IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
AUG 5 1998
CLERK, SUPREME COURT
By ____
Chief Deputy Clerk

MICHAEL SCOTT KEEN, Appellant, vs. STATE OF FLORIDA, Appellee.	CASE NO. ~~71,358~~ 88,802

REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court of the 17th Judicial Circuit.

RICHARD JORANDBY
Public Defender

RICHARD B. GREENE
Florida Bar No. 265446
Assistant Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Attorney for Michael Scott Keen

ORIGINAL

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER THE INTRODUCTION OF IMPROPER HEARSAY. . . . 1

POINT VIII

THE TRIAL COURT ERRED IN ITS RESTRICTION OF CROSS-EXAMINATION OF A KEY STATE WITNESS. 7

POINT IX

THE TRIAL COURT ERRED IN DENYING MR. KEEN'S MOTION TO SUPPRESS HIS POLICE STATEMENTS. 9

POINT X

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS AS THE INDICTMENT WAS BASED ON PERJURED TESTIMONY. 12

POINT XV

THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE. 14

POINT XVI

THE TRIAL COURT COMMITTED SUBSTANTIAL ERRORS IN ITS SENTENCING ORDER. 30

CONCLUSION 35

CERTIFICATE OF SERVICE

AUTHORITIES CITED

CASES PAGE

Anderson v. State, 574 So. 2d 87 (Fla. 1991) 12

Apfel v. State, 429 So. 2d 85 (Fla. 5th DCA 1983) 7

Barrett v. State, 603 So. 2d 1275 (Fla. 1992) 27, 28, 33

Barrett v. State, 649 So. 2d 219 (Fla. 1994) 19, 20, 25-26

Brookings v. State, 495 So. 2d 135 (Fla. 1986) 19

Caillier v. State, 523 So. 2d 158 (Fla. 1988) 19

Carter v. State, 560 So. 2d 1166 (Fla. 1990) 17

Chapman v. California, 386 U.S. 18 (1967) 11

Cheshire v. State, 568 So. 2d 908 (Fla. 1990) 17, 30

Coleman v. State, 610 So. 2d 1283 (Fla. 1992) 15

Collins v. State, 65 So. 2d 61 (Fla. 1953) 4

Conley v. State, 620 So. 2d 180 (Fla. 1993) 3, 5

Cooper v. State, 581 So. 2d 49 (Fla. 1991) 24

Craig v. State, 510 So. 2d 857 (Fla. 1987) 14, 34

Craig v. State, 685 So. 2d 1224
(Fla. 1996) 18, 19

Davis v. State, 493 So. 2d 11
(Fla. 3d DCA 1986) 3, 5

Douglas v. State, 575 So. 2d 165
(Fla. 1991) 22

Duboise v. State, 520 So. 2d 260
(Fla. 1988) 19

Eutzy v. State, 458 So. 2d 755
(Fla. 1984) 20

Faver v. State, 393 So. 2d 49
(Fla. 4th DCA 1981) 7

Fead v. State, 512 So. 2d 176
(Fla. 1987) 27, 28

Ferrell v. State, 680 So. 2d 390
(Fla. 1996) 15

Francois v. Wainwright, 741 F.2d 1275
(11th Cir. 1984) 12

Fuente v. State, 549 So. 2d 652
(Fla. 1989) 19, 20

Harmon v. State, 527 So. 2d 182
(Fla. 1988) 19

Harris v. State, 544 So. 2d 322
(Fla. 4th DCA 1989) 3

Hegwood v. State, 512 So. 2d 176
(Fla. 1987) 26

Herzog v. State, 439 So. 2d 1372
(Fla. 1983) 20

Holsworth v. State,512 So. 2d 176
(Fla. 1987) 27, 28

Horne v. State, 659 So. 2d 1311
(Fla. 4th DCA 1995) 3, 5

Jackson v. State, 599 So. 2d 103
(Fla. 1992) 19

Jackson v. State, 707 So. 2d 412
(Fla. 5th DCA 1998) 3

Jurek v. Texas, 428 U.S. 262
(1976) 16

Kearse v. State, 662 So. 2d 677
(Fla. 1995) 17, 28

Keen v. State, 504 So. 2d 396
(Fla. 1987) 6

King v. Dugger, 555 So. 2d 355
(Fla. 1990) 14

Lee v. Illinois, 476 U.S. 530
(1986) 24

Malloy v. State, 382 So. 2d 1190
(Fla. 1979) 19, 25

Marshall v. State, 604 So. 2d 799
(Fla. 1992) 15

McCampbell v. State, 421 So. 2d 1072
(Fla. 1982) 19, 20, 26-28

Pentecost v. State, 545 So. 2d 861
(Fla. 1989) 19, 24

Peoples v. State, 612 So. 2d 555
(Fla. 1992) 9

Perry v. State, 522 So. 2d 817
(Fla. 1988) 26, 33

Pomeranz v. State, 703 So. 2d 465
(Fla. 1997) 20

Porter v. State, 564 So. 2d 1060
(Fla. 1990) 17, 28

Postell v. State, 398 So. 2d 851 (Fla. 3d DCA 1981) 3, 5

Richardson v. State, 246 So. 2d 771 (Fla. 1971) 7

Robinson v. State, 610 So. 2d 1288 (Fla. 1992) 15

Santos v. State, 629 So. 2d 838 (Fla. 1994) 32

Scott v. State, 603 So. 2d 1275 (Fla. 1992) 26, 27, 33

Simmons v. South Carolina, 512 U.S. 154 (1994) 16

Skipper v. South Carolina, 476 U.S. 1 (1986) 16

Sobczak v. State, 462 So. 2d 1172 (Fla. 4th DCA 1984) 10

Spivey v. State, 529 So. 2d 1088 (Fla. 1988) 19

State v. Baird, 572 So. 2d 904 (Fla. 1990) 2

State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) 11

State v. Jennings, 666 So. 2d 131 (Fla. 1995) 5

Stevens v. State, 613 So. 2d 402 (Fla. 1992) 27

Teffeteller v. State, 495 So. 2d 744 (Fla. 1986) 14

Thomas v. State, 581 So. 2d 993 (Fla. 2d DCA 1991) 5

Thompson v. State, 456 So. 2d 444 (Fla. 1984) 27

Thompson v. State, 553 So. 2d 153
(Fla. 1989) 15, 18

Torres-Arboledo v. State, 524 So. 2d 403
(Fla. 1988) 15

Trotman v. State, 652 So. 2d 506
(Fla. 3d DCA 1995) 3, 5

United States v. Basurto, 497 F.2d 781
(9th Cir. 1974) 12

United States v. Bowers, 534 F.2d 186
(9th Cir. 1976) 12

United States v. Bracy, 566 F.2d 649
(9th Cir. 1977) 12

United States v. Johnson, 488 F.2d 1206
(1st Cir. 1973) 7

United States v. Kaplan, 832 F.2d 676
(1st Cir. 1987) 9

Valle v. State, 581 So. 2d 40
(Fla. 1991) 26

Van Pullen v. State, 622 So. 2d 19
(Fla. 4th DCA 1993) 5

Washington v. State, 653 So. 2d 362
(Fla. 1994) 14

Wilding v. State, 674 So. 2d 114
(Fla. 1996) 2

Williams v. State, 622 So. 2d 456
(Fla. 1993) 15

Young v. State, 664 So. 2d 1144
(Fla. 4th DCA 1995) 3, 5

Zakrewski v. State, ___ So.2d ___,
23 Fla. L. Weekly S352
(Fla. June 11, 1998) 15

Zeigler v. State, 580 So. 2d 127
(Fla. 1991) 15

FLORIDA RULES OF CRIMINAL PROCEDURE

Rule 3.111 9

PRELIMINARY STATEMENT

The following symbols will be used:

AB Answer Brief of Appellee

R Record on Appeal

T Transcript on Appeal

SR Supplemental Record on Appeal

ARGUMENT

For all points not discussed below, Appellant will rely on his Initial Brief.

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER THE INTRODUCTION OF IMPROPER HEARSAY.

Appellee claims that this evidence merely stated that this involves information that this case was a "homicide" AB10. This improper testimony was actually quite different.

> Q. Why did you begin to investigate the case at that time?
>
> A. The office had received information from two insurance companies that they had received information that the case was not a missing persons case, but a murder....
>
> Q. Did you talk to Patrick Keen?
>
> A. Yes, I did.
>
> Q. And do you know what Mr. Keen's relationship was to Michael Keen?
>
> A. Yes, I do know.
>
> Q. And what was that relationship?
>
> A. They are brothers.

XIIT1323-1324.

The State introduced Michael Keen's original police statement that this was a missing person case XIT1193-1199,1209-1231. Ken Shapiro admitted that he had originally made police statements to the same effect XT977-980. If the jury believed this testimony it would have had to acquit Mr. Keen. The hearsay that the police had information from two insurance companies that this was a murder and not a missing person case was harmful error as it provided improper rebuttal of this hypothesis of innocence. The State introduced Michael Keen's police statement that Ken Shapiro had pushed he and his wife off the boat and that he thought this was an accident XIIT1363. The statement of a murder was also harmful as Anita Keen's body has never been found. The State had the burden to prove beyond a reasonable doubt that there was a death.

Appellee ignores the fact that the State brought out that the officer had received information from Patrick Keen <u>and that Patrick Keen is Michael Keen's brother</u>. The only purpose in bringing this out was to imply that Patrick gave inculpatory information concerning Michael Keen.

Appellee's argument seems to be that the rule of <u>State v. Baird</u>, 572 So. 2d 904 (Fla. 1990) and <u>Wilding v. State</u>, 674 So. 2d 114 (Fla. 1996) is only violated when hearsay explicitly states that the defendant is the perpetrator of the crime. This is contrary to the decisions of this Court. In <u>Wilding</u>, this Court stated:

> During direct examination of the detective, the prosecutor asked whether the anonymous tip received by the detective gave the name Neil Wilding. The detective was allowed, over objection, to answer that it did. The detective further testified that the department began its investigation of Wilding from the tip and "verified a lost of information that we received in the tip and developed additional information."

674 So. 2d at 118.

In Conley v. State, 620 So. 2d 180 (Fla. 1993), this Court stated:

> The first claim of conflict concerns Conley's argument that the trial court erroneously admitted into evidence the hearsay testimony of a police dispatch report. The report originated when an unidentified person, not the alleged victim, called the police to report an incident. Officer Brown testified, over objection, that he "received the call in reference to a man chasing a female down the street." Then he added: "The man supposedly had some type of gun or rifle."

620 So. 2d at 182.

In Wilding, there was only an indirect reference to Wilding as the perpetrator and in Conley there was no reference to the identity of the perpetrator. Trotman v. State, 652 So. 2d 506 (Fla. 3d DCA 1995); Davis v. State, 493 So. 2d 11 (Fla. 3d DCA 1986); Postell v. State, *398 So. 2d 851 (Fla. 3d DCA 1981); Young v. State, 664 So. 2d 1144 (Fla. 4th DCA 1995); Horne v. State*, 659 So. 2d 1311 (Fla. 4th DCA 1995); Harris v. State, 544 So. 2d 322 (Fla. 4th DCA 1989); Jackson v. State, 707 So. 2d 412 (Fla. 5th DCA 1998).

The only case relied on by Appellee for its argument that the statement at issue is not hearsay but was offered to show "a logical sequence of events" is Collins v. State, 65 So. 2d 61 (Fla.

1953). The holding in Collins is that the evidence at issue was inadmissible hearsay. The sentence that Appellee relies on is dicta. Collins has been clarified by more recent decisions of this Court. In Baird, this Court rejected the "logical sequence of events" rationale that is being offered by Appellee.

> We cannot agree that the challenged testimony was admissible to present a logical sequence of events to the jury.... We agree with the Fourth District Court of Appeal in Harris v. State, 544 So. 2d 322, 324 (Fla. 4th DCA 1989), that when the only purpose for admitting testimony relating accusatory information received from an informant is to show a logical sequence of events leading up to an arrest, the need for the evidence is slight and the likelihood of misuse is great. In light of the inherently prejudicial effect of an out-of-court statement that the defendant engaged in the criminal activity for which he is being tried, we agree that when the only relevance of such a statement is to show a logical sequence of events leading up to an arrest, the better practice is to allow the officer to state that he acted upon a "tip" or "information received," without going into the details of the accusatory information. 544 So. 2d at 324.

572 So. 2d at 907-908 (footnote omitted).

Here, the officer went far beyond this. He said he had received information from two insurance companies that this was not a missing persons case, but was a "murder." He said that information had been received from Patrick Keen, who was identified as Michael's brother. The inescapable inference from this was that Patrick had provided information which incriminates Michael Keen.

Appellee cites no cases which hold information such as this to be admissible. Appellee only attempts to distinguish a portion of the cases relied on by Mr. Keen. Appellee makes no attempt to distinguish the following cases cited by Mr. Keen in his Initial

Brief. Conley; Thomas v. State, 581 So. 2d 993 (Fla. 2d DCA 1991), overruled on other grounds in State v. Jennings, 666 So. 2d 131 (Fla. 1995); Trotman; Davis; Postell; *Young*; *Horne*.

Appellee attempts to distinguish Van Pullen v. State, 622 So. 2d 19 (Fla. 4th DCA 1993) by claiming that the "opinion is clearly very case (fact) specific" and thus "does not state precedent for the instant issue". The complete discussion of this issue in Van Pullen is as follows:

> Over defendant's hearsay objection, the court permitted the arresting officer to testify that he had been advised to be on the lookout for suspect regarding a "possible rape and abduction." Although there are circumstances in which some of the information in a dispatch to police officers is admissible to explain why the officers were at a particular place at a particular time, the inclusion of the description of the alleged crime in this case was not only unnecessary but highly prejudicial. The admission of this hearsay was therefore erroneous. Jones v. State, 577 So. 2d 606 (Fla. 4th DCA 1991); Harris v. State, 544 So. 2d 322 (Fla. 4th DCA 1989).

Van Pullen makes clear that the description of the crime itself, without any reference to the identity of the perpetrator is prejudicial hearsay. This is consistent with this Court's decision in Conley. In Conley, the hearsay only referred to the fact that the perpetrator had a gun and gave no indication of the identity of the perpetrator. Assuming arguendo that Appellee is correct and that there must be something about the case that makes recounting of the nature of the crime prejudicial, such a recounting is prejudicial in this case. Here, the State had introduced evidence of an accidental death. The statement that this was a murder helped disprove this theory.

Appellee makes a claim that this error is harmless. It fails to show that the admission of this evidence is harmless beyond a reasonable doubt. Indeed, it cites no cases in which a similar error is held to be harmless. The testimony here was especially harmful given the nature of the evidence. Virtually the State's entire case was the word of Ken Shapiro. This Court stated:

> It would be legerdemain to characterize the evidence as overwhelming; the real jury issue in this trial centered on the credibility of Shapiro versus the credibility of Keen.

Keen v. State, 504 So. 2d 396, 401 (Fla. 1987).

The admission of testimony that there was other information from insurance companies and from Michael Keen's brother was harmful error. It was especially harmful when it was followed up with the statement that this led to interviewing Ken Shapiro. This led jurors to believe that other information would corroborate Shapiro, whose testimony was suspect. He admitted committing perjury in this case and admitted being a principal in a first degree murder XIT1118-19,1121.

The harmful nature of the error here is shown by comparing this case to other cases involving this issue. Here, virtually the only evidence of Mr. Keen's guilt is the testimony of Ken Shapiro, an admitted perjurer who was testifying to save his life. There was no physical evidence to corroborate his story. He had given several inconsistent statements under oath. In Wilding, this Court

found a similar error to be harmful, despite DNA evidence conclusively linking him to the homicide. In Conley, this Court found a similar error to be harmful, despite an eyewitness identification by the victim. In Thomas, the Court found the error to be harmful despite the eyewitness testimony of four police officers. The error was found to be harmful in Davis despite eyewitness identification. The error was found to be harmful in Trotman despite eyewitness victim identification. In Postell, the error was found to be harmful despite eyewitness identification. The error was found to be harmful in Jackson despite the testimony of three eyewitnesses who identified the defendant. The evidence of guilt was far stronger in these cases. The error here is clearly harmful.

POINT VIII

THE TRIAL COURT ERRED IN ITS RESTRICTION OF CROSS-EXAMINATION OF A KEY STATE WITNESS.

Appellee's reliance on Richardson v. State, 246 So. 2d 771 (Fla. 1971); Faver v. State, 393 So. 2d 49 (Fla. 4th DCA 1981); and Apfel v. State, 429 So. 2d 85 (Fla. 5th DCA 1983) is misplaced. These cases hold that a defendant is not allowed to call a witness to the stand solely for the purpose of invoking the Fifth Amendment. They stem from United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973). (The Court in Faver recognized this. 393 So. 2d at 50.) The Court in Johnson stated:

> If it appears that a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand.

488 F.2d at 1211.

The First Circuit has subsequently recognized that a different situation is involved when a defendant is cross-examining a government witness.

> Kaplan persuasively argues that, when a non-party government witness invokes the fifth amendment on cross-examination at trial, the court should permit the assertion of the privilege in the presence of the jury. The invocation of the privilege acts as a form of impeachment.
>
> In United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973), the defense sought to have a witness testify on direct only to have him assert the fifth amendment before the jury. We held that if "a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand." Id. at 1211....
>
> A different case is presented where, as here, the defense seeks to cross-examine a government witness within the scope of his direct and then the witness asserts the privilege. We note, first, the impact on the jury's deliberations from asserting the privilege has to be less here than in Johnson from the fact that Brown did not claim the privilege comprehensively. Instead, Brown answered most questions put to him by the defense and would have refused to answer at trial only those bearing on the alleged cocaine abuse. And whatever dangers exists that the jury may give too much weight to this line of questioning is small in comparison to its impeachment value. See United States v. Seifert, 648 F.2d 557 (9th Cir. 1980).

United States v. Kaplan, 832 F.2d 676 (1st Cir. 1987). Moran's stated desire to claim the Fifth Amendment was relevant. Moran previously testified against Mr. Keen in return for pending cases in Florida being dropped XIVT1500-1503. He only became reluctant to testify when he learned that the Florida authorities would not help him on his first degree murder case in Michigan XIVT1504. His

about face depending on the benefits he would receive is relevant. This error was harmful and a new trial is required.

POINT IX

THE TRIAL COURT ERRED IN DENYING MR. KEEN'S MOTION TO SUPPRESS HIS POLICE STATEMENTS.

Appellee states that the police statements at issue are only taken in violation of Florida Rule of Criminal Procedure 3.111 not in violation of the State and Federal Constitutions AB43-4.

> Under the State and Federal Constitutions a defendant is entitled to counsel at the earliest of the following points: when he or she is formally charged with a crime via the filing of an indictment or information, or as soon as feasible after custodial restraint, or at (when a defendant attends) first appearance.

AB43-44 (emphasis supplied). Under this formulation there was a constitutional violation. There has been no claim that it was not feasible to bring Mr. Keen to first appearances within 24 hours.

This Court's decisions make it clear that the statement was taken in violation of the Florida Constitution. In Peoples v. State, 612 So. 2d 555 (Fla. 1992), this Court reviewed a case on the following basis:

> We have for review Peoples v. State, 576 So. 2d 783 (Fla. 5th DCA 1991), in which the district court acknowledged conflict with Sobczak v. State, 462 So. 2d 1172 (Fla. 4th DCA 1984), rev. denied, 469 So. 2d 750 (Fla. 1985) and State v. Douse, 448 So. 2d 1184 (Fla.4th DCA 1984).

612 So. 2d at 553. This Court went on to analyze the right to counsel under the Florida Constitution as follows:

> As to the right to trial counsel under article I, section 16, Florida Constitution, we announced in Traylor v. State, 596 So. 2d 957 (Fla. 1992), that the right

> attaches at the earliest of three points set out in Florida Rule of Criminal Procedure 3.111(1):
>
>> In other words, a defendant is entitled to counsel at the earliest of the following points: when he or she is formally charged with a crime via the filing of an indictment or information, or <u>as soon as feasible after custodial restraint</u>, or at first appearance.
>
> <u>Traylor</u>, 596 So. 2d at 970 (footnotes omitted).

612 So. 2d at 556 (emphasis supplied).

Under the Florida Constitution the right to counsel attaches "as soon as feasible after custodial restraint". Here it had attached when Mr. Keen's statements were taken beyond the required time for first appearances and there was no showing why the time could not be complied with.

This Court concluded its opinion in <u>Peoples</u> as follows:

> We approve <u>Sobczak</u> and <u>Douse</u>.

612 So. 2d at 557 (footnotes omitted).

This Court specifically approved of the opinion of Judge Barkett in <u>Sobczak v. State</u>, 462 So. 2d 1172 (Fla. 4th DCA 1984). In <u>Sobczak</u> Judge Barkett wrote:

> Article I, section 16, of the Florida Constitution guarantees the right to assistance of counsel in all criminal prosecutions. Rule 3.130, Florida Rules of Criminal Procedure, provides that the right to assistance of counsel attaches as early as the defendant's first appearance, which should occur within 24 hours of arrest. <u>State v. Douse</u>, 448 So. 2d 1184 (Fla. 4th DCA 1984). Rule 3.111(a), Florida Rules of Criminal Procedure, provides that a person is entitled to appointment of counsel when he is formally charged with an offense, or as soon as feasible after custodial restraint, or upon his first appearance before a committing magistrate, whichever first occurs.

462 So. 2d at 1173. Judge Barkett made clear that the twenty four hour requirement is mandated by the Florida Constitution. The statement was taken in violation of the Florida Constitution.

This Court's placing the burden on the defendant to show that the delay induced the statement is contrary to the way that this Court and the United States Supreme Court analyzes errors under the Florida and United States Constitutions. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Appellee makes no argument against the well reasoned arguments of the cases from other jurisdictions cited in the Initial Brief. Mr. Keen will rely on these cases.

Appellee has not met its burden of showing that the admission of this evidence would be harmless beyond a reasonable doubt. Virtually, the State's sole evidence here was the testimony of Ken Shapiro, an admitted perjurer, who was testifying to save his life. There was no physical evidence to corroborate his testimony. Prior to his police statement in 1984 Mr. Keen had consistently maintained that his wife had disappeared from the boat. His 1984 police statement produced contradictory versions on his part (even though he denied killing his wife in all statements). Absent this statement, only Shapiro had made a contradictory statement. The State's use of this contradictory statement may well have influenced the jury. Reversal for a new trial is required.

POINT X

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS AS THE INDICTMENT WAS BASED ON PERJURED TESTIMONY.

Anderson v. State, 574 So. 2d 87 (Fla. 1991) and United States v. Basurto, 497 F.2d 781 (9th Cir. 1974) hold that due process is violated when the prosecutor knows the grand jury heard perjured testimony as to a material issue. The prosecution clearly knew that Patrick Keen had engaged in perjury. It had successfully prosecuted him for perjury IR1091;SR168-9.

Appellee seems to be arguing that the defense must not only show that the prosecutor knows that the grand jury heard perjured testimony but that the prosecutor knows that the grand jury testimony is false. Appellee cites to nothing in the caselaw which imposes this additional requirement.

Appellee's reliance on United States v. Bracy, 566 F.2d 649 (9th Cir. 1977) and Francois v. Wainwright, 741 F.2d 1275 (11th Cir. 1984) is misplaced. In Bracy, the Court held that the facts of the case were closer to United States v. Bowers, 534 F.2d 186 (9th Cir. 1976) than to Basurto. The Court stated:

> A Ninth Circuit case more recent than Basurto is United States v. Bowers, 534 F.2d 186 (CA9 1976), cert. denied, 429 U.S. 942, 97 S.Ct. 360, 50 L.Ed.2d 311. There a witness testified before the grand jury that the defendant's companion and defendant had shot a park service ranger. The same witness at another trial testified that the companion had told him only the defendant had shot the ranger. The court held that any failure of the prosecutor to notify the court and the grand jury of the change in the witness's testimony was harmless beyond a reasonable doubt because both versions of the testimony implicated the defendant and the defense counsel, while aware of the alleged perjury before the trial, failed to move for dismissal of the indictment. Here, as in Bowers, Porter's testimony both before the grand jury and at trial, implicated all the appellants. Here, as in Bowers, the defense counsel were aware or should have been aware of the alleged perjury before the trial, but,

> nonetheless, failed to make a motion to dismiss the indictment prior to the trial. On our facts, Bowers, rather than Basurto, would control.

566 F.2d at 656.

The analysis in Bracy shows that Basurto controls this case. Here, as in Basurto, there was a pre-trial motion to dismiss the indictment. Here, as in Basurto, the second version of the testimony is exculpatory. Francois is irrelevant as it involved a grand jury composition issue which had been procedurally defaulted on federal habeas corpus.

Appellee asks this Court to reject this issue because the other evidence is "sufficient" due to Ken Shapiro AB52-3. The doctrine of "other sufficient evidence" advanced by Appellee has been rejected. In Basurto, an unindicted co-conspirator and a Customs Agent testified before the grand jury. The grand jury testimony was unrecorded and the parties' disputed whether the agent gave testimony as to the activities prior to May 1, 1971. The Court held that it was irrelevant.

> It is not necessary that the dispute be resolved, since it does not affect the holding of this court. The issue here is not one relating to the sufficiency of evidence before a grand jury to sustain an indictment, but rather, the duty of a prosecutor when he becomes aware that perjury as to a material fact has been committed.

497 F.2d at 789, n.1.

This case must be reversed for a new trial.

POINT XV

THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE.

Appellee's first substantive argument is that this case is controlled by Washington v. State, 653 So. 2d 362 (Fla. 1994).[1] The aggravating circumstances in Washington are greater in number and in weight than in the current case and the mitigation is far less substantial. In Washington, there were four aggravators. Id. at 366. Here, the State only sought three aggravators. (Mr. Keen would argue that the jury could have reasonably rejected and/or merged some or all of these aggravators.) Washington involved the prior violent felony aggravator, which is not present here. This is an extremely weighty factor. Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996). The absence of the prior violent felony aggravator is a crucial distinction between this case and Washington and Thompson v. State, 553 So. 2d 153 (Fla. 1989), the only other override case which Appellee cites in which this Court affirmed. In the last ten years this Court has never affirmed an override

---

[1] Prior to its discussion of Washington, Appellee recounts the prior recommendations in this case. They are irrelevant to any issue in the case. This Court has determined that Mr. Keen's first two trials were fundamentally unfair. Any recommendation based on them is completely unreliable. As this Court has stated in the resentencing context.

> Resentencing should proceed de novo on all issues ... a prior sentence, vacated on appeal, is a nullity.

Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986); King v. Dugger, 555 So. 2d 355, 358 (Fla. 1990). The same rule would apply to retrials. Appellee also recounts the seven to five vote. This Court has condemned any reliance on the margin of the jury's recommendation of life. Craig v. State, 510 So. 2d 857, 867 (Fla. 1987). This is also improper and irrelevant.

case unless it involved the prior violent felony aggravator.[2] In addition to the prior violent felony aggravator, Washington had a lengthy record of convictions for other offenses.

> Washington had been previously convicted of burglary, burglary of a occupied dwelling, burglary of a dwelling, petit theft, burglary of a conveyance, and grand theft in the third degree.

653 So. 2d at 367. This case also differs from Washington in terms of the offenses involved. Mr. Keen was only convicted of first degree murder. Washington was convicted of first degree murder, burglary with battery and sexual battery. The facts of this case are different. This Court outlined the facts of Washington:

> On August 17, 1989, Ms. Alice Berdat, a 102-pound, 93-year-old woman, was found murdered in her bedroom, having been badly beaten about her face and head. Her body was badly bruised. There were signs that she had been vaginally and anally raped, and she suffered seventeen rib fractures.

653 So. 2d at 363. There is nothing in the current case to compare with this in terms of intentional, extended infliction of pain. This affects the weight to be given HAC.

Another crucial difference between Washington and this case is the issue of conduct while incarcerated. Washington committed his offense while an escapee from a work release center. It was undis-

---

[2] Zakrewski v. State, ___ So.2d ___, 23 Fla. L. Weekly S352 (Fla. June 11, 1998); Washington; Williams v. State, 622 So. 2d 456 (Fla. 1993); Robinson v. State, 610 So. 2d 1288 (Fla. 1992); Coleman v. State, 610 So. 2d 1283 (Fla. 1992); Marshall v. State, 604 So. 2d 799 (Fla. 1992); Zeigler v. State, 580 So. 2d 127 (Fla. 1991); Thompson; Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988).

puted the Mr. Keen had an excellent institutional record since his arrest for this offense in 1984. The trial court stated:

> 2. The defendant's good behavior since his arrest in 1984. The evidence revealed that in the ten years that the defendant was incarcerated, that there has only been one incident involving a minor infraction. The Court finds that this mitigating factor exists and gives it some weight.

XVIIT1932-33. The United States Supreme Court has recognized the importance of a capital defendant's conduct in prison and ability to live in prison. Simmons v. South Carolina, 512 U.S. 154, 162 (1994); Skipper v. South Carolina, 476 U.S. 1, 2 (1986); Jurek v. Texas, 428 U.S. 262, 275 (1976).

In Washington, there were four aggravating circumstances, with no grounds to reduce the weight of any of the aggravators. Here, there are only three aggravators with substantial grounds to reduce the weight of the aggravators. The jury could have reasonably not found the HAC aggravator or given it less weight because there was no showing that there was any intent to cause unnecessary and prolonged suffering. Kearse v. State, 662 So. 2d 677 (Fla. 1995); Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990). The jury could have reasonably merged or given less weight to the CCP and pecuniary gain circumstances because they are based on the same alleged plan to kill his wife for insurance money.

The mitigation in this case is also far more substantial than in Washington. The only possible mitigator in Washington was rejected by this Court. 653 So. 2d at 366. Here, there was substantial mitigation including the disparate treatment of a

principal, credibility problems with the State's main witness, doubts about the actual roles of the participants, Mr. Keen's difficult early life, his acts as a good brother and son, his positive achievements, excellent work record, excellent record while incarcerated, and good potential for rehabilitation. This case is distinguishable from Washington in several respects.

Appellee's discussion of the aggravating and mitigating circumstances is flawed. Appellee fails to recognize that the issue in a life recommendation is whether any reasonable juror could have found the mitigators, or given them more weight; or rejected the aggravators, merged them, or given them less weight. Carter v. State, 560 So. 2d 1166, 1169 (Fla. 1990); Cheshire v. State, 568 So. 2d 908, 911 (Fla. 1990).

Appellee's discussion of the disparate treatment mitigator is flawed. Appellee relies on two cases in support of its argument concerning the disparate treatment mitigator. Craig v. State, 510 So. 2d 857 (Fla. 1987); Thompson v. State, 553 So. 2d 153 (Fla. 1989). In Craig, this Court ordered a resentencing. On resentencing, this Court found the life recommendation to be reasonable:

> Our analysis of the evidence, old and new, leads us to conclude that the Tedder standard for overruling the jury's life recommendation for the murder of Eubanks has not been met. We find that the totality of the circumstances surrounding these crimes, including the disparate treatment accorded to the codefendant and the other mitigating evidence, provided a reasonable basis for the jury's life recommendation. We therefore vacate the trial judge's sentence of death for the murder of Eubanks and remand for the imposition of a sentence of life without the possibility of parole for twenty-five years.

Craig v. State, 685 So. 2d 1224, 1230 (Fla. 1996) (footnote omitted).

Appellee's reliance on Thompson v. State, 553 So. 2d 153 (Fla. 1989) is misplaced. There are more aggravating factors in Thompson and they are far weightier. In Thompson, there were five aggravating circumstances, including the extremely weighty prior violent felony aggravator. Here there were only three aggravating circumstances with no prior violent felony. Thompson involved an extended beating and torture of the victim before the homicide which is absent here. Thus, the HAC aggravator is far weightier in Thompson. In Thompson, the trial court could properly reject the only possible mitigating circumstance. Here, there is substantial mitigation that is unrebutted. This Court also noted that Thompson was "an under-world crime boss" who ran a "multi-million dollar drug smuggling enterprise". There is no such additional criminal activity present in this case. The facts in this case are different than Thompson in terms of the participation of the other parties. In Thompson, none of the others took part in homicide. 553 So. 2d at 155. Here, Ken Shapiro admitted that he drove the boat out of Anita Keen's range after she went in the water XT970-1.

Appellee only attempts to distinguish a small number of the cases cited by Mr. Keen in which this Court had found a life recommendation to be reasonable based upon disparate treatment of another participant. Mr. Keen cited the following cases in his Initial Brief, which Appellee makes no attempt to distinguish. Craig; Barrett v. State, 649 So. 2d 219 (Fla. 1994); Jackson v.

State, 599 So. 2d 103 (Fla. 1992); Pentecost v. State, 545 So. 2d 861 (Fla. 1989); Spivey v. State, 529 So. 2d 1088 (Fla. 1988); Caillier v. State, 523 So. 2d 158 (Fla. 1988); Duboise v. State, 520 So. 2d 260 (Fla. 1988); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Malloy v. State, 382 So. 2d 1190 (Fla. 1979).

Appellee's attempt to distinguish Harmon v. State, 527 So. 2d 182 (Fla. 1988); Brookings v. State, 495 So. 2d 135 (Fla. 1986); and Fuente v. State, 549 So. 2d 652 (Fla. 1989) is unavailing. Appellee attempts to distinguish Harmon by the fact that the co-defendant in Harmon could be guilty of felony-murder and here there was no felony-murder theory. Here, Shapiro's culpability was much greater than that of the co-defendant in Harmon. Here, Shapiro was guilty of premeditated murder as the prosector admitted in his closing argument XVIT1861-2. It was Shapiro who drove the boat out of the deceased's range according to his own testimony.

Appellee attempts to distinguish Fuente and Brookings in that the co-defendants "helped plan and carry out the homicide" AB63. Ken Shapiro also "helped plan and carry out the homicide". He admitted that he was involved in several discussions, went to the appointed location, and drove the boat out of Anita Keen's range.

Ken Shapiro was a principal in this offense. This Court has consistently held that "disparate treatment of principals ... can serve as a reasonable basis for a life recommendation". Brookings at 143; Barrett, at 223; Fuente, at 658. This is demonstrated by Pomeranz v. State, 703 So. 2d 465 (Fla. 1997). In Pomeranz, the defendant had entered a store alone and had been the sole trigger-

person. This Court held the co-defendant's life sentence is a reasonable basis for a life recommendation even though he was not present during the killing, had only driven the car to and from the scene, and only thought a robbery was going to occur. In Thompson, relied upon by Appellee, this principle is again cited with approval. 553 So. 2d at 158. Thompson cites Eutzy v. State, 458 So. 2d 755 (Fla. 1984); Herzog v. State, 439 So. 2d 1372 (Fla. 1983); and McCampbell for this principle.

Appellee never disputes that Ken Shapiro was a principal, equally guilty of first degree murder. Shapiro admitted that he had several conversations with Michael Keen concerning a plan to kill a woman for money XT944-946. He continued to participate in these conversations and made no effort to withdraw XT944-46. He expected to pay back his debt to Michael Keen XT955. Shapiro admitted that on November 15, 1981, Michael and Anita Keen went out alone and he met them XT956-58. They socialized and went out on the boat together XT960. He made no effort to stop Michael Keen or warn Anita Keen XT970. When she went overboard, he took control of the boat and moved it out of her range XT970-971. He claimed they both watched her swim and eventually came back together XT974-976. He claims they discussed their version of events together XT975. Shapiro admitted that he was the person who called the Coast Guard and gave them a false story XT977.

Hector Mimoso, a former deputy of the Broward Sheriff's Office, was asking Mr. Keen questions and Shapiro was always interrupting and answering them XIIT1193. He had to ask Shapiro to

be quiet and let Mr. Keen speak XIIT1195,1203. Shapiro admitted that he lied under oath in an interview with Officer Carney of the Broward Sheriff's Office about a week later and in a deposition to an attorney in 1982 XT981-82.

The prosecutor admitted that Ken Shapiro was a principal.

> Well, you can consider the fact that Ken Shapiro was indeed an accomplice in this case. He took the stand and told you that he was an accomplice.
>
> Under the law, an accomplice is by participation. And the jury has the option, if they so choose, if they were on trial to be treated equally, be treated the same as his counter part or his co-defendant, and every act, that is the act of Mr. Keen, conceivably can be transferred to Mr. Shapiro, and he can be considered as committing those acts if he knew what was going to happen, if he participated in the crime, which he did. He knew what was going to happen, he did something by which he intended to help.

XVIT1861-1862.

Additionally, Appellee, like the trial judge, views all the evidence in the light which most minimizes Ken Shapiro's involvement. For example, Appellee makes much of Shapiro's "fear" of Michael Keen. There is significant evidence that could have led a reasonable jury to discount this. Shapiro had moved to Tampa and voluntarily came back to live and work with Michael Keen in the year before this incident XT933-6. On the day of the incident he went to the appointed location on his own XT958. He first called the Coast Guard and told the Coast Guard that a woman was missing XT977. Shapiro was interviewed about a week later by Detective Carney and he lied under oath XT981. In 1982 he and Mr. Keen went to California together in a motor home and stayed together for a

week or ten days XT983. Michael came back and Shapiro stayed on for another week to ten days XT983. Shapiro then moved to New York for most of 1982 XT982. He gave a deposition in New York in 1982 and again stated that Ms. Keen disappeared XT986. He had occasional contact with Michael Keen between 1982 and 1984 XT986. He came back to Broward County in 1984 XT989. Mr. Keen had moved to Orlando XT990. See Harmon, at 189.

Appellee mistakenly attempts to distinguish Pomeranz and Douglas v. State, 575 So. 2d 165 (Fla. 1991) concerning credibility problems of the State's main witness as a mitigating factor. Appellee asserts that in Douglas "several defense witnesses testified that the defendant had an alibi" AB67. There is nothing in the opinion indicating that this happened. Even if true, it is clear that that is not what this Court was referring to in Douglas. This Court stated:

> The state's primary witness was the wife of the victim. The credibility of her testimony concerning the circumstances surrounding this murder could have reasonably influenced the jury's recommendation.

575 So. 2d at 167. This Court was concerned with the "credibility" of the State's witness "concerning the circumstances" of the offense and not whether defense witnesses may have testified that the defendant was innocent of the offense.

Appellee asserts that in Pomeranz "the defendant and the State's main witnesses both claimed that the other committed the murder" AB67. This is not true. The opinion states, "Pomeranz' defense counsel argued that it was Kinser who committed the

murder". 703 So. 2d at 467. Undersigned counsel was appellate counsel in Pomeranz and Mr. Pomeranz did not testify. Counsel's argument was based on the lack of credibility of the State's witness and the benefits he received for his testimony. Here, these two factors are present and the State's witness was an admitted perjurer and the State introduced Michael Keen's police statement which implicated Ken Shapiro.

Appellee mistakenly claims that this would be a form of lingering doubt. In essence Appellee is asking this Court to overrule Douglas and Pomeranz. Appellee misunderstands the nature of this mitigator. As this Court stated in Douglas it involves credibility concerning the "circumstances of the offense." It does not involve doubt about the defendant's guilt. There are many cases where a jury could find a defendant guilty of the offense yet doubt some or all of a State's witness' testimony about the circumstances of the offense.

Appellee mistakenly claims that there could be no reasonable doubts about Shapiro's testimony as he "inculpated himself" AB68. The point is that he inculpated himself somewhat and then proceeded to exculpate himself by putting the primary blame on Michael Keen.

> As we have consistently recognized, a codefendant's confession is presumably unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another.

Lee v. Illinois, 476 U.S. 530, 545 (1986). Shapiro is an admitted perjurer and even his statements blaming Michael Keen contain contradictions. He was also testifying literally to save his life.

Appellee also claims that the jury could not reasonably rely on doubts as to who the actual killer was as a reasonable basis for a life recommendation. Appellee cites no cases in which this Court rejected this basis. Appellee's attempt to distinguish the cases relied on by Mr. Keen is unpersuasive. Appellee claims that in Pentecost v. State, 545 So. 2d 861 (Fla. 1989) and Cooper v. State, 581 So. 2d 49 (Fla. 1991) there was "other evidence that corroborated the defendant's version that another committed the homicide" AB69. It points to nothing in the opinions to support this. In both decisions the only evidence this Court mentions which points at another party is the defendant's testimony. Appellee claims that Malloy v. State, 382 So. 2d 1190 (Fla. 1979) does not control because of a possible felony-murder theory in Malloy. There is nothing in Malloy which indicates that this had any impact on the decision. This Court stated:

> We find that the jury's action was reasonable because of the conflict in the testimony as to who was actually the triggerman and because of the plea bargains between the accomplices and the state.

382 So. 2d at 1193. Appellee erroneously claims that this Court in Harmon did not deal with this issue AB69. This Court stated:

> Of more consequence is Harmon's contention that the jury could have based its life recommendation, in part, on their questioning of the respective roles of Harmon and Bennett in the murder and the disparity in treatment between the two if Harmon were sentenced to death.

597 So. 2d at 189.

In Barrett v. State, 649 So. 2d 219 (Fla. 1994), this Court stated:

> The jury could have reasonably concluded that Barrett was not the person who actually committed the murders, and that Burnside had committed the murders with the help of someone other than Barrett. Conflicting evidence on the identity of the actual killer can form the basis for a recommendation of life imprisonment. Cooper v. State, 581 So. 2d 49, 51 (Fla. 1991).

649 So. 2d at 223.

Appellee does not dispute that Michael Keen had an alcoholic father who deserted the family when he was young AB70. However, it claims that this is not a reasonable basis for a life recommendation and cites Valle v. State, 581 So. 2d 40 (Fla. 1991). Valle is a death recommendation case and is irrelevant. Mr. Keen cited several cases in which this Court held a difficult early life to be a reasonable basis for a life recommendation. Hegwood v. State, 575 So. 2d 170 (Fla. 1991); Scott v. State, 603 So. 2d 1275 (Fla. 1992); McCampbell, supra, at 1075-76.

Appellee attempts to lump together numerous other mitigating factors and then cites Harmon and Washington to say that these would not be a reasonable basis for a life recommendation. In Washington, the only proposed mitigator was potential for rehabilitation and this was contradicted by the fact that the defendant was an escapee from prison. In Harmon, this Court found the life recommendation to be reasonable, thus any discussion of what the result would be absent certain mitigators is dicta. Appellee ignores the numerous cases which are cited in the Initial

Brief which hold these mitigators to form a reasonable basis for a life recommendation.

It is undisputed that Michael Keen was a good brother and son XVIIT1842-43. After Michael's father left the house, he had to assume the role of the father figure, until he went to college XVIIT1842. A defendant's caring relationship with his family is a reasonable basis for a life recommendation. Barrett; Scott; Perry v. State, 522 So. 2d 817, 821 (Fla. 1988).

Michael Keen had numerous positive achievements as a youth despite growing up with an alcoholic father who abandoned him. He excelled in piano and the arts XVIIT1841. He competed in the International Piano Guild XVIIT1841. He was an honor student in high school XVIIT1841-1842. He played high school football XVIIT 1842. He won a scholarship to Eckerd College and graduated XVIIT 1842. Positive character traits and accomplishments are a reasonable basis for a life recommendation. Barrett v. State, 603 So. 2d 1275 (Fla. 1992); Scott; McCampbell; Stevens v. State, 613 So. 2d 402 (Fla. 1992); Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987); Thompson v. State, 456 So. 2d 444 (Fla. 1984).

Mr. Keen had an excellent work record XT927-30,1021. Mr. Keen was a supervisor at a sign company when Shapiro first met him XT927. He then started his own company which was very successful XIT1095. A good work record is a reasonable basis for a life recommendation. Holsworth; Fead; McCampbell.

Mr. Keen had an excellent record while incarcerated. Both sides entered into a stipulation that Mr. Keen had been incarcerated since 1985 and had only one minor disciplinary infraction XVIIT1844-45. Good conduct in prison is a reasonable basis for a life recommendation. Fead; McCampbell. This mitigating circumstance is particularly compelling as both sides stipulated to Michael Keen's good record and it involved a ten year period.

Mr. Keen has a good potential for rehabilitation. The prosecutor stated that this mitigating circumstances applies XVIITI866. This factor is supported by Mr. Keen's good record in prison, his good work record and his positive character traits and accomplishments. This is a reasonable basis for a life recommendation. Barrett; Holsworth; Fead; McCampbell. The mitigating cir-cumstances, individually and cumulatively, provide a reasonable basis for a life recommendation.

Appellee attempts to uphold the HAC aggravator by engaging in speculation as to the death of Ms. Keen AB71-2. Appellee misses the two key issues regarding this aggravator. This Court has required an intent to cause unnecessary and prolonged suffering. Mr. Keen cited numerous cases to this effect in his Initial Brief which Appellee does not respond to. Kearse v. State, 662 So. 2d 677 (Fla. 1995); Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990). Appellee also fails to confront the fact that the issue is not whether a jury could have found HAC. The issue is whether a jury could have reasonably rejected it and/or given it less weight due to this lack of intent. It clearly could have.

There are several reasonable bases for the life recommendation here. This Court has held life recommendations to be reasonable in cases far more aggravated than the current one. Barrett involved four counts of first-degree murder. Parker involved three murders. Jackson involved five murders. Heqwood involved three murders. This case is far less aggravated than any of these cases and has substantial mitigation.

This case is similar to other cases which this Court has reduced to life imprisonment based on the disparate treatment of other participants. In Fuente, the trial court found three aggravating circumstances; prior violent felony, the homicide was committed to avoid arrest, and the cold, calculated, and premeditated nature of the homicide. 549 So. 2d at 654. This Court assumed the validity of all three aggravating circumstances, yet reduced the sentence to life imprisonment based on co-defendant disparity. Id. at 658-659.

In Brookings, this Court found that there were four valid aggravating circumstances; prior convictions for three violent felonies (two armed robberies and shooting with intent to kill a police officer); committed for pecuniary gain; committed to hinder law enforcement (the victim was killed to prevent him from testifying); and CCP. This Court reduced the sentence to life imprisonment based upon disparate treatment of co-participants. 495 So. 2d at 142-143.

In Harmon, this Court found that there were three valid aggravating circumstances; prior violent felony (armed robbery);

committed for pecuniary gain; and avoid arrest. This Court found the life recommendation to be reasonable based on the disparate treatment of a co-participant even though the defendant was the triggerperson. In Barrett, the defendant was convicted of four counts of first degree murder and one count of conspiracy to commit first degree murder. There were five valid aggravating circumstances; prior violent felony, avoid arrest, pecuniary gain, hinder law enforcement, and CCP. This Court found the life recommendation to be reasonable based, in part, on the life sentence given to Barrett's co-defendant. This case is far less aggravated and involves other substantial mitigation. This case must be reduced to life imprisonment.

POINT XVI

THE TRIAL COURT COMMITTED SUBSTANTIAL ERRORS IN ITS SENTENCING ORDER.

Appellee continues to make the same mistake that the trial judge made; it views the mitigating and aggravating circumstances as if this were a death recommendation case. This Court has described the trial judge's function in a life recommendation case.

> Under Tedder, the trial court's role is solely to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending life imprisonment.

Cheshire v. State, 568 So. 2d 908, 911 (Fla. 1990) (emphasis supplied).

The trial judge never viewed the case in this manner. Appellee never acknowledges that this is the function of the trial

judge in a life recommendation case. Appellee cites standards of review which this Court employs in death recommendation cases.

> Finding or not finding that a mitigating circumstance has been established is within the discretion of the trial court and will not be disturbed on appeal if supported by competent substantial evidence. **Bryan v. State, 533 So. 2d 744 (Fla. 1988).**

AB75-76.

> When a trial judge finds that an aggravating circumstance has been established, the finding should not be overturned unless there is a lack of competent substantial evidence to support it. Raleigh v. State, 705 So. 2d 1324 (Fla. 1997); Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988).

AB77. These statements are both correct for death recommendation cases. In a life recommendation case the question is whether there is any reasonable basis to support the jury's recommendation. This involves whether a jury could have reasonably found a mitigating circumstance and/or given it greater weight and whether a jury could have reasonably rejected the aggravating circumstances, merged them, or given them less weight. Neither Appellee nor the trial judge ever attempted to comply with this requirement.

Appellee misconstrues Mr. Keen's argument concerning the disparate treatment mitigator. Mr. Keen is not saying that the level of the co-participant's participation is irrelevant to the weight to be given this mitigator. The issue is that the judge never acknowledges that when the co-participant is a principal equally guilty of first degree this mitigator must apply and is often a reasonable basis for a life recommendation.

Appellee's reliance on Thompson is misplaced. In Thompson, this Court did not reject disparate treatment as a mitigating circumstance, it merely held that it was not a sufficient basis for a life recommendation given all the facts of the case. There are more aggravating factors in Thompson and they are far weightier. See Point XV. The facts in this case are different than Thompson in terms of the participation of the other parties. See Point XV.

Appellee claims that the prosecutor did not agree that Mr. Keen's potential for rehabilitation is a mitigating circumstance. The prosecutor stated in his penalty phase closing:

> He was a successful businessman. From the evidence he appears to be bright and articulate and certainly he can express himself, he certainly has the potential to rehabilitate himself.

XVII1866. It is an abuse of discretion to fail to find a mitigating circumstance which the State concedes exists. Santos v. State, 629 So. 2d 838, 840 (Fla. 1994).

Appellee mistakenly claims that Mr. Keen did not specifically identify "such matters as being a good brother and son and his achievements as a youth" AB76. In his sentencing memorandum he stated:

> The jury considered a number of non-statutory mitigating circumstances: (1) the disparate treatment given his accomplice, Ken Shapiro, (2) Keen's good behavior in prison for the past eleven years, (3) Keen's good behavior at trial, (4) Keen's prior contributions to society, including his good employment record, (5) Keen's positive personality traits, including his past history of unselfishness and generosity towards others, (6) Keen's good potential for rehabilitation, and (7) any other aspects of Keen's character or record.

> In support of non-[statutory] mitigating circumstances two through seven, the jury learned that Keen was raised in a single parent home after his abusive, alcoholic father deserted the family. His mother, an uneducated, but hard working mother, raised three sons. Being the oldest son, Keen was forced to assume responsibility (be the man of the house) at an early age. He overcame his upbringing, earned a music scholarship, and graduated from college. He was a successful salesman/businessman. He was supportive to, and generous to his employees. Most particularly, Keen gave Shapiro moral support; encouraged him to excel; and gave him a place to live and spending money when he did not work or excel. Additionally, the jury was appraised of Keen's good conduct in prison for the past eleven years. Plus, they observed his quiet, calm demeanor at trial.

SR141-142.

It is undisputed that Michael Keen was a good brother and son XVIIIT1842-43. Michael's mother testified that after Michael's father left the house, he had to assume the role of the father figure, until he went to college XVIIIT1842. A defendant's caring relationship with his family is a reasonable basis for a life recommendation. Barrett; Scott; Perry v. State, 522 So. 2d 817, 821 (Fla. 1988). There was undisputed evidence that Michael Keen had numerous positive achievements as a youth despite growing up with an alcoholic father who abandoned him. See Point XV. Defense counsel specifically identified these mitigators and the judge failed to consider them.

Appellee incorrectly relies on the death recommendation standard for the review of aggravating circumstances AB77. The jury could have reasonably rejected the HAC aggravator and/or weighed it less due to lack of evidence of an intent to cause unnecessary suffering. See Initial Brief and Point XV. The jury

could have also reasonably merged and/or given less weight to the CCP and pecuniary gain aggravating circumstances in light of the fact that they are based on the same conduct.

Appellee claims that the trial court's explicit mention of the seven to five vote in his conclusion section of his order is only "mentioned ... in passing" AB79. Appellee's argument is contradicted by the structure of its brief and the structure of the judge's order. Appellee opens its argument on the override issue by explicitly "mentioning" this fact AB62. The trial judge explicitly "mentions" this in the concluding section of his sentencing order. It strains credulity to think that both the trial judge and Appellee and Appellee "mention" this "in passing" in crucial sections of the brief and order. Both are attempting to improperly rely on this. This Court condemned this as error. Craig v. State, 510 So. 2d 857, 867 (Fla. 1987). Appellee relies on Craig to say that this is harmless error. However, Craig was remanded for resentencing. Thus, any statement concerning harmless error was dicta. Here, the judge explicitly relied on this in his conclusory section. Appellee has not met its burden of showing that this error was harmless beyond a reasonable doubt.

Appellee admits that the trial court improperly considered the length of the deliberations in deciding to override the jury's recommendations AB79. Appellee cites no cases holding this error harmless. This Court dealt with this issue in McCampbell. In McCampbell, the Court held that the jury's recommendation was reasonable and thus did not have to decide whether this error alone

would require reversal. In this case there is every indication that this was harmful. The judge mentioned this twice in the concluding section of his order. Appellee has not met its burden of showing that this error is harmless beyond a reasonable doubt.

The trial judge made substantial errors in his sentencing order. This case must be remanded for imposition of a life sentence or at least a judge resentencing.

CONCLUSION

Wherefore, appellant respectfully requests that this Court grant him a new trial, a resentencing, and/or reduce his sentence to life imprisonment.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

RICHARD B. GREENE
Assistant Public Defender
15th Judicial Circuit of Florida
Florida Bar No. 265446
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Attorney for Michael Scott Keen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to DAVID M. SCHULTZ, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this _____ day of August, 1998.

____
Attorney for Michael Scott Keen

I certify that this brief is in 12-point Courier New, which is nonproportionally spaced.

____
Attorney for Michael Scott Keen