IN THE SUPREME COURT OF FLORIDA

NO. 86,180

KAYLE BARRINGTON BATES,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR BAY COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

THOMAS H. DUNN
Florida Bar No. 871753
277 Alexander Street
Suite 900
Rochester, New York 14607
(716) 232-5480

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT I

THE SENTENCING COURT'S REFUSAL TO INSTRUCT MR. BATES' CAPITAL JURY THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE WAS A SENTENCING ALTERNATIVE TO DEATH DENIED HIM OF DUE PROCESS OF LAW AND A FUNDAMENTALLY FAIR CAPITAL SENTENCING PROCEEDING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

> **"[The sentencing court] was not required to conduct an Eighth Amendment analysis as argued by Bates in his brief, which is based upon what he alleges in essence is a "special circumstance," i.e. he is a capital defendant facing a "unique punishment" -- death.**
>
> Answer Brief of Appellee at 30.

A. Facts Relevant to the Argument

At the resentencing below, Mr. Bates was a capital defendant facing the death penalty. In fact, he was resentenced to death for the third time. In light of those facts, the State's argument quoted above is nothing but absurd. This is a capital case. Thus, an Eighth Amendment analysis was required to resolve whether Mr. Bates' jury should have been instructed on the life without the possibility of parole sentencing alternative. The applicability of the Eighth Amendment to this issue is the core of disagreement between Mr. Bates and the sentencing court.

At the time of Mr. Bates' capital resentencing, he had already served half of the mandatory minimum of twenty five years. His fear was that the jury would sentence him to death --

not because he was deserving of death -- but because they feared he could be released on parole in as few as twelve years. For that reason, and that reason alone, he requested that the jury be given the sentencing alterative of life without the possibility of parole. The sentencing court never questioned Mr. Bates' rationale for this request, nor did the State, because his rationale for requesting that the jury be instructed on the life without parole sentencing option has been explicitly recognized by the United States Supreme Court:

> Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future non-dangerousness to the public than the fact that he will never be released on parole.

Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133, 141 (1994).

The State implicitly, yet clearly, interjected Mr. Bates' future dangerousness into the jury's deliberations over whether he should be sentenced to death. The State summarily "denies" that future dangerousness was argued below and does nothing to address Mr. Bates' argument that future dangerousness was presented to Mr. Bates' jury. The record supports Mr. Bates' contention that future dangerousness was argued to the jury.

As in Simmons, the State did not explicitly discuss Mr. Bates' future dangerousness. Rather, the State advanced

"generalized arguments regarding the defendant's future dangerousness." Simmons v. South Carolina, 114 S.Ct. 2187 (1994). The Defense presented to the jury and sentencing court uncontroverted evidence that Mr. Bates had no prior history of significant criminal activity, that prior to the crime he had spent the entire twenty-four years of his life striving to be a model citizen and that since the crime he was a model inmate. Despite this uncontroverted evidence, the State argued to the jury that Mr. Bates' "true character" was shown by the facts of this crime and interjected the issue of future dangerousness -- fear of Mr. Bates -- into the jury's deliberative process. The State in closing argument intentionally used the element of fear. The State Attorney slapped his hand on the table[1] and argued: "Startled you; didn't I? Made you jump. She was there looking at him as he drove that knife straight in to the hilt." (R. 778). The State's intent was to make the jury afraid of Mr. Bates' -- afraid of what the State argued was Mr. Bates' "true character" -- so that absent a life sentence that prevented release on parole, the jury would feel compelled to sentence Mr. Bates to death. Implicit in this tactic was the message that Mr. Bates was still someone to be feared.

---

[1]Whether the State Attorney "slaps his hand on the table" as the record reports or stabbed the knife into the wooden bar before the jury as counsel clearly recalls, the State Attorney's intention was to scare the jury and instill in the jury a fear of Mr. Bates.

The State bolstered this argument by contending that the mitigating circumstances were to be considered towards "the sentence of life imprisonment with a minimum mandatory of twenty-five years before the defendant is eligible for parole." (R. XV 779-80). This argument was improper and tainted Mr. Bates' jury. Hitchcock v. State, 673 So.2d 859 (Fla. 1996) (recognizing as improper an prejudicial the State's argument that if given a life sentence defendant would be eligible for parole after twenty five years when resentencing is so close to expiration of twenty five year sentence). Like the State of South Carolina in Simmons, the State made "generalized arguments regarding the defendant's future dangerousness" by coupling the nature of the crime with the defendant's "true character." This "true character" argument and the State Attorney's tactic of instilling fear in the jury by actually startling them in the courtroom was nothing less than the State arguing that Mr. Bates' "true character" was something to be feared.[2]

---

[2]The State claims that future dangerousness was not argued to the jury. The State's argument is similar to Justice Scalia's dissent in Simmons: "The opinions paint a picture of a prosecutor who repeatedly stressed that petitioner would pose a threat to society upon his release. The record tells a different story. Rather than emphasizing future dangerousness as a crucial factor, the prosecutor stressed the nature of petitioner's crimes. . . . I am sure it was the sheer depravity of those crimes, rather than any specific fear about the future, which introduced the South Carolina jury to conclude that the death penalty was justice." Simmons v. South Carolina, 114 S.Ct. 2187 (1994) (Scalia, J., dissenting). As in Simmons, the State by tying the nature of the crime to Mr. Bates' "true character" and intentionally instilling

In fact, the State continues to advance this "true character" argument on appeal. "The State would note that the person who would have know him best, or at least thought she did, at the time of the murder, his ex-wife, did not appear on his behalf." Answer Brief of Appellee at 27. Renita Bates' observations and opinion of Mr. Bates' character was consistent with the testimony of the eighteen character witnesses who testified below. In fact, her observations and opinion of Mr. Bates' character was presented to the sentencing court:

> Kayle is not a hard person -- not the type of person that he has been blamed to be. He was a hard worker, definitely believed in being the head of household -- made sure that needs were provided for his family. He was a family man (before the present situation took place). There is no way that anyone can make me believe that Kayle himself did the things that he is being kept behind bars for. He should not even be there but instead home with his family. We spent our time together as a family. There were times when we would invite other friends over for dinner or an outing. Kyle loves our daughters very much. He would spend a lot of time with the oldest (the youngest was not born at the time). He was (is) a proud father and husband and assumed his responsibility very well. He has never (portrayed) used any type of violence around us. He was (is) a very outgoing person, kind, [and] considerate. He was (is) a loving and caring husband and father. Very very very seldom he may drink a beer but definitely not liquor (he didn't use it).

(R. XXXIV, Florida Department of Corrections, Marital

---

fear in the jury while doing so interjected future dangerousness -- fear of Mr. Bates-- into the jury's deliberative process.

Questionnaire completed by Renita Bates)(Attached as Appendix A). In addition to the eighteen character witnesses, Mr. Bates presented the testimony of two mental health experts who explained how this horrible, tragic crime could have occurred in light of Mr. Bates' good character and lack of criminal history. In fact, the State's mental health expert agreed that at the time of the crime Mr. Bates was under an emotional disturbance and that his capacity to conform his conduct to the requirements of the law was impaired. Despite this uncontroverted evidence, the State advanced this "true character" argument to put before the jury the issue of future dangerousness. Unwilling to concede the obvious, the State continues to rely on this specious argument.

The State also contends that the jury's question regarding the option of life without the possibility of parole represents that the jury was under "some degree of confusion" because of undersigned counsel's closing argument. Answer Brief of Appellee at 28. Mr. Bates submits that the jury's questions indicate a lack of confusion:

> Are we limited to the two recommendations of life with minimum 25 years or death? Or can we recommend life without a possibility of parole?

(R. XV 830). The first question makes clear that the jury understood the two sentencing options given them in the instructions. Understanding the options presented to them, the jury asks the second question, not out of confusion, but as a

genuine reflection of the nature of their deliberations up to that point -- can we recommend a third option of life without the possibility of parole. Undersigned counsel's argument emphasizing life imprisonment without mentioning the language "without possibility of parole for twenty five years" did not confuse the jury. Moreover, in light of the fact that Mr. Bates had already served more than half of the mandatory minimum, undersigned counsel's argument was proper and legally required as this Court subsequently determined in Hitchcock v. State, 673 So.2d 859 (Fla. 1996). In Hitchcock, this Court held as improper and prejudicial the State's argument that if given a life sentence the defendant would be eligible for parole after twenty five years when resentencing is so close to expiration of twenty five year sentence. The question indicates that the jury did not believe that death was appropriate, but wanted to ensure that Mr. Bates spend the rest of his life in prison without the possibility of parole. The jury should have been given that option.

B. Life Without the Possibility of Parole was a Legal Sentencing Alternative

1. The sentencing court's ruling ignores the Eighth Amendment

The State recognizes that Mr. Bates' argument is "[p]remised upon a 'death is different' foundation, . . . given his special status as a capital defendant." Answer Brief of Appellee at 29.

Despite this recognition, the State summarily dismisses the argument noting that "capital defendant's are not a 'suspect class' for equal protection purposes." Id. Thus, according to the State, "[the sentencing court] was not required to conduct an Eighth Amendment analysis as argued by Bates in his brief, which is based upon what he alleges in essence is a 'special circumstance,' i.e. he is a capital defendant facing a 'unique punishment' -- death." Id. At 30. Rather, according to the State, the United States Supreme Court has made it clear regarding ex post facto analysis that "the inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual" -- even if the special circumstances are a capital defendant facing a death sentence. Id. At 29, (quoting Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 966 (1981)).

The crux of the sentencing court's ruling and the State's argument is that no consideration need be given to the fact that Mr. Bates was on trial for his life in resolving whether the sentencing alternative of life without the possibility of parole is a legal sentencing alternative to death in this case. This argument assumes that the Eighth Amendment has no application to this issue. That a pure and simple ex post facto analysis -- devoid of any Eighth Amendment analysis -- resolves the matter. This argument ignores over two decades of Eighth Amendment

jurisprudence developed by the United States Supreme Court and this Court which recognize that in capital cases, exacting standards must be met to ensure that it is fundamentally fair. *See* Caldwell v. Mississippi, 472 U.S. 320 (1985); State v. Dixon, 283 So.2d 1 (Fla. 1973).

By refusing to give the jury the life without parole sentencing option in the context of the unique facts of this case, the sentencing court deprived Mr. Bates of a "concrete safeguard beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient." State v. Dixon, 283 So.2d 1, 16 (Fla. 1973). In response to Mr. Bates' contention that the sentencing court's order is devoid of any Eighth Amendment analysis, the State argues that the court relied upon Lee v. State, 294 So.2d 305 (Fla. 1974) and Dugger v. Williams, 593 So.2d 180 (Fla. 1991). Neither of these cases were death penalty cases when decided. Both opinions, like the sentencing court's order, was devoid of any analysis that recognized the unique nature of the death penalty. Mr. Bates contends that because his case is a death penalty case and because the failure to instruct the jury on the life without parole sentencing option enhanced "the risk that the death penalty [would] be imposed in spite of factors which may call for a less severe penalty" a traditional ex post facto analysis "is unacceptable and incompatible with the commands of the Eighth and

Fourteenth Amendments." Mills v. Maryland, 486 U.S. 367, 376-77 (1988) (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)). Although the sentencing court's analysis would be correct if this were not a capital case, "time and again the [United States Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." Caspari v. Bohlen, 114 S.Ct. 948, 955 (1994).

2. Life Without the Possibility of Parole was not an Ex Post Facto Law

Life without the possibility of parole is not disadvantageous to capital defendants facing the death penalty. In fact, such a sentencing option is advantageous. The State, like the sentencing court below, refuses to even discuss this argument. Instead, the extent of the State's analysis is that life without the possibility of parole is a harsher punishment than life without the possibility of parole for twenty five years. The State does not refute the crux of Mr. Bates' contention that life without the possibility of parole is advantageous when the capital defendant is facing the death penalty. Social science data cited in Mr Bates Initial Brief confirms that the possibility of parole from a life sentence -- or even the mistaken belief in such a possibility -- operates at least as a "silent aggravating circumstance" in capital sentencing proceedings, and often may be the decisive factor

underlying a jury's decision to sentence a defendant to death.

This very issue was presented to the Oklahoma Court of Criminal Appeals in the case of Allen v. State, 821 P.2d 371 (Okl. Cr. 1991). The court in Allen concluded that retroactive application of the life without parole sentencing option was not disadvantageous to the capital defendant facing the death penalty under an ex post facto analysis:

> In order to affirm the trial court's refusal to consider this punishment, we must also find that imposition of the sentence could have disadvantaged Appellant by subjecting him to a harsher punishment than was available at the time he committed his crimes. While we will not speculate as to the comparative drawbacks between a life in prison without chance of parole and the actual imposition of the death penalty, we believe that any possibility of a sentence which avoids the death penalty cannot be said to be disadvantageous to the offender.

Id. at 376. The Oklahoma Court of Criminal Appeals' analysis recognizes that capital defendants are facing a "unique punishment" and this fact changes the analysis of what is disadvantageous.

The State attempts to distinguish Allen from Mr. Bates case. "Crucial to the Oklahoma Court's analysis was the fact that the amendment did not affect the minimum and maximum penalties to which a defendant would be subjected." Answer Brief of Appellee at 39. Although the amendment to the Oklahoma statute added life without parole as a third option, the court's analysis in Allen

did not focus on the difference between the life with parole option and the life without parole option. Rather, the Court focused the analysis on the life without the chance of parole sentencing option and death concluding that **"any possibility of a sentence which avoids the death penalty cannot be said to be disadvantageous to the offender."** Id. (Emphasis added). In support of this conclusion, the Court relied upon an Eighth Amendment analysis:

> It has long been recognized that a system of capital punishment must meet strict constitutional requirements to be upheld. The primary goal of any such system must be the allowance of individualized sentencing tempered by a controlled amount of discretion, exercisable by the trier of fact. See generally, Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). In the present case, we are presented by a situation where the sentencer did not fully understand the options available, thus rather than the more usual case involving "unbridled discretion," we have just the opposite. The trial court committed no less an error, however, when it took such a restricted view of its sentencing options that it failed to allow Petitioner the full benefit of all sentences provided by law.

Id.

Moreover, Mr. Bates points out that at the time of the jury's question concerning the option of life without the possibility of parole he renewed his request that the jury be told that life without parole was an available option. Had the

sentencing court ceded to that request, as it should have, the jury would have received that life without parole option as an intermediate option, thus, according to the State not an ex post facto violation because it "did not affect the minimum and maximum penalties to which a defendant would be subjected." Answer Brief of Appellee at 39.

3. Mr. Bates can waive his ex post facto rights

At the time of Mr. Bates' resentencing, life without the possibility parole was a legal sentence. The only prohibition raised by the sentencing court and the State is that application of this otherwise legal sentence is improper because it would be an ex post facto violation. Mr. Bates waived his right to ex post facto protections as did the defendant in Allen. The court in Allen concluded that the defendant's waiver of his ex post facto rights made the trial court refusal to instruct on the life without the possibility of parole option even more troubling:

> This result is even more compelling in the present case, wherein the Petitioner urged the court to consider the sentence and executed a valid waiver of his constitutional right against the application of any ex post facto law. **The waiver of this right is just as valid as the waiver of any of the other constitutional protections given up in connection with a guilty plea.**

Id. (Emphasis added).

The State fails to address this Court's holdings that a defendant can waive his or her ex post facto protections, In re

Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848, 849 (Fla. 1983), and that a defendant can waive his or her eligibility to parole. Cochran v. State, 476 So.2d 207 (Fla. 1985). The State does not address these cases because there is nothing that can be said to overcome the clear application of these cases to Mr. Bates' waiver in this case. Moreover, the State fails to cite any authority for the sentencing court's proposition that Mr. Bates could not agree to a sentence that is an ex post facto sentence "absent an express legislative directive." The purpose of the rules against passage of ex post facto laws was to assure that "federal and state legislatures were restrained from enacting arbitrary or vindictive legislation." Miller v. Florida, 482 U.S. 423 (1987). Because ex post facto provisions of the United States Constitution and the Florida Constitution are protections against legislative abuses, it makes no sense to allow waiver of the those protections only upon the blessing of the legislature. Waiver of ex post facto rights should not be controlled by the very governmental entity that the rights are protecting against -- the legislature.

4. Failure to give the life without parole instruction violated due process

The State interjected the issue of future dangerousness into the jury's deliberative process. The State in closing argument intentionally used the element of fear. "Startled you; didn't I?

Made you jump." The State's intent was to make the jury afraid of Mr. Bates' -- afraid of what the State argued was Mr. Bates' "true character" -- so that absent a life sentence that prevented release on parole, the jury would feel compelled to sentence Mr. Bates to death. The United States Supreme Court's ruling in Simmons makes clear that Mr. Bates' jury should have been instructed that the sentencing option of life without the possibility of parole was available:

> [I]f the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the treat the defendant poses to society. Because truthful information of parole ineligibility allows the defendant to "deny or explain" the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.

Simmons at 141.

Mr. Bates contends that under the unique facts of this case the sentencing court should have instructed the jury on the life without the possibility of parole option. He agrees with the Oklahoma Court in Hain that "[t]he circumstances involved in this decision are unique and should not be interpreted to have any broader ramification outside the very limited situation implicated under these facts. We will apply this analysis only in cases where the amendment adding the option to life without

parole to Section 701.10 was in effect at the time of trial." Hain v. State, 852 P.2d 744, 753 (Okla. Crim. App. 1993). The State's attempt to distinguish Hain from the facts of this case because Mr. Bates was already tried and convicted is unpersuasive. Like the defendant in Hain, Mr. Bates was unsentenced at the time the life without parole amendment was passed. That is the critical fact. The Court's concern in Hain is that the decision not be applied retroactively to defendant's already sentenced under the preamendment statute which did not provide for life without parole.

ARGUMENT II

MR. BATES' JURY RENDERED A DEATH VERDICT CONTRARY TO FLORIDA STATUTE § 921.141, THE SENTENCING COURT'S INSTRUCTIONS, THE FLORIDA CONSTITUTION AND EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

The State correctly notes that the crux of Mr. Bates' argument is that "[w]hen told that [the jury] could not recommend a meaningful sentencing alternative to death -- life without the possibility of death -- they rendered a verdict of death contrary to their instructions and the evidence before them." The State, however, misunderstands Mr. Bates' contention. He is not arguing in this claim that the jury should have been instructed as to the life without parole sentencing option. *See* Claim I, supra. Rather he is arguing that even if the jury was properly instructed, as the State contends, the jury "rendered a verdict

of death contrary to their instructions and the evidence before them."

Mr. Bates submits that the jury's question regarding the availability of the life without the possibility of parole sentencing option, in the context of the facts of this case, indicates that the jury was not "weigh[ing] the aggravating circumstances against the mitigating circumstances." Rather, the jury was weighing the alternative sentence to death in light of the fact that Mr. Bates had already served over half of the mandatory minimum twenty five year sentence. As a result, Mr. Bates contends that he was sentenced to death not because the aggravating circumstances outwieghed the mitigating circumstance and death was therefore appropriate, but because the life with parole option did not adequately address their concerns about future dangerousness.

The State contends that this Court was presented with factually similar situations in Waterhouse v. State, 596 So.2d 1008 (Fla. 1992) and Whitfield v. State, __ So.2d. __, 1997 Fla. LEXIS 1364 (Fla. 1997). Those cases are factually distinguishable. In both Waterhouse and Whitfield, the jury asked a question concerning the meaning of the sentence. This Court properly concluded that the trial courts had properly instructed the jury. In this case, the jury was not confused about the meaning of the sentencing alternative. Rather, they

asked if they could recommend a third sentencing option -- life without the possibility of parole. This question indicated that the jury had determined that death was not appropriate. Mr. Bates was sentenced to death based upon an improper aggravating circumstance -- future dangerousness -- despite the fact that a lesser punishment was appropriate.

ARGUMENT III

MR. BATES WAS DENIED AN INDIVIDUALIZED AND RELIABLE SENTENCING DETERMINATION WHEN THE SENTENCING COURT VIOLATED THE PRINCIPLES OF LOCKETT v. OHIO, 438 U.S. 586 (1978), AND PRECLUDED MR. BATES FROM PRESENTING, AND THE JURY FROM CONSIDERING RELEVANT MITIGATING EVIDENCE

A. Mr. Bates was Precluded from Presenting Relevant Mitigation Evidence

The State contends that the evidence precluded below was irrelevant. The United States Supreme Court not only mandated the broad scope of issues that a defendant may address in a capital sentencing proceeding, Lockett v. Ohio, 438 U.S. 586 (1978), and the preference for admissibility of this mitigating evidence, Green v. Georgia, 442 U.S. 95 (1979), but has also expressed an equally broad test for relevance of an individual piece of mitigating evidence. In McKoy v. North Carolina, 494 U.S. 433 (1990), the Supreme Court stated that the meaning of "relevance" is no different in the context of capital sentencing than its meaning in any other area of the law:

> It is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. Whether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy. The relevance exists even if the fact-finder fails to be persuaded by that evidence. It is not necessary that the item of evidence alone convinces the trier of fact or be sufficient to convince the trier of fact of the truth of the proposition for which it is offered.

McKoy at 1232. The evidence proffered and precluded below was relevant.

1. Mr. Bates' waiver of parole

Again, the State misconstrues Mr. Bates' argument concerning his waiver of parole. This argument is not "merely a variation of his first two arguments regarding the 'life without parole' option." Mr. Bates waived his eligibility for parole under oath and on the record. It is this waiver that Mr. Bates wanted submitted to the jury. (R. XXIX 19). This Court has previously ruled that a defendant can waive his right to parole eligibility. Cochran v. State, 476 So.2d 207 (Fla. 1985). Moreover, this Court has recognized that parole ineligibility is a mitigating circumstance. Walker v. State, ___ So.2d ___, 1997 Fla. Lexis

1353 (Fla. 1997). Thus, Mr. Bates' waiver of his right to parole is relevant mitigating evidence that the jury should have heard and considered.

2. Mr. Bates' valid sentences of two life terms plus fifteen years

The State claims that the fact that Mr. Bates' was already sentenced for contemporaneous felony convictions to two life terms plus fifteen years and that those sentences were to run consecutive to the sentence for the murder was not relevant penalty phase evidence. In support of this contention, the State relies upon Nixon v. State, 372 So.2d 1336 (Fla. 1990). In Nixon, this Court construed Florida Rule of Criminal Procedure 3.390(a) to prohibit instructions regarding the possible penalties a capital defendant could receive for his contemporaneous felony convictions.

Mr. Bates' claim however is much different. Unlike the defendant in Nixon, Mr. Bates had already been sentenced for the contemporaneous felony convictions. He was only asking that the jury be told the "truth" regarding the other legal sentences he was under. Recently, this Court was presented with a claim by a capital defendant that the trial court should have sentenced him on contemporaneous felony convictions before the penalty phase was conducted so that the jury could be fully advised as to those sentences. This Court rejected that argument, not on the grounds

that such information would be irrelevant to jury deliberations at capital penalty phase, but on the grounds that Florida's sentencing scheme does not require this, that it would be inconsistent with Florida's jury override provisions and that the court would not have available evidence of the facts and circumstances surrounding the offenses and the defendant's life history. Walker v. State, ___ So.2d ___, 1997 Fla. Lexis 1353 (Fla. 1997). This Court concluded that:

> Walker was afforded what Florida and the U.S. Supreme Court case law deem sufficient, i.e., the opportunity to argue to the jury potential parole ineligibility as a mitigating factor.

Id.

Nixon and Walker do not prohibit informing the jury about valid sentences already imposed. This Court has recognized that at a capital resentencing proceeding before a jury, the jury can be told that the capital defendant has been sentenced to other life sentences for contemporaneous felony convictions. Gore v. State, __ So.2d __, 1997 Fla. LEXIS 1057 (Fla. 1997) (acknowledging that the jury was informed that Gore had received multiple life sentences for contemporaneous kidnaping and sexual battery convictions to the capital murder). As is Gore, Mr. Bates' jury should have learned that he was sentenced to two life terms plus fifteen years and that those sentences were to run consecutive to the sentence for the capital murder.

3. The community petition vouching for Mr. Bates' good character

Mr. Bates incorrectly cited to the this Court's opinion in Wasko v. State, 505 So.2d 1314 (Fla. 1987) in support of Mr. Bates' contention that the community petition should have been submitted to the jury. Mr. Bates should have cited to the sentencing court's order in State v. Wasko. *See* Appendix B, State v. Wasko, Case No. 83-15513A, Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Findings of Fact and Sentence of Death at 12.

4. Mr. Bates' U.S. Army Basic Training graduation photograph

Mr. Bates' U.S. Army basic training graduation photograph never was admitted into evidence. The State objected to its admission at the mistrial and the sentencing court sustained the objection: "I'll sustain the State's objection to the photograph. That is not relevant to prove anything." (R. XXXII 541).

Nevertheless, the State recklessly asserts that

> Bates' claim here is spurious. As support for his claim he cites from the record of the mistrial, where he attempted to submit into evidence his basic training graduation photograph, which the State pointed out was "the size of a poster board," and argued that it had no other purpose "than [as] a sympathy factor." In doing so, he attempts to mislead this Court as to the admission of this same photograph, except in a smaller form, into evidence as a defense exhibit # 4, at his subsequent resentencing.

Answer Brief of Appellee at 52-3. In doing so it is the State that is misleading this Court. The record in this regard is very clear.

Mr. Bates moved for the admission of the photograph. (R. XXXII 539-41). The State objected and the court sustained the objection. (R. XXXII 540-41). The photograph was not allowed into evidence at either the mistrial or the resentencing. At the resentencing in May, Mr. Bates proffered the same photograph again. (R. XIII 706-8). At that time undersigned counsel offered to have the photograph reduced for the record on appeal. The State did not object to and the court allowed a smaller version of the photograph to be substituted in the record for purposes of this appeal as Defense Exhibit Number 4 for identification. (R. XIII 706-8) (A copy of that photograph is attached as Appendix C).

The basic training graduation photograph of Mr. Bates was never admitted into evidence in any size. The record is clear that the only exhibits admitted into evidence before the jury were Mr. Bates school records, his military records and his baseball cap from Knight Paper. (R. XVI 1325-7). Undersigned counsel is perplexed as to how the State believes the record establishes that it was. The 7 x 11 photograph the State refers to is the poster size photograph offered into evidence. In fact, undersigned counsel corrects the court by stating that: "It may

be bigger than 7 by 11." State Attorney Appleman responds "It's more like life size, Your Honor." To which the sentencing court replies: "All right. Okay, so the Court will note that proffer and again have it marked as an exhibit for identification." (R. XIII 708-9). The record quoted by the State merely establishes that the State did not object to Mr. Bates substituting a smaller version of the photograph as a exhibit for identification for the record on appeal.

B. Preclusion of the Mitigation was not Harmless

Relevant mitigation evidence was precluded from the jury's consideration. The significance of Mr. Bates' waiver of parole is evidenced by the jury's question as to whether they could recommend life without parole. *See* Downs v. State, 514 So.2d 1069, 1072 (Fla. 1987)(rejecting a finding of harmless error in light of jury's question which related to the precluded evidence). Mr. Bates' two life sentences plus fifteen years for the contemporaneous felonies is further evidence which would have supported his contention that he would spend his natural life in prison. Like his waiver of parole, preclusion of this relevant evidence could not be harmless. Moreover, the community petition vouching for Mr. Bates' good character was compelling evidence which would have rebutted the State's "true character" argument. Finally, Mr. Bates' U.S. Army Basic Training graduation photograph was relevant and compelling mitigation. The United

States Supreme Court has recognized that "[T]he adage that 'one picture is worth a thousand words' reflects the common-sense understanding that illustrations are an extremely important form of expressions for which there is no genuine substitute." Regan v. Time, Inc., 468 U.S. 641, 677 (1984). The Georgia Supreme Court recently reversed a death sentence under Lockett when the trial court precluded the admission before the jury of photographic mitigation evidence. Barnes v. State, __S.E.2d __, 1998 WL 85596 (Ga. 1998). As in Barnes, the preclusion of Mr. Bates' photograph can not be harmless even in light of the substantial mitigation presented to the jury. Id. (rejecting the States' harmless error argument that eleven family members and friends testified about everything depicted in the photographs).

Individually and cumulatively, these errors can not be harmless beyond a reasonable doubt. State v. Diguilio, 491 So.2d 1129 (Fla. 1986).

ARGUMENT VI

THE SENTENCING COURT VIOLATED THIS COURT'S ORDER STAYING MR. BATES' CAPITAL RESENTENCING HEARING WHEN JURORS WERE EXCUSED OUTSIDE THE PRESENCE OF MR. BATES AND HIS COUNSEL AND OFF THE RECORD IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

Although, this Court has previously held that the general qualification process is not a critical stage of the proceedings requiring the defendant's presence, Robinson v. State, 520 So.2d 1, 4 (Fla. 1988), this case is factually and legally distinguishable. This Court granted Mr. Bates' Petition for a Writ of Prohibition and/or for a Writ of Mandamus requesting a twenty-four (24) hour emergency stay of Mr. Bates' capital resentencing trial. (R. 459). As a result of this stay, undersigned counsel was contacted telephonically by the Circuit Court and a telephonic hearing was set to discuss this Court's order staying the resentencing proceeding and what would be done with and told to the jury panel which was scheduled to show up for duty on May 15, 1995. At that hearing, undersigned counsel requested the following procedure be used on May 15 when the jury pool reported: 1) no one from the pool to be used to select a jury for Mr. Bates' case would be excused until the next day, May 16, 1995 -- that the jury pool would be simply told to report back the next day; 2) if the pool was also going to be used for the regular criminal trial calendar, that the number needed would

be randomly selected from the larger pool and the remainder told to return the next day; and 3) undersigned counsel waived Mr. Bates' presence with the understanding that the procedure set forth above would be followed. The Circuit Court agreed to this procedure and the State offered no objection. On May 15, 1995, those procedures were not followed and the State fails to acknowledge several critical facts.

First, Judge Hess, not Judge Sirmons who was the Circuit Court Judge on Mr. Bates' case, handled the general qualification process. Second, at the time of the general qualification process, no other trials were set except for Mr. Bates. Under the procedures agreed to by the circuit court, the defense and the State, the jury pool should have been told simply to report back the next morning. Despite the agreed upon procedures, Judge Hess clearly did not follow them. He went forward with the general qualification process even though there was no need to do so. Jurors were excused from the jury pool that was to be used in Mr. Bates' case. Undersigned counsel and Mr. Bates were not present.

Mr. Richmond, co-counsel for Mr. Bates was present. Mr. Richmond attempted to have the general qualification process recorded by the court reporter and to lodge an objection:

> I had requested and was not able to secure court reporting of [the general qualification process]. . . .[A] request [was] made [for a court reporter]. There was no time afforded

> and no way to make an objection. This was the judge doing what he thought was right with me as merely an observer.

(R. IV 669). The court reporter acknowledged that Mr. Richmond had requested that the general qualification process be recorded. State Attorney Appleman asked Mr. Richmond to whom he made this request:

> MR. RICHMOND: The court reporter that went in with Judge Sirmons to record his comments.
>
> COURT REPORTER: It was me, Judge.

(R. IV 670).

Undersigned counsel contends that the Circuit Court failed to follow the procedure agreed upon during the May 12 telephonic hearing in violation of Mr. Bates' constitutional rights, including but not limited to his right to be present, his right to due process, his right to a trial by a jury of his peers and his right to counsel, and that the Circuit Court's actions on May 15 were in contravention of this Court's order staying the resentencing proceeding. Moreover, undersigned counsel proffered that excusals were granted in a discriminatory manner which resulted in African-American jurors being improperly excused from the panel of jurors to be used to select Mr. Bates' capital sentencing jury. Once this Court stayed the resentencing proceeding and the circuit court agreed not to excuse any jurors from the pool for Mr. Bates' resentencing until May 16th when

undersigned counsel and Mr. Bates would be present, the circuit court was bound by that procedure.

In denying Mr. Bates' motion for a mistrial, the circuit court relied upon the procedure that is normally employed in selecting jurors. The fact remains that all parties agreed that this procedure would not be followed and that in light of this Court's stay no one from the pool to be used to select a jury for Mr. Bates' case would be excused until the next day, May 16, 1995 -- that the jury pool would be simply told to report back the next day. This Court stayed the proceeding to ensure that fundamental fairness not be thwarted by undersigned counsel's absence. As a result of the circuit's actions, "fundamental fairness [was] thwarted by defendant's and [his counsel's] absence during this routine procedure." Robinson v. State, 520 So.2d 1, 4 (Fla. 1988). Unlike the procedures used in Robinson and Remeta v. State, 522 So.2d 825, 828 (Fla. 1988), neither counsel or the defendant agreed to the defendant's absence or procedures used. Under the unique facts of this case, this Court can not determine that Mr. Bates and undersigned counsel's absence was harmless beyond a reasonable doubt. Francis v. State, 413 So.2d 1175, 1179-80 (Fla. 1982).

ARGUMENT VIII

MR. BATES' SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE AGGRAVATING CIRCUMSTANCES, AND THE AGGRAVATING CIRCUMSTANCES WERE IMPROPERLY ARGUED AND IMPOSED, IN VIOLATION OF THIS COURT'S PRECEDENT AND THE EIGHTH AND FOURTEENTH AMENDMENTS

The State erroneously contends that Mr. "Bates accepted the instructions as given, so any complaint thereon is procedurally barred." Answer Brief of Appellee at 94. Mr. Bates requested jury instructions which included this Court's narrowing construction for each aggravating circumstance. (R. III 488-9 (Defendant's Proposed Jury Instructions) and R. XVI 727-734 (Defendant's arguments at Charging Conference)). Mr. Bates properly renewed his objections prior to the sentencing court instructing the jury. (R. XV 772). The sentencing court refused to give the proposed instructions. (R. XVI 727-734). Instead, the sentencing court gave the standard instructions on each aggravator. (R. XV 823-4).

The instructions given are unconstitutional under Espinosa v. Florida, 112 S.Ct. 2926 (1992) and failed to give the jury adequate guidance under the Eighth Amendment. This claim is properly before this Court on the merits. No procedural bars prevent this Court from reaching the merits of the claim.

CONCLUSION

Appellant, Kayle Barrington Bates, based on the foregoing, respectfully urges that this Court vacate his unconstitutional death sentence, impose a sentence of life without the possibility of parole and grant all other relief which the Court deems just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing document has been furnished by United States Mail, first class postage prepaid, to all counsel of record on the 4th day of May, 1998.

Respectfully submitted,

THOMAS H. DUNN
Florida Bar No. 871753
277 Alexander Street, Suite 900
Rochester, New York 14607
(716) 232-5480

Counsel for Appellant

APPENDIX A

Name: BATES, Kayle Number: 088568

MARITAL QUESTIONNAIRE:

When did you marry your husband? Feb. 1980. Where? Tallahassee

If this is a common-law marriage, when and where did you begin living together? —

—. What is your maiden name? Bookman

What is your age? 23. How long did you know him before your marriage? 1 year

Were you living with him when he was arrested on the present charge? yes

If you were separated at the time, when did you separate? —

Were you divorced? NO. If so, when and where?

Did you get along well with your husband? yes. If not, explain: —

40

Do you plan to live with him after his release? yes. What was your occupation before your marriage? student / clerk typist (part time) Have you worked since your marriage? yes

If so, how much of the time? 4 hrs per day. What kind of work did you do? typist (part-time)

Are you working at the present? yes. What kind of work? typist

How much education do you have? College graduate

Are you in good health? yes. If not, explain: —

How many times, if any, have you been arrested? NONE. Jailed? NONE

Imprisoned? NONE. Have either of you been previously married? NO

Did your husband support his family? yes. Did he accept his family responsibilities? yes

How much education does your husband have? high school graduate

XXXIX

What is your husband's occupation? — — —. What was his last job? truck driver. Was he working when arrested on this charge? yes

Has he had a steady job? yes. If not, how much of the time did he work? —

Has he a promise of a job after his release? Not to my knowledge If so, what kind of a job and with whom?

Did poor health handicap him in making a living? NO. If so, explain:

How did he spend his leisure time? At home with family

MARITAL QUESTIONNAIRE: - (Continued)

How much savings does your husband have? ? Most of it was used while I was on maternity leave recently

Insurance? ? Not sure off hand. Other Assets?

Have you any suggestions to make regarding future plans for your husband?

If you have any additional information that you feel will be of assistance to us in planning a program for him, use the following space in telling us about it:

41 Kayle is not a hard person - Not the type of person that he has been blamed to be. He was a hard worker, definitely believed in being the head of household - made sure that needs were provided for his family. He was a family man (before the present situation took place) There is no way that anyone can make me believe that Kayle himself did the things that he is being kept behind bars for. He should not even be there but instead home with his family. We spent our time together as a family. There were times when we would invite other friends over for dinner or an outing. Kayle loves our daughters very much. He would spend a lot of time with the oldest (the youngest was not born at the time) He was (is) a proud Father & husband and assumed his responsibility very well. He has never (previously) used any type of violence around us. He was (is) a very outgoing person, kind, considerate. He was (is) a loving and caring husband and father. Very very very seldom he may drink a beer but definitely not liquor (he didn't use it)

Signed: R. B. Bates

THANK YOU VERY MUCH FOR YOUR TIME AND PATIENCE IN ANSWERING THE FOREGOING QUESTIONS.

APPENDIX B

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

CRIMINAL DIVISION

CASE NO. 83-15513 A

STATE OF FLORIDA,

Plaintiff,

VS.

EDWARD WASKO,

Defendant.

FINDINGS OF FACT AND SENTENCE OF DEATH

THIS CAUSE came on to be heard before the Court for the determination of an appropriate sentence following a conviction by a jury of one count of First Degree Murder, one count of Burglary While Armed or Assaulting a Person Therein, and one count of Attempted Capital Sexual Battery.

The issue of guilt or innocence was tried by a duly impanelled jury from January 9, 1984 through January 17, 1984.

A separate sentencing proceeding, as authorized by Florida Statutes 775.082 and 921.141 was presented before the same jury on January 17, 1984 and the jury recommended to the Court that it impose a Life Imprisonment upon the Defendant, EDWARD WASKO.

This Order will be in four (4) parts. First, the Court will make findings of fact based upon the evidence presented in both the trial and penalty phases. Second, the Order will discuss which aggravating and mitigating factors were proven by the evidence. Third, the Court will determine if there are sufficient aggravating circumstances which warrant the imposition of the death penalty and if so, whether there are any mitigating circumstances which outweigh those aggravating circumstances. Finally, as to the Fourth Phase, the Court will, pursuant to the line of cases following Tedder v. State, 322 So.2d 908 (Fla. 1975) determine if the jury recommendation of Life Imprisonment should be followed or if the "facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ". Tedder, supra.

I.

Based upon evidence presented in Court, primarily a statement acknowledged by the defendant, physical evidence at the scene, and the testimony of the Deputy Chief Medical Examiner, as well as the other testimony, the Court makes the following findings of fact:

The defendant unlawfully entered the home of Staci Weinstein. Staci was ten years old, weighed sixty-eight (68) pounds, was 4'8" tall, and if anything, looked younger than her 10 years of age. The defendant was with an accomplice. The defendant was Crew Chief of the carpet cleaning company team with whom both men were employed. The defendant was the dominant one of the pair. The defendant was left-handed. According to defendant's statement, he "wanted to get John laid". This is why they entered the home. The defendant admitted striking the victim's face with his fist. He said she deserved the beating she got from both men as she was "not cooperating". Staci Weinstein threatened to call the police. The defendant gave a gun to his accomplice to help him "scare" Staci Weinstein. The defendant told his accomplice to "shoot her...to finish her off". Broken white plastic gun grips were found near the victim's head. She was in her bed, lying in a pool of blood, nude from the waist up. Blood splatters on the headboard and walls confirmed that she was beaten in her bed. She received a gaping wound to the right side of her head (as if struck by a left-handed person). The only gun made which could fit the plastic gun grips found is an RG 10, a .22 calibre revolver. That gun would have had to hit her head several times to cause that wound. Two additional wounds were found on the rear of her head, as well as a bruise to her cheekbone. She had to be struck at least six or seven times. She was then shot in the chest. While that was a potentially fatal shot, it was not immediately so. She bled considerably from that wound. The gun was put to her head. She raised her arm in an effort to ward off that shot. Gun powder residue found by her elbow

was in the same shape as that made by an RG 10 revolver. The head shot was then immediately fatal. Two .22 caliber projectiles were removed from her body. She was semi-concious from the beating and chest shot. She anticipated her death and tried to fight it off.

The defendant was a very dedicated employee. He was protective of the company. After his plans for his accomplice got out of control, Staci Weinstein was killed to prevent her from reporting him to the authorities and his company. He was wearing a Stanley Steamer shirt, and their distinctively marked truck was parked in front of her house. The defendant testified that he did not commit the crime, yet he knew many of the unreported details. His testimony that polygrapher Randy Walker tried to kick him is absurd, as Mr. Walker is paralyzed from the chest down and confined to a wheelchair. The Court observed Mr. Walker testify and finds him to be a candid, impartial, and credible witness. The defendant's testimony that Detective Sessler wrote out a script for him to read into the tape recorder is equally ludicrous. Detective Sessler is an experience homicide investigator and the Court finds his testimony more credible. The Court places no credibility upon the defendant's assertion that eight (8) State witnesses lied. Stanley Steamer corporate counsel's testimony that he advised the defendant to (a) get a lawyer, (b) only tell the truth, and (c) only talk to the police if he chose to, is far more credible than the defendant's version, which included an allegation of gubernatorial immunity being offered him via the corporate counsel in Ohio.

All and all, the Court finds that the defendant freely and voluntarily admitted his involvement in this shocking crime and then attempted to recant in Court. The Court believes the majority of his first statement (on tape) and not his in-Court testimony. Based upon this brief summary of seven (7) days of testimony, the Court makes the further findings of fact as to the aggravating and mitigating circumstances enumerated in Florida Statute 921.141.

II.

Pursuant to Florida Statute 921.141(5), this Court is required to and does consider each of the aggravating circumstances involved herein, and pursuant to Florida Statute 921.141(6), this Court is required to and does consider each of the mitigating circumstances involved herein and makes the following findings and judgments:

AGGRAVATING CIRUMSTANCES

Florida Statute 921.141(5)(a)- Whether the capital felony (murder) was committed by a person under sentence of imprisonment?

FINDING

There was no evidence that defendant was under sentence of imprisonment when the murder for which he was convicted was committed and therefore, this aggravating factor is not applicable.

Florida Statute 921.141(5)(b)-Whether the Defendant was previously convicted of another capital felony or of a felony involving the use of, or threat of, violence to the person?

FINDING

Concurrent with the jury's verdict convicting the Defendant of First Degree Murder, he was also convicted of Attempted Capital Sexual Battery upon ten-year-old Staci Weinstein.

The evidence reflected that her body was nude above the waist and that her panties and shorts had been pulled down. She was severely beaten. The Court finds that this conviction was for a "felony involving the use or threat of violence to the person" and further finds that this was a "prior conviction in existence at the time of the sentencing". King v. State, 390 So.2d 315,320(Fla. 1980). See also, Johnson v. State, 438 So.2d 774(Fla.1983), in which the Supreme Court upheld this aggravating factor for a concurrent conviction of the crime of "attempted" murder.

The Indictment charged in Count II that the Burglary was done "with the intent to commit Sexual Battery". Sexual Battery is not a lesser included offense of Burglary even though it is worded as part of the Burglary charge. In Faison v. State, 426 So.2d 963 (Fla. 1983), the Defendant was convicted of Burglary and Sexual Battery under a similarly worded charging document. Originally, the Third District Court of Appeal reversed the Sexual Battery conviction, finding it to be a "necessary element of the First Degree Burglary." The Supreme Court reversed, and reinstated the Sexual Battery conviction holding that "distinct crimes were committed and the conviction for Sexual Battery was proper." at p.965. Similarly, the fact that the words "Sexual Battery" also appear in the First Degree Murder count does not prevent the conviction from being valid.

In Hegstrom v. State, 401 So.2d 1343 (Fla.1981) cited in Faison, supra, the Supreme Court upheld separate convictions for both Felony Murder and the underlying felony. Furthermore, there is sufficient evidence to support the premeditated theory of First Degree Murder or the Burglary aspect of Felony Murder, McCampbell v. State, 421 So.2d 1072 (Fla.1982),and therefore, the Sexual Battery conviction is not a doubling up of the same facts for separate aggravating factors. See Provence v. State, 337 So.2d 783 (Fla.1976). Therefore, the conviction of Attempted Capital Sexual Battery satisfies this aggravating factor.

Florida Statute 921.141(5)(c) - Whether the defendant knowingly created a great risk of death to many persons?

FINDING

There is no evidence that the Defendant knowingly created a great risk of death to many persons and therefore this aggravating circumstance is not applicable. The defendant did murder the victim; however, the risk of death must be to "many persons, not just one or two." Williams v. State, 386 So.2d 538,542(Fla.1980).

Florida Statute 921.141(5)(d) - Whether the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb?

FINDING

The jury also found the defendant guilty of burglary. The homicide was committed during the commission of, or in an attempt to commit, or flight after committing a burglary. This factor is based upon different facts than the Sexual Battery conviction (see, (5)(b) above) and is not an improper doubling. See, Provence, supra. Therefore, the conviction of Armed Burglary satisfies this aggravating factor.

Florida Statute 921.141(5)(e)- Whether the capital felony was committed for the purpose of avoiding or preventing a lawful arrest for effecting an escape from custody?

FINDING

The Court finds that the Murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. From the evidence presented, it was clear that the defendant and his co-perpetrator were beating the victim, in an attempt to have sex with her or to punish her for not cooperating with them. The distinctive "Stanley Steamer" van, bearing the name on all sides, was parked in front of her home. The defendant wore a descriptive shirt, bearing the same name. The defendant, in his statement (see page 19), acknowledges:

> Q. Did you ever think about the fact that since you had a marked van outside with the name of the company, and the fact that she had seen both you and John...did you ever feel that she would come back to get you in trouble some day?
>
> A. Yes.
>
> Q. Could this be one of the reasons why you instructed John to shoot her?
>
> A. Yes.

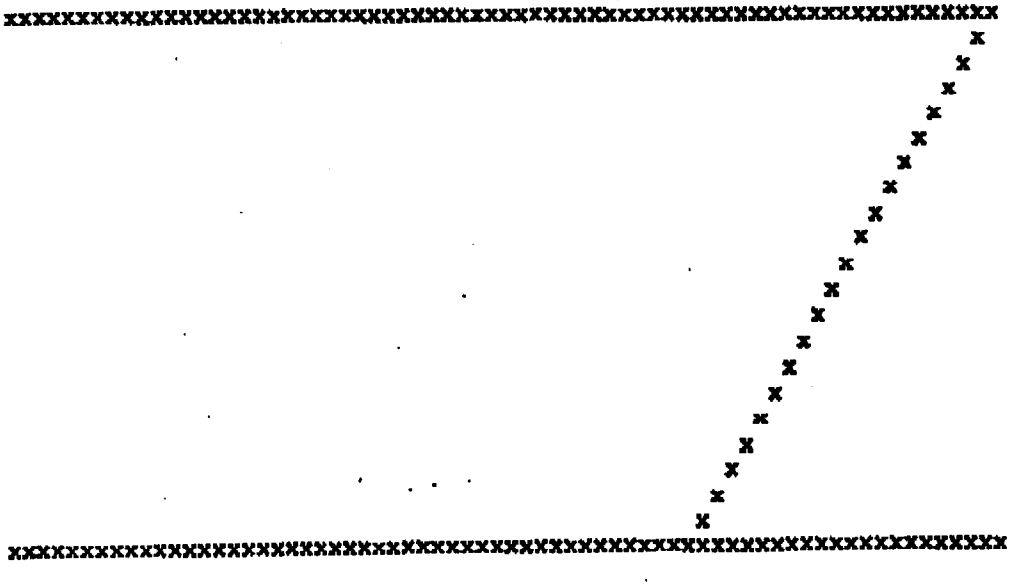
There was also evidence that Staci Weinstein threatened to call the police when she was assaulted. The case law is well settled that this aggravating factor is proven when the killing is "committed in an effort to avoid arrest by eliminating witnesses to the crime." White v. State, 403 So.2d 331 (Fla.1981). In Routly v. State, 440 So.2d 1257,1263(Fla.1983), the Supreme Court found "by killing the victim, the defendant eliminated the only witness who would apparently testify against him as to the burglary." Therein it was further stated that "this aggravating factor is broad enough to encompass a situation where a defendant murders the witness to a crime". In Jones v. State, 411 So.2d 165 (Fla.1983), this finding was upheld upon evidence that the defendant "shot the victims in order to eliminate them as witnesses." (See also, Sullivan v. State, 303 So.2d 632 (Fla.1974); and, Riley v. State, 366 So.2d 19 (Fla.1978)).

The Court finds that this aggravating circumstance was proven.

Florida Statute 921.141 (5)(f) - Whether the capital felony was committed for pecuniary gain?

FINDING

The capital felony was not committed for pecuniary gain. The Court does not find this aggravating circumstance applicable.



Florida Statute 921.141(5)(g) - Whether the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws?

FINDING

The Court finds that this aggravating circumstance is clearly a doubling up of the aggravating circumstance just discussed in 921.141(5)(e), and is therefore not given any additional weight, Provence, supra. The Court does not find this aggravating circumstance applicable.

Florida Statute 921.141(5)(h) - Whether the capital felony was expecially heinous, atrocious or cruel?

FINDING

The Court finds that this homicide was extremely heinous, atrocious and cruel. The Court saw the photos of the crime scene and of the autopsy. The Court heard from the Deputy Chief Medical Examiner, Dr. Wetli. Dr. Wetli opined that Staci Weinstein was beat about the head three or four times to cause the large wound to the right side of her head. The Defendant is left-handed. Staci Weinstein had two further abrasions to the rear of her head. While still alive, she was shot in the chest. She lived long enough to bleed about three quarters of a quart of blood into her abdominal cavity. The projectile entered the chest cavity perforating the diaphragm, the liver, the stomach, and the spleen before terminating its path near the shoulder. While she was still alive, the gun was placed to her head. The Court finds from the photos that Staci lifted her arm in an effort to block this final attack on her sixty-eight (68) pound body. This finding is supported by the gunpowder residue found on her arm which is made by the type of gun which was found to be the murder weapon. Staci was then killed with the shot to the temple. Due to the terrible beating that she took, before she was shot, and the fact that she was brutally attacked in her bed, the Court finds that this killing was especially heinous, atrocious and cruel.

The photos depict a young girl whose head was bashed in, laying in a pool of her own blood. Blood spatter is detected on the wall and the headboard near her head. This is also indicative of the number of times she was beaten about the head. She was then shot in the chest and allowed to bleed and gasp for air. Finally, she was shot in the head as she tried to protect herself. Factual findings of this aggravating factor based upon similar evidence have been uphold in Washington v. State, 362 So.2d 658 (Fla.1978); Booker v. State, 397 So.2d 910 (Fla.1981); and Mason v. State, 438 So.2d 374 (Fla. 1983). The Court therefore finds that this aggravating circumstance has been proven.

Florida Statute 921.141 (5)(i) - Whether the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

FINDING

This aggravating factor is usually reserved for execution or contract-styled killings. Lightbourne v. State, 438 So.2d 380; and Peavy v. State, 8 FLW 494 (Fla.1983). However, the Court did examine the defendant's own statement, in an effort to determine whether this killing was done in a cold, calculated and premeditated manner without any moral or legal justification.

On page 18 and continuing on to page 19 of the transcript of the defendant's statement we see:

Q. How did John get the weapon?

A. I gave it to him.

Q. Do you feel that you have any control over John at all?

A. Yes.

Q. How's that Eddie?

A. I felt he looked up to me like a big brother. I felt he respected me. I felt he'd obey me.

Q. Did he obey you?

A. Yes.

Q. Did he, in fact, shoot her?

A. First he hit her with the pistol... several times.

Q. And following hitting her with the pistol several times, what did he do?

A. I told him to do it right...shoot her.

While the evidence tends to show that the killing was committed in a cold, calculated and premeditated manner without any pretence of moral or legal justification, a careful reading of Peavy, Supra, which was also tried by this Court, and involved multiple stabbings done during a home invasion robbery, tends to disallow this aggravating factor upon this type of evidence. Therefore pursuant to Peavy, the Court does not find that this aggravating circumstance was proven beyond a reasonable doubt and gives this factor no weight whatsoever.

MITIGATING CIRCUMSTANCES

Florida Statute 921.141(6)(a) - Whether the defendant had a significant history of prior criminal activity?

FINDING

The defendant does not have a significant history of prior criminal activity. The Court finds that this mitigating circumstance is applicable.

Florida Statute 921.141(6)(b) - Whether the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance?

FINDING

There is no evidence that the capital felony (murder) was committed while the defendant was under the influence of extreme mental or emotional disturbance and therefore, the Court does not consider this a mitigating circumstance.

Florida Statute 921.141 (6)(c) - Whether the victim was a participant in the defendant's conduct or consented to the act?

FINDING

There is no credible evidence that the victim in any way participated in the conduct of the defendant's actions, or consented to the act, therefore, the Court does not consider this a mitigating circumstance.

Florida Statute 921.141(6)(d) - Whether the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor?

FINDING

There is no evidence that the defendant was an accomplice in the capital felony (murder) committed by another person and his participation was relatively minor, therefore, the Court does not consider this a mitigating circumstance. The defendant called the accomplice as a defense witness. He was not cross-examined by the State. The accomplice testified that the defendant beat Staci and shot her twice. He further testified that the defendant struck him in the face when he (John Pierson) attempted to protect the girl, therefore, the Court does not consider this as a mitigating circumstance.

Florida Statute 921.141(6)(e) - Whether the defendant acted under extreme duress or under the substantial domination of another person?

FINDING

There is no credible evidence that the defendant's action was the result of being under extreme duress or substantial domination of another, therefore, the Court does not consider this a mitigating circumstance.

Florida Statute 921.141(6)(f) - Whether the capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law was substantially impaired?

FINDING

There was no evidence that the defendant did not appreciate

the criminality of his conduct, or that his capacity to conform his conduct to the requirements of the law was substantially impaired; and therefore, the Court does not consider this a mitigating circumstance.

Florida Statute 921.141(6)(g) - The age of the defendant at the time of the crime.

FINDING

The defendant is twenty-five years of age. The Supreme Court in Peek v. State, 395 So.2d 492 (Fla.1980) upheld the rejection of the age of nineteen as a mitigating factor. In Quince v. State, 414 So.2d 185 (Fla.1982) the rejection of age twenty as a mitigating factor was upheld. "There is no per se rule that pin-points an age as a mitigating factor". Peek, supra, at 498. Therefore, the Court does not consider this a mitigating circumstance.

As to non-statutory mitigating circumstances, the defendant's mother testified during the penalty phase. She said he went to school, worked hard and offered photos and honor certificates of the defendant. She also cried and said she did not want him executed. The Court understands the grief of a mother.

As additional matters in mitigation the file reflects the many, many letters and petitions that the Court has received from Ohio regarding the defendant's background, upbringing, and general character. In addition thereto this Court held a hearing on February 16th, 1984, for any and all persons who desired to express their opinions. The number of speakers was nearly equal. The defendant's sister, brother, brother-in-law, and mother testified. The Court does give some weight to this non-statutory mitigating circumstance.

In order to further protect the interests of the defendant, although not required by law, this Court ordered a Pre-Sentence Investigation Report which this Court has examined, has given counsel for the State and the Defendant copies of same to examine, and has given them opportunity to discuss and/or refute said report. This

Court finds there are no additional mitigating circumstances setforth in the Pre-Sentence Investigation Report that are pertinent, other than that heretofore indicated in this Order.

This Court has used as a basis for consideration in imposing sentence no information whatsoever not known to the defendant and/or his counsel of record, which the defendant or his counsel has not had an opportunity to explain or deny. Gardiner v. Florida, 430 U.S. 349, 97 S.Ct.1197, 51 Ed.2d 393 (1977.

III

This Court now must weigh the circumstances found in mitigation against those found in aggravation in order to determine which penalty is appropriate. State v. Dixon, 283 So.2d 1 (Fla.1973)

This Court is fully aware that in determining whether to impose life imprisonment or death the procedure is not a mere counting process of x number of aggravating circumstances and y number of mitigating circumstances, but instead a reasoned judgment as to what factual situation requires the imposition of death and which circumstances can be satisfied by life imprisonment in light of the totality of the circumstances.

This Court finds there are two (2) mitigating factors, one statutory and one non-statutory, which were proven in this case. This Court has reviewed the entire record, including the testimony and evidence in the trial and sentencing proceedings to determine whether there might possibly exist anything else, whatsoever, of a non-statutory mitigating nature, that could be considered by this Court in mitigation of this sentence. The Court, is fully aware of all of the letters in the Court file and of all other mitigating circumstances set out herein and weighed them under the applicable evidentiary

standard, i.e., the aggravating factors proved beyond a reasonable doubt; mitigating factors deemed proven if the Court was reasonably certain that they existed.

Looking at the circumstances from a quantitative viewpoint, that is, by just adding the aggravating and mitigating circumstances, it is found that the numerical count would be 4 to 2 in favor of aggravating circumstances.

Looking at the circumstances from a qualitative viewpoint, it is easily concluded that the magnitude of the crime and the circumstances surrounding it vastly overshadows the background of the Defendant and the other mitigating circumstances as set out herein.

Wherefore, upon the preceding specific findings of fact, the Court is of the opinion that there are sufficient aggravating circumstances to justify the sentence of death; and this Court is of the further opinion that the mitigating circumstances do not outweigh the aggravating circumstances enumerated.

IV

As to the fourth phase of this Order, the Court is now faced with the factual situation that there was a jury recommendation of life imprisonment, and a set of circumstances that are overwhelmingly aggravating.

Tedder v. State, 322 So.2d 908 (Fla. 1975) and its progeny sets forth the test that the Court should follow in determining whether to accept or reject the recommendation of the jury.

> "A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." at 910.

This case should be read with State v. Dixon, 283 So.2d 1 (Fla. 1973), where it was held:

> "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 mitigating circumstances provided in Florida Statute 921.141, F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury."

As found above, there were four aggravating circumstances proven beyond a reasonable doubt. The only statutory mitigating circumstance proven was the defendant's lack of a significant prior criminal history. Every effort was made to determine non-statutory mitigating circumstances, and the Defendant was given every benefit of the doubt. A comparison of this case with several other cases of a similar nature will be undertaken to provide a meaningful review so that the action taken by this Court may be viewed within the framework of the statute. This Court is deeply mindful of the need to follow precedent to insure equal application of the law especially in cases of this sensitivity.

In Sullivan v. State, the Supreme Court found:

> "At the time the crime was committed, the Defendant was 25 years old and had no prior criminal record. He had attended the University of Miami for four years, though he had not actually received a degree. He had previously been employed....There was no indication of deprivation in his background. His accomplice, was 20 years old and had a tenth grade education. He (the accomplice) pleaded to Second Degree Murder.
>
> The facts speak for themselves....The sentence of death is appropriate and should be affirmed." Sullivan v. State, 303 So.2d 632 (Fla. 1974)

The Supreme Court in Dobbert v. State, 328 So.2d 433 (Fla.1976) affirmed a jury override. Dobbert had beaten his young daughter to death. The killing was found to be especially heinous, atrocious and cruel. There was nothing proven in mitigation. It was held that the trial court properly imposed the death penalty in spite of the jury recommendation.

In McCray v. State, 395 So.2d 1145 (Fla.1980), it was argued that the trial court violated the principles espoused in Tedder, supra. Three aggravating circumstances were proven. The defendant had a previous conviction for a violent felony, the homicide was committed during another felony and the homicide was found to be especially heinous, atrocious and cruel. A mature woman was:

> "So brutally beaten about the head and chest that her blood was splattered upon the walls and ceiling of her residence... The agony and horror which this elderly woman must have suffered prior to her death is evident." At p.1153.

The trial judge noted in his order that "the mitigating circumstances are very minor and the aggravating circumstances greatly outweigh any mitigating circumstance". At page 1155. The Supreme Court found the jury recommendation of life to have no reasonable basis under the circumstances of the case.

> "We realize the advisory recommendation of jury must be accorded great weight, Tedder, supra, but in our view the decision of the trial judge to impose the death sentence over the jury recommendation of life was in these circumstances proper." Citing Hoy & Dobbert, at p. 1155.

In Zeigler v. State, 404 So.2d 365 (Fla. 1981) a jury recommended life imprisonment. The trial court found that the homicides were committed; a) to prevent a lawful arrest, b) for pecuniary gain, and c) and were especially heinous, atrocious and cruel. In mitigation, the court found that the defendant had no significant history of prior criminal activity "which is not sufficient to override the aggravated circumstances present." At p. 376, citing Sawyer, Dobbert and Hoy.

Buford v. State, 403 So.2d 943 (Fla.1981) is another case shockingly similar to this case. That defendant committed a burglary, sexual battery and first degree murder upon a 7 year old girl. She was removed from her home and found dead, with her clothes in disarray and injuries to her head and dried blood on her head and face. The

trial court found the following aggravating factor: a) the homicide was committed during a felony, b) the homicide was especially heinous, atrocious and cruel, and c) the homicide was committed to eliminate the young girl as a witness. In mitigation, the trial judge found that the defendant had no significant history of prior criminal activity. The jury recommended a life sentence. The Court ordered the death penalty. The trial judge's comments are worthy of note:

> "The trial jury has rendered its advisory sentence for the court recommending that a sentence of life imprisonment be imposed on the defendant as to each of these capital crimes. Our Florida Supreme Court has stated that the recommendation of the trial jury is to be accorded great weight by the trial judge but I perceive the law still to be that the recommendation of the trial jury is not binding on the trial judge and that I still have the awesome responsibility of making the ultimate determination of whether the aggravating circumstances do in fact outweigh any mitigating circumstances and accordingly whether the death penalty should be imposed. In the following cases, the trial judge declined to follow the recommendation of the trial jury and the imposition of the death penalty was subsequently affirmed by the Florida Supreme Court: Hoy v. State, Barclay v. State, Dobbert v. State, Douglas v. State, and Sawyer v. State. A review of the factual statements in these cases leads the court to the conclusion that this defendant's conduct was at least equal to the conduct of the defendants in each of these capital cases.
>
> It is the ultimate finding and determination of the court that as to the charge of First Degree Murder, the aggravating circumstances substantially outweigh the mitigating circumstances and therefore the death penalty should be imposed upon the defendant, the recommendation of the trial jury to contrary notwithstanding." at 948.

On appeal it was urged that the trial judge failed to follow Tedder, supra, and erred in overriding the jury recommendation. In upholding the death penalty the Supreme Court analyzed this case to Alford v. State, 307 So.2d 433 (Fla.1975), in which a 27 year old defendant killed a 13 year old girl. She was raped and shot to death. Her nude body was found with wounds to her head, chest, back and arm. That death sentence was upheld as especially heinous, atrocious and cruel.

Following Buford, the Supreme Court again upheld a jury override in Stevens v. State, 419 So.2d 1058 (Fla1982). That defendant abducted an adult woman, raped and killed her. She was stabbed and strangled. The following factors were proven: the homicide was found to have been committed to eliminate a witness; during a felony; and especially heinous, atrocious and cruel. The defendant's three prior convictions for non-violent crimes did not outweigh the aggravating circumstances.

In this case, the Court specifically finds, that the statutory and non-statutory mitigating circumstances offered do not outweigh the magnitude of the aggravating factors. A 10 year old girl was sexually attacked in the bedroom of her own home. She was brutally beaten and then killed by intruders. The defendant's trial testimony that he did not commit the crimes and only confessed because he was brainwashed and read from prepared test is totally rejected by the Court. A photograph was introduced into evidence which shows the defendant on the morning after he confessed to this crime and following an opportunity for him to rest. The photograph depicts the defendant in good spirits and apparently in full control of his faculties. Following the taking of the picture there was a Waiver of Extradition hearing held that morning and a public defender was appointed counsel for defendant. At the hearing the defendant not only waived extradition but what he did not do or say is particularly relevant in hindsight. This obviously intelligent, articulate, and bright young man would have the Court believe that after giving a confession which he claims was not true; after sleeping, and knowing that he was leaving the sanctuary of his home state, and in the process of being transported to the State of Florida, did not state to the Ohio Judge, or have his Ohio attorney inform the Judge---"they forced my confession. I am innocent. This whole thing is contrived by the police. Help me!" The transcript of that hearing makes the recantation of his confession a mockery of Justice. His testimony is further impeached by his labeling as lies, the testimony of eight separate State-witnesses. The defendant may have no significant history of prior criminal activity, and a loving

mother, sister and brother, however, his actions in Staci Weinstein's bedroom on September 14, 1982, cannot be morally or legally excused on that basis. The Court does not know the reasoning which caused the jury to recommend life imprisonment, but the analysis of the aforementioned cases mandates this Court to hold that there is not a reasonable basis for that recommendation.

The issue of proportional sentences of the Co-Defendant is rejected by this Court on the basis of the following cases:

Smith v. State, 365 So.2d 704 (Fla.1978)

Salvatore v. State, 366 So.2d 745 (Fla.1978)

Jackson v. State, 377 So.2d 752 (Fla.1978)

Witt v. State, 342 So.2d 497 (Fla.1977)

Antone v. State, 382 So.2d 1205 (Fla.1980)

Buford v. State, 403 So.2d 943 (Fla.1981)

In closing, the Court finds great support from the order of Judge Fogle, adopted by the Florida Supreme Court in Hoy v. State, 353 So.2d 826 (Fla.1977).

> "The undersigned Judge has long been opposed philosophically to capital punishment, and publicly has so stated on numerous occasions throughout the years."
>
> "The legislature of Florida has stated its philosophy and belief to be that capital punishment should be imposed in certain cases by enactment of a law providing for the imposition of same when there are aggravating circumstances and insufficient mitigation circumstances to outweigh the aggravating circumstances."
>
> "Until the Supreme Court of the United States rules to the contrary, this Court must follow the dictates of the law and should not indulge in the sophistry of placing its judgment superior to the requirements of the law."
>
> "The Court is of the opinion that if there is any case that it has ever heard wherein the imposition of the death penalty is called for, it is this case."
>
> "Not only does the Court find aggravating circumstances in that the capital felonies were committed while the defendant was engaged, or was an accomplice in the commission of a rape, but further finds

> that the capital felonies were especially heinous, atrocious and cruel, and finds that there are insufficient mitigating circumstances as ennumerated in Section 921.141, Florida Statutes, to outweigh the aforesaid aggravating circumstances. The pitiless, wicked, shockingly evil and vile method of imposing atrocities and death upon the young people who were the victims in these cases, leads the Court to the conclusion that the recommendation of life imprisonment made by the jury should be disregarded by the Court and the death penalty imposed."

The prospect of sentencing a person to death is the most difficult task a Circuit Judge faces. However, Judges who take the oath of office and swear to uphold the law, must uphold the law. It would be an easy path for this Court to follow the Jury's recommendation, but that is not the law.

As a final point, the Court has personally agonized over each page of this Order in an effort to seek the motive or reason for the senseless crime. How does a person who has no prior criminal record; comes from a good family; has a good job and a fine work record, commit a heinous crime such as this? This Court can only conclude that the crime occurred because of those reasons and not in spite of them. Had those two defendants been seasoned criminals they would have undoubtedly realized that since no actual rape or murder had occurred, they would be facing relatively short prison terms, even if caught. I believe the panic started in this defendant's mind when Staci Weinstein wanted to call the police. I think he then realized that at the very least he would lose his good reputation and the job that he loved. The panic increased to the point that the defendant decided to risk everything on the possibility that he would not be caught if he eliminated the witness. It was Staci Weinstein's misfortune to encounter Edward Wasko at a time in his life when he thought that he has so much to lose for an attempted rape that he felt that murder was the only alternative.

Pursuant to the above, the Court hereby finds that there is n

APPENDIX C