IN THE SUPREME COURT OF FLORIDA

GARY LEE THORP,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 91,663
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 249238
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114

(904)252-3367

ATTORNEY FOR APPELLANT

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REPLY BRIEF OF APPELLANT

STATEMENT OF THE CASE AND FACTS

The appellant relies on the Statement of Case and Statement of Facts contained in his Initial Brief as an accurate, neutral, and complete statement of the relevant facts[1]

[1] True, appellant omitted some minor facts, for which the state faults him and takes great length to point out in its brief, including such "noteworthy" and "significant" items as "David Gallamore . . . has since moved to Alaska," "Investigator Sarver is now . . . employed by the Brevard County Sheriff's Office [as opposed to the Melbourne P.D. where he was employed while investigating this case]," and witness Paul Symeon "has been so employed [as a bartender/waiter] for about seven years." (Answer Brief, pp. 4-6) However, appellant can find no material additions to the state's lengthy reiteration of the facts. As such, appellant stands by its brief as a complete recitation of the **relevant** facts.

in this case.

Specifically, the appellant disputes the following items in the state's version of the case and facts:

The state contends that witness Gallamore "emphasized that he saw *small* drops of blood on Thorp." (Answer Brief, p. 5) However, the state omits that, upon cross-examination with the witness's deposition, Gallamore admitted at trial that "He had *a lot* of blood on him, yes" (Vol. 9, T 120-121), which is inconsistent with the blood on Thorp coming from the victim, since the medical examiner testified that the victim did not bleed much, if at all. (Vol. 9, T 62, 95; Vol. 10, T 251-257)

Appellant disputes the state's and police witness's self-serving claim that the description given by witnesses was general and matched the appearance of both Thorp and Deering. (Answer Brief, p. 6) In reality, the description given in the search warrant affidavit and by witnesses was much more detailed than a general description: skinny or lanky dark-skinned male, possibly a minority, with long, dark wavy hair, a long face, and a big, long nose. (Vol. 6, R 854, 858, 893, 895-896, 902, 930, 942; ***see also*** Vol. 9, T 137, 139-141, 145-146, 151, 182, 187). This description does not at all match the appearance of Thorpe, who was stocky, approximately 220 pounds, and fair-skinned, with a bald, or partially bald head, and does not have a long face or big, long nose (Vol. 9, T 117, 188); Deering was shorter than the description, had short, wavy

hair, and, while somewhat darker complected than Thorp, could not be described as appearing to be a minority. (Vol. 9, T 118, 147) The state's version of the facts omits these detailed, inconsistent descriptions.

The description by the state of the injuries to the victim omits one important fact: the bruising and abrasions were described by the doctor as merely "faint" or as "a hint" of an abrasion, most of the external injuries coming from post-mortem ant bites. (Vol. 10, T 205-206, 223-230) The state also mistakenly characterizes the injury to the victim's hyoid as a "fracture," when the doctor stated merely that fracturing may generally occur in many strangulations; but here, though, there was merely some "damage" and "bleeding" in the tissues around the joints of the hyoid. (Vol. 10, T 234-235) The doctor also testified that he was unable to opine how much pressure was applied here, since the injuries depended on many factors, such as the amount of struggling or twisting that occurred (Vol. 10, T 241), and no where at T 238-239 does the doctor state, as claimed by the appellee, that the "structures in the victim's neck were compressed, rather than the typical occlusion of blood vessels most frequently seen in strangulation cases." (Answer Brief, p. 8) The doctor merely states generally that in strangulation cases, the structures in the neck, including "the most important structures," the "blood vessels in the neck," are compressed. (Vol. 10, T 238-239)

At page 9 n. 12 of the answer brief, the state argues that the defendant never

voiced a *Frye* objection to the PCR method of DNA testing, only objecting to the RFLP testimony. The state, however, ignores the defense proffer of the expert, wherein defense counsel questions whether the PCR testing has gained acceptance in the scientific community, one of the key prongs of the *Frye* test. (Vol. 11, T 400)

At page 13 of the state's brief, n. 19, the appellee makes a material misstatement of fact, contending that "Thorp conceded that none of the statutory mitigating circumstances applied to him." Thorp's counsel, obviously inexperienced in capital litigation, did initially tell the court that he could not argue the statutory mitigators that Thorp had committed this crime while under the influence of emotional disturbance or had impaired capacity during the crime since their defense was that the defendant did not, in fact, commit the crime. However, the state neglects to inform this Court that, after the trial judge informed counsel that he could indeed argue differently during the penalty phase than in the guilt phase, counsel requested both statutory mental mitigators (Vol. 12, T 737-739), and argued both to the judge. (Supp. Vol. 1, T 1295-1296) Thus, there was no ultimate concession by Thorp that "none of the statutory mitigating circumstances applied to him," as the state would have this Court mistakenly believe.

SUMMARY OF ARGUMENT

Point I. The trial court erred in denying the motion to suppress evidence obtained following a search warrant which was supported by an affidavit containing material falsehoods and omissions. Such an affidavit cannot legally support a warrant. When the falsehoods are excised and the material omissions included, no probable cause would issue on the basis of the affidavit.

Point II. The evidence was insufficient as a matter of law to support a conviction for premeditated or felony murder. The only evidence in existence merely shows that the defendant had sexual relations with a known prostitute sometime before her death.

Point III. The court improperly allowed a lay witness to testify as to his conjecture regarding what the defendant meant by a particular statement. This opinion testimony improperly invaded the province of the jury.

Point IV. Impeachment of one of the state's key witnesses was unconstitutionally precluded. The defendant must be permitted to examine a witnesses credibility.

Point V. The trial court improperly granted a state challenge for cause of a potential juror, where the juror merely expressed some general concerns that the death sentence not be applied in every case and that he would want to closely examine the

evidence before deciding on guilt or the ultimate punishment.

Point VII. The trial court erred in making its findings of fact in support of the death sentence where the findings were insufficient, where the court failed to consider appropriate mitigating factors, where the court erroneously found inappropriate aggravating circumstances, and where a comparison to other capital cases reveals that the only appropriate sentence in the instant case is a life sentence.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE OF THE DEFENDANT'S BLOOD WHERE THE EVIDENCE WAS OBTAINED ON THE BASIS OF A SEARCH WARRANT SUPPORTED BY AN AFFIDAVIT WHICH CONTAINS MATERIAL FALSEHOODS AND OMITS MATERIAL FACTS IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION.

The state argues that a trial court's review of a magistrate's determination of probable cause is not a *de novo* review, but rather should be given great deference and is presumptively correct. This, however, is an incorrect statement of the law where it is contended that the issuing magistrate was misled by omissions and misstatements in the affidavit in support of the warrant. The correct applicable law, as set forth in the initial brief, is that suppression is called for if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or should have known was false except for his reckless disregard of the truth. (Initial Brief, pp. 19)

The affidavit in support of the search warrant reveals a multitude of false

statements, especially the conclusion that Thorp and Deering both matched the description given by a witness of the man seen in the company of Chase (skinny or lanky dark-skinned male, possibly a minority, with long, dark hair, a long face, and a big, long nose), when, in fact, they did not (Thorp was stocky, approximately 220 pounds, and fair-skinned, with a bald, or partially bald head, and does not have a long face or big, long nose (Vol. 9, T 117, 188); Deering was shorter than the description and, while somewhat darker complected than Thorp, could not be described as appearing to be a minority) (Vol. 6, R 854, 858, 893, 895-896, 902, 930, 942) That the state is arguing that Thorp fit the general description of the man seen with Chase and given to police is ridiculous.

Gary Thorpe (from Dept. of Corrections Inmate Information Search – http://www.dc.state.fl.us/activeinmates/inmatesearch.asp)

How can this man ever seriously be favorably compared to one who is dark-skinned, possibly a minority, skinny or lanky, with long, dark hair, a long face, and a big, long nose? To inform a magistrate that Thorp resembles the man seen with the victim shortly before her death is nothing short of intentional fabrication designed to specifically mislead the judge.

Where, as here, the affidavit contains material falsehoods, omissions of facts which would negate probable cause, and information for which no reliable source is given, the magistrate's finding of probable cause is tainted and

should be given no deference. When all of the reckless falsehoods and unreliable and unattributed statements are redacted from the affidavit and the material omissions are added to the factors to view for probable cause, the inescapable conclusion is that there was simply no probable cause on which to issue the search warrant for the defendant's blood. (***See*** Initial Brief, pp. 19-24)

The state next argues that the police (who by their omissions and falsehoods obtained the warrant) should benefit from the "good faith" exception. (Answer Brief, pp. 31-32) How can the state seriously contend that the police, who acted in **bad** faith in executing the warrant, be allowed to benefit from the **good** faith exception. ***United States v. Leon***, 468 U.S. 897 (1984), which formulated the good faith exception, specifically notes that it does not apply to situations such as the one here where the officer acted in bad faith in supplying the affidavit. Citing to ***Franks v. Delaware***, 438 U.S. 154 (1978), the ***Leon*** Court held that "Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. ***United States v. Leon***, 468 U.S. at 923.

A constitutionally correct version of the affidavit, without the deliberate or reckless falsehoods and unsupported matters, and with the material omissions

included, will not support the issuance of the search warrant. (***See*** Initial Brief, pp. 23-24) The blood drawn from the defendant and the resulting DNA test results must be suppressed under the federal and Florida constitutions.

POINT II.

THE CONVICTION FOR FIRST-DEGREE MURDER VIOLATES THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICT.

The state mischaracterizes the appellant's argument on the insufficiency of the evidence as only a claim against a felony-murder theory, falsely claiming that Thorp concedes the premeditation component. (Answer Brief, pp. 15-16, 32) Apparently the state has not grasped the main thrust of the appellant's argument: There was only circumstantial evidence as to the identity provided by the DNA sample that could have been deposited into the prostitute at some time other than the time of killing. Contrary to the state's assertion, there was no direct evidence of identity provided in Thorp's "confession" to a cell-mate. He merely stated that "they **did**" a prostitute (with no suggestion other than the cell-mate's pure speculation that the term "did" referred to anything else other than having sex with her), and that this same prostitute was later found murdered. This is still purely circumstantial evidence, which is not inconsistent with a reasonable hypothesis of innocence. (***See*** Initial Brief, pp. 25-32)

The state neglected to prove that the defendant committed or was a part of the killing of Sharon Chase; it failed to disprove that Thorp could have had consensual

sex with the prostitute earlier in the evening and that his semen and DNA was thus deposited in her at a time before the prostitute later that night met her killer in Bean Park. Further, the state did not prove a sexual battery as an underlying felony to felony murder. The defendant's conviction for first degree murder must be reversed.

POINT III.

THE TRIAL COURT ERRED IN PERMITTING A STATE WITNESS TO TESTIFY TO HIS OPINION AS TO WHAT DEFENDANT MEANT BY HIS WORDS, IMPROPERLY INVADING THE PROVINCE OF THE JURY AND RESULTING IN A DENIAL OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY JURY AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, AND 22, OF THE FLORIDA CONSTITUTION.

The state, as is the usual time-worn tactic, somehow contends that defense counsel's objection to the improper opinion testimony was insufficient to preserve the issue for appeal. The state again ignores the plain language of defense counsel's objection, "That's speculation. This gentleman has not been qualified to interpret anything that he thought was said. It's just irrelevant and immaterial." (Vol. 11, T 501) This argument is clearly preserved. The improper opinion testimony was irrelevant and the witness was not qualified to give his opinion. The cases cited by appellant in the Initial Brief speak of this type of opinion testimony as being irrelevant and thus improperly invading the province of the jury.

The main definition of the term "did" or "do" is, according to ***Webster's Third New International Dictionary***, p. 665 (1981), to bring to pass or to perform. Nowhere in the common, accepted definitions of "did" is there any hint that it means

"killed."[2] To allow a lay witness to opine to a definition different from the common definition of the word is to mislead the jury with irrelevant and incompetent evidence.

The state has failed to distinguish, or even to address, the cases cited by the appellant in the Initial Brief, which are directly on point for the proposition that a witness is not permitted to give his understanding of the meaning of words used in declarations of the accused, but instead it must be left to the jury to draw the proper inferences as to what was the party's meaning. ***See*** Initial Brief, pp. 35-36. It was not for Bullock to decide what the defendant meant by the term "did." With such inappropriate conjecture before the jury, the defendant did not receive a fair trial. Reversal for a new trial is required.

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[2] Similarly, ***A Dictionary of Slang and Unconventional English*** (McMillan Publ. Co. Eighth Ed. 1984), p. 316 does not include the definition of "do" given by this witness, but does, in fact, include a definition more in tune with the defendant's version: "to coït (with a girl)." Only if the defendant had said that they "did ***in***" the prostitute would the words have had the meaning ascribed to them by the witness.

POINT VII.

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §17 OF THE FLORIDA CONSTITUTION.

The sentence of death imposed upon Gary Thorp must be vacated. The trial court found improper aggravating circumstances, failed to consider (or gave only little weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors. These errors render Thorp's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution.

The state argues that pursuant to ***Guzman v. State***, 23 Fla. L. Weekly S511, S512 (October 1, 1998), this Court has interpreted HAC in such a way that it is not necessary for the state to show that the killer intended to inflict pain. However, the

state neglects to note that, even under ***Guzman***, the law remains that for this factor to apply it must be shown either that the killing exhibited a desire to inflict a high degree of pain or that the killer "was utterly indifferent to the suffering of another." Neither of these factors were shown by the state to be present here. The present murder happened too quickly with no substantial suggestion that Thorp *intended* to inflict a high degree of pain or otherwise torture the victim.

The state merely argues, as the court below apparently believed, that all strangulations are *per se* heinous. However, the state has failed to address and distinguish the cases cited by appellant in the Initial Brief, wherein this Court rejected HAC as an aggravator in strikingly similar strangulation cases. ***See Rhodes v. State***, 547 So.2d 1201 (Fla. 1989); and ***DeAngelo v. State***, 616 So.2d 440 (Fla. 1993). The appellant submits the state did not address these cases because it cannot distinguish them. Under these cases and the reasoning set forth in the Initial Brief, pp. 57-61, the trial court erred in finding this factor to be present.

Regarding mitigating circumstances, the state essentially argues that the trial court can, with impunity, give these factors any weight it desires. (Answer Brief, pp. 60-61) The recent trend of trial courts' attaching no **real** weight to uncontested mitigating evidence, results in a *de facto* return to the "mere presentation" practice condemned in ***Hitchcock v. Dugger***, 481 U.S. 393 (1987). Appellant's trial court's

refusal to give any **significant** weight to Appellant's uncontroverted mitigating evidence violates the dictates of ***Lockett v. Ohio***, 438 U.S. 586 (1978), and its progeny. By allowing trial courts unfettered discretion in determining what weight to give mitigating evidence, trial judges can effectively accomplish an "end run" around the constitutional requirement that capital sentencings should be individualized. The trial court has effectively failed to consider mitigating evidence within the statutory and constitutional framework. By giving "very little weight," to valid, substantial mitigation, trial judges can effectively ignore ***Lockett***, ***supra***, and the constitutional requirement that capital sentencings must be individualized. The trial court's refusal to give any significant weight to valid mitigating evidence, calls into question the constitutionality of Florida's death penalty scheme under the Florida and federal constitutions.

The trial court abused its discretion in rejecting or giving only little weight to valid mitigating factors. The proper mitigating factors clearly outweigh the appropriate aggravating factors. (***See*** Initial Brief, pp. 56-69) The state has neglected to address the cases cited in the Initial Brief wherein mitigating factors such as those present in the instant case, resulted in a reversal of the death sentence. Under a system of proportionality review, these cases and the uncontroverted mitigation here cry out for a reversal of Thorp's death sentence. The punishment must be reduced to

life imprisonment, or, at least, sent back to the trial court for a new consideration that more fully weighs the available mitigating evidence.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein and in the Initial Brief, the appellant requests that this Honorable Court reverse the judgment and sentence of death and, as to Points I, II, III, and VI, reverse the judgments and sentences and remand for a new trial, and, as to Point IV, vacate the death sentence remand for imposition of a life sentence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
Florida Bar # 249238
112 Orange Avenue - Suite A
Daytona Beach, FL 32114
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Gary Thorp, DC# 983369, Florida State Prison, P.O. Box 181, Starke, FL 32091, this 20th day of January, 1998.

_____

JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced CG Times, 14pt.

_____
JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER