IN THE SUPREME COURT OF FLORIDA

BOBBY ALLEN RALEIGH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee .

CASE NUMBER 87,584

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY, FLORIDA

# REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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**POINT I**

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 17, AND 22, OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN INSTRUCTING THE JURY.

**A. Failure to give the statutory mitigating instruction on no significant history of criminal activity.**

Contrary to Appellee's assertion, Appellant is not contending in this issue that the trial court's finding regarding this mitigating factor is flawed. Rather, Appellant is solely contesting the failure of the trial court to give this instruction. Appellant does not dispute that there was evidence presented in this record regarding his drug dealing. Whether this constitutes a **significant** history of criminal activity is properly a question of fact for the jury to determine. However, by refusing to instruct the jury, the trial court usurped the province

of the jury. Very recently, in James v. State, Case Number 86,834 (Fla. April 24, 1997), this Court rejected on appeal James' contention that the trial court erred in refusing his request to the trial court not to instruct on any specific mitigating factor. In rejecting this issue, this Court stated:

> However, **we** have **mandated** that statutory mitigating circumstances **must be read to the jury** to consider if **any evidence** regarding them is presented, and **failure to do so constitutes reversible error.** Robinson v. State, 487 So.2d 1040 (Fla. 1986).

Slip opinion, pp. 8-9 (emphasis added). Contrary to Appellee's assertion, the trial court does not have any discretion in this matter. The failure to instruct on this statutory mitigating factor constitutes reversible error

**B. Improper instruction on the aggravating circumstance of pecuniary gain.**

In arguing that the trial court properly instructed the jury on this aggravating factor, even though it did not find this factor to have been proven, Appellee emphasizes the two statements allegedly heard by Patricia Pendarvis that Appellant stated "everything was all about making money. " (Appellee's brief, pp. 43-44). However, these statements when placed in the proper context, clearly show that they were made in reference to a possible drug deal that Appellant wanted to talk to Cox about, **not** about Appellant's motive for murdering Cox. The trial court properly concluded that pecuniary gain was indeed not a motive for killing Cox, Therefore, the trial court was clearly in error in instructing the jury on this aggravating factor. Appellee is incorrect in its assessment of this Court's decision in Omelus v. State, 584 So.2d 563 (Fla. 1991). This Court found error in Omelus where the trial court instructed the jury on an aggravating factor for which there was no evidentiary basis even though the trial

court did not find this aggravating factor to be present. Thus, Omelus is directly on point with regard to this issue.

**C. The requested instruction on cold, calculated and premeditated.**

Appellee does not contest the correctness of the requested instruction on cold, calculated and premeditated. Indeed, the instruction is correct. While the trial court certainly does have discretion with regard to the instructions which it gives, Appellant's contention herein is that the trial court refused to even consider the instruction. Thus, while he may have had discretion, the trial court refused to exercise it or even consider it. In essence, the trial court **did not know** that he had discretion regarding this instruction. This is certainly borne out by the trial court's statement that he felt "compelled" to give the standard jury instruction. (T1905) Once again, Appellant draws this Court's attention to its recent decision in James v. State, Case Number 86,834 (Fla. April 24, 1997), wherein this Court rejected a claim that the trial court erred in giving a special jury instruction requested by the state regarding the aggravating factor of prior violent felony. In rejecting this argument, this Court stated:

> . . .a trial judge in a criminal case is **not constrained** to give only those instructions that are contained in the Florida Standard Jury Instructions. Cruse v. State, 588 So.2d 983 (Fla. 1991), cert. denied, 504 U.S. 976 (1992).

Slip opinion, p. 8 (emphasis added). Therefore, the trial court's refusal to acknowledge that he had discretion regarding the specially requested jury instruction on CCP constitutes reversible error.

## POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DISMISSING A JUROR OVER DEFENSE OBJECTION WHERE THERE WAS NO SHOWING THAT THE JUROR COULD NOT BE FAIR.

Appellee argues that the trial court properly exercised its discretion in replacing Juror Chandler. However, an examination of just what occurred reveals the error in the trial court's reasoning, It is important to note that the trial court was apprised of the alleged comments made by Juror Chandler during the course of the trial. In this regard, the trial court made a specific fmding that the comment by Chandler was not hostile to Daly, the prosecutor. (T1916) Absolutely no further evidence regarding this initial comment was presented to alter this finding by the trial court. Yet the trial court clearly stated that was its basis for dismissing the juror. (T1935) There simply was no showing whatsoever that Juror Chandler could not fairly decide the case based on the evidence presented. The dismissal of Juror Chandler was error

## POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT APPELLANT'S DEATH SENTENCES WERE IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, THUS RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

### A. The capital murders were not committed during the course of a burglary.

Appellee mischaracterizes Appellant's entry into Cox's house that night. Appellant did not enter a locked trailer; rather, he knocked on the door and was admitted to the trailer by one of the residents of the trailer. There simply is no evidence in this record to conclude that Appellant gained access through false pretenses. Appellant knocked on the door, told Eberlin that he wanted to see Cox, and proceeded back to the room where Cox was asleep. Simply put, a burglary was not proven beyond a reasonable doubt.

### B. The murder of Eberlin was not done to eliminate a witness or to avoid arrest.

Appellee has not addressed this Court's decision in Cook v. State, 542 So.2d 964 (Fla. 1989), wherein a finding of witness elimination was stricken. In Cook, the evidence showed that the defendant shot the victim to keep her quiet because she was yelling and screaming. This Court agreed that the facts indicated that the defendant shot instinctively and not with a calculated plan to eliminate the victim as a witness. The facts of the instant case are identical to the facts in Cook. Appellant's dominant motive was not witness elimination is borne

out by his statements to his mother the next day that he did not think that Eberlin was dead. Certainly, had Appellant intended to eliminate Eberlin as a witness, he would have no concern that Eberlin was still alive. This aggravating factor was not proven beyond a reasonable doubt.

**C. The murder of Douglas Cox was not committed in a cold, calculated and premeditated fashion.**

In arguing that the evidence supports a finding of CCP, Appellee states that heightened premeditation was shown by the manner of the execution itself, "where he shot a sleeping Cox at close range, not once, not twice, but three times in the left temporal area." (Brief of Appellee, p. 67). In Herring v. State, 446 So.2d 1049 (Fla. 1984), this Court affirmed a finding of cold, calculated and premeditated finding that the second shot fired by Herring after the clerk was on the floor, was evidence of heightened premeditation. However, in Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court receded from this holding in Herring. It is clear that the number of shots fired by an accused is not indicative of whether they are fired with the requisite heightened premeditation required for finding of CCP. Additionally, if, as the trial court found, the murder was a result of the altercation which occurred earlier at Club Europe between Cox, Figueroa, and Appellant's mother, it is certainly possible that this constituted a pretense of justification in the mind of Appellant. If so, the finding of CCP cannot be upheld.

**D. The murder of Eberlin was not especially heinous, atrocious and cruel.**

Appellant reiterates that the murder of Timothy Eberlin, while indeed senseless and tragic, was not done with any intent on the part of Appellant to cause a high degree of pain.

Eberlin clearly had no foreknowledge that he would be killed. In fact, in this regard it must be emphasized that it was Figueroa who started shooting at Eberlin, not Appellant. The shooting of Cox by Appellant was simultaneous with the shooting of Eberlin by Figueroa, In Bonifay v. State, 626 So.2d 1310 (Fla. 1993), this Court reversed a finding of heinous, atrocious and cruel noting:

> The record fails to demonstrate any intent by Bonifay to inflict a high degree of pain or to otherwise torture the victim. **The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that Bonifay intended to cause the victim unnecessary and prolonged suffering.** Santos v. State, 591 So.2d 160 (Fla. 1991).

Id. at 1313. While the evidence did show that Eberlin suffered some wounds to his head as a result of being beaten, this commenced only after the gun jammed. According to the state's own witness, the medical examiner, Eberlin lived a short period of time "assuming the shots were not all fired before the beating. " (T1356) Clearly, all the shots were indeed fired before the beating, and therefore, Eberlin did not linger in unbearable pain for any appreciable amount of time. The finding of HAC must be reversed.

## CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those in the Initial Brief, Appellant respectfully requests this Honorable Court to vacate his sentences and remand the cause with instructions to impose life sentences, or in the alternative, to order a new penalty phase.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to, Mr. Bobby Allen Raleigh, #124052 (R2S3), Florida State Prison, P.O. Box 181, Starke, FL 32091-0181, this 30th day of April, 1997.

Michael S. Becker

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