IN THE SUPREME COURT

OF THE

STATE OF FLORIDA

Case No. SC00-458

JASON LOONEY,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE

THE CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

IN AND FOR WAKULLA COUNTY

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE FACTS

The State makes several incorrect factual statements that ought to be corrected so that the Court can fairly determine several of the issues raised in the briefs, such as proportionality, the application of aggravating factors, and sufficiency of evidence.

On page 10 of the State's Answer Brief, the State claims that it is Jason Looney who makes the statement that "they can't have any witnesses, we don't want to go to prison, we have to do this here." The record is actually ambiguous on this point. Dempsey claims that he entered the other bedroom where Mr. Looney and Mr. Hertz were standing. Dempsey spots the computer, which he thinks is expensive. Dempsey then testified:

> And, well, they were sitting there talking and Jason turns to Wayne and says, "You going to tell him?" And, you know, "Tell me what?" "Well, we decided that, you know, we can't have no witness to all this stuff and that, you know, I don't want to go to prison, so we're going to have to do this here."

R16-1918.

The speaker of that statement is never identified by Dempsey.

On page 28 of the State's Answer Brief, the State asserts that Mr. Looney was identified by a "potential victim" by which the State presumably means Mrs. Ventry. However, Mrs. Ventry is only able to

identify Mr. Hertz. R13-1532-33. That night she thought there was just one person at her trailer. Upon further consideration, she thought there might have been two, and one was smaller than Hertz. Id. There is no evidence in the record of the comparative sizes of Hertz and Looney. The second person, if there was one, should have been Dempsey, who admitted that he was at Mrs. Ventry's house. R16-1901.

On page 32 of the State's Answer Brief, the State asserts that Mr. Looney "came in and put a rifle to Keith Spears." Actually, according to Dempsey, Looney did enter the Spears/King residence with a rifle, Looney "made a stance," and Looney had Spears "covered." R16-1906; R16-1910. It was Dempsey, however, that held a gun to Spears's head. R16-1961.

On page 33 of the State's Answer Brief, the State asserts that both "Hertz and Looney went and got the gasoline from the shed outside and, it was Hertz and Looney who poured gasoline throughout the trailer." Dempsey testified that only Hertz came in from outside with "a red container that you would put accellerant or gasoline in." R16-1921. Further, Dempsey could only clearly remember Hertz pouring the gasoline in the living room; Dempsey could not remember if he saw Hertz hand the gasoline can to Looney. R16-1921-22.

Finally, on page 54 of the State's Answer Brief, the State states that the trial court found that the medical examiner found entry and exit would that were consistent with rifle wounds. R2-285. It is true

that the trial court made this finding, but the finding is a factual error on the part of the trial court. The medical examiner determined that the cause of death of both King and Spears was "gunshot." R13-1590; R13-1598. The State never produced any evidence that a particular gun fired a particular bullet that killed either King or Spears.

ARGUMENT

I. THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE.

The State argues that the trial court's sentencing order adequately differentiates between Mr. Looney and Mr. Dempsey so that a death sentence for Mr. Looney 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." But the facts establish this:

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

(2) Although 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 the police if

police tried to arrest him on the violation of probation warrant.

(4) According to Dempsey, the decision to steal a car was jointly made. At the time of the decision, all three defendants had 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 . . . ."

(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. Dempsey and Hertz had known each other for seven years in 1997. Mr. Looney had only met Dempsey and Hertz three days before the killings.

(9) Dempsey made no effort to leave nor to 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 the other two.

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 S818 (Fla. 2000) is different from this case. Eddie Sexton was convicted of the first-degree murder of his son-in-law, Joel Good. 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, who 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 seven to eight-year-old child 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 nor equals in the crime. The same might be said for Dempsey and Looney. Dempsey was older and better educated. Dempsey had the knowledge to steal a car. Dempsey played an active role and even a dominant role in the death of King and Spears. It was Dempsey who ordered Mr. Looney to shoot Spears if Spears moved. If Dempsey is not more culpable than Mr. Looney, he is at least as culpable; either way Mr. Looney should not be subject to the death penalty.

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 only "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) (Of three defendants, Howell received death penalty because he made the 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), the victim 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 the victim. McGuire's role in the murder was secondary; the victim would not have been dead solely on what McGuire was supposed to have done. This Court held that the trial court did not abuse its discretion in finding that Brown was not a minor participant. Further, the trial court could reject as a mitigating factor the co-defendant's

lighter sentence because Brown was more culpable.

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.

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.

Looney was no Buffkin and Dempsey was at least as culpable as Hazen. The death sentence for Looney is not proportionate when Dempsey

was allowed to plead to life. The State believed Dempsey was eligible for the death sentence but the State needed Dempsey's testimony to convict Hertz and Looney. The State got Dempsey's testimony and Looney was convicted, but a fair comparison requires this Court to reduce Looney's 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 did kill Bobby Kent. Puccio and Semanec stabbed Kent and when Kent tried to run away, Semenec, 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 nothing indicated Puccio "played a greater role in the planning and killing of Kent than any of the others." Id. at 862. Kent died from stab wounds and Puccio surely contributed to Kent's death. But Puccio was not any more culpable than the co-conspirators who formed the group, choreographed the attack, and initiated the attack. Therefore, Puccio's death sentence was disproportionate and reversible. Compare Sliney v. State, 699 So.2d 662, 672 (Fla. 1997) (death sentence not disproportionate when sentences reflect relative culpability).

When this Court reviews what each person did in this case that led

to the death of Spears and King, the only conclusion can be that there is nothing to distinguish Dempsey from Looney. Therefore, the imposition of the death penalty on Looney is reversible error.

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

Mr. Looney relies on the arguments in his initial brief as to the inapplicable four aggravating factors and as to the harmfulness of that error.

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." Farina v. State, 680 So.2d at 396. 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 other jurors. The totality of the record in this case supports a finding that Ms. Free should not have been excused for cause. Accordingly, the sentence of death should be vacated.

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); Frore v. White, ___ U.S.___, 14 Fla. L. Weekly Fed S42 (January 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. Looney's 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 affects the Court's prior precedent upholding capital

sentencing schemes that require the judge to determine aggravating factors rather than the jury. 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 used 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. 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. 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." Apprendi, 120 S. Ct. at 2388. In any event, 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 "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.

Apprendi, 120 S. Ct. at 2387-88.

Thus, five members of the Court have indicated that Apprendi has overruled Walton and related cases.

The State also relies on Weeks v. State, 761 A.2d 804 (Del. 2000). However, Weeks is inapposite here because Weeks pled guilty, waiving his right to a jury determination. Looney did not waive this right, and the failure to accord him this right is reversible error.

V. THE TRIAL COURT ERRED BY ADMITTING GRUESOME PHOTOGRAPHS OF THE BODIES AT THE CRIME SCENE AND THE AUTOPSY.

The cases cited by the State do not alter the application of the evidentiary rule to the facts of this case. The photographs should not have been admitted.

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 cumulative evidence.

The State asserts that the crime scene photograph of the charred bodies on the bed was relevant to prove the identity of the perpetrator(s), a fact in dispute. However, not a single State witness testified that State's Exhibit 1-C contained any information that would prove the identity of the arsonist. Therefore, the photograph is irrelevant and inadmissible.

John Gunn referred to State's Exhibit 1-C to talk about the floor of the room, not the bed and not the victims. R.13-1634. State's Exhibit 1-T showed the floor of the room. The charred bodies in Exhibit 1-C were irrelevant to John Gunn's testimony. Chemist Carver never referred to Exhibit 1-C at all. Further, the fact that the bodies protected fragments of fabric from the fire so that Shawn Yao was able to collect unburned fabric from beneath the bodies was irrelevant. Any testimony about was what was underneath the bodies would more logically have been explained by Exhibit 1-T, which showed what was underneath the bodies after the bodies were removed.

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. Alston v. State, 723 So.2d 148 (Fla. 1998), has nothing at all to do with the admissibility of gruesome crime scene photographs.

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, because traces of accellerants were found on the fabric fragments found underneath the bodies. However, 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 v. State, 743 So.2d 1 (Fla. 1999), 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 enlarged photograph of the victim's body, was part of that overreaching. Ruiz v. State, 743 So.2d at 8. The State in Ruiz 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 Looney had already started shooting. The autopsy photographs graphically illustrate the damage to the bodies by the fire. The photographs appeal to the sympathy and prejudices of the jurors. The State cannot show beyond a reasonable doubt that the jury would have convicted Mr. Looney and Mr. Hertz if the gruesome, irrelevant autopsy photographs had not been shown. The State must do more that merely assert that error was harmless. The State must carry its burden to demonstrate that the error was harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

VI. 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. Looney relies on the argument and authorities cited in his Initial Brief.

VII. THE TRIAL COURT ERRED BY REFUSING TO GRANT A MISTRIAL AFTER A STATE'S WITNESS TESTIFIED ABOUT HEARSAY STATEMENTS BY THE NON-TESTIFYING CO-DEFENDANT WHICH INCRIMINATED LOONEY.

Two State witnesses were presented to prove that Jason Looney was involved in the crimes at the King/Spears residence. One was co-defendant, co-perpetrator Dempsey, who was subject to cross-examination. The other witness was non-testifying co-defendant Hertz, whose hearsay statement came in through the testimony of inmate Hathcock. Mr. Looney could not cross-examine Hertz. And yet the jury

heard both Dempsey and Hertz say that Looney killed Spears and King.

The introduction of Hertz's hearsay statement was unquestionably error, as the State admitted at trial and now in its Answer Brief. The error is subject to the harmless error analysis announced in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Mr. Looney has demonstrated the error; the burden is now on the State to prove that the error is harmless beyond a reasonable doubt. The State asserts that Mr. Looney's presence at the scene of the crime was proved beyond a reasonable doubt. The only proof of Looney's presence was Dempsey's testimony. That testimony was then corroborated by the hearsay statement of Hertz. Mr. Looney was in possession of the recently stolen Mustang and he did attempt to flee, all of which is circumstantial evidence. But the direct evidence came from Dempsey and the hearsay statement of Hertz. The State failed to demonstrate that the jury would have convicted Mr. Looney on the strength of Dempsey's testimony without the corroboration of Hertz's hearsay statement. Because this constitutional error is not harmless beyond a reasonable doubt, the conviction should be reversed.

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.

This issue was preserved and is, therefore, not procedurally

barred. R1-106.

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 or Article V, Section 2. A close reading of Burns reveals that the precise question raised by Mr. Looney has not been answered by this Court.

In Burns, the defendant first challenged Section 921.141(7) 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). Burns also rejected, without analysis, the challenge to 921.141 in its entirety as violative of Article 5, Section 2. Burns cites three cases in support. None of the three cases, however, refer specifically to subsection 7 of the statute.

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 5, Section 2. But this Court ruled that references to the term "procedural" in earlier cases "were not meant to be used as shibboleths for deciding whether the new law violates article V, Section 2(a) of the Florida Constitution." Id. at 149. The Court declared that the death penalty statute was substantive law "insofar as [the provisions] define those capital felonies which the legislature finds deserving of the death penalty." Id. at 149. Vaught then relies on Smith v. State,

497 So.2d 894 (Fla. 1981). Smith in turn merely cites State v. Dobbert, 375 So.2d 1069 (Fla. 1979), as authority. In Dobbert, 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. All of these cases predate the enactment of the victim impact subsection the death penalty statute.

Burns also relies on Booker v. State, 397 So.2d 910 (Fla. 1981). In Booker, the death penalty statute as a whole was challenged. Booker simply cites to Dobbert without analysis. Booker also predates the enactment of the victim impact subsection.

Finally, Burns cites Maxwell v. State, 657 So.2d 1157 (Fla. 1995), in which this Court answered a certified question from the district court. In State v. Maxwell, 647 So.2d 871 (Fla. 4th DCA 1995), the trial court held that 921.141(7) was unconstitutional on several grounds, including that the statute violated the separation of powers doctrine and the prohibition against ex post laws. Id. at 872. The district court held that statute did not infringe on the Supreme Court's exclusive right to regulate procedure on the authority of Booker v. State, 397 So.2d 910 (Fla. 1981). At the same time, the district court's rationale for holding that the statute was not an unconstitutional ex post facto law was that the statute related only to the admission of evidence, which was merely a change in procedure.

This review shows that this Court has never clearly determined whether Section 921.141(7) is procedural or substantive. The rationale of Allen v. Butterworth, 756 So.2d 52 (Fla. 2000), is applicable in this determination. This Court should review this issue to unambiguously decide that the victim impact subsection of 921.141 is unconstitutional.

IX. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE CONVICTIONS.

Mr. Looney relies on the arguments and citations to authorities and the recitation of the facts in his initial brief.

CONCLUSION

Based on the argument and authorities cited herein, Mr. Looney requests this Court to reverse his conviction and sentence and remand for a new trial. In the alternative, Mr. Looney asks the Court to vacate the sentence of death.

Respectfully submitted,

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CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this reply brief was typed using Courier, 12 pt.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished U.S. Mail to Willie Meggs, State Attorney, Leon County Courthouse, 301 S. Monroe Street, Suite 475, Tallahassee, FL 32301; Stephen Seliger, 16 N. Adams Street, Quincy, FL 32351; and Carolyn M. Snurkowski, Office of the Attorney General Robert A. Butterworth, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399 this 27th day of February, 2001.

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