

**IN THE SUPREME COURT OF FLORIDA**

**GUERRY WAYNE HERTZ,**

Appellant,

vs.

**Case Number SC00-457**

**STATE OF FLORIDA,**

Appellee.

---

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

**REPLY BRIEF OF APPELLANT**

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## **ARGUMENTS**

### **I.**

#### **THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE**

The State argues that the trial court's sentencing order adequately differentiates between Mr. Hertz and Mr. Dempsey so that a death sentence for Mr. Hertz is not disproportionate. The facts of the case and the applicable law do not support this conclusion.

The sentencing order says that "the totality of the facts and circumstances in the record completely and substantially show that [Dempsey's] dastardly culpability and role in this night of terror was less than either of his two co-defendants." The facts



establish this:

(1) Dempsey was on probation at the time of this offense and was actively hiding from the police.

(2) Although being a convicted felon, Dempsey was armed with a gun that he had used for target shooting.

(3) Dempsey thought about using the gun to shoot at the police if he was going to be arrested on the violation of probation warrant.

(4) The decision to steal a car appears to have been jointly made. At the time the decision is made, all three defendants have guns. In addition, Dempsey has the equipment and the knowledge to steal a car.

(5) The trial judge found that “Dempsey was the brightest and best educated of the three . . .” This is certainly true in comparison with Mr. Hertz. Hertz’ mental health deficits are documented in this record, including a mild range of brain impairment and having Attention Deficit Hyperactivity Disorder.

(6) Although the trial judge said Dempsey “was more of follower”, there is no evidence to support this. Dempsey played an equally significant role in every crime that was committed. Although the object was to steal a car, Dempsey took it upon himself to walk up to the porch of the trailer, knock on the door and ask to use the phone. There was no point in doing this unless he wanted to gain access to the house

for reasons other than stealing a car in the yard.

(7) Dempsey admitted shooting at least twice. There is substantial discrepancy between his testimony and the forensic evidence as to who shot whom and how many times.

(8) Dempsey agreed that his decision to participate in the killings of King and Spears was made by him alone and that no one told or forced him to do anything. He understood that Hertz was playing around when a gun was pointed at him. Dempsey and Hertz were not strangers; they had known each other for seven years in 1997 and so Dempsey would have had a good sense of Hertz' intentions.

(9) Dempsey made no effort to leave nor try to free King or Spears. Either of these efforts might be seen as lessening his culpability. Instead, Dempsey took an active role in ensuring neither King nor Spears were able to leave.

(10) It is clear that both Spears and King were killed by guns, not by the fire. Therefore, who started the fire to burn the trailer down is not pertinent to the proportionality issue.

(11) Also not pertinent to the proportionality determination is Dempsey's remorse; his confession to the police; and what happened after Spears and King were already dead. Even Dempsey believed he was as culpable as Hertz.

The State cites a myriad of cases in support of the trial judge's decision on

relative culpability. “A trial court’s determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence.” Puccio v. State, 701 So.2d 858, 860 (Fla. 1997) As articulated above, Judge Sauls’ order is not supported by the evidence.

Sexton v. State, \_\_\_\_ So.2d \_\_\_\_, 25 Fla. L. Weekly S28 (Fla. 2000) is different from this case. Eddie Sexton was convicted of the first-degree murder of Joel Good. Joel was the husband of Eddie’s daughter, Pixie. Joel was actually killed by Willie, Eddie’s “mentally challenged” 22 year old son. Pursuant to a bargain with the State, Willie pled guilty to second-degree murder in exchange for a 25 year sentence and agreeing to testify on behalf of the State.

It turned out that Eddie had fathered two children with his daughter Pixie. Pixie killed one of the children after Eddie told her to make the child stop crying. When Joel learned that Eddie had fathered the children with his wife, they got into a fight. Eddie was concerned that Joel would turn him into the police. At trial, the Sexton family testified that Eddie made repeated verbal threats on the life of Joel. In particular, Willie related conversations with his father that Eddie wanted Willie to kill Joel.

On the day Joel was killed, Joel, Eddie and Willie were together in the woods. According to Willie, Eddie told him to take the garotte out of his pocket, put it around

Joel's neck and turn it "hard and fast." Seeing that Joel was still alive after Willie did as he was told, Eddie told Willie to finish Joel off. Another Sexton family member who claimed to view the killing testified that it was actually Eddie who applied the coupe de grace and killed Joel.

The State presented lay and expert testimony that Willie killed Joel only because he was totally controlled by his father; that he was simultaneously eager to please and afraid of him. Willie functioned at the level of a 7-8 year old and was incapable of planning to kill. In addition, Eddie physically and mentally abused Willie his whole life.

In deciding that Eddie was significantly more culpable, the trial court relied on the following facts:

- 1 - Eddie was the dominant force in the killing;
- 2 - Willie was simply Eddie's instrument to carry out the murder;
- 3 - Willie was easily led;
- 4 - Killing Joel was solely Eddie's idea because Eddie had the motive to kill.

Eddie and Willie were clearly not equals in life or as part of this criminal act. The same cannot be said for Dempsey and Hertz - they were contemporaries in age and status. Dempsey was definitely smarter; both had some mental health problems. Dempsey played an active role in the death of King and Spears; he was not just in the wrong place at the wrong time.

In Jennings v. State, 718 So.2d 144, 153 (Fla. 1998), Jennings and a co-defendant Charles Graves, were charged with the death of three people. Jennings got death for each murder; the State agreed not to seek death against Graves in exchange for Graves dropping a motion to continue his trial. In concluding Jennings death sentences were not disproportionate to Graves life sentences, the trial court focused on the following facts:

(1) Graves was 18 while Jennings was 26;

(2) Jennings was the actual murderer. The knife Graves possessed could not have inflicted the mortal wounds; Jennings admitted to the killings; and the forensic evidence was consistent with Jennings being the one who killed.

Once again, Jennings and Graves illustrate the point that the law permits treating codefendants differently “where a particular defendant is more culpable.” Larzelere v. State, 676 So.2d 394, 406-407 (Fla. 1996) See Howell v. State, 707 So. 2d 674, 682 (Fla. 1998) (three defendants - Paul Howell received death because he made a bomb that was intended to kill a person who could implicate him in a prior murder; the driver of the car and Howell brother received lesser sentences because of their lesser roles).

In Brown v. State, 721 So.2d 274 (Fla. 1998), a man named Roger Hensley was found dead in his bedroom, having been stabbed multiple times and his throat slashed. Brown and McGuire were charged with the murder; McGuire pled guilty to

second degree murder in exchange for a 40 year sentence and his testimony at trial against Brown. The forensic evidence showed that Brown inflicted the fatal wounds and Brown admitted to stabbing Hensley. McGuire's role in the murder was secondary. Hensley would not have been dead solely on what McGuire was supposed to have done.

In Hazen v. State, 700 So.2d 1207 (Fla. 1997) three people entered the home of Gary and Cecilia McAdams - Curtis Buffkin, James Hazen, and Johnny Kormondy. Mrs. McAdams was sexually assaulted by two of the men but then returned to the company of her husband. The third man then took Mrs. McAdams back to the bedroom and sexually assaulted her. While in the bedroom, Mrs. McAdams heard a gunshot. The man with her fled. When she went to find her husband, the other two men were gone as well. Her husband was dead, killed by a gunshot. Buffkin pled guilty and received a life sentence. Hazen went to trial and was sentenced to death.

This Court found Hazen's death sentence "disproportional because he was less culpable than Buffkin and Buffkin received a life sentence in a plea bargain."

We pride ourselves in a system of justice that requires equality before the law. When the facts are the same, the law should be the same.

Slater v. State, 316 So.2d 539, 542 (Fla. 1975)

Apparently the State was convinced that Kormondy was the shooter. This

made Buffkin and Hazen equal in the sense they did not pull the trigger. Buffkin indicated he and Kormondy were primarily responsible for the decision to break in the McAdams house with the intent to steal things; Hazen was categorized as a “follower.” However, Hazen took pains to hide his identity during the entry to the house; he ripped the telephone cords from the wall and helped find things to steal. Hazen was armed and participated in sexually assaulting Mrs. McAdams.

Hertz was no Buffkin and Dempsey was at least as culpable as Hazen. The death sentence for Hertz is not proportionate when Dempsey was allowed to plea to life. The State believed Dempsey was eligible for the death sentence but believed it needed his testimony. It got his testimony to convict Hertz but a fair comparison requires this Court to reduce Hertz’ death sentence to one of life in prison.

In Puccio v. State, 701 So.2d 858 (Fla. 1997) Puccio and many others conspired to and ultimately killed Bobby Kent. Puccio and Semanec stabbed Kent and when Kent tried to run away, Semanec, Kautman and Puccio tackled him and then beat and stabbed him. Kautman delivered the final blow, hitting Kent with a weighted baseball bat. Kaufman and Puccio then threw Kent’s body into a canal.

This Court reviewed the facts of what each person had done that led to Kent’s death. In reviewing the trial court’s factual findings, this Court found that “[n]othing” indicated Puccio “played a greater role in the planning and killing of Kent than any of

the others.” As Kent died from stab wounds, Puccio surely contributed to Kent’s death. Compare Slincy v. State, 699 So.2d 662, 672 (Fla. 1997)

**IIA.**

**FOUR OF THE SEVEN AGGRAVATING FACTORS UPON WHICH THE JURY WAS INSTRUCTED AND WHICH THE TRIAL COURT FOUND ARE LEGALLY INAPPLICABLE**

Mr. Hertz relies on the arguments in his initial brief.

**IIB.**

**THE ERRONEOUS CONSIDERATION OF LEGALLY INAPPLICABLE AGGRAVATORS WAS NOT HARMLESS ERROR**

Mr. Hertz relies on the arguments in his initial brief.

**III.**

**THE TRIAL COURT IMPROPERLY EXCUSED FOR CAUSE A VENIRE MEMBER WHOSE OPPOSITION TO THE DEATH PENALTY DID NOT PREVENT OR SUBSTANTIALLY IMPAIR HER ABILITY TO PERFORM JURY OBLIGATIONS**

The test for determining the competency of a juror is “whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court.” Muhammad v. State, \_\_\_ So.2d \_\_\_, 26 Fla. L. Weekly S37, 38 (Fla. 2001), citing Smith v. State, 699 So.2d 629, 635 (Fla.



1997) Ms. Free's answers to the questions posed by the attorneys during voir dire do not run afoul of this test. The trial judge abused his discretion in granting the State's cause challenge. Johnson v. State, 608 So.2d 4, 8 (Fla. 1992)

It was clear that Ms. Free was uncomfortable with imposing the death penalty. The law is clear that no juror must ever vote for death, regardless of the evidence. A juror's vote is a reflection of that juror's views of the penalty evidence. Ms. Free knew that she would have a choice to be able to vote for life. Ms. Free never rejected the notion that death was a possible recommendation from the jury as a whole. As long as a vote for life in prison without parole was available to her, Ms. Free would follow the law and the law does not demand any more from Ms. Free. See Farina v. State, 680 So.2d 392, 396 (Fla. 1996), Gray v. Mississippi, 481 U.S. 648 (1987)

In Farina, the voir dire questioning revealed "that while [the juror] may have equivocated about her support for the death penalty, her views did not prevent or substantially impair her performing her duties as a juror in accordance with her instructions and oath." The juror, a Mrs. Hudson, indicated she had "mixed feelings: about the death penalty. Mrs. Hudson also indicated that she would "try" to give the State a "fair shake" on the issue of the death penalty. Mrs. Hudson affirmed that she "would try to do what's right." Ms. Free also communicated to the lawyers that she could follow the law. She indicated a willingness to listen to the views of the jurors.

The totality of the record in this case supports a finding that Ms. Free should not have been excused for cause.

#### IV.

### **THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO REQUIRE UNANIMOUS VERDICT**

The State argues that Apprendi v. New Jersey 120 S. Ct. 2348 (2000) does not apply in this case because (1) the issue was not preserved and (2) it does not apply to capital sentencing proceedings. The State is wrong on both counts.

Apprendi is based on the fundamental constitutional notion that the State must prove beyond a reasonable doubt every element of the crime charged. Jackson v. Virginia 443 U.S.307, 316 (1979); Flore v. White, \_\_\_ U.S.\_\_\_\_, 14 Fla. L. Weekly Fed S42 (1/9/2001). This is a constitutional right that cannot be waived.

On the merits of the issue, the major flaw in the state's argument is that the state ignores how Florida's capital sentencing scheme works. The state assumes that "death is within the statutory maximum for first degree murder" without attempting to demonstrate that this is correct under the Florida scheme. Mr. Hertz' initial brief explained that under the Florida statutory scheme death is not within the statutory

maximum simply upon conviction of first degree murder. The assumption underpinning the state's argument is invalid. See United States v. Rogers, 228 F. 3d 1318 (11th Cir. 2000) "Any fact (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be presented to a jury and proven beyond a reasonable doubt."

The state argues that the Apprendi majority rejected the argument that "Apprendi effects [sic] the Court's prior precedent upholding capital sentencing schemes that require the judge to determine aggravating factors rather than the jury" (citing Apprendi, 120 So. Ct. at 2366). In the discussion cited by the state, the Supreme Court says:

Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona, 497 U.S. 639, 647-649, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990); id., at 709-714, 110 S. Ct. 3047 (STEVENS, J., dissenting). For reasons we have explained, the capital cases are not controlling:

"Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed. . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the

charge.” Almendarez-Torres [v. United States], 523 U.S. [224,] 257, n.2, 118 S. Ct. 1219 [(1998)] (SCALIA, J., dissenting) (emphasis deleted).

Apprendi, 120 S. Ct. at 2366.

Under the analysis of this section of Apprendi, Walton and related cases have been overruled or, at the least, do not apply in Florida. While the Court says that Apprendi is not inconsistent with Walton, the quotation from Justice Scalia’s opinion in Almendarez-Torres clearly indicates that it is, at least so far as the Florida scheme is concerned. What this quotation says is that a judge is not permitted “to determine the existence of a factor which makes a crime a capital offense”; instead, a judge can determine the penalty “once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death.”

In Castillo v. United States, \_\_\_ U.S. \_\_\_, 120 S. Ct. 2090 (2000) the Supreme Court was confronted with the question of whether the type of firearm use or carried during a crime of violence or drug trafficking offense was a judicial sentencing determination or a fact that must be charged and found by a jury to exist beyond a reasonable doubt. The federal statute involved, Title 28 U.S.C. Section 924 is labeled “Penalties”. The Supreme Court disregarded this labeling and found that if a particular kind of firearm enhanced Castillo’s potential sentence, (in this case a machine gun) the indictment had to charge this kind of firearm and a jury had to return a verdict of guilty

beyond a reasonable doubt on this fact. See Jones v. United States, 526 U.S. 227, 232 (1999)

This is crucial language in light of Florida's capital sentencing scheme. In Florida, a criminal defendant is not eligible for a death sentence simply upon conviction of first degree murder. Without additional proceedings, the judge would have to impose a life sentence. Thus, in Florida, conviction of first degree murder does not "carr[y] as its maximum penalty the sentence of death." Further, since a judge is not permitted "to determine the existence of a factor which makes a crime a capital offense," the only conclusion is that at least under Florida's capital sentencing scheme, the jury must make the findings necessary for death to be a sentencing option.

The state dismisses the discussions of Walton in Justice Thomas's concurrence and in Justice O'Connor's dissent (AB 80-81). However, these opinions are important, representing the views of five members of the Court and indicating that Apprendi is inconsistent with Walton and related cases. Justice Thomas writes separately to explain his "view that the Constitution requires a broader rule than the Court adopts." Apprendi, 120 S. Ct. at 2367. This "broader rule" is "a 'crime' includes every fact that is by law a basis for imposing or increasing punishment." Id. at 2368. Justice Thomas further explains, "What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing

punishment . . . it is an element.” Id. at 2379. Justice Thomas describes Walton as “approv[ing] a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment. In this sense, that fact is an element.” Id. at 2380. Justice Thomas concludes that whether Walton and related cases can be distinguished from Apprendi is “a question for another day.” Id.<sup>1</sup> Leaving the question “for another day” does not mean there is no question.

The dissent describes the decision in Apprendi as “a watershed change in constitutional law.” 120 S. Ct. at 2380. Justice O’Connor directly states that if Apprendi is the law, Walton is not, writing:

While the Court can cite no decision that would require its “increase in the maximum penalty” rule, Walton plainly rejects it. Under Arizona law, the fact that a statutory aggravating circumstance exists in the defendant’s case “‘increases the maximum penalty for [the] crime’” of first-degree murder to death. Ante, at 2355 (quoting Jones, supra, at 243, n.6, 119 S. Ct. 1215). If the judge does not find the existence of a statutory aggravating circumstance, the maximum punishment authorized by the jury’s guilty verdict is life imprisonment. Thus, using the terminology that the Court itself employs to describe the constitutional fault in the New Jersey sentencing scheme presented here, under Arizona law, the judge’s finding that a statutory aggravating circumstance exists

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<sup>1</sup>The possible distinction which Justice Thomas discusses would provide capital defendants with less protection than that provided to non-capital defendants and thus is inconsistent with due process and equal protection. Justice O’Connor’s dissent points out that this possible distinction “is without precedent in our constitutional jurisprudence.” 120 S. Ct. at 2388.

“exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” Ante, at 2359 (emphasis in original). Even Justice THOMAS, whose vote is necessary to the Court’s opinion today, agrees on this point. See ante, at 2380. . . .

The distinction of Walton offered by the Court today is baffling, to say the least. The key to that distinction is the Court’s claim that, in Arizona, the jury makes all of the findings necessary to expose the defendant to a death sentence. See ante, at 2366 (quoting Almendarez-Torres, 523 U.S., at 257, n.2, 118 S. Ct. 1219 (SCALIA, J., dissenting)). As explained above, that claim is demonstrably untrue. A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty. . . . If the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today.

120 S. Ct. at 2387-88. Thus, five members of the Court have indicated that Apprendi has overruled Walton and related cases.

Finally, the state relies upon Weeks v. State, 761 A.2d 804 (Del. 2000) (AB 83). Weeks is inapposite here because Weeks pled guilty, waiving his right to a jury determination.

V.

### **MR. HERTZ WAS NOT COMPETENT TO STAND TRIAL**

The State cites to Hardy v. State, 716 So.2d 761, 763 (Fla. 1998) in support of Judge Sauls decision finding Mr. Hertz competent. Hardy’s competency problems

stemmed from Hardy shooting himself in the head with a gun after he shot and killed a police officer. Hardy was initially found incompetent to stand trial when all three mental health experts agreed he met the legal definition of incompetency. The trial judge then placed Hardy in the Mentally Retarded Defendant Program at Florida State Hospital. While in the program, “Hardy received training in trial procedure, crimes and consequences, self-management skills, and language skills.” Hardy spent 14 months in the program.

Hardy’s next competency hearing resulted in two experts opining that Hardy was now competent; one expert concluded Hardy remained incompetent. A third competency hearing was held during jury selection and again two mental health experts believed Hardy was competent while one believed he was not. One of the experts who now found Hardy competent had initially found the opposite. The trial judge found Hardy to be competent to stand trial. This Court affirmed.

We find that the trial court properly considered all of the evidence presented below regarding Hardy’s competence, including the expert testimony, testimony from jail employees regarding Hardy’s abilities to communicate and participate in a number of activities while incarcerated awaiting trial, and the trial court’s own observations of Hardy’s demeanor and ability to assist defense counsel during jury selection. The trial court noted during the third (and last) competency hearing that it found the testimony of Drs. Heiken and Sternthal to be less credible and gave more weight to Dr. Barnard’s testimony based on the fact that Dr. Barnard had examined Hardy both before and after his stay at the Mentally Retarded Defendant’s Program. The trial court did not abuse



its discretion in determining that Hardy was competent to stand trial. Any contention that the court should have followed Dr. Barnard's suggestion to slow down the proceedings is moot because no complaint was ever made about the pace of the trial.

Judge Sauls made no such findings comparable to the trial judge in Hardy. In Carter v. State, 576 So.2d 1291, 1292 (Fla. 1989) and Ponticelli v. State, 593 So.2d 483, 487 (Fla. 1991), the majority of mental health experts made a finding that the defendant was competent. In this case, a majority of mental health experts made a finding that the defendant was competent. Zakrezewski v. State, 717 So. 2d 488, 491 (Fla. 1998) is not a competency issue case. In that case, the defendant proposed and the trial judge gave no weight to a mitigating circumstance that the defendant was hyperactive as a child and was medicated with Ritalin. At the time of the hearing, Hertz should have been found incompetent to stand trial.

## VI.

### **THE TRIAL COURT ERRED BY ADMITTING GRUESOME PHOTOGRAPHS OF THE BODIES AT THE CRIME SCENE AND THE AUTOPSY**

A. The probative value of the gruesome pictures of the charred bodies at the scene of the murder and arson was substantially outweighed by the danger of unfair prejudice and needless presentation of cumulate evidence.

The essential elements of arson were not in dispute. The State did have to

prove the identity of the arsonist or arsonists and neither Hertz nor Looney admitted to being the perpetrator of the crime of arson. The State asserts that the crime scene photo of the charred bodies was relevant to prove the identity of the perpetrator. However, not a single State witness testified that State's Exhibit 1-C contained any information that would prove the disputed fact of the identity of the arsonist. Therefore, the photograph is irrelevant and inadmissible.

The State also asserts that the photograph is relevant to explain the "circumstances of the crime." The State does not, however, explain why the "circumstances of the crime" is relevant. The "circumstances of the crime" were not an issue in dispute.

The State cites a number of cases in which gruesome photographs were admitted without error. In each case, the photographs were independently relevant or corroborative of some other evidence. See Czubak v. State, 570 So.2d 925 (Fla. 1990). Thus, in Nixon v. State, 572 So.2d 1336, 1342 (Fla. 1990), the photographs were relevant to prove that fire was the cause of death and were relevant to corroborate the confession of the defendant. In Gore v. State, 475 So.2d 1205, 1208 (Fla. 1985), the photographs corroborated the testimony of two eyewitnesses. In Mansfield v. State, 758 So.2d 636, 648 (Fla. 2000), the photographs explained the cause of death and supported the application of the aggravating factor "heinous,

atrocious and cruel” in the penalty phase. In Gudinas v. State, 693 So.2d 958 (Fla. 1997), the medical examiner used the photographs to explain the location and extent of the wounds. The photos were also used to support the HAC aggravator in the penalty phase. In Pangburn v State, 661 So.2d 1182, 1187 (Fla. 1995), the medical examiner used the photographs to explain his testimony and the photographs also corroborated a witness’s testimony. In Wilson v. State, 436 So.2d 908 (Fla. 1983), the photographs proved the identity of the victim, the nature and extent of injuries, the cause of death, the force used in causing the death, and the premeditation element of the crime.

Interestingly enough, the photographs in the case at bar did not corroborate the testimony of Dempsey. According to Dempsey, he was in the room with the victims at all times. Dempsey’s only testimony about accellerants was that Hertz poured gasoline in the living room. The forensic evidence and expert opinion directly contradicted Dempsey. But in addition to the fact that the photographs did not corroborate Dempsey’s testimony, other photos were adequate to show the condition of the crime scene and the existence of fibers under the bodies. See Thompson v. State, 619 So.2d 261 (Fla.), cert. denied 510 U.S. 966 (1993).

The State urges this Court to ignore Ruiz on the basis that the case was reversed on grounds other than the erroneous admission of the photograph. The conviction of

Ruiz was reversed because of prosecutorial overreaching, and the introduction of improper evidence, such as the cumulative enlargement of the victim's body, was part. Ruiz v. State, 743 So.2d at 8. The State could not explain the reason for introducing the blowup of the gruesome photograph. Nor is there any explanation here. The photograph of the charred bodies was not relevant to any material disputed issue. Czubak v. State, 570 So.2d 925 (Fla. 1990). The trial court abused its discretion by admitting the photograph.

**B. The gruesome pictures of the bodies at the autopsy were not used by the medical examiner to illustrate his opinion of the cause of death and were therefore irrelevant.**

In Gudinas v. State, 693 So.2d 953 (Fla. 1997), the medical examiner used the photographs to illustrate his testimony of the other injuries to the victim, who had been raped and dragged into an alley and stomped to death. In the case at bar, the trial court admitted autopsy photographs showing the effects of the fire that occurred after the victims' deaths. The effects of the fire are not "injuries" caused by the defendants. Under the holding in Almeida v. State, 748 So.2d 922 (Fla. 1999), the admission of the photographs is error. In Almeida the error was harmless because the defendant had confessed twice: once to his friends before his arrest, and again to law enforcement officials after the administration of the Miranda warnings. The defendant in Almeida would have been convicted even without the introduction of the autopsy

photographs. The same cannot be said in this case. Here the evidence of first degree murder comes from the cooperating co-defendant Dempsey. Dempsey takes great pains to distinguish his conduct from that of his co-defendants. He tells the jury that he was kind to the victims, looking after their comfort while he guarded them, and that he fired his weapon only after Hertz and Hertz had already started shooting. The State cannot show beyond a reasonable doubt that the jury would have convicted Mr. Hertz and Mr. Hertz if they had not been shown the gruesome, irrelevant, autopsy photographs. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

## VII.

### **THE DETAILS OF THE COLLATERAL CRIMES IN VOLUSIA COUNTY BECAME A FEATURE OF THE TRIAL CAUSING PREJUDICE THAT SUBSTANTIALLY OUTWEIGHED THE PROBATIVE VALUE OF THE EVIDENCE**

Mr. Hertz relies on the argument and authorities cited in his Initial Brief.

## VIII.

### **THE STATUTE AUTHORIZING THE ADMISSION OF VICTIM IMPACT EVIDENCE IS AN UNCONSTITUTIONAL USURPATION OF THE COURT'S RULEMAKING AUTHORITY UNDER ARTICLE V, § 2, OF THE FLORIDA CONSTITUTION MAKING THE ADMISSION OF SUCH TESTIMONY UNCONSTITUTIONAL AND REVERSIBLE ERROR**

The State relies on Burns v. State, 699 So.2d 646 (Fla. 1997), for the proposition that this Court has previously held that subsection 7 of Section 921.141

does not violate Article 2, Section 3. A close reading of Burns reveals that the precise question raised by Mr. Hertz has not been answered by this Court.

Burns first notes that the defendant challenged sub-section seven of 921.141 as an ex post facto law. This Court summarily rejected that contention on the authority of State v. Windom, 656 So.2d 432 (Fla. 1985). In Windom, in which an ex post facto challenge was made, this Court stated that the death penalty statute “only relates to admission of evidence and is thus procedural.” Id. At 438. Burns also rejected, without analysis, the challenge to 921.121 as a whole as violative of Article 2, Section 3. Burns cites Vaught, Booker, and Maxwell.

In State v. Vaught, 410 S.2d 147, 148 (Fla. 1992), the defendant reasoned that if the statute were procedural, and therefore able to survive an ex post facto challenge, then the statute must run afoul of Article 2, Section 3. But this Court ruled that the use of the term “procedural” in Windom should not be a shibboleth for Article V Section 2 analysis. The statute was declared substantive “in so far as [the legislature] define[s] those capital felonies which the legislature finds deserving of the death penalty.” Id. At 148. Vaught then relies on Smith v. State, 497 So.2d 894 (Fla. 1981). Smith in turn merely cites Dobbert as authority.

The statute as a whole was challenged in Booker v. State, 397 So.2d 910 (Fla. 1981). Booker simply cites to Dobbert without analysis. In State v. Dobbert, 375

So.2d 1069, 1071 (Fla. 1979), the defendant attacked the entire death penalty statute as violative of both Article V, Section 2(a) and Article X, Section 9. This Court upheld the statute without any discussion. Booker v. State, 397 So.2d 910, 917 (Fla. 1981), then cites Dobbert without discussion.

In State v. Maxwell, 647 So.2d 187 (Fla. 4<sup>th</sup> DCA 1985), the defendant challenged Section 921.141(7) as unconstitutional on two ground: ex post facto and procedural. The district court relied on this Court's rationale in Glendening v. State, 536 So.2d 212 (Fla. 1989), to hold that the statute regulated the admission evidence and so was procedural. Glendening, however, concerned the application of 90.803(23), an evidence rule that is both a rule of procedure and a substantive rule, which, more importantly, had been adopted by this Court. The district court certified the question to this Court. In Maxwell v. State, 657 So.2d 1157 (Fla. 1985), this Court answered the question by upholding the constitutionality of 921.141(7), citing to State v. Windom, 656 So.2d 432, 438 (Fla. 1985). Again, Windom concerned an ex post facto challenge; because the statute is procedural it survives an ex post facto challenge.

## IX.

### **THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE CONVICTIONS**

Mr. Hertz relies on the arguments and citations to authorities and the recitation

of the facts in his initial brief.

**CONCLUSION**

For the reasons argued in his reply brief, Mr. Hertz requests this Court to reverse his conviction and sentence and remand for a new trial.

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**CERTIFICATE OF FONT AND TYPE SIZE**

I hereby certify that this reply brief was typed using Times New Roman, 14 pt.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a copy of the foregoing has been furnished by United States mail this \_\_\_\_ day of February, 2001, to **Mr. Robert Butterworth,**



Attorney General, The Capitol, Tallahassee, Florida 32399-1050.

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**STEVEN SELIGER**