel that his trial was fair." Williams v. State, 143 So. 2d 484, 488 (Fla. 1962). Thus,

> a party seeking to disqualify a judge need only show "a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for

> such feeling." State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (1938).

Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983). Accord Rogers v. State, 630 So. 2d 513, 515 (Fla. 1993). The ultimate inquiry is whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial. Id.

Special care should be taken in capital cases to ensure the judge's neutrality:

> In the case of a first-degree murder trial, where the trial judge will determine whether the defendant is to be sentenced to death, the reviewing court should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter.

Chastine v. Broome, 629 So. 2d 293, 294 (Fla. 4th DCA 1993). In Chastine, the district court granted a writ of prohibition disqualifying the trial judge because he had passed a note to the prosecutor during the penalty phase cautioning against further cross-examination of a defense witness. The court reasoned, "When the judge enters into the proceeding and becomes a participant, a shadow is cast upon judicial neutrality so that disqualification is required." Id., at 295.

When viewed in the light of these standards, Dailey's motion to disqualify Judge Penick should be found legally sufficient. By improperly considering evidence from Pearcy's trial in deciding that Dailey was more culpable than Pearcy, the judge became a participant in the penalty phase of Dailey's trial and cast a

shadow upon his neutrality. That error, in combination with the judge's errors in finding unproven aggravating factors and refusing to find or weigh established mitigating factors, would naturally cause any reasonably prudent capital defendant to fear that the judge could not be impartial upon remand for resentencing.

This Court must recognize that judges are just as subject to human frailties as other people. Having previously decided Dailey deserved to die, it is indeed unlikely that Judge Penick would change his mind upon being told by this Court that he committed legal errors in his findings in support of the death sentence. The normal human response to such a situation would be exactly what occurred in this case--to try to correct the errors without changing the ultimate result. Under these circumstances, Dailey quite reasonably feared that the judge had already made up his mind and could not be relied upon to impartially resentence him. Because Dailey's fear of judicial bias was reasonable, the denial of the motion to disqualify violated the due process clauses of the Fourteenth Amendment and Article I, section 9 of the Florida Constitution.

Violation of the right to trial before an impartial judge is a structural defect in the trial, a constitutional error which is not subject to harmless error analysis. Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); Chapman v. California, 386 U.S. 18, 23 & n. 8, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Judge Penick's denial of the motion to disqualify requires reversal of the death sentence and remand for

a new penalty phase trial before a different judge and a new jury. See Craig v. State, 620 So. 2d 174, 176 (Fla. 1993) (resentencing before a new judge requires a new penalty phase trial before a jury).

CONCLUSION

Appellant respectfully requests this Honorable Court to vacate the death sentence and remand this case for the following relief: Issue I, a new penalty phase trial with a new jury; Issue II, resentencing; and/or Issue III, a new penalty phase trial with a new judge and a new jury.

APPENDIX

Docketed

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

CRC 85-07084 CFANO-D

FILED
CIVIL COURT REC. DEPT.
SEP 2 11 49 AM '87
KARLEEN F. DE LAKER
CLERK CIRCUIT/COUNTY COURT

STATE OF FLORIDA)
)
VS.)
)
JAMES DAILEY)

416094

FINDINGS IN SUPPORT OF SENTENCE

THIS CAUSE CAME on before the Court for trial by Jury, and after deliberations, on the 27th day of June, 1987, the Jury rendered a verdict finding the Defendant, JAMES DAILEY, guilty of Murder in the First Degree for the murder of Shelly Boggio.

Thereafter, the Jury, after hearing additional matters, retired to consider an advisory sentence pursuant to Section 921.141(2), Florida Statutes (1985). On the 30th day of June, 1987, the Jury by a 12 to 0 majority returned and, in open Court, recommended that this Court impose the death penalty upon the Defendant, JAMES DAILEY.

In preparing to sentence Defendant, JAMES DAILEY, for first degree murder, this Court again carefully reviewed Section 921.141, Florida Statutes (1985) and many of the decisions of the Florida Supreme Court relating to sentencing for capital felonies (See Appendix). Additionally, this Court carefully reviewed the principles of the United States Constitution that constrain sentencing in capital cases. Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972); Proffit v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976); Dixon v. State, 283 So.2d 1 (Fla. 1973).

It should be noted that this Court presided over the trials of both defendants accused of the murder of Shelly Boggio. Accused of murdering Shelly Boggio were JAMES DAILEY, the Defendant herein, and Jack Pearcy. Both defendants were found guilty of Murder in the First Degree. However, the jury in the Jack Pearcy trial recommended life in prison for Jack Pearcy and this Court, independent of, but in agreement with the advisory recommendation returned by the jury, sentenced Jack Pearcy to life in prison.

This Court carefully considered the evidence presented at each trial, the sentencing phase of each trial and at each sentencing, the Sentencing Memoranda

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filed, the arguments of all counsel, and the statement read into the record and placed in the file by the Defendant herein, JAMES DAILEY. The presentence investigation for each defendant was also considered.

Florida law only allows two choices in imposing sentences for capital felonies; i.e., life imprisonment with a mandatory minimum service of 25 years before being eligible for parole, or death. Sec. 775.082, Fla. Stat. (1985).

The Florida Legislature has also established guidelines to control and direct the exercise of the Court's discretion in selecting and imposing a proper sentence in capital cases. Section 921.141(5)(6), Florida Statutes (1985). Pursuant to these guidelines, the Court must consider and weigh certain specified aggravating and mitigating circumstances. The Court may also consider other mitigating circumstances, but not other aggravating circumstances. Elledge v. State, 346 So.2d 998 (Fla. 1977).

The Court may consider only such aggravating circumstances as are proved by the evidence beyond a reasonable doubt, but may consider any mitigating circumstance that it is reasonably convinced exists. State v. Dixon, 283 So.2d 1 (Fla. 1973).

In weighing these aggravating and mitigating circumstances, this Court is not to merely count the number of aggravating circumstances applicable and then mathematically compare the number to the number of mitigating circumstances found to apply. Rather, the Court is to exercise "... a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); Lightbourne v. State, 438 So.2d 380 (Fla. 1983). "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances..." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). See also, Proffitt v. Florida, 428 U.S. 242, 49 L.Ed. 2d 913, 96 S.Ct. 960 (1976).

After careful and independent* consideration, this Court finds the following aggravating circumstances to exist in this case: (*Tompkins v. State, 12 F.L.W. 44 (Fla. Jan. 12, 1987)).

II. AGGRAVATING CIRCUMSTANCES

A. THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON. (Sec. 921.141(5)(b), Fla. Stat. (1985)).

This aggravating factor was established beyond a reasonable doubt. The Defendant, JAMES DAILEY, was convicted in Pima County, Arizona, in 1979 for Aggravated Battery. During the sentencing phase, the State introduced a certified copy of this judgment and sentence. Two defense witnesses, Richard Dollar and Mary Kay Dollar, testified that JAMES DAILEY had corresponded with them in 1979 and admitted his conviction in Arizona of a violent offense. These witnesses testified that Defendant, JAMES DAILEY, had been involved in a bar fight, and he had armed himself with a pool cue. There is no reasonable doubt that this aggravating circumstance has been established. The documentary evidence and Defendant's admission establish it.

B. A CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN SEXUAL BATTERY OR ATTEMPTED SEXUAL BATTERY. (Sec. 921.141(5)(d), Fla. Stat. (1985)).

The evidence presented during all phases of this trial establishes beyond a reasonable doubt that the motive for taking the victim, Shelly Boggio, to the area adjacent to the Route 688 bridge was sexual battery. The victim's body was found completely nude floating in the Intercoastal Waterway. Her underwear was found on shore near areas of fresh blood. Shelly Boggio's jeans had been removed and thrown in the waterway. Potential physical evidence of an actual sexual battery upon Shelly Boggio was lost because her body had been floating in the waterway for an extended period of time. All of the evidence and testimony presented establishes beyond a reasonable doubt that Shelly Boggio at the very least was a victim of an attempted sexual battery. Her jeans would not have fallen off during a struggle, nor would have been removed if the only motive was murder.

C. THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY. (Sec. 921.141(5)(e), Fla. Stat. (1985)).

Shelly Boggio, the victim, knew and trusted the Defendant, JAMES DAILEY. Numerous witnesses had seen the Defendant together with the victim earlier on the evening of the murder. Witnesses, Oza Shaw and Gayle Bailey, specifically testified they saw the Defendant, JAMES DAILEY, with the victim for most of the night, and these witnesses saw the Defendant return home close to the time as the medical examiner, Dr. Joan Wood, would later establish as the time of death.

In order to establish this aggravating factor beyond a reasonable doubt, the State must establish more than the mere fact that the victim knew her

assailants. In Cooper v. State, 492 So.2d 1059 (Fla. 1986), the victim recognized the defendant even though the defendant was wearing a ski mask. The defendant, in the COOPER case, shot the victims and ran from the crime scene. When informed that one of the victims was alive and could possibly identify the defendant, he returned and shot this victim a second time. See also Meeks v. State, 339 So.2d 186 (Fla. 1976).

The instant case is similar to the COOPER case. The Defendant, JAMES DAILEY, knew that Shelly Boggio could identify him and accuse him of sexual battery or attempted sexual battery. The Defendant did more than just attempt to kill. The evidence establishes that the Defendant did everything possible to permanently silence her. Shelly Boggio, the victim herein, was viciously stabbed while on land. According to the testimony presented during the trial, Defendant, JAMES DAILEY, told persons later, "She would not die." "She would not go down." In addition to the stab wounds, there were other assaults upon Shelly Boggio's body. She was beaten about the face, she was choked, she was drug to the water and held under water until she drowned. Her nude body was left in the Intercoastal Waterway to either sink or float away so as to conceal the location of the struggle. Further, in order to either prevent or delay discovery of the crime, the victim's clothes were thrown into the waterway. The next day the Defendant, JAMES DAILEY, took flight from Pinellas County, first traveling to Miami and subsequently escaping to California until his arrest.

Clearly, this aggravating factor is established beyond a reasonable doubt.

D. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL. (Sec. 921.141(5)(h), Fla. Stat. (1985)).

The murder of Shelly Boggio was especially heinous, atrocious, and cruel. She was brutally stabbed as she fought frantically and continuously for her life. She suffered numerous "pricking" wounds on her breast and stomach. She was choked. She was thrown into the waterway and held under water until she drowned.

Dr. Joan Wood testified that Shelly Boggio suffered the most severe defensive stab wounds she has ever seen in her long career as a medical examiner. Paul Skalnick, a witness during the trial, testified that Defendant, JAMES DAILEY, told him, "No matter how many times I stabbed her, she would not die."

Dr. Wood indicated that the "pricking wounds" to the victim's breast and stomach area were caused by merely piercing the top layer of skin and occurred apart from the actual stab wounds which penetrated the victim's hands, abdomen,

and neck. These "pricking wounds" are consistent with injury and pain inflicted upon Shelly Boggio during the sexual battery or attempted sexual battery.

The ultimate cause of death was drowning. Dr. Wood made this determination by the chloride concentrations in the victim's heart. Significantly, after having suffered over 30 severe stab wounds, the victim remained alive. Notwithstanding the excruciating pain inflicted on the victim and her mental anguish suffered as she fought for her life, the Defendant threw her into the waterway and held her under the water until she drowned.

This aggravating circumstance is established beyond a reasonable doubt.

E. THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION. (Sec. 921.141(5)(i) , Fla. Stat. (1985)).

This aggravating factor was established beyond a reasonable doubt by the various types of multiple wounds inflicted on Shelly Boggio by the Defendant, JAMES DAILEY. The legal requirement of "heightened" premeditation was more than met in this case.

The victim was stabbed or cut 48 times. As stated above, Dr. Wood testified the defensive wounds were the most severe she had ever observed. Further, the victim bore "pricking wounds" which indicated torture. The victim was beaten in the face. The victim was choked. Ultimately, the Defendant had to drown the victim in order to cause death.

The Defendant by his own statement established his mental and physical determination to inflict wounds necessary to kill. "No matter how many times I stabbed her, she would not die."

The facts of this case sub judice are similar to numerous cases previously upheld by the Florida Supreme Court as establishing this aggravating factor. See Jent v. State, 408 So.2d 1024 (Fla. 1982); Herring v. State, 446 So.2d 1049 (Fla. 1984); Puiatti v. State, 495 So.2d 128 (Fla. 1986); Stano v. State, 473 So.2d 1282 (Fla. 1985); and Cooper v. State, 492 So.2d 1059 (Fla. 1986). It should be noted that the COOPER Court also established that this aggravating factor (Section 921.141(5)(i), Florida Statutes (1985)) can coexist with the aggravating circumstance of preventing a lawful arrest or effecting an escape from custody (Sec. 921.141(5)(e), Fla. Stat. (1985)).

In Nibert v. State, 12 F.L.W. 225 (Fla. May 7, 1987), it was held that a "stabbing frenzy" does not establish this aggravating factor. The Defendant, JAMES DAILEY, went beyond any "stabbing frenzy." In a cold, calculated, and

premeditated manner, he stabbed Shelly Boggio, he beat her, he choked her, and ultimately, he drowned her.

II. MITIGATING CIRCUMSTANCES

The Jury herein was instructed by the Court on four mitigating circumstances plus the catchall mitigating circumstantes that the Jury could consider any other aspect of the Defendant's character. The other statutory mitigating circumstances were not presented to the Jury because they clearly and unequivocally do not apply in this case and were not requested under any circumstance by the Defendant.

A. THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE. (Sec. 921.141(6)(b), Fla. Stat. (1985).

There was some evidence presented by the Defendant that in years past, he suffered from a drinking problem and that this problem was exacerbated by his Vietnam experiences. The evidence presented rose to a level no higher than bare allegations.

There was no evidence presented of any nature or kind which established an extreme mental or emotional disturbance of the Defendant which would mitigate against or outweigh the established aggravating circumstances.

B. THE DEFENDANT WAS AN ACCOMPLICE IN THE CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR. (Sec. 921.141(6)(d), Fla. Stat. (1985)).

Two defendants were indicted and convicted for the murder of Shelly Boggio. The evidence presented through all stages of both trials and especially this trial of Defendant, JAMES DAILEY, established beyond a reasonable doubt that JAMES DAILEY was the major participant in the stabbing, beating, choking, and drowning of Shelly Boggio. His participation was not minor, it was major.

JAMES DAILEY'S own statements to fellow inmates at the Pinellas County Jail establish him as the major participant in this murder. The Defendant admitted he stabbed the victim numerous times and felt frustration that "no matter how many times I stabbed her, she would not die." Witnesses presented corroborating evidence that JAMES DAILEY played the major role in the death of Shelly Boggio. Gayle Bailey and Oza Shaw testified that JAMES DAILEY returned home wearing wet pants and wearing no shoes. This is consistent with JAMES DAILEY having physically held the victim under water until she drowned.

C. THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON. (Sec. 921.141(6)(e), Fla. Stat. (1985)).

There was absolutely no evidence presented during any phase of this trial which indicated domination by Jack Pearcy over JAMES DAILEY. Both defendants

transported the victim to the Route 688 bridge. The evidence clearly leads to the conclusion that the motive for taking Shelly Boggio to the parking spot by the Route 688 bridge was sexual battery. Further, the evidence establishes that this Defendant, JAMES DAILEY, stabbed, beat, choked, and drowned Shelly Boggio. There is no evidence that Jack Pearcy made or influenced or forced JAMES DAILEY into doing any of these acts.

D. THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED. (Sec. 921.141(6)(f), Fla. Stat. (1985)).

There was no evidence presented in this trial that the Defendant, JAMES DAILEY, was substantially impaired by alcohol or drugs.

There was some evidence that the Defendant, JAMES DAILEY, had gone to a bar on the night of the murder. There is absolutely no evidence that JAMES DAILEY was intoxicated. There was testimony that JAMES DAILEY used marijuana on the night of the murder; however, there is no evidence that he was under the influence of anything to the extent that he was so substantially impaired that he could not appreciate the criminality of his conduct. Both Gayle Bailey and Oza Shaw saw JAMES DAILEY before the murder and after the murder. Neither witnesses indicated that the Defendant was under the influence of alcohol or drugs to the point where he was unable to control his conduct.

Defendant's ability to relate with clarity and specificity the events surrounding the murder of Shelly Boggio to inmates of the Pinellas County Jail establishes the fact that he was not under the influence to the extent that he was so substantially impaired that he could not appreciate the criminality of his conduct.

E. ANY OTHER ASPECT OF THE DEFENDANT'S CHARACTER OR RECORD.

This "general" mitigating factor received the majority of the evidence put on by the Defendant during the penalty phase. The Defendant was portrayed as having a normal youthful background and having saved two persons from drowning during a high school picnic. He was in the Air Force and served several temporary duty tours in Vietnam. While in the Air Force, he had been married and fathered a daughter. When his ex-wife remarried his former Air Force friend, he allowed this man to adopt his daughter.

For nearly the past 20 years, the Defendant has been a drifter going from city to city and job to job.

During the sentencing phase, the Defendant stated among other things that

he felt remorse for the victim and her family. It is impossible for this Court to know if he genuinely feels remorse for his victim or her family.

This Court does not consider any of the factors presented by the Defendant to mitigate this crime.

CONCLUSION

In concluding these findings, it is only appropriate that the issue of disparate sentences for co-defendants be discussed. The sentence of death for Defendant, JAMES DAILEY, is appropriate even in light of the previous jury recommendation and sentence of life imposed against the co-defendant, Jack Pearcy.

This Court has carefully considered and reviewed many cases discussing the issue of disparate sentences. Hoffman v. State, 474 So.2d 1178 (Fla. 1985); Demps v. State, 395 So.2d 501 (Fla. 1981), cert. den. 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981); Woods v. State, 490 So.2d 24 (Fla. 1986); and Marek v. State, 492 So.2d 1055 (Fla. 1986). Defendant, JAMES DAILEY, was clearly the dominating force behind the murder of Shelly Boggio.

After carefully weighing the aggravating and mitigating circumstances discussed above, and after comparing the circumstances of this case with the circumstances existing for other capital cases reviewed by the Florida Supreme Court and other appellate courts which are listed in the Appendix, and after carefully considering the Constitutional standards set forth in Furman v. Georgia, supra, and Proffitt v. Florida, supra, this Court makes its own reasoned independent judgment, Tompkins v. State, supra, that the statutory aggravating circumstances clearly outweigh the statutory mitigating circumstances, therefore, it is the judgment of this Court that JAMES DAILEY be put to death in the manner provided by Florida law for the first degree murder of Shelly Boggio.

DONE AND ORDERED in Chambers, Clearwater, Pinellas County, Florida, this 2nd day of September, 1987.

THOMAS E. PENICK, JR.
Circuit Court Judge

James DAILEY, Appellant,

v.

STATE of Florida, Appellee.

No. 71164.

Supreme Court of Florida.

Nov. 14, 1991.

Rehearings Denied March 19, 1992.

Defendant was convicted in the Circuit Court, Pinellas County, Thomas E. Penick, J., of first-degree murder, and was sentenced to death, and he appealed. The Supreme Court held that: (1) error in admitting evidence that defendant fought extradition was harmless; (2) improper references to defendant's failure to testify were harmless; (3) evidence did not support finding as aggravating circumstances that murder was committed to prevent lawful arrest or that murder was committed in cold, calculated, and premeditated manner; and (4) once lower court recognized presence of mitigating circumstance, it was not authorized to give mitigating circumstance no weight at all.

Conviction affirmed, sentence reversed, and remanded for resentencing.

Kogan, J., concurred in guilt phase, and concurred in result only as to penalty.

1. **Homicide** ⇐174(7)

Fact that many months after murder defendant was residing in California and exercised his right to resist extradition had no bearing on flight following crime or consciousness of guilt, and should have been excluded from homicide prosecution.

2. **Homicide** ⇐338(1)

Error in admitting in murder prosecution testimony that defendant was fighting extradition was harmless, considering that challenged statements were extremely brief and testimony was undeveloped.

3. **Criminal Law** ⇐627.8(6)

Trial court properly overruled objection to admission of photograph that had allegedly not been provided during discovery, in view of defense counsel's declining offer of special inquiry outside jury's presence and failing to request any alternative inquiry.

4. **Criminal Law** ⇐419(1)

Detective's testimony regarding evidence collected following return of separately tried, nontestifying codefendant did not explicitly or by implication attribute finding of evidence to statements by codefendant and, therefore, did not implicate hearsay rule.

5. **Criminal Law** ⇐419(3)

Testimony of inmate that he reported notes being passed between codefendants in prison because he "didn't particularly enjoy having anything to do with inmates that were discussing a crime like where someone was killed" was not hearsay because it was not offered to prove that defendant committed murder, but rather to show why inmate went to authorities.

6. **Criminal Law** ⇐814(19)

In instructing jury regarding principals in murder prosecution, trial court properly included instruction that defendant did not have to be present when crime was committed to be a principal, in case either side argued in closing that defendant had not been present, though no evidence was introduced to that effect.

7. **Criminal Law** ⇐721(3)

Prosecutor's comment is impermissible if it is "fairly susceptible" of being viewed by jury as referring to defendant's failure to testify. U.S.C.A. Const.Amend. 5.

8. **Criminal Law** ⇐721(3)

During closing argument in murder prosecution, prosecutor impermissibly commented on defendant's right to remain silent, in stating that only people who knew what happened were victim, who was dead, codefendant, who was not available to testify, and defendant, and in stating that only defendant had evidence regarding length of his fingernails. U.S.C.A. Const.Amend. 5.

9. **Criminal Law** ⇐1171.5

Error in prosecutor's commenting on defendant's right to remain silent did not

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affect verdict in murder prosecution, in light of other substantial evidence of guilt. U.S.C.A. Const.Amend. 5.

10. Criminal Law ⇐474.5

Police detective with extensive training and experience in homicides and sexual batteries was properly permitted to give expert testimony, during penalty phase of murder prosecution, that because victim's body was found nude and her clothing scattered, it was highly likely that sexual battery or attempt had occurred; testimony was helpful in consolidating various pieces of evidence found at crime scene, which would not necessarily be within common understanding of jury.

11. Homicide ⇐343

Any error in failure to delete from certified copy of judgment and sentence for prior offense, admitted in support of aggravating factor during penalty phase of capital murder prosecution, notation that second charge had been dropped pursuant to plea agreement was harmless, in view of inconspicuousness of notation.

12. Homicide ⇐357(7)

Record contained competent substantial evidence to support trial court's finding, as aggravating factor during sentencing phase of capital murder prosecution, of attempted sexual battery, where victim's body was found nude and her clothing scattered, victim had rebuffed defendant's advances earlier in evening, victim had been stabbed both prior to and after removal of her shirt, and trail of blood led to victim's underwear from her other clothing.

13. Homicide ⇐357(8)

There was insufficient evidence that prevention of lawful arrest was "dominant motive" for murder to support trial court's finding, as aggravating circumstance during penalty phase of capital murder prosecution, that murder was committed to prevent lawful arrest.

14. Homicide ⇐357(3)

There was insufficient evidence of heightened premeditation, such as in case of execution, contract murders, and witness elimination killings, to support trial court's finding, as aggravating circumstance during penalty phase of capital murder prosecution, that murder was committed in cold, calculated, and premeditated manner.

15. Homicide ⇐357(4)

Once established, a mitigating circumstance may not be given no weight at all during penalty phase of capital murder prosecution.

16. Criminal Law ⇐986.2(1)
Homicide ⇐358(1)

In imposing sentence for first-degree murder conviction, it was error for trial court to consider evidence from separate trial of codefendant that was not introduced in guilt phase of present trial, thereby depriving defendant of opportunity to rebut that proof.

James Marion Moorman, Public Defender and A. Anne Owens, Assistant Public Defender, Tenth Judicial Circuit, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen. and Joseph R. Bryant, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

Dailey appeals his conviction for first-degree murder and sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm the conviction and reverse the sentence.

On May 5, 1985, fourteen year-old Shelly Boggio, her twin sister Stacey, and Stephanie Forsythe were hitchhiking near St. Petersburg when they were picked up by James Dailey, Jack Pearcy and Dwaine Shaw. The group went to a bar and then to Pearcy's house, where they met Gayle Bailey, Pearcy's girlfriend. Stacey and Stephanie returned home. Shelly, Gayle and the men went to another bar and then returned to Pearcy's house about midnight. Shelly left in the car with Dailey and Pearcy, and when the two men returned without Shelly several hours later Dailey was wearing only a pair of wet pants and was carrying a bundle. The next morning, Dailey

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and Pearcy visited a self-service laundry and then told Gayle to pack because they were leaving for Miami. Shelly's nude body was found that morning floating in the water near Indian Rocks Beach. She had been stabbed, strangled and drowned. Dailey and Pearcy were charged with her death.

Pearcy was convicted of first-degree murder and sentenced to life imprisonment. At Dailey's subsequent trial, three inmates from the county jail testified that Dailey had admitted the killing to them individually and had devised a plan whereby he would later confess when Pearcy's case came up for appeal if Pearcy in turn would promise not to testify against him at his own trial. Pearcy refused to testify at Dailey's trial. Dailey presented no evidence during the guilt phase. The jury found him guilty of first-degree murder and unanimously recommended death. At sentencing, Dailey requested the death penalty, and the court complied, finding five aggravating [1] and no mitigating circumstances.

GUILT PHASE

[1, 2] Dailey was extradited from California to stand trial in Florida and in opening argument the prosecutor made the following comment: "Detective Halliday will indicate to you he had to go out because Mr. Dailey was fighting extradition to come back to Florida." Defense counsel unsuccessfully moved for a mistrial. During Detective Halliday's testimony, the following exchange took place:

> Prosecutor: When was Mr. Dailey arrested on that arrest warrant?
>
> Halliday: Mr. Dailey was arrested on that, I believe, it was in November of '85.
>
> Prosecutor: As a result, did you take a further part in returning him to the State of Florida?
>
> Halliday: Yes, in the extradition procedures, yes.
>
> Prosecutor: Could you explain to the jury what extradition proceedings are?

At that point, defense counsel again moved for a mistrial, which was again denied. When testimony resumed, the prosecutor stated briefly, "Okay. Detective Halliday, we were talking about the extradition before." The prosecutor then asked Halliday the reason for going to California and the detective replied that he did so in order to identify Dailey. No further mention of extradition was made.

Dailey claims that mention of his efforts to avoid extradition was irrelevant and prejudicial. The State, on the other hand, contends that the evidence was relevant to show flight and consciousness of guilt. Dailey had moved to Florida only months before the murder. The day after the murder, he fled to Miami, but then left the next day. The fact that many months later Dailey was residing in California and exercised his right to resist extradition there has no bearing on flight following the crime or consciousness of guilt. The evidence should have been excluded. Because the statements were extremely brief and the testimony undeveloped, however, we find beyond a reasonable doubt that the error did not affect the verdict.[2] *See State v. DiGuilio*, 491 So.2d 1129, 1139 (Fla.1986).

[3] The prosecutor introduced into evidence a photograph of Dailey taken at the time he was booked into jail in Florida following extradition. Defense counsel objected, claiming that the photograph had not been provided during discovery. The trial court responded:

1. The court found the following circumstances in aggravation: previous conviction of a violent felony; commission during a sexual battery; commission to avoid arrest; the murder was especially heinous, atrocious, or cruel; and the murder was committed in a cold, calculated, and premeditated manner. *See* § 921.141(5), Fla.Stat. (1989).

2. We also find as harmless error the State's introduction into evidence of a knife sheath (which was insufficiently linked to either the crime or the defendant); the State's use of the hearsay statements of Detective Halliday concerning the inmates' reasons for coming forward (which fail under the recent fabrication exception); and the refusal of the trial court to allow defense counsel to question inmate Skalnik concerning the specifics of charges pending against him (which were admissible to show possible bias).

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Here's what I am going to do. I will ask the jury to step out. If you desire special voir dire of this witness, you may have it.

Defense counsel declined the offer. Dailey now claims that the trial court committed per se reversible error by not conducting a hearing into the alleged discovery violation pursuant to *Richardson v. State*, 246 So.2d 771 (Fla.1971). We conclude that because defense counsel declined the offer of a special inquiry outside the jury's presence and failed to request any alternative inquiry, the trial court properly overruled the objection. We note that the photograph was similar to one that had already been admitted and the effect of its admission was inconsequential.

[4, 5] Detective Halliday testified that he went to Kansas to interview Pearcy's mother and obtained Pearcy's shirt, which was introduced into evidence. The following exchange then took place:

Prosecutor: Now, Jack Pearcy was ultimately returned to Pinellas County?

Halliday: Yes, he was.

Prosecutor: When was he returned to Pinellas County?

Halliday: It was on the 21st, I believe of May. I am not exactly sure of the date but he came back with us after we went out there.

Prosecutor: Did you collect any further evidence after he returned?

Halliday: Yes, we collected shoes from him and we also, when we returned here, found a sheath at the Walsingham Reservoir which was a knife sheath.

Defense counsel objected and moved for a mistrial, which was denied. Dailey now claims that although Pearcy refused to testify at Dailey's trial the above statement was designed to introduce into evidence the content of Pearcy's out-of-court statement concerning the location of the knife sheath and was thus inadmissible hearsay.[3] The testimony, however, does not explicitly or by implication attribute the finding of the sheath to statements by Pearcy. It merely describes the temporal sequence in which evidence was uncovered.[4] We find no error.

[6] As part of the guilt phase jury instructions, the court gave Florida Standard Jury Instruction (Criminal) 3.01 concerning principals, including the sentence: "To be a principal, the defendant does not have to be present when the crime is committed." Dailey contends this was error because no evidence was introduced showing that he was not present. As the trial court pointed out, however, it gave the complete instruction in an abundance of caution in case either side argued in closing that Dailey had not been present. The instruction is a correct statement of the law and we find no error.

[7-9] During the trial, Dailey did not take the stand. The prosecutor made the following statement in closing argument:

Now, there are only three people who know exactly what happened on that Loop area.... Shelly Boggio and she is dead; Jack Pearcy and he is not available to testify; and the Defendant. So, when the defense stands up here, as they have already and I imagine Mr. Andringa will when he gets up to rebut, and says where's the evidence, where's the eyewitnesses, use your common sense. Murderers of young girls don't commit the crime, don't sexually assault and commit a crime of murder with an audience.

The prosecutor also made the following statement:

3. Dailey also claims that the hearsay rule was violated by the testimony of two inmates concerning notes they passed between Dailey and Pearcy in prison. Inmate Leitner said he reported the notes because he "didn't particularly enjoy having anything to do with inmates that were discussing a crime like that where someone was killed." This statement, however, was not hearsay because it was not offered to prove that Dailey committed the murder, but rather to show why Leitner went to authorities. As to the testimony of the second inmate, the trial court recognized it as hearsay and gave a proper curative instruction.

4. We note that we have long held that "[a]n officer may say what he did pursuant to information but he may not relate the information itself for such is hearsay." *Collins v. State*, 65 So.2d 61, 67 (Fla.1953).

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> Fingernails. You didn't here [sic] about the length of Mr. Dailey's fingernails. No, because he left Pinellas County, went to Miami, where he stayed less than 24 hours and we arrest him months later in the State of California. That's right. Only he knows the length of his fingernails.

Dailey claims that these statements constitute impermissible comments on his right to remain silent. The State counters that they were fair rebuttal to defense charges that the State had produced little evidence.

A comment is impermissible if it is "fairly susceptible" of being viewed by the jury as referring to a defendant's failure to testify. *DiGuilio*, 491 So.2d at 1131. In *State v. Marshall*, 476 So.2d 150 (Fla.1985), the prosecutor commented to the jury:

> Ladies and gentlemen, the only person you heard from in this courtroom with regard to the events on November 9, 1981, was Brenda Scavone [the victim].

Id. at 151. There, we ruled that the prosecutor's comments impermissibly highlighted the defendant's decision not to testify. *Id.* at 153. We find the present comments virtually indistinguishible and similarly impermissible. However, in light of other substantial evidence of guilt, we find beyond a reasonable doubt that the error did not affect the verdict. *DiGuilio.*

PENALTY PHASE

[10] During the penalty phase, the judge qualified Detective Halliday as an expert in homicide and sexual battery and allowed him to testify that because the victim's body was found nude and her clothing scattered, it was highly likely that a sexual battery or attempt had occurred. Dailey claims that this testimony was only common sense and it was error for the court to permit expert testimony on a matter that is within the common understanding of the jury. Halliday, however, had extensive training and experience in homicides and sexual batteries; his expert testimony was helpful in consolidating the various pieces of evidence found at the crime scene. This would not necessarily be within the common understanding of the jury. We find no error.

[11] To support the aggravating factor that the defendant had been convicted of a prior violent felony, the State introduced into evidence a certified copy of a judgment and sentence for aggravated battery. The papers contained a notation that a second charge had been dropped pursuant to a plea agreement. Defense counsel unsuccessfully sought to have the notation deleted and now claims error. The notation, however, was inconspicuous; it was on the second page of the papers and referred to a case number only. Any error was harmless.

[12] Dailey contends that the court erred in finding as an aggravating circumstance that the murder was committed during a sexual battery or attempted sexual battery. The trial court found:

> The evidence presented during all phases of this trial establishes beyond a reasonable doubt that the motive for taking the victim, Shelly Boggio, to the area adjacent to the Route 688 bridge was sexual battery. The victim's body was found completely nude floating in the Intercoastal Waterway. Her underwear was found on shore near areas of fresh blood. Shelly Boggio's jeans had been removed and thrown in the waterway. Potential physical evidence of an actual sexual battery upon Shelly Boggio was lost because her body had been floating in the waterway for an extended period of time. All of the evidence and testimony presented establishes beyond a reasonable doubt that Shelly Boggio at the very least was a victim of an attempted sexual battery.

We note the following additional evidence: Shelly had rebuffed Dailey's advances earlier that evening; Shelly had been stabbed both prior to and after removal of her shirt; her underwear was found 140 feet from her other clothing, with a trail of blood leading from the clothing to the underwear. We conclude that the record contains competent substantial evidence to support the trial court's finding of an attempted sexual battery.

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[13, 14] Dailey claims that the court erred in finding as an aggravating circumstance that the murder was committed to prevent a lawful arrest. To establish this factor, the evidence must show that the "dominant motive" for the murder was the elimination of a witness. *White v. State*, 403 So.2d 331, 338 (Fla.1981), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983). The evidence here fails to show this. The court's finding was error. The evidence also fails to support the finding that the murder was committed in a cold, calculated, and premeditated manner. This aggravating circumstance is reserved for crimes showing heightened premeditation, such as executions, contract murders, and witness elimination killings. *Hansbrough v. State*, 509 So.2d 1081, 1086 (Fla. 1987). No such showing was made here. This too was error.

[15] In its sentencing order, the court expressly considered four statutory mitigating circumstances and found them inapplicable. The trial court then considered a number of nonstatutory factors and concluded: "This Court does not consider any of the factors presented by the Defendant to mitigate this crime." The United States Supreme Court, however, requires that a sentencing court consider as a mitigating circumstance "any aspect of a defendant's character or record and any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978). Once established, a mitigating circumstance may not be given no weight at all. *Eddings v. Oklahoma*, 455 U.S. 104, 114–15, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982). In its sentencing order, the trial court recognized the presence of numerous mitigating circumstances, but then accorded them no weight at all. This was error.

[16] The judge in the present case also presided over the trial of Jack Pearcy. In his present sentencing order, the judge noted this fact and pointed out that he

> carefully considered the evidence presented at each trial, the sentencing phase of each trial and at each sentencing, the Sentencing Memoranda filed, the arguments of all counsel, and the statement read into the record and placed in the file by the Defendant herein, JAMES DAILEY. The presentence investigation for each defendant was also considered.

In considering evidence from a different trial that was not introduced in the guilt phase of the present trial, the trial court deprived Dailey of the opportunity to rebut this proof. This was error. *Engle v. State*, 438 So.2d 803 (Fla.1983), *cert. denied*, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984).

Based on the foregoing, we affirm the conviction, reverse the sentence, and remand for resentencing before the trial judge. We note that our decision in *Campbell v. State*, 571 So.2d 415 (Fla.1990), provides guidelines for mitigating circumstances.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, BARKETT and GRIMES, JJ., concur.

KOGAN, J., concurs in guilt phase and concurs in result only as to penalty.

Tobias BARFIELD, Petitioner,

v.

STATE of Florida, Respondent.

No. 76524.

Supreme Court of Florida.

Jan. 9, 1992.

Rehearing Denied March 25, 1992.

Defendant was convicted of conspiracy to traffic and attempted trafficking in cocaine and given upward departure sentence, in the Circuit Court, Broward Coun-

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IN THE CIRCUIT COURT IN AND FOR PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION
CASE NO. CRC 85-07084 CFANO C

STATE OF FLORIDA :
:
vs. :
:
JAMES DAILEY, :
Defendant :

RESENTENCING ORDER

The defendant was tried before this court on June 23, 1987. The jury rendered a verdict on the 27th day of June, 1987, finding the defendant guilty of murder in the first degree. Thereafter, evidence in support of aggravating factors and mitigating factors was heard. The jury returned a twelve to zero verdict on June 30, 1987 and recommended that the defendant be sentenced to death in the electric chair. The court considered the evidence, the jury's recommended sentence, and the memoranda before sentencing the defendant. On the 2nd day of September, 1987, the court sentenced the defendant to death in the electric chair.

On the 22nd day of April, 1992, a Mandate from the Supreme Court of Florida affirming the conviction, reversing the sentence and remanding for resentencing of the defendant was filed in this court. The defendant, together with his attorney and the attorney for the state, appeared before the court on December 9, 1993 for oral testimony and oral resentencing argument. Written memoranda were presented to the court by both sides. The court took under advisement the testimony, oral arguments and memoranda and set final sentencing for this date, January 21, 1994.

This court, having heard the evidence presented in both the guilt phase and penalty phase, having had the benefit of legal memoranda and legal oral arguments both in favor and in opposition to the death penalty finds as follows:

A. AGGRAVATING FACTORS

1. The defendant was previously convicted of another felony involving the use or threat of violence to the person.

This aggravating factor was proved beyond a reasonable doubt. The defendant was convicted in Pima County, Arizona, in 1979 for aggravated battery. During the sentencing phase, the state introduced a certified copy of this judgment and sentence. Two defense witnesses, Richard Dollar and Mary Kay Dollar, testified the defendant had corresponded with them in 1979 and admitted his

conviction in Arizona of a violent offense. These witnesses testified the defendant had been involved in a bar fight, and he had armed himself with a billiard cue.

2. The capital felony was committed while the defendant was engaged in the commission of, or attempt to commit sexual battery.

The evidence presented during all phases of this trial established beyond a reasonable doubt that the motive for taking the victim, Shelly Boggio, to the area adjacent to the Route 688 bridge was sexual battery. The victim's body was found completely nude, floating in the intercoastal waterway. Her underwear was found on shore near areas of fresh blood. Shelly Boggio's jeans had been removed and thrown in the waterway. Potential physical evidence of an actual sexual battery upon Shelly Boggio was lost because her body had been floating in the waterway for an extended period of time. All of the evidence and testimony presented established beyond a reasonable doubt that Shelly Boggio at the very least was a victim of an attempted sexual battery.

3. The capital felony was especially heinous, atrocious and cruel.

Shelly Boggio, the victim, was brutally stabbed as she fought frantically and continuously for her life. In addition to the deep stab wounds, she suffered numerous "pricking wounds" on her breast and stomach. She was choked. She was dragged into the waterway and held under water until she drowned.

Dr. Joan Wood, the Medical Examiner, testified that Shelly Boggio suffered the most severe defensive stab wounds she had ever seen in her long career as a medical examiner. Paul Skalnick, a witness during the trial, testified the defendant told him, "No matter how many times I stabbed her, she would not die."

Dr. Wood indicated that the "pricking wounds" to the victim's breast and stomach area were caused by painful piercing of the top layer of skin and occurred apart from the actual stab wounds which penetrated the victim's hands, abdomen and neck. These tormenting "pricking wounds" caused pain and suffering to the victim, in addition to the stark terror of the sexual assault.

After being stripped nude, subjected to at least attempted sexual battery, tortured with numerous "prick wounds" and severely stabbed over thirty times the victim would not die. Even though suffering excruciating pain, she fought on only to die of drowning.

While still alive the defendant grabbed Shelly Boggio and threw her into the waterway. He choked her and held her head under water until she quit struggling and died. Due to the chloride

concentrations in the victim's heart the Medical Examiner confirmed death by drowning. This murder was indeed a conscienceless, pitiless crime which was unnecessarily tortuous to the victim. The aggravating factor that the capital felony was especially heinous, atrocious, or cruel has been proved beyond a reasonable doubt.

None of the other aggravating factors enumerated by statute are applicable to this case and no others were considered by this court during this resentencing phase.

No other factors, except as previously indicated in paragraphs 1 - 3 above, were considered in aggravation.

B. MITIGATING FACTORS

During the initial sentencing phase and the resentencing phase the defendant requested the court to consider the following mitigating circumstances:

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

There was some evidence presented by the defendant that in years past, he suffered from a drinking problem and that this problem was exacerbated by his Air Force duty during the Viet Nam war. The evidence presented rose to a level no higher than bare allegations.

There was no evidence presented of any nature or kind which established an extreme mental or emotional disturbance of the defendant which would mitigate against or outweigh the established aggravating circumstances.

2. The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

The evidence presented through all stages of the trial established beyond a reasonable doubt that James Dailey was the major participant in the stabbing, beating, choking, and drowning of Shelly Boggio. His participation was not minor. It was major and the cause of her death. This mitigating factor does not exist.

James Dailey's own statements to fellow inmates at the Pinellas County Jail establish him as the major participant in this murder. The defendant admitted he stabbed the victim numerous times and felt frustration that "no matter how many times I stabbed her, she would not die". Witnesses presented corroborating evidence that James Dailey played the major role in the death of Shelly Boggio. Gail Bailey and Oza Shaw testified that James Dailey returned home wearing wet pants and wearing no shoes. This is consistent with

James Dailey having physically held the victim under water until she drowned.

3. The defendant acted under extreme duress or under the substantial domination of another person.

There is absolutely no evidence in the record of this trial which indicated that any person had domination over the defendant and caused him to commit the capital felony. The evidence proved beyond a reasonable doubt that the defendant stabbed, beat, choked, and drowned the victim. This mitigating factor does not exist.

4. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

There was no evidence presented in this trial that the defendant was substantially impaired by alcohol or drugs.

There was some evidence that the defendant had gone to a bar on the night of the murder. There is absolutely no evidence that he was intoxicated. There was testimony that the defendant used marijuana on the night of the murder; however, there is no evidence that he was under the influence of anything to the extent that he was so substantially impaired that he could not appreciate the criminality of his conduct. Both Gayle Bailey and Oza Shaw saw the defendant before the murder and after the murder. Neither witness indicated that the defendant was under the influence of alcohol or drugs to the point where he was unable to control his conduct.

Defendant's ability to relate with clarity and specificity the events surrounding the murder of Shelly Boggio to inmates of the Pinellas County Jail established the fact that he was not under the influence to the extent that he was so substantially impaired that he could not appreciate the criminality of his conduct. Therefore, this mitigating factor does not exist.

NON-STATUTORY MITIGATING FACTORS

The defendant in his resentencing memorandum asks the court to consider the following non-statutory mitigating factors.

1. The defendant was in the service and was involved in two or three tours of duty in Viet Nam.

2. The incident occurred while the defendant was intoxicated and he developed a problem with alcohol as result of his military service in Viet Nam.

3. Evidence was presented that the co-defendant, Jack Pearcey, may actually have been the perpetrator of the homicide.

4. The defendant was good to his family, helpful around the home, and never showed signs of violence.

5. Other non-statutory mitigating factors would be the fact that he participated in saving the lives of two young people at an early age.

6. Because of the alcohol problem and the heavy drinking the night of the offense, evidence was presented that the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. This was supported by the fact that he had prior history of being admitted for treatment in regard to his alcohol problem. It is not necessary to show that the defendant is insane to qualify for this standard.

1. & 2.) The fact that the defendant served in the Air Force and saw duty in Viet Nam on three occasions is commendable. Thus, the court gave some weight to this non-statutory mitigating factor. However, the record is void of any creditable evidence that the defendant had an alcohol problem, let alone an alcohol problem directly attributable to battle stress or clinically labeled "Viet Nam Syndrome". Thus, this mitigating factor does not exist in this case.

3.) The defendant asserts that there was evidence presented that another person may have been the perpetrator of the homicide. The evidence presented in this trial does not support his assertion. The defendant's own statements, "No matter how many times I stabbed her she would not die", vitiate this claim. Additionally, as discussed in paragraph 3 of the statutory mitigating factors witnesses testified that the defendant returned home wearing wet pants and no shoes. The evidence proved beyond a reasonable doubt that the defendant caused the victim's death. The court considered this mitigating circumstance but gave it no weight.

4.) The fact that the defendant was good to his family and helpful around the home deserves recognition by the court. The defendant cared enough for his daughter to allow her to be adopted by his Air Force buddy when this friend married the defendant's ex-wife. These mitigating facts were given partial weight by this court. However, the statement "(the defendant)...never showed signs of violence" is a gross misstatement of fact. The statement may have been made to indicate 'no violence toward his family' but as discussed in paragraph 1 of the aggravating

factors, the defendant was convicted in 1979 in Pima County, Arizona for aggravated battery. Therefore, the court gave little weight to the 'non-violent' factor of this non-statutory mitigating circumstance.

5.) The court gave some weight to the mitigating factor that the defendant saved two young people from drowning when he was in high school. However, the saving of two people from drowning does not alleviate the seriousness or mitigate the subsequent criminal act of causing the death of a young person by drowning.

6.) Again the defendant asked this court to consider that the defendant was under the influence of extreme mental or emotional disturbance and suffering from an alcohol problem as both a statutory mitigating factor and a non-statutory mitigating circumstance. The crux of this non-statutory mitigating factor is that the defendant's use of alcohol resulting from his tours in Viet Nam and over a period of time has taken a toll on the defendant's mind and body. In this case the defendant has not shown these circumstances to exist. The witnesses who testified about the defendant's appearance and condition when he returned home the night of the capital felony did not describe him as being intoxicated, under the influence of any substance or suffering from any mental or emotional condition. Fellow inmates who testified at the defendant's trial testified that defendant's recollections of the circumstances on the night of the homicide were clear and detailed, not confused or unbelievable.

The court did give some weight to the fact that the defendant and the victim had been partying and visited some bars together on the night of the capital felony. However, the court does not give much weight to this non-statutory mitigating factor.

The court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present.

Accordingly, it is

ORDERED AND ADJUDGED that the defendant, James Dailey, is hereby sentenced to death for the murder of the victim, Shelly Boggio. The defendant is hereby committed to the

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custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

May God have mercy on his soul.

DONE AND ORDERED in Clearwater, Pinellas County, Florida this 21st day of January, 1994.

THOMAS E. PENICK, JR.
CIRCUIT-JUDGE

1635 hours

Copies furnished to:
Bernard J. McCabe, State Attorney
John E. Swisher, Esquire
James Dailey

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 10th day of August, 1994.

Respectfully submitted,

Paul C. Helm

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PCH/ddv