IN THE SUPREME COURT OF FLORIDA

CHARLES C. PETERSON,

Appellant, Case No. SC06-252

vs. Lower Ct. NO. CRC00-05107-CFANO

STATE OF FLORIDA,

Appellee.

_____/

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant, Charles Peterson, will respond to Issues I, III, and IV. He will continue to adhere to the facts, arguments, and citations of law and authority as contained in the Initial Brief for these Issues as well as the remaining Issues not addressed in this Reply Brief.

ARGUMENT

ISSUE I

THE WILLIAMS RULE CLAIM
(as referred to by the State)

In the Initial Brief Mr. Peterson argued that the introduction of extensive Williams Rule testimony was reversible error in this case. Mr. Peterson maintains the evidence of three other robberies did not meet the degree of similarity required for admission to establish identity/MO, that the prejudicial impact of this evidence far outweighed its probative value, and that the testimony of the 22 Williams rule witnesses impermissibly became a feature of the trial for the charged crime.

There is no dispute between the parties as to the statutory basis for Williams rule evidence, preservation of the issue, and the standard of appellate review applicable to this issue.

A. Insufficient Similarity to Prove Identity

Mr. Peterson argued, and the State agreed that collateral crime evidence must have a striking similarity to the charged crime with unique and special characteristics that sets the offenses apart from others. [Initial Brief, p.46 and Answer Brief,p.35] Mr. Peterson maintains his position that the required unique and special characteristics necessary for admission of the collateral evidence was lacking in this case.

The State argues that the sum of the factors present in each case is collectively considered in order to determine admissibility. Mr. Peterson does not disagree with this premise. However, there exist only three points of similarity that are collectively present in all of the three collateral crime robberies and this one. These are the use of a firearm, the use of a mask, and some evidence that the perpetrator remained in the store after closing as a means of facilitating the robbery. While there are additional points of similarity between this case and the individual collateral case, these additional factors are not present in all of the four cases. Even when the additional factors present in some of the cases, such as the use of profanity, race of the perpetrator, directing

the employees to “not look at him”, and occasional use of some materials to tie some of the employee’s hands, the collateral evidence still fails to meet the high standard necessary for admissibility to establish identity. Even when the common features are considered in conjunction with each other, they must establish a sufficiently unusual pattern of criminal activity that points inexplicably to the defendant. Drake v. State, 400 So.2d 17 (Fla. 1981). Mr. Peterson does not agree with the State’s argument that Florida courts have authorized the use of collateral crime evidence with far less compelling circumstances to establish identity.[Answer Brief, p.38] The cases relied upon by the State for this proposition are distinguishable or inapplicable to this case under the following analysis.

Decided in 1970, Bryant v. State, 235 So.2d 721 (Fla. 1970), upheld the admission of Williams rule evidence in a murder prosecution where a laundromat attendant was killed from a gunshot wound to the head coupled with collateral evidence that five days earlier the defendant had robbed a bar and hit a patron in head with a gun. Bryant’s fingerprints were found on a telephone in the laundromat that had been ripped from the wall. Bryant denied the murder and argued his prints could have been left on the

phone at another time. Without elaboration of the facts of the offense and the collateral offense except a conclusory observation that the two crimes were useless acts and sadistic in nature, this Court affirmed the use of the collateral evidence. Bryant simply does not contain sufficient facts to support continued contemporary analysis and applicability. Since 1970, this Court has consistently and cogently narrowed the admissibility of collateral crime evidence and has provided significantly more analysis of the factual basis that supports its rulings.

Johnston v. State, 863 So.2d 271 (Fla. 2003) is a case that illustrates this point. In Johnston this court upheld the admission of collateral crime evidence in the defendant's first-degree murder trial of a murder six months later that the defendant had admitted to committing. The collateral evidence established that second victim was strangled, beaten with a belt which left distinctive marks, and her body was left in a shallow pond after her death to destroy evidence according to Johnson's statement. Johnson admitted he wanted to return the body to her apartment, but was afraid to do so in case she had an alarm system. Johnson knew the victim, as they lived in the same apartment complex. The defendant admitted to this murder.

The first victim was beaten with a belt, strangled with great force and in a violent manner, and left submerged in a bathtub in her home after her death. Johnston knew the victim, his fingerprints were found on the cold water handle of the bathtub faucet and his DNA was found on linens taken from the victim's bed. Shoe prints found in the victim's kitchen were consistent with Johnson's. Both victims were blonde, single, white females. Johnson knew where both women lived and knew both women prior to the murders. Both victims were strangled, at times from behind, and the strangulation left multiple and distinct contusions on the neck of each victim. Both were beaten by a similar instrument on the buttocks, which left severe, distinct bruising. This last fact in particular stood out as a unique feature and was critical in this Court's decision upholding the admissibility of the collateral crime evidence.

This Court noted minor dissimilarities between the charged offense and the collateral offense-the ages of the victims, one nude-one in underwear, and the location of the killings- but found the numerous shared points of unique similarity overrode the minor inconsistencies.

In upholding the ruling of the trial court in

Johnston, this Court clearly identified an unmistakable unique and distinct pattern of facts that were sufficiently unusual and established a unique pattern of criminal activity that was distinguishable from other strangulation murders. A similar detailed fact pattern is absent from the Bryant opinion and cannot be established in this case consistently between the four cases.

The State relies upon Randolph v. State, 463 So.2d 186 (Fla. 1984) as well. Randolph, with the assistance of his prostitute girlfriend Glinton, concocted a scheme where the clients were accosted and robbed by Randolph while engaged in sexual activity. In permitting collateral evidence of an attack that occurred several days before the murder that Randolph was tried for, this Court noted that the two events occurred at the same area, within days of each other, involved the same participants, and the same identifiable weapon. Again, any dissimilarities, which was primarily that the first victim was not killed, were minor. In this case there is no evidence that the same weapon was used, as the descriptions of the weapon vary from case to case. There is no evidence of identical multiple participants and no evidence from a co-defendant. The incidents were separated by months rather than days. There

was no evidence to indicate these stores were located in close proximity to each other. Simply put, the evidence in the collateral offenses and this offense was not so different to distinguish these crimes from the "garden variety" convenience store/store robbery.

The cases of State v. Ackers, 599 So.2d 222 (Fla. 5th DCA 1992) and Black v. State, 630 So.2d 609 (Fla. 1st DCA 1993) cited by the State illustrates this point. In Ackers the robberies occurred at fast food stores, with the same weapon [a gun which was fired], right at closing time, employees were confronted, brought together, forced to lie on the floor, and a manager was ordered to get the store till. The perpetrators were black males. The factor that made the fact pattern unique in the Ackers case was the presence of a rather unusual weapon- a broomstick and evidence that the same model and make of vehicle was used as the get away car in both cases. It is a good thing that Mr. Peterson was incarcerated at the time of Akers offense and that others were convicted of it before Mr. Peterson went to trial, for under the State's theory, Akers could have been admitted as collateral crime evidence against Mr. Peterson as well.

In Black, supra., the defendant was charged with three

separate robberies of "big box" stores. Each robbery happened at closing, money and merchandise was stolen, each happened on a weekend, in each case the employees were ordered at gunpoint to a confined area, the phones were disabled, and the black perpetrator wore a flannel shirt, ski mask, and gloves. Luckily for Mr. Peterson Mr. Black was convicted of these crimes for had they been unsolved at the time of this trial, the State could have used them as Williams rule evidence against Mr. Peterson.

The fact pattern of a robbery committed with a gun at closing where the employees of the business are held together while the proceeds are obtained has become the "norm". This is simply not a unique fact pattern.

The type of fact pattern that satisfies the criteria for admissibility of identity or M/O requires at least one similar and highly distinguishing fact in the pattern. For example, the highly unusual use of arsenic poisoning of three spouses/lovers in Buenoano v. State, 527 So.2d 194 (Fla. 1988) or the virtual fingerprint similarity of the abduction/murder scenario on a fishing boat used in Chandler v. State, 702 So.2d 186 (Fla. 1997), the unique robbery of only gumball machines in Mutcherson v. State, 696 So.2d 420 (Fla. 2nd DCA 1997), the assault of three

female patients under identical circumstances by the same doctor in State v. Richman, 861 So.2d 1195 (Fla. 2nd DCA 2003), the identical clothing worn by the perpetrator of three armed robberies in Black or the broomstick weapon in Ackers. There are insufficient unique factors, whether viewed cumulatively or individually, to support the admission of the collateral evidence in this case.

There are also significant dissimilarities between the cases as well. In only one case, the Family Dollar case, were the victims sexually assaulted. This is not a minor dissimilarity. In the McCrory's case only the manager was accosted-no other store employee's were rounded up or confined. This is not a minor difference.

It is clear that just because two offenses are the same, they do not qualify as sufficiently similar to meet the stringent standard applicable to this issue. See, Peek v. State, 488 So.2d 52 (Fla. 1986); Drake v. State, 400 So.2d 1217 (Fla. 1981) Recently, in Gadson v. State , 941 So.2d 573 (Fla. 4th DCA 2006), the district court reversed the defendant's conviction due to the erroneous admission of collateral crime evidence. The defendant was charged with burglary and the State introduced evidence of second residential burglary as collateral evidence to prove

identity/MO. In Gadson the burglaries were accomplished when the owners were outside in the yard and a rental car from the same agency was used in both. The burglaries happened on different days, in different areas of town, and at different times of day. In reversing, the Fourth District noted that there was nothing to distinguish the charged offense and the collateral offense from many "common garden variety burglaries." In this case the rationale of Peek, Drake, and Gadson must be applied to the collateral crime evidence and this Court should determine that it was not admissible to establish identity or M/O.

B. Intent/Motive

The trial court also determined that the collateral crime evidence was admissible to prove intent and motive for the defendant to use additional violence. The court's reasoning appeared to be that in addition to taking money, the defendant wanted to accomplish this purpose with a higher degree of violence than what was necessary. The trial court's ruling is incorrect.

First, the facts of the combined four cases do not establish a heightened degree of violence beyond that often associated with robberies. By its very definition, a robbery can only occur when the taking is accomplished by

use or threat of violence or fear. Holding a gun on the victims and threatening to shoot if the wishes of the perpetrator are not carried out is, unfortunately, not uncommon, but rather the norm. Most cases admitting collateral evidence to establish intent/motive arise when the defendant claims mistake or lack of intent. The cases cited by the State support this argument.

In Bradley v. State, 787 So.2d 732 (Fla. 2001)[State's Brief,p.43], the defendant was charged with the contract killing of the victim at the request of the victim's wife after she learned of the victim's affair with a teenage girl. The defendant claimed the death was accidental. To rebut this defense, the State admitted Williams rule evidence that a week before the victim was killed, the defendant went to the home of the teenage girlfriend at the wife's direction to get a diamond ring from the girl, threatened her, and broke out the car windows of the teen's car. The State used this evidence to show that the defendant obeyed the directions of the wife and that the general motive was to punish the victim for the affair. The State had to prove a key point at trial- intent and premeditation, as well as participation in the conspiracy with the wife, hence the dissimilar collateral crime

evidence was admissible. In this case, during guilt phase, the State did not have to prove "enhanced violence" as a material point. The only thing proved by the collateral evidence in this case was propensity and bad character. Since the evidence was not relevant for any material point under Bradley, admission on the basis of intent/motive was error.

In Johnston v. State, 863 So.2d 271, supra., the defendant was charged with sexual battery and murder. He claimed innocence. As in Bradley, the State had to prove premeditation and intent-material elements in the prosecution. Thus, collateral evidence of a strikingly similar strangulation murder that occurred six months earlier was admitted to show absence of mistake. In this case, once again, heightened violence was not a material element the State was required to prove, negating the need for collateral evidence on this point. See also, Conde v. State, 860 So.2d 930 (Fla. 2003)(evidence of five prior murders of prostitutes was admissible in defendant's murder trial of sixth prostitute where defendant claimed that the death was not the result of premeditation, but rather the result of "instantaneous combustion" of anger at wife) and Titel v. State, 788 So.2d 286 (Fla. 4th DCA 2000)(evidence

of two prior sexual batteries ten years previous not sufficiently similar to current charge of sexual battery, evidence only established bad character and propensity).

The State does not cite to any case in support of the Court's ruling that is not distinguishable on the grounds that the collateral evidence was necessary to prove a material fact in issue-usually premeditation. Because enhanced violence was not a material fact in issue in this case, the collateral evidence should have been excluded for this point.

C. The Probative Value Was Outweighed by the Prejudicial Impact and the Collateral Evidence Became a Feature of the Trial

Mr. Peterson argued against the admission of the collateral evidence in his case because it would become a feature of the trial and because any probative value of the evidence was outweighed by the prejudicial impact.

As part of his argument that the collateral evidence became an impermissible feature of the trial, Mr. Peterson argued that the volume of collateral evidence admitted in this case should be considered as one factor in the analysis. At no point did Mr. Peterson suggest that quantity was the only factor to be considered.[Initial

Brief, p. 53-54] To rebut Mr. Peterson's argument that the 22 collateral crime witnesses that accounted for approximately 75% of the evidence was impermissibly excessive, the State relies on several cases, each of which is distinguishable.

In Conde v. State, 860 So.2d 930, supra., the defendant was charged with six prostitute murders. During trial for one of those murders, the State introduced collateral evidence of the five prior murders. This was done to rebut the defendant's claim that the charged offense was not premeditated. The State's presentation of the collateral evidence lasted less than six hours, a single ME, a single serologist, and a single DNA expert was called for all the cases and only eight other witnesses were called on the collateral crimes. In contrast to Conde, the State in this case called 22 witnesses who testified about only three prior offenses, and the collateral evidence testimony lasted the entire day of trial on July 21st (the third day of trial and first day of testimony), six out of seven witnesses on July 22nd, 11 out of 16 witnesses on July 25th (the third day of testimony), and all 4 witnesses on the final day of testimony on July 26th. The length, breadth, and depth of

the collateral crime evidence in this case far exceeded that utilized in Conde. In this case the only scientific/serology/DNA evidence that was admitted came from collateral evidence.

In Snowden v. State, 537 So.2d 1383 (Fla. 1st DCA 1989), the opinion states that one third of the evidence and about half of the witnesses were related to the collateral crime evidence. In Mr. Peterson's case, two thirds of the witnesses were collateral witnesses and roughly seventy-five percent of the evidence related to collateral crimes.

This Fourth District Court of Appeal permitted extensive collateral crime evidence to be admitted in Townsend v. State, 420 So.2d 615 (Fla. 4th DCA 1982). Roughly twice as many pages of transcript and exhibits were collateral evidence as opposed to evidence of the charged crime. However, the defendant had confessed to the three cases for which he was being tried and the six collateral cases. All were strangulation murders of prostitutes. While Townsend upholds the admission of the evidence, under the more recent Conde standard, it is unlikely that such excess would be condoned.

Two cases cited by the State, Ashley v.State, 265

So.2d 685 (Fla. 1972) and Hawkins v. State, 206 So.2d 5 (Fla. 1968) do not contain sufficient information for a quantitative analysis. Although in both case evidence of multiple prior offenses was permitted, the opinions do not contain any indication of how extensive the collateral testimony was, including how many witnesses or how many pages of transcript was spent on collateral crime evidence versus the charged crimes.

Stano v. State, 473 So.2d 1282 (Fla. 1985) is of little comparative value with this case because the collateral evidence was admitted during the penalty phase in Stano. The State is permitted to introduce evidence of not only the defendant's prior record, but the facts behind those prior convictions in penalty phase. The considerations of prejudice simply do not apply with the same degree of force in penalty phase proceedings as they do in the guilt phase.

The State has not specifically addressed prejudicial nature and the quality of the collateral evidence in this case. Mr. Peterson maintains the contrasts between the collateral witnesses (DNA experts, fingerprint identification experts, shoeprint identification experts population statisticians, and close friends of Mr.

Peterson) and the witnesses related to the charged offense are striking. The State, through sheer quantity of testimony coupled with a plethora of scientific experts, lay witnesses, and the victims from the collateral offenses succeeded in distracting the jury from the real case on trial. The State impermissibly made the far more compelling collateral crime evidence a feature of this case and unjustly secured a conviction based upon inflammatory evidence of propensity. The current conviction should be overturned and this case remanded for a new trial.

ISSUE III

THE PROPORTIONALITY CLAIM
(As referred to by the State)

In his Initial Brief, Mr. Peterson argued that a death sentence was not proportional in this case because it was not the most aggravated and not the least mitigated. Mr. Peterson maintains that although his case is not without aggravation, the facts at trial are absent of the excessively brutal and cold fact patterns that permeate many first-degree murders. The absence of those factors, HAC and CCP were never argued to be controlling, but their absence is recognized by this Court as relevant. Death sentences should be imposed for only the most aggravated of

first-degree murders. Recidivism, as evidenced by prior convictions and contemporaneous supervision status, should not be considered sufficiently severe to warrant the application of the most condemned punishment in modern western civilization.

Mr. Peterson disagrees with the State's contention that the cases of Urbin v. State, 714 So.2d 411 (Fla. 1998) and Terry v. State, 668 So.2d 954 (Fla. 1996) should not be used in comparison to this case because Urbin and Terry were teenagers. These cases are similar to Mr. Peterson's case based upon the testimony of Dr. Maher that Mr. Peterson functions at the equivalent of a 14-16 year old coupled with Dr. McClain's testimony that Mr. Peterson has a borderline to low-average range IQ. The trial court accepted Mr. Peterson's claim that his biological age differed from his mental age by finding that his age coupled with emotionally maturity was entitled to little weight. While Mr. Peterson may be biologically older than Urbin or Terry, his functional abilities are consistent with a teenager and with the ages of the defendant's in those cases. Thus, the reasoning of those cases is applicable.

Mr. Peterson maintains his argument that a death

sentence is disproportionate under the facts of this case.

ISSUE IV

The Penalty Phase "Lack of Remorse Claim" (as termed by the State)

In the Initial Brief Mr. Peterson argued that the trial court impermissibly permitted the State to introduce evidence of an invalid aggravator-lack of remorse-during the penalty phase and the argue that evidence to the jury as a basis for a death recommendation. Mr. Peterson does not accept the State's argument that he is procedurally barred from raising this claim.

A. Procedural Bar

The State argues that defense counsel did not object to any of the State's penalty phase closing arguments, thus failing to preserve the issue for appellate review. The record reflects that during the State's cross-examination of Dr. Maher, defense counsel lodged a contemporaneous objection to any questioning of Dr. Maher that would elicit evidence on lack of remorse. (XVI,T2713) The objection was overruled and the State continued with that line of questioning. Defense counsel attempted a second time to forestall the improper introduction of evidence of lack of remorse when the State questioned Dr. Maher about Mr.

Peterson's lack of empathy for others, again overruled.(XVI,T2725) These objections demonstrate that trial counsel was seeking to limit the presentation of impermissible evidence and the basis for that objection, but was overruled by the trial court on each occasion. Defense counsel's objections were contemporaneous and preserved any appellate issue related to the introduction and consideration of evidence supporting an impermissible aggravator based on lack of remorse.

The State's argument that no objection was made during closing arguments by the defense overlooks the bench conversation between the judge, prosecutor, and defense attorney that occurred just prior to closings.(XVI,T2777) The judge engaged in an lengthy admonition to counsel for both parties about what arguments would be permitted. (VI,R2772-2780) Immediately following a lengthy argument between the court and State about limitations on the State's ability to argue the weighing process of aggravators and mitigators, the trial court addressed the remorse issue.(XVI,R2776) The court prefaced her comments by noting that "I understand Mr. Watts' objection. If you take it a step further, we'll just—I first, of all, caution you not to. But second, I'm going to stop anything that

indicates to them that they must or shall do something on the basis of---". After some response from the State, who believed that they were unfairly being singled out, the court continued to expound on the limitations on closing arguments. The trial court stated "There was a specific issue that came up previously in questioning, and we had a discussion at the bench about the subject matter of showing mercy. And I stated at the bench from my review of the case law—and I'm going to state it again—that there can't be any argument of lack of showing of mercy as any type of aggravating circumstance. The only argument that can exist on the part of the State is in response to the Defense attempting to use that as a mitigator. I haven't heard that as a mitigator offered here." (XVI,R2778) Defense counsel agreed to the last statement of the court.(XVI,R2778) The trial court continued "I would expect the State not to be making an argument about it. But since there seems to be some disagreement here, is that going to be an issue, Mr. Crow?". The State responded he would not argue what he considered unauthorized aggravators, but clarified with the court that he would be permitted to argue the testimony that the State elicited regarding Dr. Maher's basis for saying that Mr. Peterson was substantially impaired and

could not empathize and understand the suffering he'd inflicted on the victim, and he did intend to discuss that. The trial court advised both parties that she felt that the argument by the State regarding Dr. Maher's testimony "falls within the confines of what I just said." XV(,T2679) The trial court advised the parties that in her opinion, evidence of lack of remorse had not been introduced, but the prosecutor would be permitted to argue lack of empathy and the feelings for others in accordance with Dr. Maher's testimony. Additional objection by defense counsel to this argument would have been futile in light of the trial court's ruling. (XVI,2680) The purpose of an objection is to provide the trial court an opportunity to give a curative instruction or otherwise admonish counsel against further such comment. Nixon v. Florida, 572 So.2d 1336, 1341 (Fla. 1990). In this case, the trial court had already made her position and ruling clear prior to the start of argument. The trial court clearly advised the parties that she would permit the State to argue that Mr. Peterson had no empathy for his victims or their suffering, thus the purpose of an objection was accomplished.

If this Court were to determine that the exchange between the trial court and parties did not preserve the

comments of the prosecutor's closing argument comments about lack of empathy, such error would constitute fundamental error. Fundamental error is error which reaches down to the validity of the trial itself [in this case the sentence recommendation] to the extent that the verdict or recommendation could not have been achieved without the assistance of the error. Card v. State, 803 So.2d 613, 622 (Fla. 2001). In order to constitute fundamental error in closing arguments, the prosecutor's comments are considered in the aggregate and must be fairly egregious. Card, Ibid.; Cherry v. Moore, 829 So.2d 873, 882 (Fla. 2002). The Initial Brief outlined the full content of the prosecutor's statements, which included emphasis on Mr. Peterson's lack of empathy and lack of regard for his victims, yet possessed those same qualities for others. The prosecutor argued that Mr. Peterson didn't care about the suffering of any of his victims. (XVI,T2797;2799) These comments are certainly beyond fairly egregious.

The final argument in the State's brief couched in procedural bar requires a convoluted reading of the record. The State argues that because defense counsel did not file the "Motion Regarding Penalty Phase" until October 3, 2005 [the date of September 30, 2005 appears in the certificate

of service of the motion], that Mr. Peterson should be barred from pursuing this claim on appeal. The State's argument is misleading because it omits the flurry of exchanges and hearings that were being conducted on the question of juror misconduct premised on the jury improperly considering lack of remorse as an aggravator based on the evidence the trial court deemed admissible at trial. This argument further cites to no rule of procedure that would impose any time limitation as suggested by the State.

The jury recommendation was returned on July 29, 2005, a Friday.(XII,R2129) The St. Petersburg Times article appeared in the Saturday, July 30, 2005 edition of the paper.(XII,T2156-2158) Defense counsel filed a Motion for Juror Interviews with accompanying affidavits from defense counsel and a request for the transcription of the penalty phase with a designation to the court reporter on Tuesday, August 3, 2005, as written in the certificate of service.(XII,T2141-2142;2144) The motion specifically addressed the concern that the jury had recommended death because Mr. Peterson didn't say he was sorry.(XII,T2156)

The State's response to the request for juror interview was filed on August 8, 2005.(XII,T2151)

The trial court issued an Order on August 8, 2005, directing transcripts of the penalty phase.(XII,T2143) The court reporter was given 20 days in which to complete the transcription by the court.(XII,T2142)

After the court ordered the transcripts, defense counsel filed a Memorandum of Law in Support of the Juror Interviews to determine if the jurors had inappropriately considered remorse as an invalid aggravator. In support of the motion, defense counsel referenced the improper evidence that had been admitted and the State's improper argument.(XII,T2154) The State addressed the claims related to evidence of remorse and prosecutorial misconduct in arguing there was no improper evidence in their response filed on August 11, 2005. (XII,T2161) The defense filed an additional response to the State's reply on August 12, 2005, which focused on the juror misconduct aspect of the claim.(XII,2168) The court refused to permit juror interviews, but did agree to transcription at a hearing on August 12, 2005.(XVI2833)

The issue of remorse and the objections of defense counsel to the improper use of remorse as evidence and argument was continuously made throughout the sentencing proceedings including the defendant's sentencing memorandum

(XII,R2169-2176), the Spencer hearing (XVII,T2852), and by the court in the sentencing order (XIII,T2347-2349).

Defense counsel did not wait until months after the jury recommendation to bring this issue to the attention of the trial court. After objecting to the introduction of the evidence and an improper remorse aggravator during the penalty phase, defense counsel renewed his assault on this error as soon as it became apparent that the error negatively affected the jury recommendation. Defense counsel brought his renewed objection to the court's attention within two business days of the recommendation, or four days if the weekend is included in that calculation. There is no evidence in this record whatsoever to indicate that the trial court or the state was unaware of the defense claim for over two months after his trial. Defense counsel vigorously litigated this issue for two months and the state vigorously responded in opposition. At no time in the lower court did the State object that defense counsel's litigation of the issue of improper remorse evidence was not timely, thus baring such argument in this proceeding.

ANALYSIS

The State's argument that the prosecutor was permitted

to rebut the defense's mitigation presentation of anti-social personality disorder and his abilities to function in prison because this was not remorse testimony is not supported by the ruling of the trial court. The trial court specifically found that the defense, during the presentation of Dr. Maher's testimony, had not interjected remorse into the proceedings. Without a legitimate basis for countering a defense mitigator, the State has no sustainable basis for the admission of testimony and argument that centered on Mr. Peterson's lack of empathy for his victims and their suffering.

The State's suggestion [State's brief p.74-77] that the line of questioning employed with Dr. Maher was legitimate cross-examination to rebut the impaired capacity of Mr. Peterson as a result of his personality disorders has been specifically disapproved by this Court in Atwater v. State, 626 So.2d 1325, 1328 (Fla. 1993). Atwater was cited in the Initial Brief, however the State made no attempt or effort to distinguish Atwater from this case. The state attorney below specifically told the trial court that his questions were directed at impeaching Dr. Maher and explaining aspects of anti-social personality disorder-conduct unquestionably forbidden under Atwater. The trial

court does not appear to have been aware of the Atwater limitations, as her ruling permitting the line of prosecutorial questioning is not supported by Atwater.

Likewise, the record does not support the State's argument that this evidence or the comments of the prosecutor were invited. The trial court ruled that the defense had not presented any evidence of remorse. Absent such evidence being presented by the defense, there is no invitation extended for rebuttal. The defense closing argument that this was a felony murder and not a premeditated murder cannot be read as opening the door to evidence of lack of remorse. It may open to the door to rebuttal comments relating to the planning and preparation for the crime, but it does not invite comment on the defendant's lack of feeling for his victims. The defense argument that the State suggests opened the door to the prosecutor's lack of remorse focused on the comments that Mr. Peterson did not intentionally go to kill someone and that he did not want someone in a subsequent robbery to be injured are again are not comments on his remorse for this crime. Those comments were directed to the issue of premeditation. Further, the State had elicited the improper evidence well in advance of the defense penalty

phase argument.

The harmful nature of this improper argument cannot be discounted. The statements of jury foreman clearly indicate that, at least for her, the absence of a statement of regret by Mr. Peterson impacted her in reaching her recommendation. Despite the presence of what the State terms "three powerful aggravators"[State's Answer Brief p.72] and the extensiveness of Mr. Peterson's prior record, the jury in this case did not return an overwhelming death recommendation. The vote was 8-4. The lack of an overwhelming vote for death supports Mr. Peterson's argument that the jury was improperly influenced by the prosecutor's vigorous and inflammatory arguments that Mr. Peterson had no empathy, care, or concern for the suffering of his victims and for the death of Mr. Cardoso and they could consider that as evidence in reaching their recommendation. These comments were not fairly based on evidence elicited from the defense- these comments were based on inadmissible evidence presented by the State.

A new penalty phase will, contrary to the State's suggestion, cure the errors which infected this penalty phase. While the testimony of Dr. Maher may be presented

again, the State can be foreclosed from improper questioning and argument in violation of Atwater and Robinson v. State, 520 So.2d 1 (Fla. 1988). The jury's attention can be focused on the legitimate aggravators and mitigators instead of on Mr. Peterson's failure to say he was sorry.

CONCLUSION

Based upon the foregoing arguments and citations of authority contained in this Reply Brief and in the Initial Brief, the judgment and sentence below should be reversed for relief commiserate with the opinion of this Court.

Respectfully submitted,

_____
ANDREA M. NORGARD
Special Assistant P.D.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, AGA Katherine Blanco, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607 this ___ day of March, 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of font used in the preparation of this Reply brief is 12-point Courier New in compliance with Fla. R. App. P. 9.210(a)(2).

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