IN THE

SUPREME COURT OF FLORIDA

WILLIAM CODAY,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC02-1920
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____)		

REPLY BRIEF OF APPELLANT

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Appellant will rely on the Preliminary Statement as set forth in his Initial Brief.

STATEMENT OF THE CASE

Appellant will rely on the Statement of the Case as set forth in his Initial Brief.

STATEMENT OF THE FACTS

Appellant will rely on the Statement of the Facts as set forth in his Initial Brief.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S INSTRUCTION ON HEAT OF PASSION WHICH WOULD BE A DEFENSE TO PREMEDITATION AND REDUCE THE CONVICTION TO SECOND DEGREE MURDER.

The essence of Appellee's analysis is that the trial court had unbridled discretion not to instruct on a valid theory of defense supported by evidence. Appellee specifically claims that the jury need not be instructed on the law of the theory of defense because: 1) the trial court has almost unbridled discretion, Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980), deciding whether to instruct on a theory of defense; 2) the standard instructions on excusable homicide informed the jury on Appellant's theory of defense; and 3) on point cases of Kilgore v. State, 688 So. 2d 895 (Fla. 1997) and Hunt v. State, 753 So. 2d 609 (Fla. 5th DCA 2000) hold that a trial court never has to instruct on a defendant's theory of defense. Appellee is wrong on all three counts.

First, the standard instructions explained excusable homicide and premeditation, but they did not explain the law on Appellant's theory of defense - that heat of passion could negate the element of premeditation. Heat of passion was only mentioned in the context of excusable homicide. Heat of passion was never actually explained to the jury. The jury was informed that heat of passion could render the killing lawful. Thus, an accidental killing contrary to Appellant's claims, the jury was never informed of the heat of passion defense to the mens rea. See Palmore v. State, 838 So. 2d 1222 (Fla. 1st DCA 2003).

Also, instruction on the elements of a crime does not eliminate the requirement that jurors be instructed on the theory of defense:

> We also reject the state's contention which, while admitting the existence of some evidence as to the good faith defense, assets that the standard instruction on the element of felonious intent was sufficient to cover such defense. In a sense, **most theories of defense constitute negation of some element of the offense charged. However, this does not mean that an instruction on the required elements will necessarily satisfy the requirement that the jury be separately instructed on recognized theories of defense.** It is one thing to inform the jury as to the state's obligation to prove each element of its case, but quite another to inform the jury that certain maters, if established, constitute a defense to the crime charged.

Dudley v. State, 405 So. 2d 304, 305 (Fla. 4th DCA 1981). (emphasis added).

More importantly, instructing on heat of passion (excusable homicide) as an exception to criminal liability implies exclusion of other exceptions to liability (such as negating premeditation) - Expresso Unius Exclusio Alterus. Jurors could believe that by instructing the use of heat of passion in excusable homicide limited the use of heat

of passion to excusable homicide. It was only instructed to the jury in that one context.[1] This hindered rather than aided the jury in considering Appellant's theory of defense.

The decisions of Kilgore and Hunt are not on point to the present case and do not give trial judges unbridled discretion to reject instructions on the law of the theory of defense which is supported by evidence. Appellant submits that any language in these cases which supports unbridled discretion is wrong. Kilgore and Hunt are materially different from the present case and Palmore in that the defendant's requested instruction could have been misleading or confusing:

> ... the trial court was well within its perogative to refuse a separate, and possibly confusing, instruction.

Kilgore, 688 So. 2d at 898 (Emphasis added).

> ... the convoluted language taken from the Forehand opinion may have led to *confusion*.

Hunt, 753 So. 2d at 616. Trial judges should never be blamed for not giving confusing instructions to juries. The result of the decisions in Kilgore and Hunt were correct for this reason.

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[1] The jury was repeatedly instructed to only consider the law as it was instructed to them by the trial court. For example - "you must follow the law as it's set out in these instructing." "In closing, let me remind you that it's important you follow the law spelled out in these instruction..." T. 1902. "There are no other laws that apply to this case." T. 1906. Thus, should one juror offer that due to the heat of passion the defendant may not have premeditated a likely response would be that the court did not instruct them on heat of passion in that matter and it should only be considered as it was instructed - excusable homicide.

Also Kilgore cites to Kramer v. State, 619 So. 2d 274 (Fla. 1993) as a decision indicating that a trial court is within its discretion not to instruct on heat of passion. However, in Kramer heat of passion was not the defense - rather involuntary intoxication was the defense - thus a heat of passion instruction was not required. This Court recognized the propriety of an instruction on defense (in this case involuntary intoxication) "negating the specific intent required for premeditation" 619 So. 2d at 277 (emphasis added). Thus, more than a premeditation instruction is needed.

Appellee complains that the court in Palmore v. State, overlooked Kilgore and Hunt. However, in Palmore (as in this case) the requested instruction was not challenged as confusing.[2] Thus, it would not be surprising that the Palmore court would not utilize Kilgore or Hunt.

Out of state decisions support the decision in Palmore that heat of passion negating a mens rea must be instructed on as a theory of defense. E.g., Crawford v. State, 96 P. 3d 751 (Nev. 2004)(despite standard instructions, heat of passion negating mens rea theory of defense was required to be instructed upon to reduce degree of murder.); United States v. Lofton, 776 F. 2d 918, 920 (10th Cir. 1985) (trial court must instruct on applicable law on heat of passion with clarity when raised as theory of

[2] If there was any problem with the instruction, the defendant could have modified the instruction. Because the accuracy of the instruction was not raised below, it cannot now be challenged for the first time on appeal. Robertson v. State, 629 So. 2d 901 (Fla. 2002). Anyway, the requested instruction accurately reflects the law.

defense); Howell v. State, 917 P. 2d 1202 (Alaska App. 1996)(reversible error not to give instruction on heat of passion as defendant's theory of defense). Undersigned counsel could not find a single jurisdiction that would affirm rejection of an instruction on the heat of passion defense because of the standard instruction on premeditation or excusable homicide. Florida would stand alone for such a claim if Palmore is rejected and Appellee's argument accepted.

Again, Palmore contains a logical analysis why the heat of passion defense instruction should be given. The idea that the excusable homicide instruction on heat of passion substitutes for the requested heat of passion instruction negating premeditation is not logical. Appellant acknowledges that it is absolutely necessary for the jury to determine whether the killing was lawful or unlawful. Thus, it was required that the jury be instructed on excusable homicide/heat of passion. However, Appellant should not be saddled with the jury only being instructed on whether heat of passion made the killing lawful (excusable). Classifying a killing as lawful due to heat of passion is almost non-existent. The task of convincing a jury that heat of passion made a killing lawful would dwarf the task of convincing them that heat of passion negated any possible premeditation. However, where the jury is never given an instruction on the law on the theory of defense that task also becomes nearly impossible.

The standard of review may be the controlling factor as to this issue. Appellant and appellee have totally different views as to the standard of review. At bar the trial court rejected the requested instruction not based on its legal accuracy or not being

supported by the evidence, but rejected it because it was not in the standard jury instructions. In other words, there was no exercise of discretion - i.e. evaluating the special instruction. It was more of a raw judicial power that Appellee claims is valid through Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980)[3]. Appellee does not cite to any cases involving the standard of review for rejecting instructions on a theory of defense. The Florida appellate courts agree that the standard of review on whether to instruct the jury on the law of the theory of defense is an abuse of discretion that is narrow because the defendant is entitled to have the jury instructed on a valid theory of defense if there is any evidence which could support it. E.g., Goode v. State, 856 So. 2d 1101, 1104 (Fla. 1st DCA 2003)("discretion is fairly narrow"); Upshaw v. State, 871 So. 2d 1015, 1017 (Fla. 2d DCA 2004)(no matter how flimsy evidence is ... it is for jury and not the court to weigh defense evidence); Laythe v. State, 330 So. 2d 113 (Fla. 3d DCA 1970)(regardless how the trial court feels about theory of defense); Dudley v. State, 405 So. 2d 304 (Fla. 4th DCA 1981) (if valid defense and evidence trial court is "obligated" to instruct on law on theory of defense); Arthur v. State, 717 So. 2d 193, 194 (Fla. 5th CA 1998) ("entitled" to instruction if evidence supports no matter how "flimsy"); Bryant v. State, 412 So. 2d 347, 350 (Fla. 1982); Hansbrough v. State, 509 So. 2d 1081, 1085 (Fla. 1987). Again, it is undisputed that Appellant had

[3] Appellee cites to Canakaris to advocate discretion would only be abused where no reasonable man would take the view adopted by the trial court. Under this theory, since at least one reasonable man would agree that the Standard Jury Instructions can be relied upon - there should never be a need to entertain specially requested jury instructions again (regardless of what issue is involved).

a legal theory of defense that was supported by evidence. It does not matter whether Appellee believes there may be conflicts in the evidence. The jury was still entitled to be instructed on Appellant's theory of defense. The trial court erred by not doing so.

Finally, Appellee claims that because the State had a theory of guilt that the error of not instructing on Appellant's theory of defense was harmless. However, this is the time when not allowing the jury instruction on the theory of defense is most harmful. In addition, the State's theory does not justify not giving an instruction on the theory of defense. Appellee points to the evidence that Appellant was planning to leave before the killing by arranging travel and traveler's check, etc. Traveling does not negate a heat of passion. The evidence in this case showed an ended relationship. Appellant was in love with and obsessed with Gloria Gomez. Appellant was desperately attempting to reconciliate with Gomez. Gomez was having a relationship with another man. Gomez told him that not only would she not come back to him, but that she never loved him. Appellant reacted in a heat of passion:

> Then she told me that I had idolized her, that I had over-idealized the relationship. "But you loved me, you told me so many times, you left the message on my phone..." I said, she paused, then she told me that she had never loved me the way I thought. Then she said she had to get her things from my apartment and leave. I sat there, hearing those words of hers reverberate through my mind - - that she had never loved me the way she made me think - - and then I felt myself entering a state of shock - - then I broke into a rage. A demonic rage.

SR, page 2 of Exhibit 53. Evidence showed that Appellant wanted to reunite with Gomez and did not plan to kill her. T. 1618. Appellant used his own identity in making

arrangements. T. 1413.

The wounds were a result of Appellant's frenzied action during the heat of passion. Contrary to Appellee's assertion the State's theory cannot be used to justify keeping the defense theory of the case from the jury.

POINT II

THE TRIAL COURT'S INSTRUCTION ON PREMEDITATION WAS HARMFUL REVERSIBLE ERROR.

Appellee claims that the instant issue was not preserved. However, appellant objected and his objection was denied. R. 168, SR. . Moreover, failure to give a proper instruction on a disputed element (in this case premeditation) constitutes fundamental error which is reviewed even absent an objection. Reed v. State, 837 So. 2d 366 (Fla. 2002) (where element of malice was disputed).

Appellee does not dispute the specific analysis that shows that the premeditated design instruction given to the jury in this case: (1) fails to include deliberation; (2) only requires time for reflection as opposed to actual reflection; and 3) fails to inform the jury that premeditation is required prior to the killing. See Appellant's Initial Brief pages 35-37.

Instead, Appellee merely relies on Spencer v. State, 645 So. 2d 397 (Fla. 1994); and subsequent cases that rely on Spencer without any analysis, to claim that these requirements (listed in McCutchen v. State, 96 So. 2d 152 (Fla. 1975)) are met by the premeditation instruction. However, the portion of Spencer upon which Appellee relies was only written by three members of the court and does not have the

precedential value of a majority decision of the court.[4] It lacks precedential value. The subsequent cases mistakenly rely on Spencer as a majority opinion - without any analysis of the issue. Thus, the instant case is not legitimately controlled by precedent - Spencer and its progeny.

In addition, the three member opinion fails to give any explanation of how the premeditation instruction includes deliberation and the other requirements that are discussed in McCutchen. That is because the premeditation instruction doesn't meet these requirements.

Finally, Appellee makes the claim that the error was harmless. However, a faulty instruction on a disputed element is fundamental error and cannot be harmless by its very nature. Reed v. State, 837 So. 2d 366 (Fla. 2002).

[4] The other justices only joined in the result and not the opinion.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE FAILED TO PROVE THE ELEMENT OF PREMEDITATION

Appellee claims that this is a direct evidence of premeditation in this case because of Appellant's confession. However, Appellant's statements always denied premeditation. There was only direct evidence of a lack of premeditation. McArthur v. State, 351 So. 2d 972, 976 (Fla. 1977)(defendant confesses to killing but conviction for premeditated murder is reversed because reasonable hypothesis of lack of premeditation). If direct evidence trumps circumstantial evidence, the motion for judgment of acquittal should have been granted.

In the court below the prosecutor argued that Appellant had planned the killing by inviting Gomez to his place and making travel arrangements ahead of time in order to get away with the killing. The travel plans and inviting Gomez are not direct evidence of premeditation and were in fact part of Appellant's reasonable hypothesis of innocence. Evidence supported that Appellant's plan was to try to reunite with Gomez. Appellant made travel arrangements in case he was unsuccessful in reuniting. His plan was to go to Europe (the place he had spent his happiest moments) and then commit suicide.

Premeditation sought to be proved by circumstantial evidence must be inconsistent with every other reasonable inference. Cochran v. State, 547 So. 2d 928 (Fla. 1989).

This was a circumstantial evidence case. On page 37-38 of its brief Appellee concedes that the motive for killing Gomez did not occur until after she was at his place and told him she had never loved him. Since any motive occurred after travel plans, the travel plans were inconsistent with a preplanned killing and consistent with a preplanned reuniting.

Pre-planned trip - As explained above an objective of the preplanned trip was to commit suicide if Appellant failed to reunite with Gomez. Nothing is inconsistent with this evidence. Appellee claims that not purchasing the tickets before Gomez came over is only consistent with premeditation. The opposite is true. If Appellant was planning to kill Gomez he would have purchased the ticket ahead of time. Waiting increases the risk of not escaping. However, if he planned to try to reunite with Gomez, waiting to purchase the ticket makes sense - if he was successful he would want to stay with Gomez instead of leaving her for Europe. It would be a senseless waste of money to purchase a ticket he was not going to use.

Appellee claims Appellant's failure to call his employer is inconsistent with a "vacation" to Europe. It is true that Appellant loved traveling to Europe more than anything in the world. But the ultimate plan was to commit suicide. It is not unreasonable not to call one's employer if the plan was to commit suicide. It was not necessary. Certainly, not calling under these circumstances does not make the hypothesis unreasonable.

There are certain facts that make a hypothesis of a preplanned killing unreasonable and make a planned reuniting hypothesis reasonable. There was

evidence showing that Appellant gave Gomez a gift when she came over (T. 1010) - inconsistent with a plan to kill - more consistent with a plan to win her back. Appellant did not plan to avoid being a suspect - as shown by the killing occurring in his residence; there was no effort to hide or dispose of evidence; traveling plans under his own name (tickets, and credit cards). These facts are more consistent with the fact that Appellant killed without planning than a plan to kill ahead of time.

Appellee claims the nature of the killing is inconsistent with killing in the heat of passion. Yet Appellee fails to logically explain how the evidence refutes a frenzied attack. Instead, Appellee merely throws out cases for generic propositions where specific facts were used to analyze premeditation. In many of the cases a reasonable hypothesis was never offered for the evidence to refute. Some of the cases involve direct evidence.

Jimenez v. State, 703 So. 2d 437 (Fla. 1997) - reasonable hypothesis involved felony murder and not premeditation. In addition, it appears Jimenez, unlike in this case, targeted the victim's vital organs.

Ross v. State, 474 So. 2d 1170 (Fla. 1985) - no reasonable hypothesis of lack of pre-medication to refute. Claimed defense of being at different location was refuted by direct evidence.

Morrison v. State, 818 So. 2d 432 (Fla. 2002) - multiple victims rebutted claim of accidental killing.

Woodel v. State, 804 So. 2d 316 (Fla. 2001) - multiple victims killed and no reasonable hypothesis to refute.

Conde v. State, 860 So. 2d 930 (Fla. 2003) - Conde confessed to the killing being premeditated.

Francois v. State, 808 So. 2d 110 (Fla. 2001) - multiple victims and no hypothesis of innocence offered.

Kramer v. State, 619 So. 2d 274 (Fla. 1993) blood spatter indicated that attack was while victim lying prone on stomach. In the present case the blood spatter was confined to a small area and not inconsistent with a frenzied heat of passion attack.

Bedoya v. State, 779 So. 2d 574 (Fla. 5th DCA 2001) killing occurred in three different rooms and after procurement of seven weapons versus compared to a killing that was confined to a very small area.

Sirecs v. State, 399 So. 2d 964 (Fla. 1981) deliberately slitting victim's throat - nothing like that occurred in this case.

The wounds and weapons do not refute a reasonable hypothesis that the killing was a frenzied attack done in the heat of passion.

Multiple weapons does not rebut a reasonable hypothesis of lack of premeditation. See Kirkland v. State, 684 So. 2d 732 (Fla. 1996) (knife and walking cane). Especially considering the smallness of Appellant's residence. All the weapons were within reach of Appellant. Hammers were by the bedside table (Appellant's wife testified this was because hammers were needed to constantly keep Appellant's bed in repair - she even kept a hammer bedside while she lived with him. T. 1704. The residence was so small that one could reach a knife located in the kitchen without moving from where the body was in the bedroom. If Appellant had to move around,

the house rather than merely grab a knife, the victim would have probably tried to move and escape. Yet there is no evidence of this. Like, in Kirkland multiple weapons on or close to the defendant do not rebut a reasonable hypothesis of a frenzied attack in the heat of passion. Cases such as Bedoya involves searching through the house in three different rooms and using seven different weapons is different than the present case.

Multiple wounds - as explained on pages 40-41 of Appellant's Initial Brief multiple wounds are very consistent with a frenzied attack during a heat of passion. All the cases involving multiple wounds which Appellee cites have distinguishing features (as explained above and do not rebut multiple wounds resulting from a frenzied attack during a heat of passion.

Appellant relies on the cases cited in the Initial Brief at 40-44 for the principle as to why premeditation was not proven in this case. However, Appellee has give superficial way to distinguish facts of these cases. Briefly -

Tien Wang v. State, 426 So. 2d 1004 (Fla. 3rd DCA), - Appellee distinguishes this case based on prior planning. As explained above, the prior planning is consistent with the heat of passion scenario.

Austin v. United States, 382 F. 2d 129 (1967). Appellee claims multiple weapons distinguish this case. However, multiple weapons do not distinguish a premeditated killing from a depraved mind killing. Austin demonstrates how extreme violence can result from an impulsive and senseless frenzy which is the result of a depraved mind rather than the result of a premeditated intent to kill.

Kirkland v. State, 684 So. 2d 732 (Fla. 1996). Appellee claims unlike in this case there was no friction between Kirkland and the victim. This is not true. 684 So. 2d at 734-35. Both Kirkland and this case involve multiple weapons. Both are depraved mind second degree murders.

Green v. State, 715 So. 2d 940 (Fla. 1998). Appellee again mentions the preplanned trip. Again, this did not negate lack of a premeditated design to kill another (there was an admission to a premeditated design to kill himself). Also, in Green the case was premeditation because of the prior threat to kill - but it was not premeditation. Here, there was no prior threat to kill. There was only the prior desire to reunite.

Coolen v. State, 696 So. 2d 738 (Fla. 1997). Appellee again attempts to distinguish Coolen based on the planning that occurred. As noted above the planning was not to kill but to reunite.

Appellee does not discuss Castillo v. State, 705 So. 2d 1037 (Fla. 3rd DCA 1998), even though, as explained on pages 44-45 of the Initial Brief, it contained many similar features with the instant case. Appellant relies on his Initial Brief for further argument on this point.

POINT IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS

Appellee first claims that whether exigent circumstances are a pure question of fact. However, whether exigent circumstances exist is a mixed question of fact (what are the circumstances?) and law (do the circumstances sufficiently exigent to dispense with 4th Amendment requirements?). The review for the legal suppression issue is de novo. State v. Setzler, 667 So. 2d 343, 344-45 (Fla. 1st DCA 1995).

Appellee claims that Johnson v. State, 660 So. 2d 648 (Fla. 1995) is on point as to the follow officer rule. This is not true. In Johnson the two police agencies were cooperating and communicating in the investigation:

> Nevertheless, there is competent substantial evidence that Castro fell within this particular category, since Redden had been in communication with persons who possessed probable cause and later communicated that information to Castro. We thus believe that the arrest, at a minimum, was supported by probable cause under the fellow-officer rule.

660 So. 2d at 658 (emphasis added); see also State v. Peterson, 739 So. 2d 561, 566 (Fla. 1999)(officers Lee and Komosa were "cooperating in an investigation"). In the present case there was no communication or cooperation between New York and Florida law enforcement before the search and seizure. The fellow officer rule simply does not apply to utilize the Florida warrant or Florida probable cause.

As explained in the Initial Brief the action in this case without a warrant required both probable cause and exigent circumstances. Kirk v. Louisiana, 112 S. Ct. 2458 (2002).

Appellee cites numerous cases to claim that the citizen informant tip was sufficient to provide probable cause. However, in all the cases involving citizen informants the citizens were either eyewitnesses to the crime or victims of the crime. In the present case the citizen informant was neither an eyewitness or victim to the relevant information that was passed on to police - that Appellant was wanted for murder in Florida. The citizen had no personal knowledge. This was second hand information that the citizen gained from watching T.V. - America's Most Wanted. The rationale for the citizen informant doctrine is that "a personal observation by an informant is due greater reliablility than a second hand account." State v. Steffensen, 625 N. W. 2d 360, 242 Wts. 472 (Wis. App. 2001). Watching a T. V. Show simpley does not give sufficient reliable information to constitute probable cause. See Maxwell v. City of Indianapolis, 998 F. 2d 431 (7th Cir. 1993)(information derived from America's Most Wanted does not constitute probable cause.). Searches and seizures should not be allowed to bypass the warrant requirement due to what someone saw on T. V. T. V. does not yield probable cause. The motion to suppress should have been granted.

Appellee claims that sufficient exigent circumstances existed merely on the basis of Appellant being wanted for murder. This is not true. E.g., Jackson v. State, 607 S. W. 2d 371 (Ark. 1980)(fact that defendant was murder suspect was not sufficient exigency); People v. Spicer, 516 N. E. 2d 491 (1st 1987). There were no exigent circumstances such as hot pursuit; concern for safety because suspect armed; destruction of evidence, etc., the motion to suppress should have been granted.

Appellee mentions consent. However, the trial court relied only on the fellow officer rule and exigent circumstances. The trial court did not rely on consent. Furthermore, the police never sought permission to enter. Amiri did not tell the police verbally they could enter nor was there testimony that she gestured or stepped aside. She only stated that Appellant was upstairs. T. 957. This is not consent to enter. Turner v. State, 754 A. 2d 1074, 1084 (Md. App. 2000)(analyzing numerous cases and holding that in absence of police request to enter that opening door and leaving door open is not valid consent to enter.)

Appellee also claims that Crepusulo would have been admissible for a reason not used in the trial court-inevitable discovery. However, inevitable discovery was never raised below. Defense counsel never had the opportunity to challenge the factual or legal aspects of applying inevitable discovery in this case. Thus, this theory under the Tipsy Coachman cannot be used in this case. See Robertson v. State, 629 So. 2d 901 (Fla. 2002).

Appellee argues that the police would have ultimately arrested once they had the Florida warrant for Appellant and then discovered Crepusculo after a search. Inevitable discovery may not be used to speculate that the suppressed evidence would have been discovered in a future search. Moody v. State, 842 So. 2d 754, 759 (Fla. 2003) (inevitable discovery doctrine did not apply because it was "speculation to argue that once Foster turned in the murder weapon and told the police that Moody sold it to him, the police ultimately obtained the search warrants and then discovered the other evidence Moody sought to have suppressed").

Finally, Appellee claims that the error was harmless because other evidence inculpated Appellant. As explained earlier, the evidence was consistent with a heat of passion killing. The prosecutor emphasizes Crepusculo in closing argument. T. 1820-1821. The error cannot be considered harmless.

POINT V

THE TRIAL COURT ERRED IN ADMITTING EXHIBIT WHICH WAS NEVER ADEQUATELY AUTHENTICATED

Appellee claims that the exhibit was authenticated because it contained information only the perpetrator would know. Such a reason was never offered or utilized before. Thus, it cannot now be used for the first time on appeal as a predicate. See Robertson v. State, 629 So. 2d 901 (Fla. 2002). Had Appellee offered this predicate been offered below, defense counsel would have had the opportunity to challenge that the information was solely in the possession of the perpetrator. Much time had passed since the killing. For all we know, this information may have been distributed on America's Most Wanted.

Appellant relies on his Initial Brief for further argument on this point.

PENALTY ISSUES

POINT VI

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

Appellee avoids discussions, and does not challenge, the concept that the death penalty is reserved for only the "most aggravated" and "least mitigated" of murders. E.g., Cooper v. State, 739 So. 2d 82, 85 (Fla. 1999); Almedia v. State, 748 So. 2d 922, 943 (Fla. 1999). Nor does Appellee refute that this was not one of the most[5] aggravated and least mitigated of crimes. Thus, the death penalty is not warranted.

Appellee does recognize that where only one aggravating circumstance exists the death penalty will be proportionate only where there is either nothing or very little in mitigation McKinney v. State, 579 So. 2d 80, 81 (Fla. 1991). If there is mitigation of significance the death penalty will be disproportionate. Id.

In the present case there was significant mitigation relevant to the crime charged. This is unlike any of the cases cited by Appellee to claim the death penalty is proportionate. Pages 18-28 of the Initial Brief summarize very powerful mitigation. In this case the trial court found extreme mental or emotional disturbance at the time of the offense. The evidence was that Appellant's mental disorders are "the essence of explaining the crimes" in this case. T. 3402. In fact, Dr. Goldstein testified it was very uncommon for six different mental health professionals to come to the same exact

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[5] This was a case with only one aggravating circumstance and Appellee has not disputed pages 56 - 57 of the Initial Brief that the one aggravating circumstance was not as significant in this case as it is in other cases.

conclusion as to a diagnosis in a case like this but the records and tests are so consistent. T. 3351-52. Appellant suffered from a severe mental illness. T. 3176, 3226. This included major depression, severe recurrent with psychotic features, borderline personality disorder and an underlying severe paranoid delusional disorder. T. 3395, 3396. 3246, 3178, 3418. Appellant had an active psychotic episode at the time of the killing. T. 3223, 3403. The mental disorder included auditory hallucinations. T. 3328. His feelings and thoughts were all but shut down. T. 3329. In fact, a number of the experts testified that if they had testified during the guilt phase they would have testified that Appellant was insane at the time of the offense. T. 3210, 3223. Appellee's reliance on Blackwood v. State, 777 So. 2d 405 (Fla. 2000), (a 4-3 decision on proportionality) as being on point on proportionality is misplaced. Although Blackwood had a mitigator related to the commission of the crime (emotional disturbance) he did not have six unanimous mental health experts finding a severe mental illness and concluding that the mental disorders were the essence of the crime. Unlike Blackwood, and the other cases Appellee cites, it cannot be said in this case that there was nothing or very little in mitigation. This was very significant mitigation as it explained the essence of the crimes.

Although Appellee distinguishes Huckaby v. State, 343 So. 2d 29 (Fla. 1977) and Wilson v. State, 493 So. 2d 1019 (Fla. 1986), Appellee does not dispute that other similar cases have had death deemed disproportionate by this court, see Penn v. State, 574 So. 2d 1079 (Fla. 1991)(sole aggravator HAC was outweighed by heavy drug use and belief that victim stood in way of reconciliation with wife) and Ross v. State, 474

So. 2d 1170, 1174 (Fla. 1985)(death penalty not proper for bludgeoning of wife while she attempted to defend herself where only aggravator was HAC and although no mental illness there was mitigation of drinking at time of attach and attach was result of emotional state). Likewise, the death penalty is disproportionate in this case.

Appellee does claim that the proportionality analysis in Farinas v. State, 569 So. 2d 425 (Fla. 1990) is no longer valid as this Court does not recognize a domestic dispute exception to the death penalty. Obviously, merely utilizing the label of "domestic dispute" does not make the death penalty disproportionate. Mere use of the label to minimize the situation is offensive. However, it has been recognized that crimes are mitigated when done in the heat of passion. Contrary to what Appellee implies, a killing in a heat of passion (even though not meeting the exact legal criteria for a heat of passion defense) is extremely mitigating regardless of whether it occurs in a domestic or non-domestic dispute.[6] It is the situation and not the labels, that must be analyzed. Appellee's claim that Farinas can be ignored is without merit. Death was not disproportionate because of a domestic dispute label. Death in Farinas was disproportionate because of the heat of passion situation. In Farinas the victim moved out of Farinas' home. 569 So. 2d at 431. Like this case, Farinas would unsuccessfully try to see her. Id. Like this case, Farinas was obsessed with having the victim return to him. Id. Farinas would later kidnap the victim. Farinas then ignored her pleas for

[6] Appellee seems to believe that by the state labeling a heat of passion situation as a domestic dispute the mitigation disappears. Again, the label should not be used. Rather the analysis of the situation is what is important.

mercy and shot her in th back paralyzing her. Id. The victim was fully conscious and aware of her impending death as Farnas unjammed his gun and shot her again and again. Id. Despite two aggravating circumstances, including HAC, this Court found death to be disproportionate because, although not found by the trial court, the evidence tended to establish that the killing was committed by Farinas when he was under an extreme mental or emotion disturbance. The present case is like Farinas in that the killing was the result of an obsession with having the victim return and an extreme mental or emotion disturbance. However, Farinas was even more aggravated where the victim was kidnaped (whereas in instant case involved a rapid explosion) and less mitigated unlike Farinas Appellant had an extreme mental illness which was unanimously supported by six mental health professionals - and in Farinas the trial court gave the mental mitigation little weight. Appellant relies on his Initial Brief for further argument on his Point.

POINT VII

THE COURT ERRED IN REJECTING THE MITIGATING CIRCUMSTANCE IN SECTION 921.141(6)(f) OF THE FLORIDA STATUTE WHERE IT WAS UNCONTROVERTED THAT APPELLANT'S ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED.

Appellee claims that the trial court could reject the unanimous findings of all six experts that this mental mitigator exists. Appellant acknowledges that there are times when the experts' findings may be rejected, but this is not one of them. Appellee cites to numerous facts that the trial court did not utilize in rejecting the mental mitigator. It is the trial court's, and not Appellee's, concerns over the mitigation that is important.

The trial court cited to only one fact to reject the experts' findings. The trial court indicated because Appellant lived the prior 20 years without incident he was able to conform his conduct on the day in question. The trial court's reasons are not supported by the record. Evidence showed that Appellant suffered other psychotic episodes. T. 3394, 3179, 3180, 3232-33. Appellant tried to kill himself at these times. T. 3179. Certainly, killing oneself is against the law. Thus, the trial court's so called fact to overcome the experts findings did not exist.

In addition, the experts all recognized that Appellant normally had the ability to conform - - it was only during the rare psychotic episodes that the ability to conform was impaired. Under the trial court's reasoning a person with no criminal history could not qualify for this mitigator because most of the time the ability to conform

would be present. Of course, this is not true.

The key is that this mitigator relates to the ability to conform at the time of the offense and is not negated by the fact that at other times the ability to conform exists and in fact the defendant may be a good father, citizen, etc.

The six experts (including those hired by the State) were all in agreement and took in account Appellant's behavior before, during, and after the hearing. Pages 18-28 of the Initial Brief summarizes their findings. The trial court abused its discretion in rejecting their findings.

Appellee concedes that while Appellant's father was "not emotionally involved" with Appellant because the father did not express disappointment in Appellant it was proper to reject emotional abuse as a mitigating circumstance. However, this circumstance was uncontroverted. See Initial Brief 60-61. Appellant relies on his Initial Brief for further argument on this point.

POINT VIII

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL WHERE ONE IS ELIGIBLE FOR THE DEATH PENALTY MERELY BY BEING CONVICTED for violating § 784.02 OF THE FLORIDA STATUTES.

Appellee claims that the instant issue has been waived because it was not raised below. However, the illegality of a sentence may be raised at any time and also such error goes to the very heart of the matter and thus constitutes fundamental error.

Moreover, Appellee has now further ripened this issue by claiming that a mere finding of guilt makes one eligible in Florida. Appellee's Brief at 64. Florida's death

penalty is unconstitutional and cannot survive under this reasoning. See Furman v. Georgia, 408 U. S. 238 (1972).

POINT IX

THE DEATH SENTENCE VIOLATES THE UNITED STATES AND FLORIDA CONSTITUTIONS PURSUANT TO APPRENDI V. NEW JERSEY, 530 U. S. 466 (2000) AND RING V. ARIZONA, ____ U. S. _____, 120 S. CT. 2348 (JUNE 24, 2002).

Appellant relies on his Initial Brief on this Point, but would point out that this case does not fall within the fourth categories of cases which have been determined not eligible for relief pursuant to Ring. These issues have not been resolved for Appellant's situation by this Court. Also, Appellee's argument that one becomes death eligible by merely being convicted of first degree murder would render the death penalty unconstitutional. See Point VIII. Appellant would also correct the error in the Initial Brief - the jury's recommendation 9-3 rather than 8-4.

POINT X

THE TRIAL COURT ERRED IN FINDING THE KILLING WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

Appellee has not disputed that Appellant acted in a frenzy in the heat of passion. In Porter v. State, 564 So. 2d 1063 (Fla. 1990), this court recognized that killing in the heat of passion is not a crime meant to be deliberately painful and is not HAC:

> Moreover, this record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was *meant* to be deliberately and extraordinarily painful. The state has not met its burden of proving this factor beyond a reasonable doubt, and the trial court erred in finding to the contrary.

564 So. 2d at 1063. Furthermore, contrary to Appellee's claim, Dr. Goldstein's testimony was that Appellant was so dissociated that he was focusing on lashing out and not causing pain:

> My view is at the time he was so dissociated that he was focusing solely on lashing out opposed to causing pain. Causing pain, which is deliberately causing pain over and above and incremental to the act of death, is in fact a mental state. It involves cognition. It involves thinking. It involves awareness.
> It's my opinion that this is an emotional reactions, not a intellectual one that is though out, and at the time he's attacking Miss Gomez over for whatever period of time it is, he is not thinking about intending to purposely, knowingly, willfully, or any of the 70 odd intent terms that are used in the word deliberately attempting to cause her pain.
>
> ********
>
> Q. Do you believe he intentionally tortured Gloria Gomez? Was he of a state of mind to torture?
> A. Again, I would give the same answer. I think it implies a level of thinking that Mr. Coday was not capable of engaging in at the time, because of his emotional arousal and psychotic state.

T. 3360-61. Thus, it was error to find HAC in this case.

Appellee argues that a prolonged attack is HAC. This is not true. It is the prolonged suffering that contributes to HAC, it is not a frenzied attack that is HAC. See Elam v. State, 636 So. 2d 1312, 1314 (Fla. 1994) (HAC struck even though victim was "bludgeoned and had defensive wounds" because due to frenzied attack there was no prolonged suffering). Although Appellee portrays a epic struggle, the physical evidence showed that the violence was confined to a very small area of the bedroom by the door. T. 901, 1037. Nothing in the bedroom was disturbed. T. 1038. While there was some struggle, it appears to be very short - otherwise there would be more

physical evidence of a struggle at the scene. The medical examiner could not conclude when consciousness was lost. T. 1253. The medical examiner testified Gomez did not live very long T. 1245, and even when alive during Appellant's frenzy she may have been unconscious. T. 1253. Much of Appellee's claim is based on there absolutely being "defensive wounds." However, the medical examiner merely testified that there were injuries consistent with defensive wounds and they might not have been defensive wounds because Gomez could have been unconscious. T. 1243. There was a reasonable hypothesis that Gomez did not suffer for a prolonged time. See Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992) (for aggravator to exist evidence must be inconsistent with any reasonable hypothesis negating the aggravator). It was error to find HAC.

POINT XI

THE SENTENCE OF DEATH MUST BE VACATED AND THE SENTENCE REDUCED TO LIFE WHERE THE TRIAL COURT FAILED TO MAKE THE FINDINGS REQUIRED FOR THE DEATH PENALTY

Appellee argues that the present issue I not preserved. However, the death penalty cannot be imposed without the required findings. This issue reaches to the heart of sentencing and the error constitutes an illegal sentence (which can be challenged at any time) and fundamental error (which is cognizable on appeal). Appellee claims that because the trial court found one aggravating circumstance and found that the aggravation outweighed the mitigation all the required findings to impose the death penalty were made. Such a claim is without merit.

Appellee claims there was no reason for the trial court to specifically find that sufficient aggravating circumstances exist to justify the death penalty and that Appellant "points to nothing to the contrary which is on point." Appellee's Brief at 77. However, § 921, 141(3) of the Florida Statutes is directly on point, and requires such a finding. Furthermore, § 921.141(3) requires imposition of a life sentence if this finding is not done within thirty (30) days of sentencing. The Legislature's directive is much better than any on point case. The Legislature's directive should not be overriden by the courts as Appellee impliedly advocates. Appellant relies on his Initial Brief on this point.

POINT XII

SECTION 921.141, FLORIDA STATUTES DOES NOT PERMIT A DEATH SENTENCE WHEN THERE IS ONLY ONE AGGRAVATING CIRCUMSTANCE.

Appellee does not challenge that the Legislature uses the plural word "circumstances" in describing the aggravation required to impose the death penalty. However, Appellee in essence argues that this Court has overruled the legislature directive of requiring aggravating circumstances. There is no merit in a claim that a court can rewrite a statute in such a manner.

Appellee notes that because the statue has been held constitutional the present issue has no merit. However, the constitution in not involved in this issue.[7] This is a matter of how to interpret a statute.

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[7] Unless Appellee is claiming that court's have the power to rewrite statutes.

Appellee claims that statutory interpretation is not required because the statue is unambiguous. In that case, because the Legislature was the plural requirement of aggravating circumstances to impose the death sentence should be reversed in the case where there was only one aggravating circumstance. If the statue's use of the plural requirement of aggravating circumstances is ambiguous for reasons stated in the Initial Brief construction of the statute must be in Appellant's favor. Appellee analytically has not challenged this claim.

Appellee claims that the present issue is not preserved. However, the argument is that the death penalty cannot be imposed unless the requisite findings are made. Thus, the issue reaches to the heart of sentencing the error constitutes an illegal sentence (which can be challenged at any time) and fundamental error (which is cognizable on appeal). Appellant relies on his Initial Brief for further argument on this point.

POINT XIII

THE TRIAL COURT ERRED IN RULING THAT THE STATE COULD CROSS-EXAMINE THE MENTAL HEALTH EXPERTS AS TO FACTS WHICH WOULD NOT BE USED AS A BASIS FOR THE EXPERT OPINION AND WHERE THE FACTS WERE UNDULY PREJUDICIAL AND WOULD NOT UNDERMINE THE EXPERTS FINDINGS

Appellee claims that the prosecutor was merely interested in testing the opinion of the experts and a full cross-examination was needed to do so. However, the prosecutor had no legitimate interest in bringing out the German incident - it only strengthened the experts' opinions about the mental mitigators. It is hard to believe

that the prosecutor was interested in bolstering the case for a life verdict. The only real benefit the prosecutor would receive would be to unfairly prejudice the jury. Contrary to Appellee's claims, one can limit the scope of an expert's opinion. Erwin v. Todd, 699 So. 2d 275, 277-78 (Fla. 1997)(expert need not be asked about certain prejudicial evidence which may have added to his opinion). Finally, Appellee claims that the error was harmless because some of the information came out in a roundabout way. However, when one compares what the jury heard at the penalty phase (pages 13-17 of Initial Brief) compared to what was presented at the Spencer hearing (pages 18-28 of the Initial Brief) there is no question that the error was not harmless.

POINT XIV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO INTERVIEW THE JURORS.

Appellee claims that the trial court could not interview the jurors about things that are inherent in the jurors verdict. However, Appellant made no such request. Appellant wanted the jurors interviewed about exposure to publicity. Appellant relies on his Initial Brief for further argument on this point.

POINT XV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED VERDICT FORM WHICH ALLOWED FOR UNDECIDED VOTES

Appellee claims that there was nothing from stopping jurors from casting an undecided vote. However, there was no space on the penalty phase verdict form for a undecided vote. Also, there is no provision of law that prohibits the trial court from

giving jurors that option on a verdict form. Without that option jurors were forced to make a decision. As explained in the Initial Brief this was error.

POINT XVI

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT THE CONSEQUENCE OF AN UNDECIDED VOTE IS A LEGAL MATTER FOR THE COURT TO DECIDE.

Appellant relies on his Initial Brief but would add that despite continuous warnings Ring, supra, etc., the state continues to believe that the trial court may minimize the jury's decision in capital cases by certain remarks.

CONCLUSION

Based on the foregoing Argument and the authorities cited therein, Appellant respectfully requests this Honorable Court to reverse the judgment and sentence of the trial court and remand this cause with such directives as may be deemed appropriate.

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Reply Brief has been furnished to LESLIE CAMPBELL, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, by courier this _____ day of November, 2004.

_____
Attorney for William Coday

CERTIFICATE OF FONT COMPLIANCE

Counsel hereby certifies that the instant brief has been prepared with Courier New 12-point font.

_____
JEFFREY L. ANDERSON
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