IN THE SUPREME COURT OF FLORIDA

PINKNEY CARTER,

Appellant,

v. **CASE NO. SC06-156**

STATE OF FLORIDA,

Appellee.

______________________/

REPLY BRIEF

PRELIMINARY STATEMENT

References to the State=s Answer Brief shall be as AAB@ all other references shall be as set initially.

ISSUE I.

THE COURT ERRED IN DECLARING SECTION 775.051, FLA. STAT. (2002), CONSTITUTIONAL AND REFUSING TO LET CARTER ARGUE THAT HIS VOLUNTARY INTOXICATION PREVENTED HIM FROM FORMING THE NECESSARY INTENT TO COMMIT FIRST-DEGREE PREMEDITATED OR FELONY MURDER, A VIOLATION OF HIS RIGHT TO PRESENT EVIDENCE IN HIS BEHALF, A VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

This Court's opinion in Troy v. State, 948 So. 2d 635 (Fla. 2006) is on point on this issue, and, unless this Court is swayed by the brilliance of Carter's argument and reverses its holding in that case, Carter loses. In it, this Court found the Second and Fourth District Courts of Appeals decisions in Barrett v. State, 862 So. 2d 44 (Fla. 2nd DCA 2003) and Cuc v. State, 834 So. 2d 378 (Fla. 4th DCA 2003) "to be sound and we adopt that reasoning as our own." Troy at p. 645. Carter points out that in Barrett, the Second DCA summarily dismissed Barrett's claim that the State's due process guarantees found in Article I section 9 of the constitution were greater than those found in the Fourteenth Amendment's due process clause when it held "there is no basis to conclude that the Florida Constitution provides greater protections to Barrett than does the United States Constitution in relation to the elimination of voluntary intoxication as a defense to a criminal offense." Id. At 48. On that point, the Second District is wrong. Florida's due process guarantee, while virtually identical

to the Fourteenth Amendment's Due Process clause, Id, at 47, provides greater protections than its federal counterpart. In Traylor v. State, 596 So. 2d 957 (Fla. 1992), this Court explicitly held that under Article I Section 9, the State guarantee of due process had a broader scope than its Fourteenth Amendment cousin. "In any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling." Id. at 962. Traylor, thus, clearly refuted the Second District's holding that Article I Section 9's Due Process clause had no further reach than the guarantee found in the Fourteenth Amendment's Due Process clause.

Because of that greater protection, this Court should reconsider its opinion on this issue in Troy in light of what this Court said in Traylor.

ISSUE II.

THE COURT ERRED IN FINDING CARTER COMMITTED THE MURDERS OF ELIZABETH REED AND GLENN PAFFORD IN A COLD, CALCULATED, AND PREMEDITATED MANNER BECAUSE 1. ITS ORDER LACKS THE UNMISTAKABLE CLARITY THIS COURT HAS REQUIRED, AND 2. THE EVIDENCE FAILS TO SUPPORT THIS AGGRAVATOR, A VIOLATION OF CARTER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

On pages 42 and 43 of Carter's Initial Brief, Carter pointed out that because the trial court had simply presented a "Statement of the Facts" approach to the aggravating factors without any analysis or explanation of why its selective version of what had happened at the Barkwood house justified

finding specific aggravators, appellate counsel had to do that analysis and then refute it. He also pointed out that the "State may have a different analysis, which, of course, Carter can refute in his Reply Brief."

True to that prediction, the State has done this, and equally true, Carter now must attack the facts it used and the analysis it did, not only because they are wrong, but because the State used facts the trial court never found, and an analysis it never made.

First, the facts. The trial court never found the following facts, which the State, in its Answer Brief, claimed supported a finding of the CCP aggravator. Specifically, the court never found:

1. "Even resistance is not really present."

2. "She[Reed] was no threat to Carter."

3. "Mr. Pafford was in shock and did not move much less take any threatening action toward Carter."[1]

4. "The sixteen year old Courtney was attempting to run away when shot."[2]

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[1] Contrary to the State's assertion on page 51 of its brief, Carter never said he went to the Barkwood house to see if Pafford was there (Appellee's Brief at p. 51). He went there to talk to Liz Reed, and again, contrary to the State's assertion on page 65 of its brief, not "to commit aggravated assault if he had to.

[2] This fact is irrelevant because the State never sought to have the CCP aggravator applied to Courtney (23 R 2776). In addition Rebecca, one of Reed's other children

5. "The murders were carried out as a matter of course."

6. "The rifle was not an automatic weapon; it required Carter to release the trigger between shots."

7. "Carter was also required to aim the rifle at each victim who were at opposite ends of the living room."

(Appellee's Brief at pp 58-59)

Indeed, the lower court found virtually none of the facts used by the State used to justify the CCP aggravator, and the only ones it used that the trial court also found relevant to the CCP aggravator were that Carter shot Reed twice in the head, Pafford three times in the head,[3] and Courtney once in the head; and that Carter was an excellent shot. As to this last fact, the court said he was only a "good shot," but that is a minor quibble when compared to the State ignoring the trial court's order and finding its own facts to justify the lower court's conclusion.

But if it ignored the facts, it, like the trial court, also never used the analysis this Court articulated in Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994) and

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was either in the living room or nearby at the time of the homicides (13 R 889, 18 R 1536).

[3] Thomas Pulley, the FDLE analyst who testified about how close the gun was from Pafford said that it was probably within 6 inches of him when fired (16 R 1365). Yet, he also testified that the bullet's stippling, which tends to be on objects when the gun

Lynch v. State, 841 So. 2d 362 (Fla. 2003). Instead, it used its own approach by citing Diaz v. State, 860 So. 2d 960, 970 (Fla. 2003) for the proposition that "advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course" can show a murder to have been CCP.

Carter, in his Initial Brief, also used Diaz in his analysis of the cold and calculated parts of the CCP analysis, but he did so by way of distinguishing it from his case.

For example in Diaz, the defendant, several days before the murder of his estranged lover's father, impatiently bought a hand gun and ammunition. In this case, Carter had owned the .22 caliber rifle since 1977(15 R 1315, 16 R 1350, 1352), and fortuitously rather than deliberately he had it stored in his truck.[4] He grabbed it as he climbed out of it and went to Reed's house (16 R 1523-25). There was no advance procurement of the rifle so he could kill Reed, Pafford, and Smith, as there was in Diaz.[5]

As to the provocation, the Reed/Carter relationship had blown hot and cold

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is close to them, could have been found on Pafford even if the gun was fired 18 inches to 2 feet away (16 R 1463)..

[4] Contrary to the State's claim on page 58 of its brief, there was no testimony of whether gun's safety was off or on, or that Carter switched it off when he took the rifle out of the truck.

for months. In the winter of 2001, after he had saved her from being tossed onto the streets, they had become engaged and lived together at the Barkwood house. By May, Reed backed out of the engagement, returned his ring, and he moved out. Yet, despite this obvious breakup, they continued to see each other weekly and have sexual relations as often. Even the Sunday before the killings, Reed and Carter had had sex as usual when she came to his apartment (16 R 1519), and they agreed to meet the following Tuesday (16 R 1521). She stood him up (16 R 1522), however, and when he drove by her house(which he had lived in only a few months earlier), he saw Pafford's truck. When he called her home a short time later Reed's son told him he was not there, an obvious lie. Who would not be hurt and confused by Reed's on one day, off the next attitude toward Carter? Carter and any other reasonable person would have been angry and provoked at being made to play the fool.[6]

The murders also were not carried out "as a matter of course." There was no inevitability to them. They happened quickly, and as a result of the unanticipated struggle for the rifle.

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[5] That Carter also stopped at several ATMs after the murder to get money and as he fled shows a lack of heightened premeditation ((15 R 1256-57).

[6] These legitimate emotions could have become more quickly unleashed by the antidepressants Prozac or Fluoxetine and alcohol he took a few hours before the killings (16 R 1523-25). The online Physicians' Desk Reference,

Finally, the State argues that if the trial court erred in finding the CCP aggravator, it was a harmless error. For the reasons presented on pages 58-59 of the Initial Brief, this Court cannot find it so.

ISSUE III.

> THE COURT ERRED AS A MATTER OF LAW IN INSTRUCTING THE JURY AND FINDING THAT CARTER COMMITTED THE MURDERS DURING THE COURSE OF A BURGLARY, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The question presented by this issue is whether the revised definition of burglary, section 810.015 Fla. Stat. (2001), when used to justify a sentence of death, "genuinely narrows" the class of first degree killers. As argued in the Initial Brief, it not only does not do that, it expands that narrow class to encompass virtually every first degree murder. The State, in its Answer Brief, says nothing on that question.

Instead it seeks to short circuit this argument by claiming that the evidence showed Elizabeth Reed never consented to Carter coming into her house, so he was guilty of burglary under a classic "lack of consent" theory. Delgado v. State, 776 So. 2d 233 (Fla. 2000), even if it has relevance to capital sentencings, as Carter argues, does not apply in this case, and this

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(www.pdrhealth.com) cautions that people taking prozac should not drink alcohol, and among the side effects of taking too much prozac are delirium and mania.

Court, therefore, need not even consider his argument on this issue.

(Appellee's brief at pp. 65-66).

Yet, as presented at trial, the facts were ambiguous and conflicting. Reed had invited Carter into the home. "She had already opened it [the front door], but she opened it more for me to come in, and I'm not sure if she opened it for Mr. Pafford too, but I know he came in." (17 R 1532-33).[7]

Thus, with the evidence conflicting on this issue, the court could have instructed the jury under the old instruction on burglary. Gregory v. State, 937 So. 2d 180 (Fla. 4th DCA 2006)("A criminal defendant is entitled to have the jury instructed on the law applicable to his or her theory of defense where there is *any* evidence to support it, no matter how weak or flimsy.") It chose, however, to instruct the jury on burglary as defined under the revised burglary statute (3 R 515-16). It never gave a Delgado type limitation on what entries could not become burglaries. So the jury's felony murder verdict, at least as it pertains to the sentencing phase of the trial, is invalid because the

[7] Contrary to the State's argument (17 R 1662), Carter never forced his way into the house. He also may have had a right to come inside because he had helped buy the home, had lived in it for two years, and had left only two or three months earlier. Moreover, in January 2002, he had paid Reed's delinquent mortgage bills and that month's debt as well (16 R 1501, 1503), and it is reasonable to assume he continued to pay at least part of the mortgage every month at least until May or June 2002, since by herself, Reed habitually had insufficient income to meet her financial obligations on

jury could never consider, for penalty phase purposes, whether Reed consented to Carter coming into the Barkwood house. C.f., Yates v. United States, 354 U.S. 298, 312 (1957).

Because of that failing to give a penalty phase instruction that comports with the old definition of burglary and this Court's ruling in Delgado, this Court must consider whether that case applies to the sentencing phase of a capital trial, or whether the revised definition of burglary "genuinely narrows" the class of persons eligible for a death sentence.

Moreover, the trial court had no right to invade the exclusive province of the jury to find facts and declare that "The testimony conclusively establishes that the Defendant unlawfully entered and/or unlawfully remained in the dwelling of Ms. Reed with the intent to commit at minimum an assault therein." (4 R 698-99, 703) First, finding facts, and resolving factual conflicts is within the exclusive jurisdiction of the jury. Apprendi v. New Jersey, U.S. 530 U.S. 446 (2000); Ring v. Arizona, 536 U.S. 584 (2002). Second, the evidence as "conclusively" supports Carter's claim that Ms. Reed invited him inside.

Now, as to whether the 2001 redefinition of burglary "genuinely

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the note. contrary to the State's argument (17 R 1662), Carter never forced his way into the house.

narrows" the class of persons eligible for a death sentence, the State says precious little. Indeed, it is hard to imagine how it could make that claim, and it is to its credit that it does not try to do so.

On page 69 of its brief, the State faults Carter for the "serious flaw in the logic of the aggravators being 'automatic.' . . . But counsel fails to explain what the constitutional problem with [certain fact patterns giving rise to certain aggravators.]" Justice Anstead in his concurring opinion in Blanco v. State, 706 So. 2d 7, 12 (Fla. 1997) provided that explanation: "Rather the felony aggravator used there would make the entire large group of felony murderers automatically eligible for the death penalty without proof of any additional aggravating misconduct. Hence, the felony aggravator serves no legitimate narrowing function in this case." (Emphasis in opinion.)

Beyond Justice Anstead's argument, we have in this case a dramatic widening of the death penalty net by the simple expedient of redefining a crime that can be used to justify felony murder. By analogy, if the legislature had redefined premeditation as any act that results in the death of another, would this Court find Florida's death penalty statute constitutional in light of such a broad redefinition of that term? Similarly, here, when the legislature significantly redefined burglary in 2001 to include far more than the common law, or the previous statutory definition, contemplated, it included within that

new statute's sweep acts that until then had not been considered a burglary.

Thus, while the 2001 legislature defined burglary, it was a definition so at odds with the previous notion of that crime that it amounted to a new crime altogether, and it was not the one contemplated by the legislature in 1972 when it first enacted section 921.141 Fla. Stats (1972) that defined the prior violent felony aggravator.

ISSUE IV.

THE COURT ERRED IN GIVING GREAT WEIGHT TO THE AGGRAVATING FACTORS 1) THAT CARTER COMMITTED THE MURDERS IN THE COURSE OF COMMITTING A BURGLARY, AND 2) THAT HE HAS A PRIOR CONVICTION FOR A VIOLENT FELONY, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

On page 72 of its brief, the State says, "Moreover, a jury's life recommendation in one murder does not limit the judge's discretion in weighing aggravators in the other murders." Well, yes it does because when this Court conducts a proportionality review, the significance of those factors becomes important. Moreover, with "status" type aggravators, such as the prior violent felony and during the course of a burglary, the weight should be the same regardless of the number of victims. Carter could understand the different significance given to aggravators such as especially heinous, atrocious, or cruel; or cold, calculated, and premeditated because those almost by definition focus

on what the defendant did to a specific victim. But when a particular aggravator, such as a prior violent felony, has a "universal" and equal application to each victim, they should have equal weight when applied to them. If the trial court believed they deserved different weight than that given by the jury, or that it should have had more or less significance depending on the victim, it should have made that finding explicitly and unmistakably clear why this type of aggravator merited a different weight.

In this case, the trial court gave no explanation why the prior violent felony and during the course of a burglary aggravators should receive greater weight for the Reed and Pafford murders than that given by the jury when it recommended life for the Smith homicide.

Moreover, while the court has discretion in weighing aggravators, it is a very limited type of freedom. In State v. Dixon, 283 So. 2d 1 (Fla. 1972), this Court said, regarding the discretion given a sentencing judge in determining if a defendant should live or die:

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live

> and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, Supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

Reasoned judgment. In this case, there was no reasoned judgment when the Court incanted a mantra that the prior violent felony and during the course of a burglary aggravators, that applied equally to the murder of Courtney Smith, could, individually, justify a death sentence. There was no reasoned judgment because the jury had clearly rejected that conclusion, and if their recommendation in her death deserves "great weight," Tedder v. State, 322 So. 2d 908 (Fla. 1975) then, as a corollary, their rejection of the only aggravators that could justify a death sentence must also have great weight. When nothing existed to distinguish the application or weight those aggravators deserved in her murder from the Pafford and Reed killings, the trial court abused the limited discretion it had in finding that either one of them, by themselves, could justify a death sentence.

On page 73 of its brief the State says, "A judge is not bound by a jury's determination of the weight to be given the aggravators and mitigators. So, even if the jury rejects an aggravator, the judge is not required to do likewise." So, according to the State's argument, a judge can find facts, and it can find facts the jury has clearly rejected. That approach has serious constitution problems. Apprendi v. New Jersey,

530 U.S. 446 (2000); Ring v. Arizona, 536 U.S. 584 (2002).

The States says, on page 73 of its brief, “But, in fact, in this case, we do not know what weight the jurors assigned to these two aggravators.” [8] Well, yes, we do, because when they recommended a life sentence for the murder of Smith, they found these two aggravators had insufficient weight to overcome the mountain of mitigation Carter had presented.

Finally, on page 74 of its brief, the State says this error was harmless because “The trial court also assigned great weight to the CCP aggravator,” and that it, by itself, would justify a death sentence. But, it made the same claim regarding the other aggravators, so one wonders how much thought this judge gave to the weighing process. This Court should reverse the lower court’s sentence of death and remand so it can give serious, considered attention to the whether this single aggravator, by itself, can justify executing Carter.

ISSUE V.

THE COURT’S SENTENCING ORDER LACKS THAT UNMISTAKABLE CLARITY THIS COURT HAS DEMANDED SUCH ORDERS HAVE WHEN THEY FIND THE DEFENDANT DESERVES TO BE SENTENCED TO DEATH, A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

[8] The State also says Carter “admitted, on the stand, the he intended to murder Reed and Pafford but claimed he did not intend to murder Smith.” (Appellee’s brief at p. 73.) Carter admitted shooting Reed and Pafford, but he never admitted murdering them (17 R 1534-35, 1537, 1752-57).

If we accept the State's assertion on page 77 of its brief that the jury's life recommendation for the murder of Courtney Smith was "not mitigating evidence," the question remains of whether the trial court can simply ignore it in deciding whether Carter should die for the murders of Reed and Pafford. If proportionality review, which involves more than looking at aggravators and mitigators, requires a court to compare similar cases to insure a uniformity of result, then in this case, the trial court should have explained why, in light of the life sentence it imposed for the murder of Smith, Carter should be executed for the other murders, especially when they arose at the same time as the murder of Courtney. In this case, it was as if Smith's homicide had no relation or relevance to the analysis of the Reed and Pafford murders. Whether the life recommendation fits the "textbook definition of mitigating evidence," (Appellee's brief at p. 77) is irrelevant. To insure the uniformity of sentencing, not only on a statewide basis, but within the case itself, the sentencing court must consider the jury recommendations in the other murders arising from the same facts as those involved in the death recommended homicides.

The State on page 78 tries to distinguish Smith's murder from Pafford's and Reed's by saying "Carter's testimony was that he accidentally shot Courtney but just plain shot Ms. Reed and Mr. Pafford." The jury rejected

that assertion because it found he had killed each victim with premeditation (4 R 548-54).

Also, on page 78 of its brief, the State says , "The trial court, in its sentencing order does not have a section entitled cumulative mitigation as a separate mitigator to be consider by itself. But that is understandable. Cumulative mitigation is part of the weighing process."

If cumulative mitigations is part of the weighing process, the court's sentencing order should have made that analysis unmistakably clear. In this case, and the entire point of this issue is that if the trial court did that, nowhere in its order does it mention any sort of "totality of the circumstances" analysis. To the contrary, it appears the court simply listed all the mitigation and considered it only on an item by item basis, and not surprisingly gave "some weight" to each offered mitigating factor.

The State, on page 79 of its brief, says "There is no requirement that the judge reduce his weighing to writing and this Court should not create one." If, in State v. Dixon, 283 So. 2d 1 (Fla. 1972), this Court said the ultimate objective of death sentencing is a reasoned judgment rather than an exercise of discretion, then why should not this Court move in the direction of a reasoned, articulated judgment by requiring judges who intend to put a man or woman to death to explain why the aggravation outweighs the mitigation or that the case

presents the strongest aggravation and weakest mitigation.

The point of this issue is that the court's sentencing order lacks the unmistakable clarity this Court has required of orders sentencing defendant's to death. With a man's life in the balance, expecting a court to clearly state why it is imposing a death sentence and presenting clear evidence that it has considered and weighed all the mitigation is a reasonable requirement.

CONCLUSION

Based on the arguments presented here, the Appellant, Pinkney Carter, respectfully asks this Court to do one of the following: 1. Reverse the trial court's judgment and sentence and remand for a new trial. 2. Reverse the trial court's sentence of death and remand for imposition of a life sentence. 3. Reverse the trial court's sentence of death and remand for a new sentencing hearing before a new jury, or 4. Reverse the trial court's sentence of death and remand for a new sentencing hearing before the judge only.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Trisha Meggs Pate, Assistant Attorney General, counsel for the State of Florida, by U.S. Mail to The Capitol, Tallahassee, FL 32399-1050; and to Mr. Pinkney Carter, DC# 127513, Florida State Prison, 7819 N.W. 229th Street, Raiford,

FL 32026, on this _____day of April, 2007.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that pursuant to Rule 9.210(a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

Respectfully submitted,

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REPLY BRIEF OF APPELLANT

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