IN THE SUPREME COURT OF FLORIDA

JAMES MILTON DAILEY, :

Appellant, :

vs. : Case No. 83,160

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This brief is filed on behalf of the appellant, JAMES MILTON DAILEY, in reply to the Brief of the Appellee, the State of Florida.

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.

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.

The most fundamental precepts of criminal law and procedure are embodied in the Eighth and Fourteenth Amendments and the corresponding provisions of the Florida Constitution. First, the state is forbidden to "deprive any person of life...without due process of law...." U.S. Const. amend. XIV, § 1; Art. I, § 9, Fla. Const. Second, the state is forbidden to inflict cruel and unusual punishment. U.S. Const. amend. VIII; Art. I, § 17, Fla. Const.

With the sole exception of the execution of an innocent person, there can be no more cruel and unusual punishment, no more egregious violation of due process of law than to knowingly execute a person whose death sentence was unconstitutionally imposed. James Dailey's death sentence was unconstitutionally imposed, through no fault of his own, because his original court-appointed penalty phase attorney, his original court-appointed appellate counsel, the prosecution, the trial court, and this Court all failed to recognize that the standard penalty phase jury instructions on three of five aggravating factors--heinous, atrocious, and cruel (HAC); cold, calculated, and premeditated (CCP); and avoid

arrest--did not satisfy the constitutional requirements for guiding and channeling the jury's discretion in recommending death. To refuse to grant Mr. Dailey a new penalty phase trial under these circumstances would be a grotesque miscarriage of justice.

In Godfrey v. Georgia, 446 U.S. 420, 427, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), the Supreme Court ruled that the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty "under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." The state "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Id., at 428 (footnotes omitted). The Court held that the death penalty could not be imposed on the basis of a single aggravating factor providing that the offense was "outrageously or wantonly vile, horrible, and inhuman," because there was "nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of a death sentence." Id., at 428-29.

In Maynard v. Cartwright, 486 U.S. 356, 362, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), the Supreme Court ruled that "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." The Court held that Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance was too vague and

overbroad to sufficiently guide the sentencing jury's discretion. Moreover, the defect was not cured by the state appellate court's finding that specific facts supported the aggravating factor. Id., at 363-64.

In Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989), this Court ruled that the Maynard decision did not apply in Florida because the final sentencing decision is made by the trial judge whose findings are subject to the application of a narrowing construction upon appellate review. In Brown v. State, 565 So. 2d 304, 308 (Fla.), cert. denied, 498 U.S. 992, 111 S. Ct. 537, 112 L. Ed. 2d 547 (1990), this Court rejected a claim that the CCP aggravating circumstance jury instruction was unconstitutionally vague because Maynard did not apply in Florida and did not apply to the CCP factor.

This Court's refusal to apply Maynard in Florida appeared to be supported by the subsequent decision in Walton v. Arizona, 497 U.S. 639, 653, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), in which the Supreme Court rejected a Maynard claim because the judge was the sentencer, and "the logic of those cases [Maynard and Godfrey] has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions."

At the time of Dailey's original penalty phase trial in 1987, Maynard had not yet been decided, and there was no precedent for trial counsel or the trial judge to seriously question the constitutional validity of the standard jury instructions on

Florida's aggravating circumstances. While Dailey's original appeal was pending, Maynard, Walton, Smalley, and Brown were decided. Although Maynard initially provided a constitutional basis for challenging the standard instruction on HAC, the other cases appeared to lay the issue to rest, so there was no reason to seriously question the instructions in Dailey's original appeal. In fact, this Court has ruled that appellate counsel cannot be found ineffective for failing to anticipate the decision in Espinosa v. Florida, 505 U.S. __, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), and that it would not have granted relief on an argument concerning the vagueness of the standard jury instruction on HAC before Espinosa. Lambrix v. Singletary, 19 Fla. L. Weekly S330 (Fla. June 16, 1994).

Not until the Supreme Court decided Espinosa did it become clear that the Eighth and Fourteenth Amendments required the same specific and detailed guidance for Florida penalty phase juries in applying aggravating factors as in states where the jury is the only sentencer. Unfortunately for Mr. Dailey, Espinosa was decided after the decision on his initial appeal became final.

However, this Court reversed Dailey's death sentence because the trial court erred by finding two aggravating factors not supported by the evidence, avoid arrest and CCP, and failed to weigh proven mitigating factors. Dailey v. State, 594 So. 2d 254, 259 (Fla. 1992). This Court remanded for resentencing by the trial judge instead of granting a new penalty phase trial with a jury. Id. Not until the following year did this Court recognize the need

for a new jury recommendation under state law when the jury was instructed on factually inapplicable aggravating factors. Padilla v. State, 618 So. 2d 165, 170 (Fla. 1993); Archer v. State, 613 So. 2d 446, 448 (Fla. 1993).

Because Espinosa, Padilla, and Archer were decided before Mr. Dailey was resentenced to death, it ought to be self-evident that it was fundamentally unfair for the trial court to deny his motion for a new penalty phase trial with a jury and to rely upon the original, constitutionally and legally invalid jury death recommendation in resentencing him to death. Yet the state insists that because Dailey's original trial and appellate counsel failed to recognize and argue the constitutional violation in giving vague, overbroad jury instructions on aggravating factors, an error never recognized by this Court before Espinosa, Dailey should now be executed in reliance upon a constitutionally invalid sentencing procedure. The state's over-zealous desire to kill Mr. Dailey under these circumstances should shock this Court's conscience.

The state relies upon Riley v. State, 413 So. 2d 1173 (Fla.), cert. denied, 459 U.S. 981, 103 S. Ct. 317, 74 L. Ed. 2d 294 (1982), and Riley v. Wainwright, 433 So. 2d 976 (Fla. 1983), for the proposition that Dailey should be procedurally barred from raising his Espinosa claim on this appeal because he had not properly objected to the unconstitutional jury instructions at his original penalty phase trial and did not argue this issue on his original appeal. Brief of the Appellee, pp. 4-5. Yet both decisions were rendered long before Espinosa was decided, and the

Court also held that the jury was properly instructed on aggravating circumstances. In Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987), this Court found that Riley's penalty phase jury was unconstitutionally instructed on mitigating circumstances and vacated his death sentence. This Court explained,

> We reject the state's argument that a new advisory jury upon resentencing is not constitutionally required under Florida's sentencing scheme. If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by the procedure.

Id., at 659. Since the jury's death recommendation in Dailey's case also resulted from an unconstitutional procedure, as argued in Issue I of appellant's initial brief, this Court should also grant Dailey a new penalty phase trial with a new jury.

Appellant acknowledges this Court's prior decisions procedurally barring unpreserved Espinosa claims. The state specifically relies upon Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993), and Lambrix v. Singletary. Brief of Appellee, p. 7. But neither case is dispositive of Dailey's case because neither involves the reimposition of a death sentence in reliance upon a constitutionally invalid jury death recommendation over defense counsel's objection following the Espinosa decision. Beltran-Lopez was Espinosa's co-defendant. This Court affirmed his death sentence on direct appeal and procedurally barred his Espinosa claim on remand from the Supreme Court because he had not attacked the vagueness of the HAC jury instruction in the trial court. In Lambrix, this Court

denied collateral relief from a previously affirmed death sentence because no Espinosa claim was argued on direct appeal.

Applying the Lambrix holding concerning ineffective assistance of counsel, supra, neither Dailey's original trial or appellate counsel was ineffective for failing to argue the unconstitutional vagueness of the aggravating circumstance jury instructions before Espinosa, and this Court would have denied relief if they had raised the argument. The first time Dailey had any opportunity to effectively argue the Espinosa violation in his case was on remand for resentencing when he moved for a new penalty phase trial with a jury after Espinosa was decided. (R 207-09, 310-21, 338-47) Moreover, this is Dailey's initial direct appeal from his present death sentence and his first opportunity to effectively argue his Espinosa claim on appeal to this Court. Under these circumstances, there can be no legitimate basis for procedurally barring his argument.

Contrary to the state's assertion, Brief of the Appellee, p. 7, Dailey is not seeking retroactive application of the Espinosa rule. Espinosa was decided before Dailey's present death sentence was imposed and plainly governed the resentencing proceedings, as well as this appeal. "The decisional law in effect at the time an appeal is decided governs the issues raised on appeal, even where there has been a change of law since the time of trial." Wheeler v. State, 344 So. 2d 244, 245 (Fla. 1977). In Proffitt v. State, 510 So. 2d 896, 897 (Fla. 1987), this Court declared,

> The death sentence law as it now exists, however, controls our review of this resen-

> tencing. There have been multiple restrictions and refinements in the death sentencing process, by both the United States Supreme Court and this Court, since this matter was first tried in 1974 and affirmed in 1975, and we are bound to fairly apply those decisions.

Similarly, this Court is bound to apply Espinosa because Dailey's resentencing and this appeal have occurred since that case was decided.

Even if it were true that Dailey is seeking retroactive application of Espinosa, this Court is constitutionally bound to apply the Supreme Court's Espinosa decision to all capital cases in which the judgment and sentence of death was not final when Espinosa was decided. In Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), the Supreme Court held,

> that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

Moreover, this Court adopted the Griffith rule for applying this Court's decisions in criminal cases to all other cases which were not yet final at the time of decision in Smith v. State, 598 So. 2d 1063 (Fla. 1992). Pursuant to Smith, Dailey would also be entitled to retroactive application of this Court's decisions in Padilla and Archer, requiring a new penalty phase trial with a jury when the original jury was instructed upon factually inapplicable aggravating factors.

The state also asserts that the trial court was foreclosed from conducting a new penalty phase trial with a jury because such

action would have exceeded the scope of this Court's mandate remanding for resentencing by the court. Brief of the Appellee, p. 11. If the state's premise is correct, then the only lawful sentence the court could have imposed at resentencing was life imprisonment because Espinosa prohibited the court from relying on the unconstitutionally obtained jury death recommendation.

In Mills v. Maryland, 486 U.S. 367, 108 S. Ct., 100 L. Ed. 2d 384 (1988), the Supreme Court vacated a state court decision which affirmed a death sentence because the jury may have interpreted the instructions and verdict form to mean that they could not consider any mitigating factor unless they unanimously agreed that it was proven by a preponderance of the evidence. The Eighth Amendment required that each individual juror be allowed to weigh every mitigating circumstance he found to be proved. The Court declared,

> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case. The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing.

Id., at 383-84. Again, this principle requires a new penalty phase trial with a new jury in Dailey's case.

The state incorrectly argues, Brief of the Appellee, pp.8-9, that Sochor v. Florida, 504 U.S. __, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992), requires this Court to presume that the jury did not rely upon the CCP and avoid arrest factors found to be unproven in

Dailey's appeal from his prior death sentence. Dailey v. State, 594 So. 2d at 259. First, the Supreme Court's presumption, upon certiorari review, that a properly instructed jury did not rely on an unproven aggravating factor does not require this Court to apply the same negative presumption on direct appeal. This Court is authorized to hold that state law provides more protection than the United States Constitution, which establishes the minimum requirements of due process, not the maximum. More importantly, the jury must be properly instructed for the Sochor presumption to apply. Sochor, at 340. Because Dailey's jury was not instructed upon this Court's limiting constructions of the HAC, CCP, and avoid arrest factors, (OR 1426-27) those instructions were unconstitutionally vague. Espinosa; Jackson v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994). When the jury is not properly instructed, Sochor suggests and Espinosa requires this Court to presume that the jury relied upon constitutionally invalid aggravating factors in making their recommendation.

Moreover, the mandatory presumption that the jury relied upon invalid aggravators forecloses this Court from finding that the error was harmless because the evidence supposedly overwhelmingly established the HAC factor. Under Espinosa, whether HAC was proven is irrelevant, notwithstanding this Court's decisions in numerous cases, including Beltran-Lopez, 626 So. 2d at 164-65. In Maynard v. Cartwright, 486 U.S. at 363-64, the Supreme Court held that the error in instructing the jury that it could rely upon an unconstitutionally vague aggravator, HAC, could not be remedied by the

appellate court's determination that the aggravator was properly established by the evidence.

Constitutional error cannot be held harmless on the ground that the evidence was sufficient to support the result, even when the evidence is overwhelming. Chapman v. California, 386 U.S. 18, 23-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1965); State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). Instead, the state must establish beyond a reasonable doubt that the error did not affect the jury's verdict. Chapman; DiGuilio. Not only has the state failed to carry its burden of proving the error harmless, Espinosa expressly requires this Court to presume that the error caused the jury to consider invalid aggravating factors, which in turn were indirectly weighed by the trial court by according great weight to the jury's death recommendation. Id., 120 L. Ed. 2d at 858-59. The jury's consideration of invalid aggravating factors, when there are also proven mitigating factors, is not harmless and requires a new penalty phase trial with a new jury. Padilla v. State, 618 So. 2d at 170; Elledge v. State, 346 So.2d 998, 1002-03 (Fla. 1977).

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.

The state's unsubstantiated assertion that appellant's complaint is not the trial court's consideration of mitigating circumstances, but the court's conclusion that they were insufficient to outweigh the aggravating factors, Brief of the Appellee, p. 14, is simply untrue. Issue II of appellant's initial brief is plainly addressed to the court's errors in failing to find and weigh particular mitigating factors shown by competent, unrefuted evidence as required by this Court's decisions in Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993), and Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990).

The state's reliance upon Lucas v. State, 568 So. 2d 18 (Fla. 1990), for the proposition that the trial court cannot be faulted for failing to consider mitigating factors which were not clearly identified and argued by defense counsel, Brief of the Appellee, p. 19, is misplaced. While Lucas does place initial responsibility for identifying mitigating factors on defense counsel, this Court reversed Lucas's death sentence and remanded for reconsideration and reweighing of the findings of fact because the sentencing order was unclear regarding the trial court's findings on statutory mitigating factors and did not mention nonstatutory mitigating factors shown by the record. Id., at 23-24. In Farr v. State, 621

So. 2d 1368, 1369 (Fla. 1993), this Court ruled that the trial court is required to consider all mitigating factors shown by the record, even when the defendant expressly requests the court not to consider any mitigating evidence.

The Farr rule cannot be limited to situations where the defendant waives mitigation because it is constitutionally mandated for all capital cases. In Parker v. Dugger, 498 U.S. 308, 315, 320-22, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991), the Supreme Court ruled that the Eighth Amendment requires both the sentencing judge and this Court to consider all mitigating factors shown by the record.

The state argues that there was insufficient evidence to establish that Dailey had a history of alcohol abuse. Brief of the Appellee, pp. 14-15. Yet Mary Kay Dollar, Dailey's former wife, 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 stationed in the Philippines. (OR 1375) Dailey's drinking resulted in their divorce after ten years of marriage. (OR 1366-67) Mrs. Dollar was obviously an eyewitness to these events, and the state presented no evidence to refute her testimony. Because the defense presented a reasonable quantum of competent, uncontroverted evidence that Dailey had a history of alcohol abuse, the trial court was required to find and weigh this mitigating circumstance. Knowles v. State, 632 So. 2d at 67; Nibert v. State, 574 So. 2d at 1062.

The state also argues that the trial court properly considered the evidence that Dailey consumed alcohol and marijuana on the day of the offense by giving some weight to the fact that Dailey and the victim had been partying and visiting bars and by finding a lack of evidence that Dailey was under the influence. Brief of the Appellee, p. 19. However, the court's findings (R 250-52) ignore Shaw's testimony that he, Dailey, and Pearcy had been drinking heavily all day in addition to smoking marijuana and continuing to drink that night. (OR 995-97, 1002-03) The court's conclusion that there was "absolutely no evidence that he was intoxicated" (R 250) ignores Stacey Boggio's testimony that everyone in the car was "buzzed." (OR 908-09) The trial court's statement that it "did give some weight to the fact that the defendant and the victim had been partying and visited some bars together" (R 252) does not address Dailey's consumption of alcohol and marijuana. Many people can and do have parties and even visit bars without consuming alcohol or drugs.

More importantly, the trial court rejected Dailey's consumption of alcohol and marijuana as a mitigating factor because it concluded "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," nor that Dailey "was under the influence of alcohol or drugs to the point where he was unable to control his conduct." (R 250) Had the evidence established that Dailey was so intoxicated that he could not appreciate the criminality of his conduct and was unable to

control his conduct, there would be no need to consider mitigating circumstances since Dailey would be entitled to acquittal of first-degree murder and kidnapping because the evidence would preclude a finding of both premeditation and the requisite specific intent for kidnapping.[1] See Gardner v. State, 480 So. 2d 91 (Fla. 1985)(voluntary intoxication is a defense to first-degree murder and robbery); Linehan v. State, 476 So. 2d 1262 (Fla. 1985)(voluntary intoxication is a defense to first-degree felony murder when the underlying felony is a specific intent crime). The degree to which Dailey was under the influence of alcohol and marijuana may be considered in determining the weight to be given this mitigating circumstance, but the trial court was constitutionally required to consider the circumstance and to give it some weight. Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Dailey v. State, 594 SO. 2d 254, 259 (Fla. 1992).

The state asserts that the court properly gave some weight to Dailey's act of saving two young people from drowning when he was in high school. Brief of the Appellee, p. 16. But the court's express findings on this mitigating factor were self-contradictory. Immediately after stating that he gave this factor some weight, the court said that Dailey's act "does not alleviate or mitigate the subsequent criminal act of causing the death of a young person by

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[1] The kidnapping statute requires proof of intent to: (1) hold the victim for ransom or as a shield or hostage; (2) commit or facilitate the commission of any felony; (3) inflict bodily harm upon or terrorize the victim or another person; or (4) interfere with the performance of a governmental or political function. § 787.01(1)(a), Fla. Stat. (1989).

drowning." (R 252) The state and the court cannot have it both ways. The same factor cannot be both mitigating and unmitigating at the same time. The court's contradictory findings violate the Lucas requirement of unmistakable clarity.

The court's errors in failing to weigh proven mitigating factors require reversal and remand for resentencing pursuant to Parker v. Dugger and Farr v. State.

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.

Due process of law requires trial before an impartial judge. Johnson v. Mississippi, 403 U.S. 212, 216, 91 S. Ct. 1778, 29 L. Ed. 2d 423 (1971); U.S. Const. amend. XIV; Art. I, § 9, Fla. Const. In the federal courts, this requirement is implemented through section 455(a), Title 28, United States Code, which provides that a federal judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Liteky v. United States, 510 U.S. __, 114 S. Ct. __, 127 L. Ed. 2d 474, 482 (1994). This provision requires evaluation of motions to disqualify

> on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal [is] required whenever "impartiality might reasonably be questioned."

Id., at 486.

Thus, the state's contention that Dailey must demonstrate actual bias or prejudice in the mind of the judge, Brief of the Appellee, p. 22, must fail. To whatever extent this Court's decision in Dragovich v. State, 492 So. 2d 350, 353 (Fla. 1986), conflicts with the decision in Liteky, Dragovich was wrongly decided. Actual bias or prejudice concerns the judge's subjective state of mind, which can rarely be proven. Under Liteky, Dailey was required to demonstrate the judge's bias or prejudice on an

objective basis, that is, whether the judge reasonably appeared to be biased. In fact, this is the standard applied by this Court in Rogers v. State, 630 So. 2d 513, 515 (Fla. 1993), and Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983).

Under this standard,

> The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a necessary condition for "bias or prejudice" recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice. Nor is it a sufficient condition for "bias or prejudice" recusal, since some opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will not suffice.

Liteky, at 490. Thus, whenever a judge's impartiality may reasonably be questioned, he is required to disqualify himself regardless of the source of his apparent bias or prejudice.

Appellant acknowledged in his initial brief, pp. 30-31, that prior adverse rulings and prior exposure to the evidence in prior judicial proceedings are not generally sufficient to require disqualification of the trial judge. However, prior judicial proceedings, such as the co-defendant's trial, constitute an "extrajudicial source" for the court's possible bias or prejudice. Liteky, at 484. Also, prior judicial rulings are an expression, rather than a source, and may be based upon extrajudicial knowledge or motives. Id., at 484-85.

Furthermore, there is a need for closer scrutiny and greater sensitivity in reviewing the basis for a capital defendant's grounds for seeking to disqualify the judge whose sentencing deci-

sion is literally a matter of life or death for the defendant. Chastine v. Broome, 629 So. 2d 293, 294 (Fla. 4th DCA 1993). See Zant v. Stephens, 462 U.S. 862, 884-85, 103 S. Ct. 2733, 72 L. Ed. 2d 235 (1983)(Eighth Amendment imposes a greater need for reliability in determining whether the death penalty is appropriate in a specific case).

In this case, the sentencing judge's prior rulings were not only adverse to Dailey, some were legally invalid and sufficiently prejudicial to Dailey to require reversal of the original death sentence and remand for resentencing. The judge improperly considered two aggravating circumstances, avoid arrest and cold, calculated, and premeditated, which were not proved by the state and were not applicable to Dailey. Dailey v. State, 594 So. 2d 254, 259 (Fla. 1991). The judge unconstitutionally failed to give any weight at all to proven mitigating circumstances. Id. And, the judge violated a basic premise of due process by considering evidence outside the record, specifically, evidence from the co-defendant's trial which convinced the judge that Dailey was more culpable and more deserving of death than his co-defendant. Id.

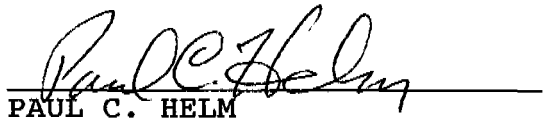
It is not enough to presume that the judge will follow the law on remand when the judge has already demonstrated a predisposition not to do so in this case. Under these circumstances, it was altogether quite reasonable for Dailey, or any reasonably prudent defendant similarly situated, to fear that the judge was biased and prejudiced against him and unlikely to seriously consider imposition of a life sentence. Because Dailey's apprehension of judicial

bias was based on reasonable grounds, the judge's denial of the motion to disqualify violated due process and requires reversal.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Carol M. Dittmar, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 16th day of November, 1994.

Respectfully submitted,



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