IN THE SUPREME COURT OF FLORIDA

LEROY POOLER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee,
_____/

CASE NO: 87,771

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

# REPLY BRIEF OF APPELLANT

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## STATEMENT OF THE CASE AND FACTS

Appellant stands by its initial recitation of facts but would emphasize the following. There was no testimony as to exactly when Kim Brown died, The Medical Examiner testified that none of the shots were immediately fatal (T 960), and there was no evidence presented as to whether Kim Brown was alive when Appellant kicked her after shooting her.

Appellant takes issue with Appellee's factual assertion that Kim Brown had two days to ponder her impending death. The record is silent as to whether she considered Appellant's threat, or whether Kim Brown was actually scared by the threat. It was undisputed that Carolyn Glass waited several days before telling Kim Brown about the threat. (R 729-730). Moreover, on cross examination Carolyn Glass stated that she did not go to the police about the threat, did not inform Ms. Brown about the threat, and did not discuss the threat with Kim Brown's mother,

Appellee relies upon the fact that Appellant received a disciplinary report while incarcerated for threatening another prisoner. The full record regarding this report is ignored by Appellee. The evidence showed that the report was never resolved due to manpower shortages, that such incidents were common in prison, that Appellant was imprisoned for approximately one year, and that there was no violence reported in connection with the threat. (T 1450-1453).

## SUMMARY OF THE ARGUMENT

I) THE STATE'S COMMENTS DURING VIOR DIRE REGARDING APPELLANT'S PRESUMPTION OF INNOCENCE RENDERED THE TRIAL FUNDAMENTALLY UNFAIR.

II) THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S FINDING OF THE "HEINOUS ATROCIOUS, OR CRUEL" AGGRAVATING FACTOR (HAC).

III) THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S FINDING OF THE "PRIOR VIOLENT FELONY" AGGRAVATING FACTOR BASED ON CONTEMPORANEOUS OFFENSES AGAINST A SECOND VICTIM.

IV) DEATH IS NOT PROPORTIONAL IN THIS CASE AND THE TRIAL COURT ERRED IN REJECTING THE DOMESTIC NATURE OF THE CRIME AS A MITIGATING FACTOR. (ISSUES V AND XI COMBINED FOR REBUTTAL).

V) THE TRIAL COURT ERRED IN REJECTING THE MITIGATION FACTOR IN SECTION 921.141(6) AND THE NONSTATUTORY MITIGATING FACTORS THAT THE APPELLANT WAS OF LOW NORMAL INTELLIGENCE AND HAD MENTAL PROBLEMS. (ISSUES VI, IX AND X COMBINED FOR REBUTTAL).

VI) THE TRIAL COURT ERRED IN REJECTING MULTIPLE NON-STATUTORY MITIGATING FACTORS BASED UPON AN UNRESOLVED DISCIPLINARY REPORT (ISSUES VIII, XI, XII, XIII).

THE APPELLANT STANDS BY HIS INITIAL BRIEF AS TO ISSUES II AND VII OF HIS INITIAL BRIEF AND ANY OTHER ISSUES NOT LISTED IN THE SUMMARY OF ARGUMENT.

## ARGUMENT

I) THE STATE'S COMMENTS DURING VIOR DIRE REGARDING APPELLANT'S PRESUMPTION OF INNOCENCE RENDERED THE TRIAL FUNDAMENTALLY UNFAIR.

The record shows that defense counsel objected to this comment and that his objection was overruled by the trial court, which instructed the prosecutor to proceed. (T 586). It is clear from the exchange which followed the prosecutor's comment that the jurors were unclear on the appropriate burden. Instead of viewing the presumption of innocence as a fundamental due process right the juror in question stated, without comment from the Court, that the concept was "jaded" and that she needed "evidence" to overcome the presumption. Moreover, the prosecutor's comments all used the permissive term "can" creating the impression that the presumption of innocence was optional.

The case law upon which Appellee relies is distinguishable. Neither, Lucas v. State, 568 So.2d 18 (Fal. 1990), nor combs v. State, 525 So.2d 853 (Fla. 1985) involve a comment on a constitutional right. The court in, State v. Wilson, 1996 WL 734512, (Fla. 1996) noted that even when the extraneous comment of a trial judge regarding reasonable doubt was not incorrect the comment:

> ". . .was at least ambiguous to the extent that it might have been construed as either minimizing the importance of reasonable doubt or shifting the burden to the defendant to prove that a reasonable doubt existed. . ..While we can understand why trial judges might wish to acquaint the jury with the

> concept of reasonable doubt . . .we strongly suggest that this be done only by reading in advance the approved standard jury instruction on the subject. Any extemporaneous explanation of sensitive legal issues . . . embraced within the standard jury instructions runs the risk of creating error." Id. 733512

Wilson is also distinguishable in that the Defendant failed to object.

Here Appellant asserts that the standard jury instruction given at the end of the case was insufficient after the Court, by overruling Defendant's objection, tacitly approved the prosecutor's comment.

II) THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S FINDING OF THE "HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING FACTOR.

There was no evidence that the victim was alive or conscious during the entire shooting nor that the victim, as found by the trial court and argued by the Appellee, pondered "the potential of her impending death" for two days. (See Answer Brief of Appellee p. 22). There was no evidence as to the victim's state of mind prior to the killing, and no evidence supporting Appellant's argument that the victim was alive for all five shots or when Appellant allegedly kicked her. The medical examiner was unable to ascertain when she died. (T 949-960).

Appellant's reliance on Wyatt v. State, 641 So.2d 1336, (Fla 1994), is misplaced. The Defendant in Wyatt committed a multiple murder, raping one of the victims before killing her. The same is true for Hannon v. State, 638 So62d 39 (Fla. 1994), where the Defendant again committed a double murder, one of which was a

brutal knife slaying. Finally the Defendant in, Farinas v. State, 569 So.2d 425, (Fla. 1990), pursued the victim in his own vehicle, forced the victim off the road, forced her to leave her car and enter his, and paralyzed the victim before killing her. All of these cases are distinguishable on the facts.

A key inquiry in the HAC aggravator is whether the Defendant intended the murders to be painful. See, State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), " . . .cruel means designed (emphasis added) to inflict a high degree of pain"; Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990), ". . . this record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was *meant* (emphasis in original) to be deliberately and extraordinarily painful." There is no evidence which supports an inference that Appellant designed this crime to inflict a high degree of pain.

It should be noted that Porter, *supra*, was double murder, and that the record reflects that both victims were aware of their impending deaths. Despite this fact the HAC aggravating factor was stricken by this Court. Porter conclusively refutes the Appellee's position that a murder qualifies for this factor whenever the victims are aware of their impending demise.

## III THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S FINDING OF THE "PRIOR VIOLENT FELONY" AGGRAVATING FACTOR BASED ON CONTEMPORANEOUS OFFENSES AGAINST A SECOND VICTIM.

The only prior aggravating felonies relied upon by the trial court were contemporaneous with the murder of the victim. This

Court has indicated that although contemporaneous felonies can qualify as prior aggravating factors, it has done so only where there are multiple victims or multiple episodes. Here the attempted murder of the victim's brother was not premeditated, and indeed such premeditation was not charged by the State. Moreover Appellee ignores the fact that another contemporaneous act, the burglary, used by the Court as an aggravating factor was part of a ". . .continuous series of events and there was no break in the chain." (T 1698). The trial court gave undue weight to these contemporaneous events, in light of permissive language cited in the cases relied upon by the Court,

IV) **DEATH IS NOT PROPORTIONAL IN THIS CASE AND THE TRIAL COURT ERRED IN REJECTING THE DOMESTICE NATURE OF THE CRIME AS A MITIGATING FACTOR. (ISSUES V AND XI COMBINED FOR REBUTTAL).**

Appellee begins its argument by acknowledging that historically there has been a tendency toward leniency in domestic dispute cases. Appellee notes that this Court's decision in, Spencer v. State, 21 Fla.L.Weekly 5366, (Fla. Sept. 12, 1996), conflicts with its decision in, Wright v. State, 21 Fla.L.Weekly S498 (Fla. Nov. 1996), and urges this Court to apply Spencer. (See Answer Brief of Appellee, p. 31). Appellee also cites to several cases which are easily distinguished.

They all involve domestic disputes and all of them involve true "previous" or "separate" instances of violent criminal acts, resulting in additional aggravating factors.

In, Dusty Ray Spencer v. State, 21 Fla.L.Weekly S366 (Fla.Sept.12, 1996) this Court considered for the second time the propriety of the death sentence wherein there was a domestic dispute. The facts of the case, previously explained by this Court in, Spencer v. State, 645 So.2d 377, 379-80 (Fla.1994), evidence a protracted domestic dispute. The medical examiner testified that all wounds occurred while Karen was alive and that she probably lived for ten to fifteen minutes after receiving the stab wounds in the chest.

The initial sentence of death was vacated and remanded. On remand the trial judge found that Spencer was previously convicted of a violent felony, based upon his contemporaneous convictions for aggravated assault, aggravated battery, and attempted second-degree murder; and that the murder was especially heinous, atrocious, or cruel. Four mitigators were found. The death penalty was again imposed. Clearly there was a pattern of torment, and several separate and distinct episodes involving violence.

This court discussed the domestic nature of the crime in failing to overturn the death penalty. The Court further found that the domestic aspect of the incident did not negate the heinous, atrocious, and cruel nature of the crime. The facts in Spencer were far more aggravated than in the instant case.

Likewise in Henry v. State, 649 So.2d 1366, (Fla. 1994), this

Court found a situation in which there was a pattern of multiple, distinct, episodes of violent behavior. Shortly before Christmas 1985, Henry went to Pasco County to talk with his wife, and after an argument Henry stabbed her repeatedly in the throat. Henry then abducted the victim's five-year-old son, drove him to Hillsborough County and killed him there nine hours later.

On appeal this Court found the penalty proportionate. The court cited to, Lemon v. State, 456 So.2d 885 (Fla.1984), which also involved a situation wherein there was a domestic dispute involving a pattern of separate, non-contemporaneous convictions. Finally, the aggravating factor of prior convictions for violent felonies was easily established by an unrelated conviction for second-degree murder for the stabbing death of Patricia Roddy to which Henry had pled guilty in 1976.

A third case wherein the Court found the death penalty appropriate despite the domestic nature of the killing is, Cummings-El v. State, 1996 WL 543401, (Fla. 1996). Despite Appellee's assertion that Cumminss-El is dispositive of this case, upon examination one again finds the key distinction of truly separate episodes. The defendant was the victim's estranged lover. After he assaulted her at a friend's house, the victim obtained a restraining order against the defendant. Despite the order the Defendant put a gun to her face and told her he was going to kill her. Two days later, Cummings-El kicked in the door at a friend's

house, beat up the victim, broke her wrist, kicked and stomped on her, threw a TV on her, and promised he would kill her. Each of these separate incidents occurred well prior to the actual murder of the victim. Finally, like the Court in Henry, the Court in Cumincrs-El found little or nothing in mitigation,

Finally, in Porter v. State, 564 So.2d 1060, (Fla. 1990), this Court again affirmed the imposition of the death penalty despite the existence of the domestic relationship between the Defendant and the victim. The Defendant was the victim's live-in lover and the relationship was marked by several violent incidents occurring during the course of the relationship. In 1986 Porter damaged Williams' car while she was at work, and later he telephoned and threatened to kill Williams and Amber. Porter left town and returned five months later at which time Williams had entered a relationship with the second victim, Walter Burrows.

Before the murder Porter went to the home of another friend and asked to borrow a gun. When the friend declined the gun vanished from his home. On October 8, 1986, Porter visited Williams, who called the police. Porter spent the evening at a bar and in the morning went to the victim's home and shot both her and her new boyfriend. Facts showed that both victims were alive and aware of their impending death.

This Court held that these facts did not support a finding of heinous atrocious or cruel, because the facts of the case did not

evidence an intention to inflict pain, and the case was not one in which the murder was accompanied by acts setting it apart from the norm of capital felonies.

Porter is distinguishable from the instant case on several counts. Initially, Porter was a double murder. Next, as in other cases cited by Appellant on this point, there was additional evidence of separate incidents of distinct, violent conduct, against the victim. However, in Porter this conduct did not result in the finding of an aggravating circumstance as in Spencer, Henry, and Cummings-El, *supra*. Moreover the Porter trial court found multiple aggravators including a conviction for another capital felony or a felony involving the use or threat of violence to that person (the two murders and the accompanying aggravated assault); that the capital felonies were committed in the commission of a burglary; the murder of Williams was especially heinous, atrocious, or cruel (reversed by this Court); and the murder was committed in a cold, calculated, and premeditated manner. The trial court found no mitigating circumstances.

If indeed there is a conflict, it is between Porter v. State, *supra*, and, Wrisht v. State, 1996 WL 670180, (Fla. 1996). There this Court was faced with a situation which was analogous to Porter. The defendant and victim separated after being married for several years. After the victim refused to let the defendant visit his children, the defendant went to her house, broke through the

plate-glass door, shot the victim twice, abducted the children, kicked down a door to another bedroom and threatened the victim, and then turned himself in.

During the sentencing phase of the case the trial court found that several years earlier wright had shot another individual in the wrist during a dispute over the victim. The trial court imposed a sentence of death based on two aggravating circumstances (that Wright had been convicted of a prior violent felony and that the murder was committed during a burglary), one statutory mitigating circumstance, (that the murder was committed while Wright was under the influence of extreme mental or emotional disturbance) and multiple nonstatutory mitigating circumstances.

This Court overturned the death penalty as being disproportionate to the crime, stating:

> "The present record is devoid of evidence of prior violent offenses or other aggravation committed by Wright unrelated to the ongoing struggle between him and Allison. The evidence in mitigation, on the other hand, is copious."

Seen in light of the double murder and complete absence of mitigating circumstances, even Porter and Wright can be reconciled. Clearly there are two different lines of cases. First, Spencer, Henry, Cumminss-El, and Porter. In each of those cases there is a domestic dispute, a marked or complete absence of mitigating factors, and a pattern of domestic violence that predates the actual murder. There are also multiple aggravating factors.

Then there are Wright and the instant case. In both Wright and the instant case there was a single murder. In both Wriaht and the instant case the trial court, in finding aggravating factors, relied solely on contemporaneous conduct. Wright had cooperated with police, the Appellant had turned himself in. Wright had mental health problems, Appellant had demonstrably low mental abilities. Both crimes arose in a heated domestic dispute. Wright and Appellant both had good military and employment records. As in **Wright,** the death penalty in the this case is disproportionate.

On a final note, Appellant reiterates his concern that the trial **court's** rejection of the domestic nature of the crime as a mitigating factor was based upon the trial court's impression that such a consideration would somehow deprive women of the full protection of the law. A "domestic exception" to the death penalty, if indeed it exists, would presumably operate in favor of both men and women. Conceivably, the rule would even include a **"domestic"** confrontation between two men or two women. The Court's rejection of this mitigating factor because it is impliedly unfair to women is illogical.

**V)** THE TRIAL COURT ERRED IN REJECTING THE MITIGATION FACTOR IN SECTION **921.141(6)** AND THE NONSTATUTORY MITIGATING FACTORS THAT APPELLANT WAS OF LOW NORMAL INTELLIGENCE AND HAD MENTAL PROBLEMS. (ISSUES VI, IX AND X COMBINED FOR REBUTTAL).

The record on this point is clear. Whenever a reasonable quantum of competent, uncontroverted evidence of mitigation has

been presented, the trial court must find that the mitigating circumstance has been proved. On the other hand, a trial court may reject a mitigating circumstance only if the record contains competent, substantial, evidence to support the trial court's rejection of the mitigating circumstances. See, Cook v. State, 542 So.2d 964, 971 (Fla.1989); Nibert v. State, 574 So.2d 1059, 1062 (Fla.1990); Robert A. Consalvo v. State, 1996 WL 559883, (Fla, 1996).

The evidence cited in Appellee's brief is not positive "substantial" evidence supporting a rejection of the mitigating factors. Appellee makes much of the Appellant's life accomplishments, arguing that a "C" average in high school, military service, and employment with a moving company, belie the objective evidence shown by extremely low test *scores.* The most this evidence shows is that Appellant was able to overcome his mental handicap and lead a normal life. If anything, such evidence should weigh in favor of leniency.

VI) THE TRIAL COURT ERRED IN REJECTING MULTIPLE NON-STATUTORY MITIGATING FACTORS BASED UPON AN UNRESOLVED DISCIPLINARY REPORT (ISSUES VIII, XI, XII, XIII).

The trial court rejected the following non statutory mitigating factors: that Appellant had a good jail record and had shown an ability to adapt to prison life; that Appellant is capable of rehabilitation; and that the Appellant is unlikely to endanger others and will adapt well to prison life. The Court rejected all

three of these mitigating factors because of two pieces of evidence: a disciplinary report given to Appellant while he was in prison, and Appellant's arrest record.

Neither the disciplinary record nor Appellant's arrest record constitute "substantial" evidence for rejection of these mitigating factors. It does not appear that the disciplinary report is even part of the record. The trial transcript does not reveal that the report was ever entered into evidence. (T1448-1453). Moreover, the report was never resolved due to a lack of manpower. Appellant was incarcerated for a year prior to trial and by definition a jail is populated by aggressive, violent individuals. One unresolved disciplinary report under such circumstance is deserving of absolutely no weight. The same is true of the Appellant's arrest record. As Appellee points out, the disposition of many of these offenses is unknown.

Finally one should note that Appellee argues as to each mitigating factor that the failure to find the existence of the mitigating factor would not have changed Appellant's sentence because the trial court believed that each aggravator, standing alone, would have supported the death penalty. (See Answer Brief of Appellee p. 42). The trial court's beliefs simply are not in conformity with this Court's prior rulings on this issue. See, Nibert v. State, 574 So.2d 1059, 1163 (Fla.1990)."This Court has affirmed death sentences supported by one aggravating circumstance only in cases involving either nothing or little in mitigation."

## CONCLUSION

This court should vacate or reduce Appellant's sentence and grant such other relief as it deems appropriate.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, postage prepaid to CELIA TERENZIO, ESQ., Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, FL 33401, on this 3ed day of April, 1997.

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