IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

FLOYD W. DAMREN,)

Appellant,)

vs.)

STATE OF FLORIDA,)

Appellee.)

)

CASE NO.: 86,003
LOWER CASE NO.: 94-537-CF

On appeal from the Circuit Court of the Fourth Judicial Circuit, in and for Clay County, Florida

REPLY BRIEF OF APPELLANT

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ISSUE I.

THE TRIAL COURT ERRED IN PERMITTING EVIDENCE OF SIMILAR ACTS OR OTHER CRIMES TO BE PRESENTED AT THE GUILT PHASE OF THE TRIAL

Appellee relies upon Sims v. State, __ So.2d. __, 21 F.L.W. S 320 (Fla. 1996), for the proposition that evidence of Damren's prior burglary of the Sun Electric truck is relevant and admissible because it is linked to a motive to murder. (Answer brief of appellee at 24). Sims is inapplicable to the instant case; in Sims, the question was whether the defendant's ***parole status*** was admissible, ***not*** the details of the prior crime for which Sims was on parole. __ So.2d. at __. Sims does not dictate that in this case the testimony of the unrelated, dissimilar vehicle burglary was relevant to a motive to murder of Don Miller. This court should not rely upon Sims for the proposition that this evidence was admissible.

Appellee also relies upon Hunter v. State, 660 So.2d. 244 (Fla. 1995), in support of its assertion that the previous theft was offered to counter the intoxication defense. (Answer brief of appellee at 24). Hunter is entirely inapplicable to the instant case -- in Hunter, the prior crime occurred immediately before, and almost as part of, the robbery and shooting spree. In Hunter, at 11:44 p.m. on September 16, 1992, the defendant robbed a man in DeLand, then headed immediately for Daytona Beach, where four additional men were robbed and shot. Clearly the prior robbery in Hunter was inextricably intertwined with the subsequent robberies

and murders, and evidence of that robbery was properly admitted. The same cannot be said for the instant case, where the prior burglary was of a vehicle, not a structure; was of property belonging to an entirely different victim; and was an entirely dissimilar crime not intertwined with the murder at hand. Hunter is inapplicable and should not be relied upon by this court.

Similarly, Armstrong v. State, 642 So.2d. 730 (Fla. 1994), is inapposite to the instant case. In Armstrong, the question was one of prosecutorial misconduct regarding certain testimony elicited from a witness -- not the admissibility of evidence of a prior crime.

Appellee also relies on Layman v. State, 652 So.2d. 373 (Fla. 1995), for the proposition that the evidence of the prior vehicle burglary was relevant to show motive and ability to premeditate. In Layman, the testimony consisted of the defendant's prior battery of his girlfriend (the victim of the homicide), and prior vandalism on her car. Clearly, in Layman, the evidence was integrally connected to and showed a motive for, the murder, unlike the instant case.

This court should reject appellee's argument and find that the trial court erred in permitting the similar fact evidence to be admitted. Because the admission of this evidence violated appellant's right to a fair trial, this cause should be reversed and remanded for a new trial.

ISSUE II:

THE TRIAL COURT ERRED IN REFUSING TO GIVE THE STANDARD WILLIAMS RULE INSTRUCTION WHEN EVIDENCE OF PRIOR SIMILAR ACTS OR CRIMES WAS ADMITTED AGAINST DEFENDANT

Appellant relies on the argument set forth in his initial brief as to this issue.

ISSUE III.

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTION TO THE STATE'S REMARKS IN GUILT PHASE CLOSING ARGUMENT REGARDING THE INTOXICATION DEFENSE

It is the undisputed law of the state of Florida that voluntary intoxication *is* a defense to the specific intent crimes of first-degree murder and robbery. Gardner v. State, 480 So.2d. 91 (Fla. 1985). In the instant case, Damren's main defense to the charges of first-degree murder and robbery was that he was too intoxicated to be able to form the requisite intent required as elements of those offenses. Damren adequately proved at the guilt phase of the trial that he had consumed a sufficient quantity of alcohol on the date in question to render him intoxicated, both through testimony of lay witnesses and experts.

The state urges that because no witness saw Damren exhibiting any typical physical signs of intoxication that he was not entitled to claim a voluntary intoxication defense. (Answer brief of appellee at 34). The state has mischaracterized Dr. Miller's trial testimony; Dr. Miller testified very precisely that the physical symptoms of intoxication were the last to appear, after symptoms such as diminished judgment and lowered inhibitions appear. (T-592-93). The evidence presented by the defense was clearly established that Damren was heavily intoxicated prior to the commission of the murder. (T-594-95).[1]

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[1]Dr. Miller calculated that a man of Damren's size drinking twelve beers between 4:00 p.m. and 7:30 p.m. would have had a blood alcohol level of .19.

Appellee has confused the legal test for insanity in Florida with the intoxication defense. Clearly, legal insanity requires different proof than voluntary intoxication, and addresses the ability of the defendant to appreciate the nature and quality of his acts and the wrongfulness of the crime, not just the question whether the defendant is able to form the requisite specific intent.[2] The question before the jury in this case was whether Floyd Damren had consumed too much alcohol to prohibit him from having the specific intent to commit a premeditated first-degree murder, or to commit a robbery (the state's basis for its felony-murder theory). Unfortunately, the state has confused "mental infirmity, disease, or defect" with voluntary intoxication. The issue of insanity and the "M'Nghten Rule" have no place in this court's consideration of this issue, and this court should disregard this portion of appellee's argument.

Because the prosecutor's improper misstatement of the law as to the defense of voluntary intoxication, the jury was misled as to the law relating to appellant's main defense. State Attorney Shorstein intimated that the jury was required to find that Damren was not aware that he was committing a murder or a burglary. (T-668). Shorstein argued:

> How drunk would you have to be not to know you've committed a murder or a burglary? I don't know. The jury has to decide that.

(T-668). This argument was tantamount to telling a jury they had

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[2]A defendant could form general intent to commit a crime, but still not have the specific intent required of first-degree murder and armed robbery.

to find Damren was out of touch with reality in order to apply the defense of voluntary intoxication -- precisely what is required in an insanity defense. This error went directly to the main issue in the case and cannot be said to be harmless.

Because this court erred in overruling trial counsel's timely objection and in denying the contemporaneous motion for mistrial, this cause must be reversed and remanded for a new trial.

ISSUE IV.

THE TRIAL COURT ERRED IN ADMITTING "VICTIM IMPACT" EVIDENCE AT THE PENALTY PHASE

Appellee has mischaracterized appellant's argument as to this issue. Damren argues that the victim impact evidence presented during the penalty phase was presented solely to encourage the jurors to impose the death penalty because of sympathy for the victim's family members. Appellant's point is that the victim impact evidence in this case was not properly limited under Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed. 2d 720 (1991).

The prosecutor improperly argued in closing:

> Defense counsel doesn't want you to think about all the people who loved Donald Miller, some of whom you've heard from today, what the senseless murder has done to what was once a wonderful family.
>
> * * *
>
> What has happened to this once great family must be considered in determining Floyd Dampen's personal responsibility and guilt, his blameworthiness.
>
> * * *
>
> You can and should consider, though not as an aggravating factor, what kind of husband or friend Donald Miller was to his wife, Susan. There is nothing you can do to ease the pain of these loved ones and that's a tragedy. They will have to live with it the rest of their lives. The children, grandchildren, Nicholas and Stephanie, will grow up and they will want to know what happened. They are going to know what type of justice was done, what happened. With your recommendation, you help to answer these questions.

(T-935-36; T-939). The prosecution asserts that any improper victim impact testimony is harmless. Because the prosecution argued to the jury that the victim's family was "great" and was "once wonderful," and that these factors must be considered in assessing Damren's responsibility, it is clear that any error in admitting victim impact evidence is far from harmless. The jury had to be swayed by the comments that the deceased Miller had been planning to go fishing with his grandson, had been planning on taking a "delayed honeymoon;" that the "grandchildren would want to know what happened," and other poignant facts. None of these facts is the type of evidence contemplated by Payne; this testimony was offered solely to invoke the sympathy of the jurors.

The trial court erred in admitting this improper victim impact evidence, and in permitting the state to argue to the jury that Damren should be held responsible because of characteristics of the victim and his family. Because the trial court erred in this regard, the imposition of the death penalty in this case must be reversed, and this cause remanded for a new penalty phase hearing.

ISSUE V.

THE TRIAL COURT ERRED IN ADMITTING HEARSAY TESTIMONY AS TO OUR-OF-COURT STATEMENTS OF JEFF CHITTAM

Appellant relies on the argument set forth in his initial brief as to subsection (2) of appellee's argument as to this issue. Appellant's response to subsection (1) follows.

In its argument as to whether the hearsay statements of Jeff Chittam were admissible at the penalty phase under section 921.141(1), Florida Statutes, the state overlooks the proviso in the statute "provided the defendant is accorded a fair opportunity to rebut any hearsay statements." The state relies on Spencer v. State, 645 So.2d. 377 (Fla. 1994), for the proposition that a police officer's hearsay testimony as to the decedent's statements were admissible in the penalty phase. Spencer is distinguishable from the instant case because in Spencer the officer was actually available at trial for cross-examination. Waterhouse v. State, 596 So.2d. 1008 (Fla. 1992), upon which the state also relies, is similarly inapplicable.

In its answer brief, appellee asserts that Damren was provided an opportunity to rebut Chittam's out-of-court statement. (Answer Brief of Appellee at 40). The fact that trial counsel was able to cross-examine the witnesses who claimed they heard the out-of-court statement of Chittam does not cure the problem of inability to rebut -- those witnesses did not ask Chittam the specific questions trial counsel would have asked, and those witnesses did not cross-examine Chittam about the details relating to cold, calculated, and

premeditated, or to heinous, atrocious and cruel. As trial counsel pointed out in his argument below:

> For instance, how long did Floyd Damren walk back and forth in front of the man; the question whether Floyd Damren talked to the victim at all, how Floyd Damren acted, how his face looked, did he appear confused, worried, angry or enraged; what else he did other than pace back and forth, if he looked at Mr. Miller; if so, how he looked; if Mr. Miller said more words other than about fishing and begging, what does he mean by the word begging, since that doesn't exactly tell the words that were spoken; if -- whether Floyd Damren started to walk away, whether he changed his mind at any point; whether Mr. Miller tried to get away and tried to grab a weapon or tried to lunge at either Floyd Damren or Jeff Chittam; whether Floyd Damren put the weapon down, picked it up again or changed weapons, and whether Floyd told Jeff what was going through his mind at the time.
>
> All of those questions are relevant to cold, calculated, and premeditated under the case law and I cannot get answers to those questions by asking these witnesses.
>
> With regard to heinous, atrocious and cruel, I cannot rebut this testimony because I can't get answers to questions such as: when Mr. Damren hit Mr. Miller, did Mr. Miller lose consciousness and then revive and then lose it again; if he did lose consciousness, how quickly; did he struggle and if so, how much; was he hit from behind or in front; was he hit suddenly without warning; how many times was he hit; and when Mr. Miller was talking, who was he addressing, Jeff Chittam or Floyd Damren or both; and if he was addressing Floyd Damren, where was Floyd; was he close enough to hear, was -- were they talking over each other so possibly Floyd Damren did not hear; and how does Jeff Chittam know that Floyd Damren heard Mr. Miller when he talked to him.
>
> For that reason, it -- even if it's hearsay and normally admissible in penalty phase, it should not be here because I don't have an adequate opportunity to rebut it.

(T-767-68).

Moreover, the in-court witnesses who recounted Chittam's statements were unclear as to exactly what Chittam had said. Tessa Mosley couldn't remember whether Chittam had said Floyd had hit the man once or twice -- certainly a factor to be considered in determining whether the murder was heinous, atrocious or cruel. (T-815-16). Incredibly, Mosley testified that she could remember some of Jeff Chittam's statements, but there was "some of it that [she] really didn't pay that much attention to. . . . " (T-820). Mosley admitted that she did not pay attention to some of the small details. (T-820).

It is clear that counsel was deprived of the right to cross-examine and to rebut the out-of-court statements made by Chittam, and was unable to rebut any of the speculation arising therefrom. Because counsel was not able to adequately rebut this testimony, this testimony should not have been permitted under chapter 921. Appellant was denied his right to confront and cross-examine the witnesses against him as required by the federal and Florida Constitutions. The admission of these hearsay remarks deprived Damren of his right to a fair trial at the penalty phase; this cause should be remanded for a new penalty phase trial.

ISSUE VI:

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL

The cases upon which the state relies to support its claim that the homicide in this case was especially heinous, atrocious, or cruel, are factually distinguishable from and therefore are inapplicable to the instant case. In Bogle v. State, 655 So.2d. 1103 (Fla. 1995), in addition to the seven blows to the head, the victim's head had been crushed with a piece of cement, and she had been sexually assaulted both vaginally and anally prior to her death. No such facts exist in the instant case, and Bogle is inapplicable. Similarly, Whitton v. State, 649 So.2d. 861 (Fla. 1994), is inapplicable. In Whitton, the homicide took place over a period of thirty minutes, and the trial court determined that there had been evidence of a "violent combat." The trial court recounted there having been blood on the floor, furniture, walls, and ceiling; moreover, the victim was stabbed three times in the heart and subsequently beaten to death.

The facts of Colina v. State, 634 So.2d. 1077 (Fla. 1994), are more egregious than this case, and cannot be relied on in determining that was heinous, atrocious, and cruel. In Penn v. State, 574 So.2d. 1079 (Fla. 1991), the victim sustained thirty-one separate wounds, mostly to her head. The medical examiner in that case opined that it would have taken her up to forty-five minutes to die. 574 So.2d. at 1083. No such facts exist in the instant case.

In Bruno v. State, 574 So.2d. 76 (Fla. 1991), the homicide was held to be heinous, atrocious, and cruel because the victim was beaten with a crowbar. In Cherry v. State, 544 So.2d. 184 (Fla. 1989), evidence established that there was a footprint on the victim's pajama bottoms, and a corresponding bruise on her buttocks. This is unlike the instant case, where there was no unnecessarily torturous behavior over and above the actual striking of the victim. This court even stated in Chandler v. State So.2d. 701 (Fla. 1988), that the Chandler case was a "far cry from . . . the situation where a robber is startled or goaded into attacking a victim." 534 So.2d. at 537. In Chandler, there was evidence that Chandler had armed himself, marched the victims out of their home and stricken them repeatedly with a baseball bat. Chandler is indeed a "far cry" from the facts of this case where the evidence shows a burglar had been startled.

Lamb v. State, 532 So.2d. 1051 (Fla. 1988), is also distinguishable from the instant case because the evidence showed that the victim had fallen to his knees, and then to the floor after Lamb pulled his feet out from under him. There were additional facts sustaining the heinous, atrocious, and cruel finding in Lamb which do not occur here. Lamb and the remainder of the cases upon which the state relies predate Thompson, Robertson, and Campbell,[3] which are this court's most recent pronouncements

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[3]Thompson v. State, 619 So.2d. 261 (Fla. 1993), Robertson v. State, 611 So.2d. 1228 (Fla. 1993), and Campbell v. State, 571 So.2d. 415 (Fla. 1990). Appellant relied upon these cases in is initial brief.

upon the issue. These cases are controlling, and this court should not rely upon the earlier cases cited by the state.

The facts of this case simply do not rise to the level of "heinous, atrocious or cruel." The testimony relating to Damren's actions at the time of the actual killing is tenuous at best, and is insufficient to establish this aggravating factor.

ISSUE VII:

THE EVIDENCE FAILED TO ESTABLISH THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER

In asserting that the record sustains the trial court's finding that this homicide was cold, calculated and premeditated, appellee overlooks the assumptions and speculations contained in the finding of the trial court as to the aggravator "cold, calculated, and premeditated." Appellee relies heavily upon the trial court's finding that Damren planned the subsequent murder of Miller; however, the trial court's findings indicate speculation in this regard:

> All this time the defendant was pacing and ***surely*** contemplating the situation, considering the pleas of Chitham [sic] and the victim and reflecting on his next course of action.

(R-790-91). (Emphasis supplied). The speculation of the trial court as to the defendant's acts in this regard are unsubstantiated by any evidence, including the out-of-court statements of Jeff Chittam. Appellee cannot successfully argue that these findings are based on "evidence;" because there was no such "evidence," this court should reject the claim that the facts of this case establish that the homicide had been committed in a cold, calculated, and premeditated manner.

Damren agrees with the state's assessment of the law surrounding the CCP aggravator, but disagrees with the application of the cases relied on by the state to the facts of this case.

In Walls v. State, 641 So.2d. 381 (Fla. 1994), this court

cited Jackson v. State, 648 So.2d. 85 (Fla. 1994), for the proposition that four elements must exist to establish "cold, calculated, and premeditated." The state correctly points out that the first of these is "that the killing was the product of cool, calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." The state incorrectly asserts that Damren "did not even claim any loss of emotional control." (Answer Brief of Appellee at 51). Quite to the contrary, Damren had claimed voluntary ***intoxication***.

The state also asserts that Damren's actions were calm and deliberate; this can hardly be the case, wherein the state's own witness, the assistant medical examiner, testified that the wounds were the result of violent "chopping" activity. (T-441). It is clear from the nature of the wounds in this case that this homicide was not committed in a calm and deliberate fashion, but were more likely the product of surprise or rage.

The state also asserts that the second element of CCP has been met; that is that "the murder must be the product of a careful plan or prearranged design." (Answer Brief of Appellee at 51). The state argues that because Damren listened to the pleas of the victim and to the pleas of Jeff Chittam after initially striking the victim, that Damren "carefully considered his course of action, and formed a prearranged design to kill the victim." (Answer Brief of Appellee at 52). There was absolutely no evidence of this presented at either the trial or the penalty phase -- the only evidence which the trial court could possibly have considered in

determining these facts is the questionable out-of-court statement of Jeff Chittam released by Tessa Mosley.[4] There was no evidence that Damren had even heard these words, or, if he had, whether he had comprehended. The trial court added assumptions and speculation to the statement of Chittam to conclude that the homicide had been committed in a cold, calculated, and premeditated fashion. Because there was no evidence to sustain the elements required under Walls and Jackson, the finding that CCP existed was error.

The state also asserts that the requirement of "heightened premeditation" of CCP was met because Jeff Chittam had begged Damren not to hurt the victim. The state relies on Bonifay v. State, 21 F.L.W. S 301 (Fla. 1996), for this proposition. Bonifay, however, is distinguishable; in Bonifay, the victim was shot from outside an auto parts store. Those initial shots did not result in immediate death, and the victim lay on the floor begging for his life and talking about his wife and children ***after*** he had been shot. Bonifay is therefore distinguishable from the instant case. Once again, there is no evidence to show Damren had heard Chittam's statements, or, if he had, whether he had comprehended them.

The state also asserts that the "lengthy nature" of the crime also goes to the heightened premeditation to establish CCP. (Answer Brief of Appellee at 52). There was never any evidence introduced at either the guilt or the penalty phase regarding the

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[4]In fact, Mosley testified that she had not really paid much attention to Chittam, and that she had missed some of the details of his statement. (T-820).

length of time during which the homicide was committed. It is therefore speculative to claim that the homicide was "lengthy," and this court should not rely on this speculation for proof of CCP.

The facts of this homicide are equally consistent with a murder committed during the heat of passion, with a murder committed during a burglary and theft which was interrupted by an eye witness, and are consistent with a murder committed without premeditation. It was therefore error for the trial court to determine without a sufficient evidentiary basis that the aggravating factor CCP had been proved beyond a reasonable doubt. This court should hold as a matter of law that the facts of this homicide do not rise to the level of CCP and should vacate and set aside the death penalty imposed herein and impose a life sentence.

ISSUE VIII:

THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING OR IN ASSIGNING ONLY SLIGHT OR LITTLE WEIGHT TO THE NON-STATUTORY MITIGATING FACTORS WHICH APPELLANT PROVED

The trial court incorrectly rejected or gave little weight to Damren's mitigation evidence. For example, in rejecting the claim that Damren had impaired judgment, the trial court found that there "was no testimony from anyone that [Damren] was impaired in any way." (R-791). This finding directly conflicts with the uncontroverted testimony of Dr. Ernest C. Miller, M.D., that Damren likely had a blood alcohol level of .19 at the time of the homicide. (T-594). The trial court's conclusion that Damren was able to reflect on all his actions both before and after his visit to R. G. C. Minerals Sands," was unsupported by the evidence, and was directly contrary to the uncontroverted scientific evidence presented on the question. Because the trial court rejected such mitigating evidence despite uncontroverted proof thereof, the trial court abused its discretion, and this cause must be remanded for reconsideration of the mitigation by the trial court at a new sentencing hearing.

The state relies on Garcia v. State, 644 So.2d. 59 (Fla. 1994), for the proposition that the trial judge could properly find from the evidence that there was insufficient evidence of intoxication to establish this mitigating factor. (Answer Brief of Appellee at 56-57). Garcia is inapplicable to the instant case for in Garcia, the defense counsel presented *no* evidence at the penalty phase and there was no discussion in the opinion regarding the

nature of the evidence Garcia had presented at the guilt phase on the question of intoxication. 644 So.2d. at 61.

Despite lengthy testimony from witnesses relating the events of Floyd Damren's childhood, the trial court chose to reject the testimony presented by the defense in this regard. The trial court gave no weight to mitigating factors relating to Damren's childhood, to his work history or to his military service. (R-791-96). Damren was the child of an alcoholic father who never exhibited love or affection toward him, and who never engaged in any familial activities with his son. Damren's brother could remember his father being home on only one Christmas. Not only was Damren's father an alcoholic, but he was apparently a thief as well. The defense also established that Damren had been a superior soldier in Viet Nam, and had been a good worker at jobs he had held in the past. The trial court rejected this mitigation without receiving any rebuttal or impeachment evidence from the state. Because the mitigation evidence was unimpeached and was uncontradicted, the trial court erred in rejecting or giving little weight to the defense mitigation.

This court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has reasonably been established by the greater weight of the evidence. Besaraba v. State, __ So.2d. __, 20 F.L.W. S 212 (Fla. 1995), citing Campbell v. State, 571 S 415 (Fla. 1990).

A trial court may reject a defendant's claim that a mitigating circumstance has been proven only if the record contains competent,

substantial evidence to support such a rejection. Consalvo v. State, So.2d. , 21 F.L.W. S 423 (Fla. 1996), ***citing*** Nibert v. State, 574 So.2d. 1059 (Fla. 1990); and Cook v. State, 542 So.2d. 964 (Fla. 1989). In this case, there is no competent substantial evidence on which to base such a rejection. Because the trial court abused its discretion with its unfounded rejection of the defendant's mitigation evidence, this cause must be remanded with instructions for the imposition of a life sentence.

ISSUE IX:

THE IMPOSITION OF THE DEATH PENALTY IN THIS CAUSE IS NOT PROPORTIONATE WITH THE IMPOSITION OF THE DEATH PENALTY IN OTHER CASES

The cases upon which appellee relies in support of its contention that the death penalty is proportionate and appropriate in this case are factually distinguishable from this case, and should not be relied upon by this court to reach that conclusion.

In Geralds v. State, 674 So.2d. 96 (Fla. 1996), this court noted the "lack of substantial mitigation" in this case compared to the substantial aggravation precludes . . . [the] finding that Geralds' sentence of death was disproportionate." In the instant case, substantial mitigation was presented by the defendant and should not preclude this court from finding that the death sentence is disproportionate.

Finney v. State, 660 So.2d. 674 (Fla. 1995), can also be distinguished because of the violent and sexual nature of the crime toward the victim. In Finnev, the victim was stabbed thirteen times, and all but one of those stab wounds penetrated her lungs, causing bleeding and loss of oxygen. In Finnev, the medical examiner testified that the victim had ultimately died by drowning in her own blood. The facts of the instant case are totally different from those in Finnev, and Finnev cannot be relied upon to justify the imposition of the death penalty in this case, a burglary gone bad.

The state relies on the case of Gamble v. State, 659 So.2d. 242 (Fla. 1995), for the proposition that the death is

proportionate where there are two aggravators, one statutory mitigatory **and several** non-statutory mitigators. Gamble is inapplicable to the instant case, because the non-statutory mitigator which Gamble argued mandated a reversal of the death sentence was the co-defendant's life sentence. Clearly, that issue does not arise in the instant case, and Gamble is inapplicable because of the difference in the factual situation. Moreover, the state seeks to have this court determine that the death sentence is appropriate and proportionate by counting the aggravating versus the mitigating factors. This is clearly a prohibited approach, and this court should not engage in such a counting process.

In Bogle v. State, 655 So.2d. 1103 (Fla. 1995), this court determined that the trial court had proper;y evaluated the factors in mitigation, whereas here, the trial court rejected uncontroverted mitigation without explanation. Bogle is inapplicable to this case, because here the trial court rejected or gave little weight to mitigation without their being substantial evidence in the record to sustain such rejection. This court should not **rely on** Bogle for the proposition that the death sentence is proportionate in this case.

Similarly, Whitton v. State, 649 So.2d. 861 (Fla. 1994), should not be relied upon by this court. In Whitton, five aggravating factors were found to be clearly supported by the record, and no statutory mitigating factors had been found. Finney v. State, 648 So.2d. 95 (Fla. 1994), involves an execution style murder, with evidence of an extremely careful plan and prearranged

design. Finney differs significantly from the facts of this case, and is not a basis for determining that the death penalty is proportionate in this case.

It is clear from the cases upon which appellee relies that in order for the death penalty to be an appropriate and proportionate sentence, the crime must be one of the most aggravated and unmitigated of crimes. It is disproportionate and not appropriate to impose the death penalty for a homicide which occurs during a burglary gone bad. It is also disproportionate to impose the death penalty where there is "vast" mitigation. See, e.g., Besaraba v. State, __ so. 2d. __, 20 F.L.W. S 212 (Fla. 1995) (death penalty disproportionate where defendant had a badly deprived and unstable childhood). Because Damren's particular circumstances are more akin to the facts of Besaraba, this court should reverse the imposition of the death penalty and should remand this cause for imposition of a life sentence.

CONCLUSION

Because the trial court erred in permitting the evidence of prior bad acts of appellant, in refusing to give the standard Williams rule instruction simultaneously therewith and in overruling appellant's objection to the state's improper remarks in guilt phase closing argument, appellant was deprived of his right to a fair trial; this cause should be reversed and remanded for a new trial.

The trial court also committed error in the penalty phase which necessitates remand for a new penalty phase, including the admission of "victim impact evidence" and the admission of the out-of-court statements of Jeff Chittam. Because this testimony was impermissibly permitted to be presented to the jury during the penalty phase, a new penalty phase is required.

Finally, the trial court erred in finding the aggravating factors of "especially heinous, atrocious and cruel," and "cold, calculated and premeditated;" prohibitions against double jeopardy bar the re-trial of a sentencing hearing wherein the state has failed to present sufficient evidence to sustain the aggravators. This cause should be remanded for the trial court to vacate the death sentence and to impose a life sentence for the offense of first-degree murder.

Moreover, the imposition of the death penalty in this case is not proportionate with the death penalty in other cases, and must be vacated and set aside for the imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Curtis M. French, Office of the Attorney General, the Capitol, Tallahassee, Florida 32301, and to Harry Shorstein, State Attorney, Duval County Courthouse, Jacksonville, Florida 32202, by regular United States Mail this 30th day of October, 1996.

Teresa J. Sopp
Attorney for Appellant