IN THE SUPREME COURT OF FLORIDA

EDDIE LEE SEXTON,	:	
Appellant,	:	
vs.	:	Case No. 94,487
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

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PRELIMINARY STATEMENT

Petitioner will be responding to Issues I,II,III, and IV as set forth in the Initial Brief and Answer Brief. Petitioner will rely upon the arguments and citations of authority as presented in the Initial Brief for Issue V.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE TESTIMONY RELATING TO THE DEATH OF THE INFANT, SKIPPER LEE GOOD, WHERE THE ADMISSION OF THIS EVIDENCE WAS NOT RELEVANT AND THE PREJUDICIAL IMPACT FAR OUTWEIGHED THE PROBATIVE VALUE.

The Attorney General is correct that the record does not reflect a contemporaneous objection by defense counsel to the admission of the extensive testimony detailing the death of Skipper Lee Good. A pre-trial motion in limine was filed by the defense which sought clarification of this Court's prior opinion relating to the dissimilar fact evidence and it was argued to the trial court that details of the death of the child should not be admitted. The trial court did not issue a ruling as to this specific area. The record does demonstrate that the trial court was apprised, pre-trial, of defense counsel's objections and the trial court was afforded an opportunity to consider the issue.

Even absent an objection during the trial, Mr. Sexton is not procedurally barred from asserting the error of the admission of this evidence under the doctrine of fundamental error. See, Sec. 924.051, Fla. Stat. (1997). This Court has defined fundamental error as:

> "error which goes to the foundation of the Case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970).... "[F]or an error to be so fundamental that it can be raised for the first time on appeal,, the error must be basic to the judicial decision under review and

equivalent to a denial of due process."

State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993). Fundamental error permits this Court to review unobjected to error and permits Mr. Sexton to raise it for the first time on appeal. State v. Johnson, 616 So. 2d 1,3 (Fla. 1993).

Constitutional error is subject to the harmless error review under the standard established by the United States Supreme Court in Chapman v. California, 386 U.S. 18 (1967), which this Court adopted and explained in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) This standard places the burden on the State, as the beneficiary of the error, to demonstrate beyond a reasonable doubt that the error did not contribute to the conviction or affect the jury's verdict. Chapman, at 23-24; DiGuilio, at 1135. As argued below, the state cannot meet this burden.

The State complains that the claim in this case is meritless or harmless. The State's theory is that the evidence relating to the death of the baby was relevant to show Mr. Sexton's motivation to murder Joel Good in order to prevent him from divulging this death to his grandparents. This might well be true if Joel's desire to return to Ohio came about after the death of the baby. However, the record is clear that Joel desired to leave the family before the death of baby, the reasons of which are speculative. Both Pixie (Vol.7, T574-575) and Willie (Vol.VI,T426-7) testified that Joel talked about getting away from the family and returning to Ohio while they were staying in New Port Richey, well before the baby died. At that point Mr. Sexton, according to the testimony of

those two witnesses, was afraid that if Joel returned, the family would be caught. The death of the baby did not cause Joel to suddenly want to leave. Nor did the testimony of Pixie indicate that Mr. Sexton was afraid that he would be implicated in the death of the child- Mr. Sexton did not want to be found on the outstanding charges that he believed existed relating to child abuse in Ohio, the very reason for the flight. The State had the opportunity to present evidence to support their theory of the case without resorting to the wrenching testimony about the death of an eight-month old infant at the hands of his mother which impliedly occurred at the direction of his grandfather, to establish that Mr. Sexton did not want Joel to return and divulge the whereabouts of the family.

Even if this Court holds that the jury could be informed about the death of child as an additional motivation for Joel's desire to return to Ohio, the State should not be permitted to overtly imply to the jury that Mr. Sexton was guilty of killing the child as well. It would be possible to simply inform the jury that while at the camp the child died and Joel continued to wish to return to Ohio. Any suggestion or testimony that Mr. Sexton had criminal responsibility for the death of the child was unnecessarily prejudicial. Whatever marginal relevance might have been contributed by this testimony was far outweighed by the prejudicial impact it would have on the jury.

Although all evidence of criminal conduct is prejudicial, as the State is fond of pointing out, the sheer weight of the

prejudicial impact can clearly outweigh it's probative value resulting in error if the questioned evidence is admitted. Mr. Sexton has not argued, as the State suggests, that the appropriate determinative standard is necessity as opposed to relevancy. Mr. Sexton's position is that the testimony in the retrial was of even less relevance in establishing a motive for Mr. Sexton to have ordered Willie to kill Joel instead of Pixie because Willie testified this time that it was his father, not Pixie, that ordered him to put Joel to sleep. In the first trial there was no testimony that established the content of conversations between Willie and Mr. Sexton regarding Joel.

There can be no question that to suggest that Mr. Sexton ordered the death of his grandchild was not highly inflammatory. Even without photos depicting the dead child, the sheer impact on a jury that heard testimony that a grandfather would require his child to kill her own child, his grandchild, is as graphic and damaging as the testimony and photos that this Court ruled inadmissible in Steverson v. State, 695 So. 2d 687 (Fla. 1997).

The State relies upon the cases of Heiney v. State, 447 So. 2d 210 (1984) and Fotopoulos v. State, 608 So. 2d 784 (1992) to support the position that the evidence of the death of the infant was relevant to show motive or context. These cases are distinguishable.

In Heiney the collateral crime of aggravated battery had happened the day before the homicide and was the direct cause for the defendant's flight. His desire to avoid apprehension for the

battery (and what he thought would be murder charges) was the reason that he immediately committed a robbery and murder in Florida. In this case, the primary motivation for the murder of Joel Good was not because of the death of the baby- it was to avoid detection so Mr. Sexton and other family members would not be arrests for the child abuse charges in Ohio and so the children would not be taken from Mr. and Mrs. Sexton.

Fotopoulos was not, as the State suggests, a case which focused on the admission of collateral evidence, but instead addressed the issue of whether or not a motion for severance should have been granted. The only reference to the collateral evidence in the opinion is the comment that even if severed, the evidence would have been admissible and then cites the Heiney opinion and several other cases.

Likewise, Wournous v. State, 644 So. 2d 1000 (1994), was a case in which the evidence of the six other homicides was admitted to establish a pattern and similarities among the homicides and to rebut the defendant's claim of self-defense and level of intent. There was no need to establish a pattern or to rebut a defense that the State argued as reasons for admissibility in this case.

Despite the State assertions to the contrary, the evidence of the death of the infant was not inseparable to the murder of Joel Good nor was it necessary to establish the State's theory as to the motive or context behind the murder of Joel Good. If the evidence relating to the death of the baby were completely excluded or if the jury was just told that following the death of the child Joel

continued to speak of leaving the family without the overt assertions that Mr. Sexton ordered the child's death, the State could still introduce evidence to establish the family's flight from Ohio and the reasons behind it, Joel's desire to return to his family, Willie's testimony regarding his conversations with Mr. Sexton, and Mr. Sexton's role in the crime as testified to by the State witnesses. The only impediment the State would suffer if the evidence relating to the death of the infant were to be excluded would be the loss of an opportunity to present Mr. Sexton as a child-killer or someone responsible for two homicides. On the other hand, Mr. Sexton stands to gain an opportunity for a fair trial if the evidence were to be excluded or minimized.

The State's presentation was excessive and the probative value of the evidence of the infant's death outweighed the probative value of such testimony. Fundamental principals of due process including the right to a fair trial were thwarted by the admission of this evidence. Thus, a new trial should be ordered.

ISSUE II

THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY ADDRESS APPELLANT'S REQUEST FOR NEW COUNSEL WHERE APPELLANT RAISED QUESTIONS REGARDING THE EFFECTIVENESS OF COUNSEL'S REPRESENTATION.

Mr. Sexton's letter to the trial court informed the court that he had consulted a different attorney about his case and the decisions that his current lawyers were making. Mr. Sexton stated that this attorney had offered the opinion that his lawyers must be

inexperienced. Mr. Sexton advised the court he did not feel his lawyers were handling his case properly. These assertions were more than enough to trigger an inquiry under Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973). The State asserts that no such inquiry was necessary and cites several cases in support of this position. A closer examination of those cases reveals that they do not support the State's contention and are distinguishable from this case.

In Gudinas v. State, 693 So. 2d 953 (Fla. 1997), the opinion states that after the defendant complained about his attorney the trial court went to "great lengths" to determine the nature of the complaint. The opinion also notes that the trial court in Gudinas complied with the dictates of both Hardwick v. State, 521 So. 2d 1071 (Fla. 1988) and Nelson. The opinion states that Gudinas had a full opportunity to explain the problems to the trial court and that no specific claim of incompetence was ever made. The issue in Gudinas was not the sufficiency of the inquiry as in the case at bar, but instead, whether or not the trial court made the correct decision after conducting a thorough inquiry. This record does not reflect that Mr. Sexton had a full and fair opportunity to explain the difficulties or that the trial court went to "great lengths" to determine the nature of the complaints. The record does not reflect the trial court went to any lengths at all.

Likewise, in Howell v. State, 707 So. 2d 674 (Fla. 1998), the specific complaints about counsel were extensively aired over several hearings and even through motions filed by the State.

Defense counsel had responded to the allegations of both the State and Howell. The record in this case does not support a position that the trial court conducted any type of extensive hearing about Mr. Sexton's allegations of incompetence, nor was inquiry made of defense counsel.

The factual situation of Branch v. State, 685 So. 2d 1250 (Fla. 1996) differs completely from the facts in this case. Branch did not have court-appointed counsel, his attorney was privately retained. Branch found no Nelson inquiry was required for retained counsel. Neither did Branch want to discharge his attorney, he made only general complaints, and no allegation of incompetence on the part of his attorney.

In Jiminez v. State, 703 So. 2d 437 (Fla. 1997), the attorney that the defendant sought to discharge was second-chair counsel. This Court ruled that no Nelson inquiry was required in regard to second-chair counsel because there was no entitlement to second-chair. Again, there were no assertions of incompetence and neither trial counsel nor the defendant would respond to the trial court's specific request for an explanation of the problem.

None of the cases relied upon by the State support the denial of a Nelson inquiry in this case. Because the complaints that Mr. Sexton wrote of constitute a claim of incompetence the requirements of Nelson were triggered and it was incumbent upon the trial court to conduct a thorough Nelson inquiry. The failure to conduct this hearing is reversible error requiring a new trial.

ISSUE III

THE TRIAL COURT ERRED IN THE ADMISSION OF VICTIM IMPACT EVIDENCE.

The State asserts that Appellant is procedurally barred from raising this Issue due to a lack of objection. The State does concede that defense counsel objected during the course of the testimony of Teresa Boron, but then states that counsel was only objecting to the crying of the witness and two members of the jury. (State's Brief at p.41) This position is completely unsupported by the record. The text of the objection is as follows:

> MR. FRASER: Judge, on behalf of Mr. Sexton, I move for mistrial. The witness was weeping during her testimony. By my count, we have two jurors, two women on the far end of jury box who were crying during her testimony. A couple of the other jurors appear ready to cry if they aren't already.
>
> I understand the law. I understand the Court's position. I understand victim impact. This is preposterous. This man cannot get a fair trial in a penalty phase with this kind of evidence. It's absolutely irrelevant.
>
> THE COURT: Well --
>
> MR. FRASER: She also mentioned the former trial, and to some extent I have to accept the blame for not catching that when I read it; but, Judge, there is not way this man can get a meaningful penalty phase with this kind of evidence.

(Vol.XII,R895). This exchange conclusively demonstrates that the objection was not just to the crying of the witness and the jurors, but obviously included what (the evidence) had made them react so emotionally. The objection is sufficient to preserve this issue for appellate review by this Court.

The cases cited by the State in support of their position that the evidence in this case was appropriate are distinguishable. In none of the cases cited in the Answer Brief did the evidence reach the level of intolerability presented in this case. For example, in Moore v. State, 701 So.2d 545 (1997), the testimony presented during in the penalty phase related specifically to the victim-that he was kind-hearted, loved everyone. The testimony did not relate to the impact suffered by everyone else, nor did it deal with the impact that a second death had caused to the survivors. The opinion also does not state that the evidence was as emotionally overreaching, as is demonstrated in this case by the sobbing jurors. The opinion indicates that the testimony was quite brief.

In Cole v. State, 701 So.2d 845 (Fla. 1997), the victim impact testimony was limited to one statement from the decedent's high school teacher that the victim was a good student and was respected at school for his athletic abilities and personality. In no way does that compare to the victim impact evidence in this case.

The victim impact in Davis v. State, 703 So. 2d 1055 (Fla. 1997), related the importance of the victim to his family members, not the importance of another murder victim to the deceased or the impact on the family as a result of the other individual's death.

Not a single case cited by the State permits the introduction of victim impact evidence relating to a death other than the one for which the defendant has been convicted of committing and the impact that this other death had on the surviving family. Mr. Sexton is not, as the State suggests, seeking to rewrite the facts

of what occurred. He is seeking to exclude highly prejudicial testimony about another crime and the impact suffered from it -- a crime he has never been charged with, let alone convicted of.

The Initial Brief will be relied upon for points 2 and 3 of this Issue.

ISSUE IV

THE SENTENCE OF DEATH IS DISPROPORTIONATE.

Proportionality review requires a qualitative analysis of the aggravating and mitigating factors in a case as compared with those in other cases, making sure that the death penalty is reserved for only those cases which are the most aggravated and least mitigated. While simply tallying the aggravating and mitigating factors is not appropriate, the existence or lack of these factors can be used in the determination of whether a case fits the category of "most aggravated and least mitigated", thus answering the question of whether this case qualifies for the imposition of the death penalty.

In utilizing a qualitative analysis, the application of the aggravating circumstance of prior violent felony conviction present in this case must be given slight consideration, as was done by the trial court. This conviction arose over 20 years prior to the instant charges and there were no intervening convictions. Qualitatively, this single conviction hardly compares with the prior record of 71 prior convictions amassed by the defendant in Rodriguez v. State, 25 Fla. L. Weekly S89 (Fla. February 3, 2000).

Despite the State's contentions to the contrary (State's Brief,p.54), there was evidence that the brain damage suffered by Mr. Sexton was a factor in this homicide and that it affected the aggravating circumstance of CCP. According to Dr. Weiner, the brain injuries suffered by Mr. Sexton would cause him to obsess, he could not let something go and would dwell on it inappropriately. The State's primary evidence of CCP arose from Mr. Sexton's continuing comments that Joel was a snitch. The idea that Joel was a snitch and Mr. Sexton's continual preoccupation with that idea is explained by the obsessive features of his mental illness. As stated in the initial brief, there is no evidence of premeditated, calculated planning over a long period of time.

Those cases cited by the State in support of their position that a death sentence is proportional are distinguishable from this case. In James v. State, 695 So. 2d 1229,1239 (Fla. 1997), the sentence of death was upheld in a case where there were two counts of first-degree murder, each case having the aggravating circumstance of HAC in addition to the aggravating circumstances of a contemporaneous felony conviction and a conviction for a prior violent felony. James had strangled and then raped an 8 year-old child, then stabbed the child's grandmother 21 times and attempted to rape her as well. James also left another child who came upon him while he was stabbing the grandmother tied up in a bathroom.

The trial court in James rejected the "extreme mental or emotional disturbance" mitigating circumstance, but found sixteen mitigating factors, including substantial impairment due to drugs

and alcohol abuse, and that there was moderate mental or emotional disturbance.

The instant case is obviously distinguishable from James on it's face- there was only one homicide in this case. The sheer brutality inflicted upon the victims in James is absent in this case. The aggravators in James were supported by far more egregious facts.

Likewise, Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992), cert. denied, 508 U.S. 924 (1993), is factually distinguishable from Mr. Sexton's case. Fotopoulos received two death sentences -- one for killing a man who had been blackmailing Fotopoulos; the second for the murder of a man whom Fotopoulos had hired to kill his wife. The first murder was videotaped. The second murder involved Fotopoulos ordering his accomplice in the first murder to hire a hit man to kill his wife. During the attempted murder of his wife, Fotopoulos killed the hit man to make the attempted murder look like a burglary. The instant case does not involve a double homicide, nor was it orchestrated at the high level that occurred in Fotopoulos.

Appellant's case contains more mitigation than found in Hodges v. State, 595 So. 2d 929 (Fla.1992), vacated on other grounds, 506 U.S. 803 (1992). Apparently, the mitigation in Hodges was only that Hodges had close family relationships, employment history, and some lack in his childhood and educational history. There is no mention in Hodges of any type of mental mitigation, which was present and found in this case; nor is there any mention of any

positive contributions Hodges made to others, which is also present in this case.

Appellant's case is more similar to that of Ray v. State, 25 Fla. L. Weekly 597 (Fla., Feb. 3, 2000). Ray also involves co-defendants, Ray and Hall. Hall and Ray robbed a liquor store and, in the subsequent chase, Hall shot and killed a police officer. Ray participated in the gun battle, but did not fire the fatal shots. Hall received a life sentence. The jury recommended death by a vote of 7 to 5. In sentencing Ray to death, the trial court found three aggravating circumstances -- two of which were merged by this Court, leaving the aggravating circumstance of murder of a law enforcement officer and murder in the course of a felony/contemporaneous conviction. One statutory mitigator, no significant prior criminal history was established, along with five non-statutory mitigating factors. This Court reversed, finding that the sentence of death was disproportionate based upon the lessor sentence received by a more culpable co-defendant and also because it was not among the most aggravated and least mitigated of homicides. Mr. Sexton's case, when the facts relating to the homicide alone, are considered, does not meet the standard set forth by this Court as the most aggravated and least mitigated of cases. As in Ray, the aggravation is not overwhelming and the mitigation is substantial.

In Larkins v. State, 739 So. 2d 90 (Fla. 1999), this Court reversed a death sentence based upon proportionality. This Court found two aggravating circumstances -- previous conviction for a

violent felony and pecuniary gain. Two mental mitigators were found, along with eleven nonstatutory mitigating factors. In reversing, this Court noted that the prior conviction had occurred in 1972. Larkins' mental illness made it difficult for him to control his behavior and caused him to be easily irritated by events that would not bother others, and he suffered substantial memory impairment, and had poor impulse control and low average intelligence.

Mr. Sexton shares many of the same symptoms of mental illness which were present in Larkins. His prior conviction is likewise from many years previous. Mr. Sexton's case is comparable to this case and should be reversed as well. The sentence of death in this case in disproportionate and must be set aside in favor of a sentence of life in prison in order to comply with the requirements of due process.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Attorney General's Office, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of October, 2000.

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