

_____ IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

FOR PUBLICATION

STATE OF TENNESSEE,)	<u>Filed: April 15, 1996</u>
_____)	
Appellant,)	SHELBY COUNTY
)	
vs.)	HON. JOSEPH B. McCARTIE,
)	JUDGE
TIMOTHY D. HARRIS and)	
CRAIG THOMPSON,)	
)	No. 02S01-9410-CR-00071 and
Appellees.)	No. 02S01-9410-CR-00075

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OPINION

REVERSED AND REMANDED.

ANDERSON, C.J.

_____The single¹ issue in this consolidated appeal is purely a question of law and requires a determination of whether a remand for resentencing is appropriate when an appellate court in a capital case concludes the sole aggravating circumstance found by the original sentencing jury is legally invalid and sets aside the sentence of death. Because there is no legal principle which precludes the State from seeking the death penalty upon resentencing, a remand for that purpose is appropriate. Accordingly, the Court of Criminal Appeals' judgments modifying the sentences to life imprisonment are reversed and the cases remanded to the respective trial courts for resentencing.

BACKGROUND

In separate trials in the Shelby County Criminal Court, the defendants, Timothy D. Harris and Craig Thompson, were each convicted of first-degree felony murder during the course of a robbery, and sentenced to death.

As to Harris, the proof introduced by the State established that on the evening of May 29, 1990, Jack Thomas was shot to death as he sat in his car outside his home in Memphis. The incident began when four young men approached Thomas as he was placing some items in his car. At least two of the men were armed. When Thomas realized that the men intended to rob him, he jumped in his car and closed the door. Thomas suffered eight gunshot wounds in the attack, during which the rear window of his car was shattered by gunfire.

¹ In its application for permission to appeal the State requested that this Court reconsider its holding in State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992). However, the State in its brief to the Court has expressed its intention to no longer pursue that issue in light of State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994), which reaffirmed the holding in Middlebrooks. In any event, a majority of this Court as presently constituted also reaffirms the holding in Middlebrooks.

Thomas's girlfriend, who was inside the house at the time, identified the defendant as one of the four young men she saw approach. She did not see the defendant with a gun, but saw another of the men shoot Thomas four times. While she hid inside the house, three of the men ransacked the bedroom. During this time, Thomas was shot several times at close range. A cellular phone and gold necklace were taken in the robbery. Although Harris admitted participation in the burglary and in planning the robbery, he claimed that he was unarmed and did not shoot Thomas. While the identity of the person who shot Thomas was never definitively established, Harris's fingerprint was lifted from the passenger door of the victim's car. The jury convicted Harris, based on that evidence, of felony murder committed during the course of a robbery.²

At the sentencing hearing, the State relied on evidence presented during trial and testimony from the victim's mother. Harris testified in his own behalf, admitting that he had instigated the robbery, but claiming that he had never intended that Thomas be shot. He expressed remorse and regret for what happened. The defense also relied on testimony from the defendant's aunt. At the time of the killing, Harris was twenty years old, a high school graduate with no prior criminal record.

Based on the proof, the jury imposed the death penalty after finding that the State had proven, beyond a reasonable, doubt that the murder had occurred during

² Harris was also convicted of especially aggravated robbery and aggravated burglary. The trial court imposed sentences of twenty-five and six years, respectively, on each of those convictions, which are not at issue in this appeal.

the commission of a robbery and that the aggravating circumstance outweighed the mitigating factors.

As to Craig Thompson, the proof introduced at the guilt phase of the trial established that on December 16, 1990, Thompson entered a Delta Express Market in Memphis and shot to death the clerk, Carrie Lee Walker. A second clerk who had fled to the back of the store identified Thompson as a person matching the description of the killer, while a customer identified Thompson as the man who came out of the store with a gun in his hand. In addition, the homicide was videotaped by a security camera, and the jury saw the tape and photographs made from it. Thompson also admitted shooting the clerk to the driver of the get-away car and to a friend, but claimed that the clerk was trying to shoot him. The jury convicted Thompson of felony murder during the commission of a robbery.

At the sentencing hearing, the State relied on the proof presented at trial and in addition, introduced testimony from Walker's sister. Testifying for the defense, Thompson's mother said that he was eighteen or nineteen years old at the time of the killing, had no prior criminal record, and had been a well-behaved honor student from a stable family until he came to Tennessee and joined the Navy at age seventeen.

Based on the proof, the jury imposed the death penalty after finding that the State had proven, beyond a reasonable doubt, that the murder had been committed during the commission of a robbery, and that the aggravating circumstance outweighed the mitigating factors.

Accordingly, during the sentencing phase of each case, the State presented proof to establish the aggravating circumstance that the killing occurred during the course of a robbery. Tenn. Code Ann. § 39-13-204(l)(7)(1991 Repl.).³

Each defendant separately appealed to the Court of Criminal Appeals raising numerous issues for review. The intermediate court, in each case, affirmed the conviction, but reversed the sentence of death concluding that the jury's reliance on the felony murder aggravating circumstance at the sentencing hearing was contrary to Middlebrooks. In that case, this Court held that, when a defendant is convicted of felony murder, the State's use of felony murder as an aggravating circumstance at the sentencing hearing violates Article I, Section 16, of the Tennessee Constitution because the aggravating circumstance is a duplication of the crime itself and does not narrow the class of death-eligible defendants as is constitutionally required. Reasoning that resentencing is precluded because the sentencing jury relied upon only one aggravating circumstance which was legally invalid to support imposition of the death penalty, the Court of Criminal Appeals modified the sentence in each case to life imprisonment. The State filed applications for permission to appeal, which were granted, and thereafter, the cases were consolidated for hearing and decision. For the reasons that follow, the judgments of the Court of Criminal Appeals modifying each sentence to life imprisonment are reversed and the cases remanded to the respective trial courts for resentencing.

³ The statute provides: "The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnaping, aircraft piracy, or unlawful throwing, placing or discharging a destructive device or bomb."

DOUBLE JEOPARDY

Resolution of the issue in this appeal requires a review of well-settled principles of double jeopardy jurisprudence. The Fifth Amendment to the United States Constitution is applicable to the states through the Fourteenth Amendment Due Process Clause,⁴ and provides that no person shall "be subject to the same offense to be twice put in jeopardy of life or limb." Similarly, Article I, Section 10 of the Tennessee Constitution provides "[t]hat no person shall, for the same offence, be twice put in jeopardy of life or limb." The double jeopardy provisions of the state and federal constitutions have heretofore been interpreted as co-extensive.⁵ The double jeopardy clauses were

designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223-24, 2 L.Ed.2d 199 (1957); State v. Maupin, 859 S.W.2d at 315; State v. Knight, 616 S.W.2d 593, 595 (Tenn. 1981).

⁴ Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

⁵ State v. Maupin, 859 S.W.2d 313, 315 (Tenn. 1993); Lavon v. State, 586 S.W.2d 112, 114 (Tenn. 1979).

The double jeopardy guarantee affords three separate constitutional protections against, 1) a second prosecution for the same offense after acquittal; 2) a second prosecution for the same offense after conviction; and 3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 716, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969); State v. Mounce, 859 S.W.2d 319, 321 (Tenn. 1993). In application, these protections forbid retrial of a defendant who has been acquitted and, when a conviction has been set aside because of insufficiency of the evidence, double jeopardy forbids giving the prosecution "another opportunity to supply evidence which it failed to muster in the first proceeding." Burks v. United States, 437 U.S. 1, 11, 98 S.Ct. 2141, 2147, 57 L.Ed.2d 1 (1978).

When a defendant obtains a new trial through a successful appeal on some basis other than insufficiency of the evidence, however, double jeopardy does not preclude a retrial of the defendant. Id.; Ball v. United States, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896); State v. Campbell, 641 S.W.2d 890, 893 (Tenn. 1982). The rationale for allowing retrial in such circumstances was aptly explained in United States v. Tateo, 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964), as follows:

While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the

reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

Id., 377 U.S. at 466, 84 S.Ct. at 1589. Accordingly, no constitutional provision prevents retrial after a reversal for legal error. Moreover, "upon appellate reversal of a conviction the Government is not limited at a new trial to evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence." Pickens v. State, 730 S.W.2d 230, 235 (Ark. 1987), quoting, United States v. Shotwell Mfg. Co., 355 U.S. 233, 243, 78 S.Ct. 245, 252, 2 L.Ed.2d 234 (1957).

A well-settled corollary of the power to retry a defendant is the power, upon a defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction. North Carolina v. Pearce, 395 U.S. at 720, 89 S.Ct. at 2078. Imposition of a particular sentence usually is not regarded as an "acquittal" of another more severe sentence that could have been imposed. Thus, the double jeopardy protection imposes no absolute prohibition on the imposition of a harsher sentence at retrial after a defendant has succeeded in having the original conviction set aside. North Carolina v. Pearce, 395 U.S. at 720, 89 S.Ct. at 2078; United State v. DiFrancesco, 449 U.S. 117, 133 and 137-38, 101 S.Ct. 426, 435 and 437-38, 66 L.Ed.2d 328 (1980). This principle is generally known as the "clean slate rule" and "rests ultimately on the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." North Carolina v. Pearce, 395 U.S. at 721, 89 S.Ct. at 2078. Therefore, upon retrial, the constitutional guarantee against double jeopardy does not prohibit imposition of a legally authorized

sentence, whether or not it is greater than the sentence imposed after the first conviction.

One exception to the "clean slate rule" has been recognized by the United States Supreme Court in the context of bifurcated capital prosecution and sentencing proceedings. In Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), the United States Supreme Court held that, a defendant sentenced to life imprisonment rather than death is protected by the Double Jeopardy Clause against re-imposition of the death penalty when the defendant obtains a reversal of the underlying conviction, and is retried and reconvicted. In so holding, the Court acknowledged the "clean slate" rule, but determined that the rule is "inapplicable whenever a jury agrees or an appellate court decides that the prosecution has not proved its case." Id., 451 U.S. at 443, 101 S.Ct. at 1860. Although recognizing that it is usually "impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case,'" id., (quoting Burks v. United States, 437 at 15, 98 S.Ct. at 2149), the Court found that Missouri, by "enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, . . . *explicitly requires* the jury to determine whether the prosecution has 'proved its case.'" Id., 451 U.S. at 444, 101 S.Ct. at 1861 (emphasis in original). Therefore, the Court determined that the jury's decision to sentence Bullington to life imprisonment after his first conviction amounted to an "acquittal" of the death penalty under the Double Jeopardy Clause which eliminated death from the punishment options available at resentencing.

Likewise, in Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), the Court applied the Bullington principle, and held that resentencing is barred following imposition of a life sentence, even if imposition of the life sentence is based on legal error. In Rumsey, an Arizona trial judge erroneously construed a statutory aggravating circumstance, concluded that the State had failed to prove the existence of an aggravating circumstance, and imposed a life sentence. Concluding that the trial court had misconstrued the aggravating circumstance, the Arizona Supreme Court set aside the life sentence and remanded for resentencing.

At the resentencing hearing, the State again sought, and this time, obtained the death penalty, but on appeal, the Arizona Supreme Court, in light of Bullington, determined that imposition of the death sentence violated the constitutional prohibition against double jeopardy.

The United States Supreme Court affirmed, concluding that the "initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding--whether death was the appropriate punishment" Arizona v. Rumsey, 467 U.S. at 211, 104 S.Ct. at 2310. In so holding, the Court emphasized that the double jeopardy effects of the judgment that amounted to an acquittal on the merits was not altered because imposition of the life sentence resulted from an erroneous interpretation of governing legal principles. Id.

More recently, in Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986), the scope and application of the Bullington rule was further delineated. In that case, the State argued at the penalty phase of the defendants'

capital murder trial the existence of two aggravating circumstances: (1) the murder was committed for pecuniary gain; and (2) the murder was especially heinous, cruel or depraved. The sentencing judge imposed the death penalty, finding the heinous, cruel, or depraved factor to exist, but rejecting the pecuniary gain factor because, as in Rumsey, the sentencing judge interpreted it as only applying to contract killings. In the event that limiting construction was inaccurate, however, the sentencing judge in Poland alternatively found the evidence sufficient to establish the pecuniary gain aggravating circumstance. Id., 476 U.S. at 149, 106 S.Ct. at 1752.

On appeal, the Arizona Supreme Court reversed the convictions because of trial error and remanded for a new trial. With regard to the penalty phase, the court found the evidence insufficient to support the heinous, cruel, or depraved circumstance, but held that the pecuniary gain factor was not limited to contract killings and determined that factor could be considered at resentencing.

The defendants were retried, reconvicted and again sentenced to death. The trial judge found both the especially heinous, cruel or depraved, and the pecuniary gain aggravating circumstances to be present. On appeal, the defendants challenged the State's use of the pecuniary gain factor, which was not found at the original trial. While again finding the evidence insufficient to support the heinous, cruel or depraved factor, the Arizona Supreme Court upheld the pecuniary gain factor and, after weighing the aggravating and mitigating circumstances, concluded that the death penalty was appropriate.

The United States Supreme Court granted review and rejected the defendants' contention that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution constitutes an acquittal of that circumstance for double jeopardy purposes. Poland v. Arizona, 476 U.S. at 155, 106 S.Ct. at 1755. The Poland court reiterated that the proper inquiry under Bullington is whether the sentencer or reviewing court has concluded that the prosecution failed to prove its case that death is the appropriate punishment. Id. The Court refused to extend Bullington and view the capital sentencing proceeding as a set of mini trials on the existence of each aggravating circumstance, id., 476 U.S. at 156, 106 S.Ct. at 1755, but instead concluded that

[a]ggravating circumstances are not separate penalties or offenses, but are standards to guide the making of the choice between the alternative verdicts of death or life imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself "convict" a defendant (i.e., require the death penalty), and the failure to find any particular aggravating circumstance does not "acquit" a defendant (i.e., preclude the death penalty).

It is true that the sentencer must find *some* aggravating circumstance before the death penalty may be imposed, and that the sentencer's finding, albeit erroneous, that no aggravating circumstance is present is an "acquittal" barring a second death sentence proceeding. This is because the law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that even though innocent he may be found guilty. This concern with protecting the finality of acquittals is not implicated when, as in these cases, a defendant is sentenced to death, *i.e.*, "convicted." There is no cause to shield such a defendant from further litigation; further litigation is the only hope he has. The defendant may argue on appeal that the evidence presented at his sentencing hearing was as a matter of law insufficient to support the aggravating circumstances on which his death sentence was based, but the Double Jeopardy Clause does not require the reviewing court, if it sustains that claim, to ignore evidence in the record supporting

another aggravating circumstance which the sentencer has erroneously rejected. Such a rule would have the odd and unacceptable result of requiring a reviewing court to enter a death penalty "acquittal" even though that court is of the view that the State has proved its case.

Poland v. Arizona, 476 U.S. at 156-57, 106 S.Ct. at 1755-56 (emphasis in original)(internal quotations and citations omitted).

Based on that reasoning, the Court in Poland concluded that the trial court's original rejection of the pecuniary gain factor did not bar resentencing since neither the sentencing judge nor the reviewing court found the evidence legally insufficient to justify imposition of the death penalty. Therefore, the Double Jeopardy Clause "did not foreclose a second sentencing hearing at which the 'clean slate' rule applied." Poland v. Arizona, 476 U.S. at 157, 106 S.Ct. at 1756.

After consideration of the foregoing authorities, we conclude that resentencing in these consolidated cases is not prohibited by either the state or federal constitutional prohibition against double jeopardy. The determinative inquiry under Bullington, Rumsey, and Poland, is: Were the defendants acquitted on the merits of the central issue in the proceeding -- whether death is the appropriate punishment? The answer to that inquiry is clear. The dissent fails to recognize that unlike Bullington or Rumsey, the defendants in this appeal were initially sentenced to death, and have not been acquitted of the death penalty. The State did not fail to prove its case that death is the appropriate punishment. The error present is a legal error, not a matter of insufficient evidence.

Because there has been no acquittal, a remand for resentencing is not precluded. As the United States Supreme Court recognized, a corresponding interest to the fair trial right of an accused is society's interest in punishing one who has been found guilty at trial. United States v. Tateo, 377 U.S. at 466, 84 S.Ct. at 1589. Both these defendants have been convicted of crimes for which society, through its elected officials, has seen fit to provide death as a punishment option. Both defendants did in fact receive the death penalty. Accordingly, the significance society attributes to an acquittal is not involved in this appeal, and resentencing is not precluded.

In so holding, we join the majority of jurisdictions which have adopted the analysis of the U.S. Supreme Court in Poland, and concluded that the capital sentencing trial is not a series of mini trials, and there is no such thing as an acquittal from an aggravating circumstance. See e.g. Pickens v. State, 730 S.W.2d 230 (Ark. 1987); Preston v. State, 607 So.2d 404 (Fla. 1992); Zant v. Redd, 290 S.E.2d 36 (Ga. 1982); State v. David, 468 So.2d 1133 (La. 1985); Commonwealth v. Zook, 615 A.2d 1 (Pa. 1992); State v. Johnson, 410 S.E.2d 547 (S.C. 1991); Hopkinson v. State, 664 P.2d 43 (Wyo. 1983); contra State v. Silhan, 275 S.E.2d 450 (N.C. 1981); State v. Bigenwald, 542 A.2d 442 (N.J. 1988). Accordingly, the State is free, at resentencing to introduce proof of any aggravating circumstance which is otherwise legally valid.

The dissent would adopt a rule prohibiting the use of new aggravating circumstances at resentencing in all cases except the rare case in which the defendant is convicted of a violent felony after the original sentencing hearing.

According to the dissent, the rule is based on due process and fundamental fairness. The dissent's approach, however, is patterned on a decision of the New Jersey Supreme Court, State v. Bigenwald, *supra*. The fundamental fairness language in that case was dicta, and as such is not binding on that court or precedent for any other court. In fact, the New Jersey Supreme Court, in State v. Koedatich, 572 A.2d. 622 (N.J. 1990), retreated from its Bigenwald language and held that the State may, at resentencing, rely upon aggravating circumstances not found by the jury in the initial sentencing hearing.

Finally, and perhaps most importantly, the principles announced by dicta in that decision, and embraced by the dissent in this case, have been adopted by no other court, and represent an isolated minority view which should not be adopted as the law in Tennessee. The administration of justice in this State is better served by allowing resentencing in accordance with the analysis contained within the United States Supreme Court decisions previously discussed. See also State v. Miller, 771 S.W.2d 401, 403 (Tenn. 1989) (discussing the Poland decision).⁶

Moreover, the State is not precluded by Tenn. R. Crim. P. 12.3 from relying on new aggravating circumstances at resentencing. Notice such as that rule requires is not constitutionally mandated, though it is the better practice. State v.

⁶ Contrary to the dissent's characterization of this Court's decision in State v. Branam, 855 S.W.2d 563 (Tenn. 1993), we have never previously held that resentencing is precluded in circumstances such as those presented in this appeal. Relief was granted in Branam **solely** because the death sentence was disproportionate under both the state and federal constitutions. We simply held that under state and federal law "death is a disproportionate penalty . . . where it is imposed against a defendant solely for participation in a robbery in which another robber takes life, without proof that the defendant himself attempted or intended to kill or intended that lethal force be used." Id., at 570.

Berry, 592 S.W.2d 553, 562 (Tenn. 1980). The purpose of the rule is to ensure that the defense receives timely notice to enable adequate trial preparation. In the context of a capital resentencing hearing wherein the State intends to rely on aggravating circumstances different from those relied upon at the original trial, that purpose is fulfilled by requiring the State to file a new notice under Tenn. R. Crim. P. 12.3, which informs the defense of its intent to seek the death penalty, including the aggravating circumstances upon which the State intends to rely, thirty days prior to the resentencing hearing. Cf. State v. Hines, ____ S.W.2d ____ (Tenn. 1995) (Holding that a new notice is not required before resentencing if the State intends to rely upon only those aggravating circumstances noticed before the first trial).

As this Court previously has observed, "[o]n a resentencing hearing, the rule of evidence with regard to the only issue before the jury remains the same – both the State and the defendant may introduce any evidence relating to the circumstances of the crime, relevant aggravating circumstances or any mitigating circumstances, so that the jury will have complete information relevant to punishment. State v. Bigbee, 885 S.W.2d 797, 813 (Tenn. 1994). Simply stated, if the offered evidence bears on punishment, it is admissible." State v. Teague, 897 S.W.2d 248, 250 (Tenn. 1994).

At resentencing, the defendant is not limited to proof of mitigating circumstances presented in the initial sentencing hearing. Id. Neither is the State limited, by constitutional restrictions, or Tenn. R. Crim. P. 12.3, to evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence. Pickens v. State, 730 S.W.2d at 235, (quoting, United

States v. Shotwell Mfg. Co., 355 U.S. at 243, 78 S.Ct. at 252. Any other rule would defeat the basic premise of capital sentencing proceedings which are theoretically designed to allow the sentencer to consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine the appropriate punishment. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976); see also Preston v. State, 607 So.2d at 409.

CONCLUSION

For the reasons stated herein, the Court of Criminal Appeals' judgments modifying the sentences in each case to life imprisonment are reversed and each cause is remanded to the respective trial courts for a resentencing hearing in which the State will be free to again seek the death penalty. Costs of this appeal are taxed equally to the defendants, Timothy D. Harris and Craig Thompson.

RILEY ANDERSON, CHIEF JUSTICE

CONCUR:

Drowota, J., and Lewis, Sp.J.

DISSENT:

Reid and White, JJ. -- See Separate Dissenting Opinion