IN THE SUPREME COURT OF FLORIDA

ARTHUR FREDERICK GOODE, III, :

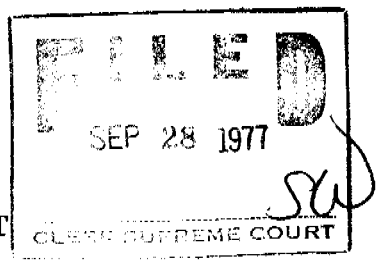
Appellant, :

vs. : Case No. 51,480

STATE OF FLORIDA, :

Appellee. :

_____ :



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

BRIEF OF THE APPELLANT

JACK O. JOHNSON
PUBLIC DEFENDER

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ATTORNEYS FOR APPELLANT

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BRIEF OF THE APPELLANT

PRELIMINARY STATEMENT

The Appellant, ARTHUR FREDERICK GOODE, III, was the defendant below and will hereafter be referred to as "Appellant." The Appellee, the State of Florida, was the plaintiff below and will hereafter be referred to as "State." References to the Record on Appeal will be designated by "R" followed by the appropriate page number.

STATEMENT OF THE CASE

On October 11, 1976, a Lee County grand jury returned an indictment charging Appellant with the first degree murder of Jason [redacted] (R842) The Circuit Court conducted a hearing to determine if Appellant was competent to stand trial. (R853-926) After hearing the testimony of four psychiatrists (R857-921), Circuit Judge John H. Shearer, Jr., found Appellant competent. (R925-926) The court next entertained Appellant's personal request to represent himself and to discharge his private attorney, Wilbur Smith. (R954) Judge Shearer granted both of Appellant's requests, but also appointed the Public Defender's Office to assist Appellant at trial. (R954-960)

Appellant's appointed counsel filed a motion for change of venue prior to trial. (R967-1028) The court denied the motion before trial and again when the motion was renewed during trial. (R7-20,43-44,50,56) Appointed counsel also objected to Appellant's personal participation at trial. (R23-30)

At the conclusion of the first stage of the trial, the jury found Appellant guilty as charged. (R506) The same jury recommended the death penalty after the sentencing stage. (R1262) Judge Shearer adjudged Appellant guilty and sentenced him to death. (R512,1266-1282) A motion for new trial was filed and denied. (R1283-1289) Notice of Appeal to this Court was filed on April 19, 1977. (R1298)

STATEMENT OF THE FACTS

On the morning of March 5, 1976, ten-year-old Jason [redacted] waited for the school bus with several neighborhood children at a bus stop near his home. (R156-181) A young man approached the children and began talking to some of them. He eventually left the bus stop with Jason and walked into a wooded area. (R157-181) When Jason failed to return from school that evening, a search began. The next day, Richard Brown, a Cape Coral police officer, found Jason's nude and beaten body almost concealed under palmetto fronds in the woods near Jason's home. (R71-78)

Police officers secured the area where they discovered the body and started an investigation of the scene. (R68-80) After photographing and searching for physical evidence (R134-139), the officers removed the body. Pathologist and associate medical examiner, Robert Schultz, performed the autopsy. (R204-238)

Jason [redacted] died of asphyxia, secondary to strangulation with a garrote or strap. His body evidenced bruises, some swelling and a mark on his neck; Dr. Schultz believed the mark to be the results of the death instrument. The doctor also testified [redacted] suffered an anal sexual assault before his death. (R204-238)

At trial, a number of children from the bus stop identified Appellant. (R157-181) One woman saw him near the bus stop before he approached [redacted]. (R142-145) Other witnesses placed Appellant near the woods during the late morning of the day of the murder. (R194-196)

Appellant later traveled to Maryland where he had previously escaped from a mental hospital. (R118-1189) He checked into a hospital but immediately left. He kidnapped Billy [redacted] and Kenneth [redacted], later killing Kenneth [redacted] in Virginia. Appellant also admitted to Billy [redacted] that he murdered Jason [redacted] (R243-254) The State of Virginia tried and convicted Appellant of Kenneth's [redacted] murder. (R1175-1178)

While in Virginia, Appellant gave a statement to the press in which he demanded to be returned to Florida. He said he wanted to be convicted of the [redacted] murder and be executed. (R967-1028)

Appellant, upon his return to Florida, gave a full confession to the State Attorney prosecuting the case. His stated reason was to insure his conviction and death sentence. (R306-309, State Exhibit #1) Appellant's testimony at trial was again a detailed confession in which he expressed a desire to be convicted and executed. (R350-396)

On January 13th and 14th, 1977, Judge Shearer heard a Motion Suggesting Insanity. Privately retained counsel, Wilbur Smith, represented Appellant at the time. Four psychiatrists testified. All of them agreed that Appellant suffered from a mental disorder, but only one concluded he was incompetent to stand trial or assist in his defense. Judge Shearer ruled Appellant competent to stand trial. (R853-925)

Also on January 14th, Appellant personally requested the court to allow him to represent himself and to discharge his attorney. Judge Shearer permitted Appellant to discharge Wilbur Smith and to participate in his own defense. (R954-960) However, the judge appointed the Public Defender's Office to assist Appellant after the following colloquy:

> THE COURT: That's the lawyer's problem. His obligation is to advise Mr. Goode of what they are and what he should do. It's Mr. Goode's option to accept that advice or reject it.
>
> MR. SMITH: I am merely offering a suggestion to the Court that no lawyer is going to be able to work under those conditions and you are going to have -- whatever lawyer you appoint will be filing a motion to withdraw shortly and you are going to wind up back to the same thing. That's my suggestion.
>
> THE COURT: I'm sure there are competent counsel who are capable of fulfilling their obligations.
>
> Mr. Goode, define for me first degree murder.
>
> THE DEFENDANT: Pardon me?
>
> THE COURT: Define for me first degree murder. What are the elements in Florida?
>
> THE DEFENDANT: First degree murder is when you plan to kill the person.
>
> THE COURT: What is the voir dire examination of jurors?
>
> THE DEFENDANT: The what? Pardon me? (R956)

THE COURT: What is the voir dire examination of jurors?

THE DEFENDANT: I don't understand.

THE COURT: Very well. Tell me, Mr. Goode what is the purpose of opening and closing argument in a jury trial?

THE DEFENDANT: To get the Court to understand everything.

THE COURT: Who has the order of burden of proof in a criminal trial?

THE DEFENDANT: I don't understand.

THE COURT: What is the method of presentation of testimony in a criminal trial?

THE DEFENDANT: I don't understand.

THE COURT: Then you need a lawyer to explain these things to you. (R957)

At trial, the court permitted Appellant to question witnesses after his appointed counsel completed his questioning and to make a closing argument. (R23-30,88,98,111,247,422)

The Court considered several other pre-trial matters. First was a Motion for Change of Venue filed on March 4, 1977. (R967-1028) Numerous newspaper articles were attached to the motion, including several which reported that Appellant admitted his guilt and wanted to be executed. In one article dated September 25, 1976, the following appeared,

> Arthur Frederick Goode III, who was charged with the March 5 slaying of young Jason [redacted] of Cape Coral, was sentenced in Fairfax, Va., today to life in prison for the March strangulation death of an 11-year-old Virginia boy. Goode, 22, received Virginia's maximum penalty for the murder of Kenney [redacted] of Fall's Church,

> but Goode said he wants the death penalty when he stands trial in Florida next month for the [redacted] boy's slaying.
>
> Asked if he had anything to say upon receiving his sentence, Goode rose from his chair, pulled a piece of paper from his pocket, and said, 'my rights have been violated. I want to write to the state's attorney in Florida to make statements on the murder I committed there.'
>
> 'I think I should get the death penalty because if I ever get my hands on another little boy--a sexy little boy--he'll never make it home.' (R992)

In another article dated, November 23, 1976, the following was printed:

> For the second time in a week, Goode brought notes with him to Court and said he wanted to give them to newsmen. Last Monday, during another Court appearance Goode gave newsmen notes proclaiming he killed [redacted] and stating that he wants to die in the electric chair. (R1002)

A third article, dated January 15, 1977, contained the following,

> Goode has demanded he be allowed to represent himself and insists he is guilty of the [redacted] slaying. He said he wants a jury trial and a death sentence. (R1003)

Appellant's counsel argued the Change of Venue Motion just prior to trial, and the court considered the motion, or its renewal, on at least three occasions. (R967-1028,6-20,43-44,56) After arguments of counsel on the first motion, Appellant and the court had the following exchange:

> THE COURT: I understand your motion. Mr. Goode, now it is your turn.

THE DEFENDANT: About all this publicity and so forth that he's talking about, I admit I'm responsible for most all of it. Therfore, I don't see it's necessary for you to grant a motion for change of venue, because (R13), I'm responsible for it, and I wrote a letter to Mr. D'Alessandro--

THE COURT: My question is this: do you want the change of venue?

THE DEFENDANT: No, sir.

THE COURT: Has your lawyer explained to you what the change of venue means, that you could have the case tried in another area anywhere in the state? We can go to Pensacola, Jacksonville, Miami, as far as I think it would be necessary to get away from the impact the media may have had on this particular procedure.

THE DEFENDANT: Let me say--

THE COURT: I am asking you has he explained that to you?

THE DEFENDANT: Yes.

THE COURT: Okay. Notwithstanding the right that you may have to do that--and I say may have because it is my decision--do you want to be tried here?

THE DEFENDANT: Yes, I do.

THE COURT: In other words, you do not want venue moved?

THE DEFENDANT: No. (R14)

Another colloquy occurred after the first renewal of the motion (R43-44),

THE COURT: I disagree. Arthur, what do you think about it?

THE DEFENDANT: I don't believe so.

THE COURT: Don't believe what?

THE DEFENDANT: I think it should be right here.

THE COURT: After seeing these folks and listening to--

THE DEFENDANT: I can give you a better indication in the morning on that.

THE COURT: Okay. I will reserve that until the morning. (R44)

The next morning, after the above dialogue, Appellant said he was happy with the jury. (R50) However, new publicity of the case had occurred, and defense counsel renewed his motion for Change of Venue. (R50-56) The court denied the motion summarily without a response from Appellant. (R56) Appellant's counsel also moved to sequester the jury, but the court ultimately denied the motion after jury selection. (R39)

Appellant personally requested permission to hold a press conference during trial. Judge Shearer, over State and defense counsel objections, ruled Appellant could hold the conference. (R44-48) The second day of trial, Appellant held the conference. (R118)

Twenty-five prospective jurors were called during the jury selection process in this case. (R518-841) The court excused one (R774), the State excused one peremptorily and Appellant's attorney's excused ten peremptorily. (R40-41) Appellant did not personally participate in the voir dire. Since Appellant's attorneys exhausted all the allotted peremptory challenges,

they asked the court for more, but the court denied the request. The court also denied an attempted eleventh challenge to a juror. (R810,40-41)

Of the twenty-five prospective jurors called, twenty-three had read or heard news reports of this case; only two had not. (R518-841) Eleven of the twelve jurors had read or heard about the case. (R518-841) Jury selection ended on March 15, 1977. (R67)

The next day, the prosecutor advised the court of an article, in the morning newspaper, carrying a purported confession of Appellant's. Defense counsel, on this basis, renewed the motions for change of venue and sequestration of the jury. The State and defense counsel also renewed objections to Appellant's holding a press conference. Judge Shearer denied all the motions and objections. (R50-56)

Investigating police officers, children from the bus stop, Billy [redacted] (who had been with Appellant in Virginia), persons who saw Appellant near the scene on the day of the murder and the pathologist testified against Appellant at trial. (R68-333) The State also played Appellant's tape recorded confession. (R306-309,State Exhibit #1) Appellant's own testimony reiterated the confession with more detail. (R351-396) The jury found Appellant guilty as charged. (R506)

The sentencing trial was conducted the following day. On its own motion, the trial court called three psychiatrists to testify--Tin Myo Than, Robert Wald and Mordecai Haber. (R1107-1171) These three previously found Appellant competent to stand trial, and Judge Shearer had asked them to reexamine Appellant to determine his mental status at the time of the offense. (R881-920) All three agreed that Appellant was sane at the time of the offense. (R113,114,1132-1136, 1155-1156)

Each psychiatrist responded to the judge's questions concerning Appellant's mental status as a mitigating factor. In Tin Myo Than's opinion, Appellant was under the influence of an extreme mental or emotional disturbance at the time of the offense. (R116-118) Additionally, Appellant's capacity to appreciate the criminality of his act or conform his behavior to the requirements of the law was substantially impaired. (R118-119) Robert Wald and Mordecai Haber disagreed with this opinion on both issues. (R1137-1139, 1157-1158)

Ronald Yeager, a Virginia policeman, testified for the State concerning Appellant's murder conviction in Virginia. The court permitted Yeager to testify to the facts of the Virginia murder (R1172-1179,1183-1154), over defense objections that a certified judgment be required. (R1088-1093) After the State rested, the court permitted the State to reopen and recall Yeager to elicit testimony about the strangulation murder in Virginia. (R1183-1184) Again, defense counsel objected. (R1183)

Appellant also testified during the sentencing trial. He detailed the commission of the crime and his feelings about it. (R1187-1203)

The court allowed the State, Appellant and Appellant's counsel to present arguments to the jury. (R1223-1247) During his argument, the prosecutor made the following statements of the law:

> Mitigating circumstances, and this is probably on of the only times there is any burden on the defendant in a criminal trial because mitigating circumstances can be presented--they don't have to be proven to you beyond a reasonable doubt. There is a different standard. I believe it is--I may be incorrect, but I believe it is the preponderance of the evidence. I may be wrong, but it is less than the State. (R1226)

> What I'm saying is, when you get down to your ultimate decision, if you are convinced that the aggravating circumstances outweigh the mitigating and a majority of you were so convinced, seven or more, then you must recommend death. (R1227)

Appellant's counsel objected to two instructions on aggravating circumstances made at the close of the sentencing trial. The first was on involuntary sexual battery under circumstance (d) of the standard intructions. (R1205,1073,1976) The second was the instruction on circumstance (b) (R1073,1217); the instruction ultimately read,

> (b) That at the time of [conviction for the] crime for which he is to be sentenced, the defendant had been previously convicted of.... (R1073,1249)

After deliberating about thirty minutes, the jury recommended Appellant be sentenced to death. (R1258,1261,1262)

A few days later, on March 22, 1977, Circuit Judge John Shearer, Jr., sentenced Appellant to death. (R1273-1279)

> THE COURT: Florida Statute 921.141 requires that specific findings of fact in support of sentence of death be reduced to writing. It is the decision and judgment of this Court that Arthur Frederick Goode, III be sentenced to death for the reasons I will elaborate on.
>
> I am of the opinion and have been that findings of the Court in support of such a sentence should be stated in the record at the time of sentencing in the presence of the Defendant and his counsel, and as such this Court does hereby order the court reporter to transcribe the findings of the Court that I have began to render here and will continue to do so and deliver them to the Court for inclusion in the order of sentencing the Defendant to death in this cause.
>
> The statute sets forth certain issues which the Court must consider in reaching the judgment. One, do any aggravating circumstances exist and do they exist beyond and to the exclusion of every reasonable doubt; secondly, whether mitigating circumstances exist and most importantly do the mitigating circumstances outweigh the aggravating circumstances.
>
> It is not this Court's opinion that because those have been set forth in the statute that they are the only matters the Court can look at in sentencing. However, they are the primary guidelines the Court must use in reaching a decision as to whether to impose the sentence of death or life imprisonment.
>
> The Court finds the following aggravating circumstances to exist beyond and to the exclusion of every reasonable doubt: the Defendant was previously convicted of another capital felony involving the use

or threatened use of violence to a person; in fact, involving the death of that person. That factor is set forth in Subparen B of Paragraph 5 of the statute that I have heretofore mentioned.

The Court also finds Subparagraph D that the capital felony of which the Defendant was convicted, to wit: First degree murder, was committed while the Defendant was engaged in kidnapping and was committed shortly after the sexual battery, and that does not mean that I conclude only one incident of sexual battery taking place, but shortly after an incident or incidents of sexual battery, which was a part of a scheme to commit a sexual battery and/or batteries, and to ultimately murder the victim.

I also find under Subparagraph H that the capital felony was especially heinous, atrocious and cruel. The Court finds no other aggravating circumstances to have been proved beyond and to the exclusion of every reasonable doubt.

The Court finds the following mitigating circumstances to exist, again citing the statute: B, that the capital felony was committed by the Defendant--I'm sorry, not B, but D--forgive me again, mitigating circumstances, A, which is Subparen 6, Subparen A of the mitigating circumstances set forth in the statute which I have already cited; one, that the Defendant had no significant history of prior criminal activity prior to the date of the murder of the victim in this case; G, the age of the Defendant at the time of the crime was age 22. The factual findings in the record; which support the finding that those mitigating circumstances exist is established by the Defendant's testimony. All I recall was that he said he was age 22 at trial and thus it is easy to conclude the date at the time of the offense and, quite frankly, there was simply no evidence of mitigating circumstances under A, that is, prior criminal activity occurring prior to the

murder in this case. Of course, after that murder we have the Virginia murder.

The Court finds the existence of no other mitigating circumstances from the record, and the Court makes the following finding of facts supported by the record and alludes to them in support of the existence of the aggravating factors which exist beyond and to the exclusion of every reasonable doubt; In regard to Subparagraph B one need to only review the testimony of Officer Yeager from the State of Virginia to support that conclusion beyond and to the exclusion of every reasonable doubt. That testimony was elicited at the sentencing portion of the trial.

Under Subparen D in regard to the question of whether the capital felony was committed while the Defendant was engaged in certain other crimes, one need only to review the Defendant's testimony given at trial and the taped statement which was presented in the State's case when corroborated by the testimony of the witnesses Stintzi, Gonzalez, Walker and Reppa, and I think importantly Dr. Schultz, the pathologist, to clearly find support for the finding of aggravating circumstance; D, that is, that there was beyond a question the holding of the minor child against his will as defined by law and against his will as a matter of fact and committed shortly after several acts or incidents of sexual battery so closely connected in time that I cannot conclude as a matter of law that they were not committed within the meaning of the statute while the Defendant was--that the murder was not committed while the Defendant was not in fact engaged in them.

In other words, I just can't cut off the incident leading up to the murder under the specific words "engaged in". I have to look at the total picture, and have done so and concluded that both the kidnap-

ping and the acts of sexual battery, that the murder was committed while he was engaged in the kidnapping and, as I have indicated, shortly after several sexual batteries, which I even found as a matter of fact was a part of the scheme to murder after the sexual batteries.

Under Subparagraph H, that the murder was especially heinous, atrocious and cruel, again the Defendant's testimony at trial and also the taped confession establishes that the murder was especially heinous, atrocious and cruel. Furthermore, the testimony of Dr. Schultz, the pathologist, indicates severe trauma, severe trauma to the head and abdomen in addition to the trauma of the strangulation which ultimately caused death.

In addition to the head trauma and the abdominal trauma, and I am specifically referring to the trauma found in the brain which, I believe was on the right side, Exhibits 6-A1, 6-P, 6-R, 5-A, 5-A1, 5-C, 5-E, 5-1, 5-V and 5-W when considered in connection with the testimony of the pathologist clearly and empathetically indicate that the murder and events surrounding the murder were especially heinous, atrocious and cruel.

Thus, the Court in weighing the aggravating circumstances and the mitigating circumstances finds that the mitigating circumstances found to exist do not outweigh the aggravating circumstances found to exist, and thus it is the decision and judgment of the Court that the Defendant be sentenced to the penalty of death.
(R1273-1279,SR1346-1352)

POINTS ON APPEAL

POINT I.

WHETHER THE TRIAL COURT'S APPOINTING COUNSEL TO PARTIALLY REPRESENT APPELLANT, WHILE ALLOWING APPELLANT TO PARTIALLY REPRESENT HIMSELF, DENIED APPELLANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHT TO REPRESENT HIMSELF, WHEN APPELLANT REQUESTED TO REPRESENT HIMSELF WITHOUT THE ASSISTANCE OF COUNSEL?

(Predicated upon Assignments of Error No. 9 and 18)

POINT II.

WHETHER THE TRIAL COURT ERRED IN PERMITTING APPELLANT TO HOLD A PRESS CONFERENCE DURING HIS TRIAL OR IN REFUSING TO GRANT A MISTRIAL AFTER THE PRESS CONFERENCE AND ITS PUBLICITY DENIED APPELLANT DUE PROCESS?

(Predicated upon Assignments of Error No. 15 and 16)

POINT III.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SEQUESTER THE JURY, SINCE THE PRETRIAL AND TRIAL PUBLICITY PERVADED THE ENTIRE COMMUNITY CREATING A HIGH PROBABILITY OF THE JURY BEING EXPOSED TO INADMISSIBLE AND PREJUDICIAL INFORMATION?

(Predicated upon Assignment of Error No. 17)

POINT IV.

WHETHER THE TRIAL COURT ERRED IN REFUSING TO CHANGE THE VENUE OF APPELLANT'S CASE, THEREBY DENYING HIM DUE PROCESS AND A FAIR AND IMPARTIAL TRIAL?

(Predicated upon Assignment of Error No. 5)

POINT V.

WHETHER APPELLANT, WHO PARTIALLY REPRESENTED HIMSELF WITH ASSISTANCE FROM APPOINTED COUNSEL, WAIVED A CHANGE OF VENUE AND A FAIR AND IMPARTIAL TRIAL BY MERELY REQUESTING HIS TRIAL TO REMAIN IN LEE COUNTY?

(Predicated upon Assignment of Error No. 5)

POINT VI.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING APPELLANT SANE AND COMPETENT TO ASSIST COUNSEL IN THE PREPARATION OF HIS DEFENSE?

(Predicated upon Assignment of Error No. 4)

POINT VII.

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO MISSTATE THE LAW TO THE JURY DURING THE SENTENCING PORTION OF THE TRIAL?

(Predicated upon Supplemental Assignment of Error No. 1)

POINT VIII.

WHETHER THE TRIAL COURT ERRED IN FINDING AND WEIGHING THE AGGRAVATING CIRCUMSTANCE OF A PRIOR CONVICTION FOR A CAPITAL FELONY, SINCE THE STATE PRODUCED ONLY HEARSAY EVIDENCE

TO ITS PROOF AND COULD NOT PRODUCE A CERTIFIED COPY OF THE VIRGINIA JUDGMENT?

(Predicated upon Assignments of Error No. 19 and 21 and Supplemental Assignment of Error No. 2)

POINT IX.

WHETHER THE TRIAL COURT ERRED IN NOT FINDING AND WEIGHING THE MITIGATING CIRCUMSTANCES, (1) THAT APPELLANT COMMITTED THE CAPITAL FELONY WHILE UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE, AND (2) THAT APPELLANT'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR CONFORM HIS CONDUCT TO THE LAW WAS SUBSTANTIALLY IMPAIRED: IN VIEW OF THE PSYCHIATRIC TESTIMONY THAT SUCH CIRCUMSTANCES EXISTED?

(Predicated upon Supplemental Assignment of Error No. 3)

ARGUMENT

POINT I.

THE TRIAL COURT'S APPOINTING COUNSEL TO PARTIALLY REPRESENT APPELLANT, WHILE ALLOWING APPELLANT TO PARTIALLY REPRESENT HIMSELF, DENIED APPELLANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHT TO REPRESENT HIMSELF WITHOUT THE ASSISTANCE OF COUNSEL.

The United States and Florida Constitutions guarantee every criminal defendant the right to assistance of counsel or the right to represent himself. Amend. VI, XIV, U.S. Const.; Art. I §16 Fla. Const.; Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975); State v. Cappetta, 216 So.2d 749 (Fla.1969), cert. den., 394 U.S. 1008, 22 L.Ed.2d 787, 89 S.Ct. 1610 (1969). However, a mixture of partially appearing pro se and partially being represented by counsel is not a constitutional right, and few trial courts permit such a practice.[1/] In this case, the trial judge's forcing such a hybrid form of representation on Appellant, when he requested to represent himself

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1/ See, Powell v. State, 206 So.2d 47 (Fla.4th DCA 1968); Thompson v. State, 194 So.2d 649 (Fla.2d DCA 1967); U.S. v Hill, 526 F.2d 1019 (10th Cir. 1975); U.S. v. Swinton, 400 F. Supp. 805 (S.D. N.Y. 1975); People v. Harris, 65 Cal. App. 3d 978, 135 Cal 668 (2d DCA 1977); State v. Burgin, 539 S.W. 2d 652 (Mo.App. 1976).

without a lawyer, denied Appellant both his right to represent himself and his right to effective assistance of counsel. (R22-30,954-957)

Initially, the trial court erred in failing to properly inquire into Appellant's waiver of counsel before allowing him to partially represent himself. Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975) requires a trial judge to fully inform the accused of the perils of self-representation and clearly establish, on the record, that the accused decides to appear pro se knowingly, intelligently and with full awareness of the consequences. Florida courts have recognized and followed the Faretta standard. Williams v. State, 337 So.2d 846 (Fla.2d DCA 1976); Brooks v. State, 336 So.2d 647 (Fla.1st DCA 1976).

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. [citations omitted]
>
> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." Faretta v. California, 422 U.S. 806, 835, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975).

When Appellant requested to represent himself, the following colloquy transpired:

> THE COURT: Very well.
>
> Mr. Goode, on your request to terminate your attorney-client relationship with Mr. Smith, is that still your desire and intent, to terminate Mr. Smith?
>
> THE DEFENDANT: To discharge him from being my counsel?
>
> THE COURT: Yes.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You do not want him to be your lawyer?
>
> THE DEFENDANT: No, sir. I want to represent myself as my own attorney.
>
> THE COURT: I won't let you represent yourself without the assistance of counsel unless you can satisfy me you have sufficient legal training to do so, so I will have to appoint an attorney for you. (R954-955)
>
> * * *
>
> Mr. Goode, define for me first degree murder.
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> THE DEFENDANT: Pardon me?
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> THE COURT: Define for me first degree murder. What are the elements in Florida?
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THE COURT: Very well. Tell me, Mr. Goode, what is the purpose of opening and closing argument in a jury trial?

THE DEFENDANT: To get the Court to understand everything.

THE COURT: Who has the order of burden of proof in a criminal trial?

THE DEFENDANT: I don't understand.

THE COURT: What is the method of presentation of testimony in a criminal trial?

THE DEFENDANT: I don't understand.

THE COURT: Then you need a lawyer to explain these things to you.

THE DEFENDANT: But the point is, I do not want to have a lawyer, to have that take place, as far as representing me at the trial, especially a lawyer like Mr. Smith, who has not been truthful with me whatsoever at all. (R956-957)

The trial court's questions concerned only Appellant's legal skills, which were irrelevant to the issue of self-representation. See, Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975); Brooks v. State, 336 So.2d 647 (Fla. 1st DCA 1976). No inquiry was made into Appellant's awareness of possible adverse consequences of self representation. This failure invalidates any waiver of counsel or decision to appear pro se. Id. The record does not establish that Appellant knew the pitfalls of self representation.

If this Court decides the trial court's ruling that Appellant could represent himself was correct, Appellant submits, in the alternative, that he was not permitted to represent himself. Partial self-representation coupled with partial assistance of counsel is not what Appellant requested.[2/] He asserted his right to represent himself without a lawyer. (R256,257,954-957) The trial court's forcing legal counsel upon him denied him his constitutional right to self-representation. Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975).

The hybrid form of representation not only denied Appellant his right to represent himself, but also denied him his right to effective assistance of counsel. Amend. VI, XIV, U.S. Const.; Art. I §16 Fla. Const. Since Appellant and his appointed counsel had different trial strategies, an enforced co-counsel relationship hampered both of them.[3/] (R16,17,22-23,43,46,256-258)

This conflict appeared at several crucial points during the trial. Appellant disagreed with his counsel over a change of venue (see point IV and V), over his participation in

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2/ Cf., People v. Windham, 129 Cal.R. 828 (4th DCA 1976). This case discusses distinctions between assistance of counsel and a co-counsel relationship when a defendant represents himself. Although the decision's holding was vacated at 137 Cal. R. 8 (1977), the case is enlightening on this subject.

the case (R22-23), and over his ignoring counsel's advise. (R256-258) The disagreement lead to counsel's moving to withdraw from the case, but the trial judge denied the motion. (R256-258)

> MR. SIMPSON: Since the outset of this case I have requested a number of occasions that the court not allow Arthur Goode to participate in the trial in the nature in which he is doing and the court has ruled against me each time. I think, though, the case has gotten to such a point that it is almost becoming that of a circus atmosphere on the part of Mr. Goode. Because of that I would ask for a mistrial. I think the court was wrong in permitting the press conference. I think the court was wrong in permitting Mr. Goode to cross examine the witnesses inasmuch as he is not trained in law.
>
> We have been appointed to represent Mr. Goode. We are doing no good for Mr. Goode by his actions, and I would ask that the court grant my motion.
>
> THE COURT: What is good, Joe? What is good?
>
> MR. SIMPSON: We are not able to properly represent him.
>
> THE COURT: What is proper representation? What does that mean? Does that mean looks? Does that mean what you think is right?

3/ See note 2, supra. The following appears in People v. Windham, 129 Cal.R. 828 (4th DCA 1976), at pages 833 and 834.

> Theoretically, it would be possible for defendant to be represented by counsel and also to act as his own counsel. Defendant and his counsel would then be "jointly and severally" responsible for the management of the defense. This arrangement, which is

> MR. SIMPSON: See that he gets a fair trial, but with his own actions, he cannot be assured of a fair trial.
>
> THE DEFENDANT: I want to represent myself.
>
> THE COURT: Arthur is competent. Your function is to advise him. If he listens to that advice and ignores it then it's his damned trial, he can do what he wants. (R256-257)

Such discord rendered impossible a cooperative co-counsel relationship. Pulling in two directions, it rendered impossible effective use of a trial lawyer's skill. This enforced relationship worked to deny Appellant his right to self-representation and the right to effective assistance of counsel, Amend. VI, XIV, U.S. Const.; Art. I §16 Fla. Const., and this Court should reverse.

3/ cont'd

> what we mean by co-counsel status, could continue, however, only so long as both defendant and his attorney agreed perfectly on all questions of trial stategy and tactics, including who should conduct which portions of the defense. Such total agreement must be rare and difficult to predict in advance. As a practical matter, moreover, this arrangement would be cumbersome and tend to confusion.

POINT II.

THE TRIAL COURT ERRED IN PERMITTING APPELLANT TO HOLD A PRESS CONFERENCE DURING HIS TRIAL AND IN REFUSING TO GRANT A MISTRIAL AFTER THE PRESS CONFERENCE AND ITS PUBLICITY DENIED APPELLANT DUE PROCESS.

Appellant's personal press conference (R118), during an already heavily publicized trial (see point IV, infra), was icing on the cake for the local news media. Although the conference was not held in open court or recorded, newspaper and television reports could have easily reached the unsequestered jury. (See point III) (R1287-1288) Since the probability of prejudicing the jury was high, the trial court failed in its inherent responsibility to ensure a fair trial. Sheppard v. Maxwell, 384 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507 (1966).

The United States Supreme Court, in reviewing a highly publicized case which the trial judge failed to adequately regulate, had the following comments:

> The court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. And he reiterated this view on numerous occassions. Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence.

We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press nor the charges of bias now made against the state trial judge.

The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. As we stressed in Estes, the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged. Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested. The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom. For instance, the judge belatedly asked them not to handle and photograph trial exhibits lying on the counsel table during recesses.
Id. at 357, 358.

...The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.
(Emphasis added) Id. at 363

This case is analogous to Sheppard v. Maxwell, supra. The trial judge, in this case also believed he lacked the power to control trial publicity. (R44-48)

> MR. SIMPSON: Fred has a couple matters he wants to bring up to the court.
>
> THE DEFENDANT: Concerning what?
>
> MR. SIMPSON: You know.
>
> THE DEFENDANT: Yes. I would like you to order me sometime tomorrow to talk to these reporters and discuss certain things.
>
> THE COURT: I don't know. I originally thought of putting some conditions on it as to their questions. I don't believe I will do that. If you want to do that I have no objection to a brief conference with the reporters.
>
> MR. D'ALESSANDRO: If it please the court, the State will interpose an objection on the record.
>
> THE COURT: I mean, subject to you all convincing me otherwise, either one of you.
>
> MR. D'ALESSANDRO: To the Defendant talking to the reporters? I think once we are within the trial matters within the courtroom and a jury that at this stage appears will not be sequestered, that I object to the Defendant being allowed to talk to the reporters. Obviously the case has had publicity in the past. I don't know what he will say and that is something that concerns me that the jury may see or hear, and I think that's something within the inherent discretion of the court to not allow, I don't think he should be able to discuss it.
>
> THE COURT: I know that you vehemently object.
>
> MR. SIMPSON: I continue to object, although Mr. Goode stated he understands.

THE COURT: What's the basis of your objection?

MR. SIMPSON: I feel that it's very detrimental and prejudicial to his case to talk to reporters.

THE DEFENDANT: I know I have freedom of speech, and since I have been ruled competent and sane --

THE COURT: I agree. I will schedule a time for you tomorrow. Anything else you want to talk to me about at this time? (R44-46)

The trial court was fully aware of the potential for prejudicial publicity from the press conference. Just prior to the press conference, the prosecutor advised the court of an article in that morning's newspaper carrying a purported confession Appellant gave reporters the previous day. (R49-53) Both appointed defense counsel and the state attorney objected to Appellant's press conference. 4/ A newspaper article the following day reported the press conference and described the trial as a "circus". (R1287-1288)

At the very least, the trial court should have granted a mistrial or sequestered the jury (R56), after the press conference. Appellant submits the court failed to exercise its inherent authority to control the trial and its litigants, and this Court should reverse. Sheppard v. Maxwell, 384 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507 (1966).

4/ Appellant submits the State is estopped to argue that the trial court was correct in permitting a press conference, since it also asserted error at trial.

POINT III.

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SEQUESTER THE JURY, SINCE THE PRETRIAL AND TRIAL PUBLICITY PERVADED THE ENTIRE COMMUNITY CREATING A HIGH PROBABILITY OF THE JURY BEING EXPOSED TO INADMISSIBLE AND PREJUDICIAL INFORMATION.

Appellant requested sequestration of the jury on at least two occasions (R30-39,56); both were denied. (R39,56) The first occurred before selection of the jury which the court denied upon empaneling a jury. (R39) A second occurred after the prosecutor advised the court of a current newspaper article carrying a confession and the court's decision to permit Appellant's press conference. (R56)

Florida Rules of Criminal Procedure 3.370(a) leaves the decision to sequester a jury to the discretion of the trial court.

> (a) Regulation of Jury. After the jurors have been sworn they shall hear the case as a body and, within the discretion of the trial judge, may be sequesterd. Fla.R.Crim.P. 3.370.

However, the trial court in this case abused its discretion in denying Appellant's request for sequestration. The probable prejudicial impact on the jury of the comprehensive news coverage was apparent. (For brevity Appellant incorporates the discussion in Points IV A & B concerning pretrial and trial publicity.) Appellant urges this Court to reverse.

POINT IV.

THE TRIAL COURT ERRED IN REFUSING TO CHANGE THE VENUE OF APPELLANT'S CASE, THEREBY DENYING HIM DUE PROCESS AND A FAIR AND IMPARTIAL TRIAL.

A.

The Trial Court Abused Its Discretion In Denying A Change Of Venue, Since Appellant's Admissions Of Guilt Featured In The News Media Peremptorily Prejudiced His Case.

On several occassions, the United States Supreme Court has reversed criminal convictions because community publicity so affected the judicial process as to be inherently prejudicial to a fair trial. Pervasive news media coverage of a trial,[5/] televising pretrial hearings[6/] and confessions[7/] have all been held due process violations without regard to a specific showing of prejudice. See, Rideau v. Louisiana, 373 U.S. 723, 10 L.Ed.2d 663, 83 S.Ct. 1417 (1963). When media publicity tries a case, rendering court proceedings a "hollow formality" Id. at 726, due process has been violated.

This Court has also shown its concern for "newspaper trials." See, Singer v. State, 109 So.2d 7 (Fla.1959); Oliver

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5/ Sheppard v. Maxwell, 384 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507 (1966).

6/ Estes v. Texas, 381 U.S. 532, 14 L.Ed.2d 543, 85 S.Ct. 1628 (1965).

7/ Rideau v. Louisiana, 373 U.S. 723, 10 L.Ed.2d 663, 83 S.Ct. 1417 (1963).

v. State, 250 So.2d 888 (Fla.1971). Responding to the most blatant example of a "newspaper trial", printing a confession, this Court held,

> ...when a "confession" is featured in news media coverage of a prosecution, as here, a change of venue motion should be granted whenever requested; we also hold that in the case sub judice the voir dire process cannot cure the effect of a "confession" which has been given news media coverage. Oliver v. State, 250 So.2d 888, 890 (Fla. 1971).

Appellant's case was also a "newspaper trial." Local media covered all phases of the prosecution from investigation through trial. (R973-1028) The coverage included Appellant's personal history, mental condition and prior convictions. Additionally, the newspapers printed Appellant's admission of guilt and request to be executed. (R992,1002,1003) This latter item places this case squarely within the Oliver holding.

Although the published confession in Oliver may have been more detailed, Appellant's admissions were nevertheless a guilty plea in the media. One article in the Fort Myers News Press carried the following heading in bold type: "GOODE WANTS DEATH PENALTY IN CAPE BOY'S SLAYING." (R992) The body of the article printed the following,

> Arthur Frederick Goode III, who was charged with the March 5 slaying of young Jason [redacted] of Cape Coral, was sentenced in Fairfax, Va., today to life in prison for the March strangulation death of an 11-year-old Virginia boy. Goode, 22, received Virginia's maximum penalty for the murder of Kenney [redacted] of Fall's Church, but Goode said he wants the death penalty

> when he stands trial in Florida next month for the [redacted] boy's slaying.
>
> Asked if he had anything to say upon receiving his sentence, Goode rose from his chair, pulled a piece of paper from his pocket, and said, 'my rights have been violated. I want to write to the state's attorney in Florida to make statements on the murder I committed there.'
>
> 'I think I should get the death penalty because if I ever get my hands on another little boy - a sexy little boy - he'll never make it home.' (R992)

Another News Press article a month later printed:

> For the second time in a week, Goode brought notes with him to Court and said he wanted to give them to newsmen. Last Monday, during another Court appearance Goode gave newsmen notes proclaiming he killed [redacted] and stating that he wants to die in the electric chair. (R1002)

A couple of months before trial the following appeared,

> Goode has demanded he be allowed to represent himself and insists he is guilty of the [redacted] slaying. He said he wants a jury trial and a death sentence. (R1003)

The above articles are tantamount to guilty pleas, a newsprint court finding Appellant guilty. A community exposed to such articles, particularly when coupled with saturation coverage of the rest of the case, [8/] is no place to select a fair and impartial jury. The publicity was inherently prejudicial and denial of a change of venue violated due process and Appellant's right to a fair trial. Amend. VI, XIV, U.S. Const.; Art. I §§ 9, 16, Fla. Const.

8/ See Argument IVB of this brief, infra.

B.

The Trial Court Abused Its Discretion In Denying A Change Of Venue, Since News Media Publicity Prejudiced The Jury That Heard Appellant's Case, Thereby Denying Appellant A Fair Trial.

Appellant submits that the local publicity of his case presumptively prejudiced any trial held in Lee County. However, an examination of the character of the publicity, and its effect on the jury, shows actual prejudice. See, Murphy v. Florida, 421 U.S. 794, 44 L.Ed.2d 589, 95 S.Ct. 2031 (1975). The trial court's denial of a change of venue after jury selection constituted an abuse of discretion requiring this Court to reverse. See, Singer v. State, 109 So.2d 7 (Fla.1959).

The constitutional right to a fair and impartial trial does not require a jury of persons totally ignorant of the case, but it does require a jury of persons capable of laying aside any preconceptions. Amend. VI, XIV, U.S. Const., Art. I §16, Fla. Const. Irvin v. Dowd, 366 U.S. 717, 6 L.Ed. 2d 751, 81 S.Ct. 1639 (1961); Murphy v. Florida, 421 U.S. 794, 44 L.Ed.2d 589, 95 S.Ct. 2031 (1975); Singer v. State, 109 So.2d 7 (Fla.1959); Pitts v. State, 307 So.2d 473 (Fla.1st DCA 1975), cert. dis., 423 U.S. 918 (1975); Gavin v. State, 259 So.2d 544 (Fla.3d DCA 1972), cert. den., 265 So.2d 370 (Fla. 1972). Looking to the comprehensiveness and pervasiveness of

the media coverage, the difficulty a juror would have in laying aside out of court information is apparent. (R973-1028, 1287,1319-1338) The voir dire confirmed the difficulty, showing the jury was not impartial. (R525-840)

Newspaper and television reports encompassed every facet of this case over a several month period from investigation through trial. (R973-978,1387,1319-1339) They included not only Appellant's admission of guilt and request to be executed (See point IV-A, supra) (R992,1002,1003,1287-1288,1319-1320), but also numerous items which were not admitted into evidence at trial.

Several articles and television broadcasts referred to Appellant's prior conviction for Murder in Virginia. (R981, 983,987,991,994,995,1007,1020,1021,1321,1326,1333,1336) Although the jury heard this fact during the sentencing stage, no evidence of it was presented during the guilt determining stage.

A mere look at some headlines tells the articles' stories.

> Murder Suspect Goode Is Indicted For Slaying Of Youth In Virginia (R987)
>
> * * *
>
> Murders Link Maryland, Virginia With Cape Coral (R989)
>
> * * *
>
> Grand Jury Indicts Goode In Baltimore (R991)

* * *

Goode Guilty In Boy's Death (R995)

* * *

Goode faces trial in Virginia murder case (R1020)

* * *

Goode

Convicted in Virginia plan extradition here. (R1021)

Reports also included information on Appellant's history of mental problems and the competency hearings which occurred in the case. (R976,977,979,980,983,986,993,1001,1321, 1324,1326,1328,1329,1338) Once again, a review of the headlines tells the story.

Psychiatric Exam Delays Slaying Trial Of Goode (R993)

* * *

Competency of Goode to be weighed (R1001)

Numerous articles referred to Appellant as a mental patient: "...Maryland mental hospital escapee..." (R976,977), "... Maryland mental patient..." (R980-982).

There were also articles which evidenced the community's feelings about the case. One reported the renaming of a park after the [redacted] boy, who had played there as a Little Leaguer. (R1012) Another article carried a picture of Appellant after his Virginia conviction with the caption--

"Convicted Killer." (R994) All the publicity even brought the trial judge into the headlines, "Judge 'tired' of coverage in Goode case." (R1000) The article's first paragraph read,

> Claiming he's tired of seeing accused slayer Arthur Goode III on the television screen, Circuit Judge John Shearer of Fort Myers Monday postponed a hearing for the defendant until he's sure newsmen aren't in the courthouse. (R1000)

The effect the publicity had upon the venire is best demonstrated in the prospective jurors' answers during voir dire. Although responses of jurors who actually heard Appellant's case are more crucial, the answers of persons from the venire who were not selected enlighten the question of prejudice.

Twenty-three of the twenty-five prospective jurors called had heard news reports of this case. (R518-841) The court excused one prospective juror (R774), the State excused one peremptorily and Appellant's appointed counsel excused ten peremptorily, exhausting all available challenges. (R40-41,810)

Responses from members of the venire who did not sit on the jury included the following:

> MR. SIMPSON: Do you recall having followed this case in the news?
>
> MRS. WARNER: I read about it. I don't know if I followed it, really. I read it, just like you read all the news.

MR. SIMPSON: Okay. Was this just a minor article or a serious article to your way of thinking?

MRS. WARNER: It wasn't minor, it wasn't quite major, but I didn't dwell on it. Also the paper --

MR. SIMPSON: I didn't hear that.

MRS. WARNER: I said that the newspaper, you can print anything in it. Some of the things that I read in the paper I don't think are possible. It doesn't necessarily make it a fact.

MR. SIMPSON: Okay. Has the thought entered your mind that my client must be guilty of something or else he wouldn't be sitting right here today?

MRS. WARNER: I don't believe so. He's here because he is here. Somebody must have thought something happened to him. He must have been in the wrong place at the wrong time or the right place at the right time, or something is the reason he's here. (R628-629)

* * *

MR. SIMPSON: Mr. Mudge, based on what you read, what you listened to, have you formed any opinions concerning this case?

MR. MUDGE: I don't think you can help but form some opinions, but I realize opinions aren't what we are basing this on. We got to base it on what we hear in the courtroom.

MR. SIMPSON: What is the opinion you have, sir?

MR. MUDGE: The articles that I read was more based opinion on law enforcement than anything else, rather than whether he is guilty or innocent or anything like that. The articles that come to mind--and I maybe missed a week or so--but they seemed to be before there was any suspects. (R629-630)

* * *

MR. SIMPSON: Mr. Waxman, did you follow this case in the newspaper or on the TV?

MR. WAXMAN: Just to glance at it.

MR. SIMPSON: Based upon what you glanced at, did you form any opinion one way or the other concerning this case?

MR. WAXMAN: The only opinion I formed is that the paper was slanting towards guilt. (R631)

* * *

MR. SIMPSON: Based upon what you may have read in the past, did you form any opinion one way or the other about the case as to what you thought should happen or what may have happened, this sort of thing?

MRS. ALLEN: I thought what a terrible crime, you know. I was shocked that something like this could happen, and I couldn't understand it. (R631)

* * *

MRS. ANDERSON: I heard about it when it was in the papers before, but I haven't read anything this time.

MR. D'ALESSANDRO: Have you formed any opinions about it?

MRS. ANDERSON: Well, I have a feeling that--to be perfectly honest I think maybe I do have an opinion.

MR. D'ALESSANDRO: Well, Let me ask you a couple other questions and then I will come back to that in a minute. Do you understand that if you are selected to sit on this jury that whatever decision you reach you do so based upon the evidence and testimony you hear in this courtroom?

MRS. ANDERSON: Yes, sir.

MR. D'ALESSANDRO: There is nothing wrong with having an opinion. That's part of life, but my question to you is is your opinion, whatever it is, of such a nature that regardless of what you may hear or see or whatnot that it would not change that opinion?

MRS. ANDERSON: Well, I think I can look at the evidence and be fair about it.

MR. D'ALESSANDRO: Well, I understand that, but that's not an answer to my question.

MRS. ANDERSON: I'm sorry.

MR. D'ALESSANDRO: No, I'm not trying to put you on a spot.

MRS. ANDERSON: I'm nervous.

MR. D'ALESSANDRO: I understand that, but it is a question which we need to know an answer to. The opinion which you hold, is it of such a nature that you could not change it?

MRS. ANDERSON: No, I don't think so, because it's been quite a while ago and I sort of forgotten reading about it. I just remember at the time I was shocked.

MR. D'ALESSANDRO: You understand that this Defendant in this courtroom is presumed innocent and that presumption remains with him unless or until the State proves his guilt beyond a reasonable doubt?

MRS. ANDERSON: I'm being perfectly honest when I tell you how I feel.

MR. D'ALLESSANDRO: Yes, ma'am, I appreciate that. That's what I asked you for. I'm not trying to put you on the spot at all. Can you give to the Defendant that presumption of innocence which the law affords to him?

In other words, as he sits here right now to you does he have that presumption of innocence?

MRS. ANDERSON: I don't think so. (R772-774)

Focusing on just the jury actually selected, the prejudicial effect of the publicity is apparent. One juror and Appellant's counsel had the following exchange:

MR. SIMPSON: Okay. Do you recall having followed this particular case in the newspaper?

MR. OWEN: Yes, sir. It pretty much dominated the headlines for several weeks.

MR. SIMPSON: Okay. So, you have followed this case; is that correct?

MR. OWEN: Yes, sir. (R618)

. . .

MR. SIMPSON: Mr. Owen, as a result of what you may have seen on the TV or what you read in the paper, did you form any type of opinion?

MR. OWEN: From what I had from the media, yes. It tended to indicate Mr. Goode was, you know, guilty of the crime, but then I also know that what you read in the newspaper is not too good a source of information.

MR. SIMPSON: Okay. Based upon what you read in the newspaper you formed this opinion; is that correct?

MR. OWEN: At the time, yes, it indicated that he was a person guilty of the crime.

MR. SIMPSON: And have you since changed you opinion or do you still have that opinion?

MR. OWEN: Well, he is here in court now, and so it would indicate, you know, that this might be the case, but I haven't heard the facts from the people that have them, and so I really don't know.

MR. SIMPSON: Okay. Do you have an opinion one way or the other at this time?

MR. OWEN: Not really, no.

MR. SIMPSON: Are you leaning one way or the other at this time?

MR. OWEN: No, I don't believe so.

MR. SIMPSON: What was the opinion that you formed?

MR. OWEN: Well, --

MR. D'ALESSANDRO: I object, Your Honor. I don't believe the opinion that the prospective juror holds is relevant, other than if, in fact, he has an opinion and if it is firm and abiding or whether it can be set aside.

MR. SIMPSON: On the contrary, Your Honor, the gentleman says he has an opinion and I'd like to know what his opinion is.

THE COURT: I will allow the inquiry. Overruled.

MR. SIMPSON: Thank you.

MR. OWEN: My opinion was that what came through the news was that he had been arrested and brought back to the county and would stand trial and, you know, had been arrested for the crime. So, therefore, there was enough evidence to arrest him and there must be, you know, reasonable assumption of guilt.

MR. SIMPSON: Does the fact that he is sitting here today influence that opinion that you have?

MR. OWEN: No.

MR. SIMPSON: Does it strengthen it or take away from it?

MR. OWEN: No. I mean, it was an opinion that he was probably guilty, but not that he is.

MR. SIMPSON: That he is probably guilty but not that he is?

MR. OWEN: Well, there's got to be probable guilt or cause to have him in court?
(R623-626)

Another juror gave the following responses to the effect of pretrial publicity,

MR. SIMPSON: Okay. Mr. Edwards, after having listened or watched what you may have watched on the TV concerning this case and what you may have read after you came back from your trips, did you form any opinion concerning this case one way or the other?

MR. EDWARDS: Not really. You know, a lot of things you hear and you read in the paper and it's not so, and so you don't know the thing until you get the understanding of it, and so I didn't form anything whatsoever.

MR. SIMPSON: Has the thought ever entered your mind that Mr. Goode must be guilty of something or else he wouldn't be sitting here today?

MR. EDWARDS: Well, that did enter my mind something had to be wrong for him to be here, but he could be innocent. There are a lot that do be innocent. (R626-627)

Even though the jurors selected said they could be impartial in spite of exposure to the case, that does not preclude this Court from reviewing the jurors partiality. 9/

Murphy v. Florida, 421 U.S. 794, 44 L.Ed.2d 589, 95 S.Ct. 2031 (1975); Irvin v. Dowd, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1961).

> ...No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, 'You can't forget what you hear and see.'
> Irvin v. Dowd, 366 U.S. 717, 728, 6 L.Ed. 2d 751, 759, 81 S.Ct. 1639 (1961)

Given the publicity, Appellant submits to this Court that it was impossible for the jurors to be impartial. The subtle effect on the jurors cannot be measured by their statements of impartiality. Determining the impact of the media necessarily requires probability and degrees, and the degree of publicity in this case certainly makes jury prejudice more probable than not. See, Murphy v. Florida, 421 U.S. 794, 44 L.Ed.2d 589, 95 S.Ct. 2031 (1975).

> The length to which the trial court must go in order to select jurors who appear to be impartial is another factor relevant in evaluating those jurors' assurances of impartiality. In a community where most

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9/ A New Mexico Court had the following to say about a juror's statement of impartiality:

> To expect a juror to confess prejudice is not always a reliable practice. A juror can be completely honest in denying prejudice. In the words of Alexander Pope, 'All looks yellow to the jaundiced eye.'
> State v. Shawon, 423 P.2d 39, 42 (N.M. 1967).

> veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it.... Id. at 802, 803.

The trial court erred in finding the jury fair and impartial and in denying a change of venue. Appellant requests this Court to reverse.

POINT V.

APPELLANT, WHO PARTIALLY REPRESENTED HIMSELF WITH ASSISTANCE FROM APPOINTED COUNSEL, DID NOT WAIVE A CHANGE OF VENUE AND A FAIR AND IMPARTIAL TRIAL BY MERELY REQUESTING HIS TRIAL TO REMAIN IN LEE COUNTY.

The trial court considered changing the venue in this case on three separate occasions. (R967-1028,6-20,43-44,56) Appellant, objected to his counsel's motion and requested to be tried in Lee County.[10/] His actions created a contradiction, demanding the right to a jury trial versus the right to be tried in the county of the crime. Amend. VI, U.S. Const.; Art. I §16, Fla. Const.

10/ Appellant's objection to the change of venue in this case must be analyzed as a waiver of a fair and impartial trial. (See arguments on point IV-A & B, supra.) To waive such a constitutional right, Amend, VI, XIV, U.S. Const.; Art. I §16, Fla. Const. a defendant must do so freely, knowingly and voluntarily. See, Boykin v. Alabama, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969) Appellant's initial objection and the court's inquiry might be facially sufficient to constitute a waiver. (R13-14) But the second and third renewal of the motion engendered little (R44,50), or no inquiry or reaction. (R56) With a presumption against waiver of a constitutional right, the silent record, after the third renewal of the motion for change of venue, cannot be deemed a renewed objection and waiver of a right to a fair and impartial trial. See, Carnley v. Cochran, 396 U.S. 506, 8 L.Ed.2d 70, 82 S.Ct. 884 (1962); Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938); Saunders v. Wainwright, 254 So.2d 197 (Fla.1971); Perez v. State, 167 So.2d 313 (Fla.2d DCA 1964). This Court need not even consider Appellant's objections in reviewing the final denial of the change of venue.

In our system of justice, a demand for a jury trial necessarily requires a trial by an impartial jury. Fairness and impartiality are concomitants that are indispensable. Appellant had the right to a fair and impartial jury trial, not the right to an unfair and partial jury trial. Amend. VI, U.S. Const.; Art. I §16, Fla. Const.; Cf., Singer v. U.S., 380 U.S. 24, 13 L.Ed.2d 630, 85 S.Ct. 783 (1965). In view of the pretrial publicity and its taint upon the minds of the jurors (See Point IV A & B), Appellant's objection to a change of venue interprets into a request for a partial jury.

An inherent responsibility of a trial judge is to ensure a fair and impartial trial. Sheppard v. Maxwell, 384 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507 (1966). When Appellant's objections or requests hampered the fulfillment of that responsibility, the trial judge should deny the request. He has the duty, not only for the defendant but also for the maintenance of our justice system, to assure no one, including the accused, makes a mockery of a trial. Id.

The right to be tried in the county of the crime must give way when an impartial trial is not possible. See, Ashley v. State, 72 Fla. 137, 72 So. 647 (1916); O'Berry v. State, 47 Fla. 75, 36 So. 440 (1904); Ward v. State, 328 So.2d 260 (Fla. 1st DCA 1976). Appellant's objections to a change of venue were inconsistent with his demand for a jury trial. Those objections should be denied since pretrial publicity had prejudiced the jury. (See, Point IV A & B).

This case is analogous to situations where the state moves for a change of venue over defense objections. Id. Those instances also involve two competing constitutional rights --the right to be tried in the county of the offense and the right to an impartial trial. The cases also support the theory that a defendant is not entitled to a partial trial, whether the partiality be for or against him. Id.

It is well established that a state's motion for change of venue will be granted only after an actual test shows it practically impossible to impanel an impartial jury. See, Ashley v. State, 72 Fla. 137, 72 So.647,648(1916); O'Berry v. State, 47 Fla. 75, 36 So. 440 (1904); Ward v. State, 328 So.2d 260 (Fla.1st DCA 1976).

> Where an application in a criminal prosecution for a change of venue from the county where the crime was committed is made by the prosecuting attorney, and the accused objects thereto, the matter should be tested in some way so as to make it to clearly appear that it is practically impossible to obtain an impartial jury to try the accused in that county. Ashley v. State, at 647, 648.

This strict standard is required out of deference to the accused's constitutional right to be tried in the county of the crime. However, if an impartial jury is practically impossible to impanel, the venue can be changed over the defendant's objections. Id. This indicates that a right to an impartial trial overrides the right to be tried in the county of the crime. Those two rights, although embodied in the same paragraph in our constitutions, Amend. VI, U.S. Const.; Art. I §16, Fla. Const., are not equal in importance.

This standard can be applied in the instant case. Although it is the strictest standard this Court could adopt, the prejudice actually shown in the voir dire more than meets the burden. (See, point IV-B).

POINT VI

THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING APPELLANT SANE AND COMPETENT TO ASSIST COUNSEL IN THE PREPARATION OF HIS DEFENSE.

It is well settled that the state cannot try an insane person for a criminal offense. See, Drope v. Missouri, 420 U.S. 162, 43 L.Ed.2d 103, 95 S.Ct. 896 (1975); Deeb v. State, 118 Fla. 88, 158 So. 880 (1935); State ex rel Deeb v. Fabisinski, 111 Fla. 454, 152 So. 207 (1933), reh. den., ___ Fla. ___, 156 So. 261 (1933). Florida law recognizes that anyone who is insane cannot assist in the preparation of a defense, and cannot be tried. Fla.R.Crim.P. 3.210, Brock v. State, 69 So.2d 344 (Fla.1954); State ex rel Deeb v. Fabisinski, 111 Fla. 454, 152 So. 207 (1933), reh. den., ___ Fla. ___, 156 So. 261 (1933). Appellant is aware that the trial court has the discretion in finding or not finding insanity at the time of trial. Fowler v. State , 255 So.2d 513 (Fla.1971); Brown v. State, 245 So.2d 68 (Fla.1971), modified on other grounds, 408 U.S. 938, 33 L.Ed.2d 759, 92 S.Ct. 2870 (1972); Brock v. State, 69 So.2d 344 (Fla.1954). Appellant is also aware he has the burden of proving his insanity by a preponderance of the evidence. Brock v. State, 69 So.2d 344 (Fla.1954). Nevertheless, Appellant submits he met that burden through his own observable behavior, Cf., Pate v. Robinson, 383 U.S. 375, 385,

386, 15 L.Ed.2d 815, 822, 86 S.Ct. 836 (1966), and the testimony of Dr. George Barnard. (R856-878)

Four psychiatrists examined Appellant to determine his sanity and ability to stand trial. (R856-921,1361-1369) All agreed that Appellant suffered from a mental disorder, but only Dr. George Barnard concluded Appellant was unable to stand trial. 11/

Barnard insightfully diagnosed Appellant as a borderline schizophrenic (R862), with pedophilia. (R866) While Appellant appeared rational and oriented to person, time, place and circumstances, he suffered from illusions of grandiosity and power manifesting itself in a misperception of roles. (R869-874)

> A. He does, however, demonstrate a thought disorder in my opinion.
>
> Q. And how does he demonstrate that?
>
> A. I'll show you. The disturbance in thinking is most vividly demonstrated as he expresses understanding about his role, his own role as well as the role of the defense attorney, State Attorney and Judge during the process of the trial. He perceives the State Attorney as being an ally who will help him in the trial to achieve his mission. He does not believe his attorney can defend him because he is making it impossible for the defense attorney to do so by his actions, thus begins some of the stresses of the illusions of grandiosity and power.

11/ Appellant incorporates Barnard's testimony from page 856 through 880 in this brief. Also, written reports of psychiatrists Haber (R 1361-1363), Tin Myo Than (R1364-1365), and Wald (R1366-1369), are found in the Supplemental Record.

Q. From a psychiatric standpoint what does grandiosity indicate?

A. It means that he is falsely representing reality or perceiving reality. (R870)

* * *

In summary, Mr. Goode to me shows signs of schizophrenia of the latent type with disturbance in his thoughts, in his thinking, in his affect and his behavior. In addition, I think that he meets the criteria as I understand them related to the issue of competency to stand trial in that - and I think here is the misleading part - he can give factual information and he does so very readily, and I think that this is deceiving to people in that he appears to make sense about what he is saying, but--and I think this is a matter to be argued by you and the State and for the Judge to decide, but is it rational, and I think that is the key issue.

Q. Is what you're saying, are his decisions not to cooperate or his decisions to represent himself or to fire me, all of these things that you have just related, are you saying those are not--they appear to be, but they are not rational decisions?

A. In my opinion, that's it.

Q. Now, is he making these decisions just because he chooses to behave that way, or is it a result of some type of mental disorder?

A. I think it's a result of the mental disorder, and I think that in a way he is--he does not realize the seriousness of his actions, that he is doing a lot of it like a child playing games, but he is playing serious and deadly games. His parents said they know in the past he had

always been concerned about his health and perhaps excessively so. To me he says, 'You give me a gun now and I would not commit suicide,' and yet the actions that he is doing is a form of suicide by giving information freely to people about evidence which could go against him. In the Courtroom today he showed, I think, poor judgment in that he was passing out letters and information to reporters available and--.

Q. Okay, Doctor, I understand, and I think everyone understands that it's not in his best interest and most people would understand that, but is he doing these things because of--just because he is an ornery guy or because he has a mental disorder?

A. He does this, in my opinion, because he has a mental disorder.

Q. And how long has he had a mental disorder?

A. Perhaps from the day he was born.

Q. Do you have any other testimony that could enlighten this Court as to the reasons you have reached your opinion that he is not competent to assist counsel?

A. Not unless I respond to some specific questions.

Q. Can Mr. Goode at this point assist counsel in the preparation of his defense at his trial, in your opinion?

A. In my opinion, no.
(R874-876)

Appellant's behavior throughout his case supports the type of role distortion in his thinking Barnard diagnosed. (R870-974) This Court has certainly gleaned the instances of Appellant's unusual behavior from the record and the previous arguments in this brief. Appellate counsel will not belabor them again, but will incorporate them by reference here.

The trial court abused its discretion in rejecting Barnard's diagnosis and opinion, which Appellant amply supported with his behavior before and during his trial. Appellant submits the trial court erred in finding him competent to stand trial, and requests this Court to reverse.

POINT VII.

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO MISSTATE THE LAW TO THE JURY DURING THE SENTENCING PORTION OF THE TRIAL.

During his argument to the jury in the sentencing portion of the trial, the prosecutor misstated the law concerning the imposition of the death penalty. (R1226,1227) The first misstatement purported to place a burden of proof on the Appellant in proving mitigating circumstances. (R1226)

> Mitigating circumstances, and this is probably one of the only times there is any burden on the defendant in a criminal trial because mitigating circumstances can be presented--they don't have to be proven to you beyond a reasonable doubt. There is a different standard. I believe it is--I may be incorrect, but I believe it is the preponderance of the evidence. I may be wrong, but it is less than the State. (R1226)

This Court in State v. Dixon, 283 So.2d 1 (Fla.1973) explained the procedures involved in imposing a death sentence under Section 921.141 Florida Statutes. In regard to aggravating circumstances this Court said,

> The aggravating circumstances of Fla. Stat. §921.141(6), F.S.A., actually define those crimes--when read in conjunction with Fla.Stat. §§ 782.04(1) and 794.01(1), F.S.A.--to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.
> Id. at 9.

However, as to mitigating circumstance, this Court said all evidence was to be considered.

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overriden by one or more of the mitigating circumstances provided in Fla. Stat. §921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury. Id.

The clear meaning is that all evidence in mitigation is considered with no specific burden of proof required.

The trial court and Appellant's appointed counsel compounded the harm of the misstatement when they accepted it as correct. Appellant's counsel commented during his argument as follows:

> As Mr. D'Alessandro explained to you, we only have to show these by a preponderance of the evidence. I believe we have shown that particular act, mitigating circumstance, by the preponderance of the evidence. (R1240)

Judge Shearer must have also believed that Appellant had to prove mitigating circumstance by the preponderance of the evidence, since he failed to weigh Appellant's mental condition when imposing sentence. (R1273-1279, see point IX, infra.)

In his second misstatement, the prosecutor said the jury must return an advisory sentence of death if it finds the aggravating circumstances outweigh the mitigating.

> What I'm saying is, when you get down to your ultimate decision, if you are convinced that the aggravating circumstances outweigh the mitigating and a majority of you were so convinced, seven or more, then you must recommend death. (R1227)

Section 921.141 Florida Statutes (1975) does not make such a requirement. The statute merely says,

> (2) ADVISORY SENTENCE BY THE JURY--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);
>
> (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death §921.141(2) Fla.Stat. (1975)

The decisions of this Court recognize that trial juries and judges must exercise reasoned judgment when deciding whether or not to impose a death sentence. Alvord v. State, 322 So.2d 533 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973). The law was not meant to be coldly applied soley on the basis of weight of the circumstances.

> There is no way that the Legislature could program a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors in each case. See State v. Dixon, supra. The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitiga-

> ting factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.
>
> The statute contemplates that the trial jury, the trial judge and this Court will exercise reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence. Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case. Alvord v. State, 322 So.2d 533, 540 (Fla.1975).

These errors concern fundamental points in this state's death penalty law. Even though the errors were not called to the attention of the trial judge, this Court, exercising its responsibility to independently review a death sentence, State v. Dixon, 283 So.2d 1 (Fla.1973), should remand this cause for a new sentencing trial.

POINT VIII.

THE TRIAL COURT ERRED IN FINDING AND WEIGHING THE AGGRAVATING CIRCUMSTANCE OF A PRIOR CONVICTION FOR A CAPITAL FELONY, SINCE THE STATE PRODUCED ONLY HEARSAY EVIDENCE TO ITS PROOF AND COULD NOT PRODUCE A CERTIFIED COPY OF THE VIRGINIA JUDGMENT.

Although Section 924.141(1) Florida Statutes relaxes the rules of evidence in a sentencing trial, the aggravating circumstances must still be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla.1973). For a trial court to find the aggravating circumstance of a prior conviction for a capital felony, the conviction must be proven beyond a reasonable doubt. §921.141(5)(b); Elledge v. State, 346 So.2d 998 (Fla.1977); Provence v. State, 337 So.2d 783 (Fla.1976). The State failed in its burden in this case, and the trial court erred in finding and weighing the Virginia murder as an aggravating circumstance. (R1274,1347)

A Virginia policeman, Ronald Yeager, testified about the murder case in his state. He investigated the case and arrested Appellant for the crime. He also testified at that trial, and said it resulted in Appellant's conviction. (R1172-1178) Appellant's counsel objected to Yeager's testimony, requesting, as a minimum, a certified copy of the Virginia judgment. (R1092-1093) The trial court overruled the objection. (R1093,1175)

Yeager's hearsay testimony of the Virginia conviction was insufficient proof of an actual conviction. Id. Counsel's suggestion of a certified judgment as the minimum proof required was correct.

A direct analogy is found in proving a prior conviction under Florida's habitual offender statute. §775.084 Fla. Stat. (1975). This Court held in Shargaa v. State, 102 So.2d 809 (Fla.1958), cert. den., 358 U.S. 873, 3 L.Ed.2d 104, 79 S.Ct. 114 (1958) that in second offender proceedings, the official records of the convicting court should be filed in evidence. It is necessary to prove an actual adjudication of guilt.

> ...It is the responsibility of the prosecution in a second offender proceeding to prove the prior conviction by competent evidence. This includes a proper showing that the accused was previously adjudged guilty of a felony by a court of competent jurisdiction. In proceedings of this nature the existence of the prior conviction, however, is a fact to be proved as any other fact. The nature of the proof has varied in different jurisdictions. In some instances the docket entries in the Clerk's office have been considered adequate. We have the view that the official records of the court in which the accused was convicted should be produced and filed in evidence in the second offender proceeding. Id. at 812.

Where a man's life is involved, as in this case, such a minimal proof requirement should also apply.

Since the aggravating circumstance of a prior capital felony conviction was not proven through competent evidence beyond a reasonable doubt, the trial court erred in weighing that circumstance. The imposition of a death sentence was improper, and Appellant urges this Court to reverse.

POINT IX.

THE TRIAL COURT ERRED IN NOT FINDING AND WEIGHING THE MITIGATING CIRCUMSTANCES, (1) THAT APPELLANT COMMITTED THE CAPITAL FELONY WHILE UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE, AND (2) THAT APPELLANT'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR CONFORM HIS CONDUCT TO THE LAW WAS SUBSTANTIALLY IMPAIRED; IN VIEW OF THE PSYCHIATRIC TESTIMONY THAT SUCH CIRCUMSTANCES EXISTED.

Three psychiatrists testified at Appellant's sentenc ing trial. (R1107-1171) At the judges request, each of them had examined Appellant to determine his sanity at the time of the offense. All three had previously testified at a hearing to decide Appellant's competency to stand trial. (See point VI) The court specifically asked each of them his opinion as to the mitigating circumstances found in Section 921.141(6)(b)(f) Florida Statutes. (R1116-1117,1136-1137,1157)

> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> * * *
>
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substanitally impaired. §921.141(6)(b)(f) Fla. Stat. (1975).

Two of the psychiatrists concluded that neither of the above mitigating circumstances applied to Appellant's case.

Although mentally disturbed, Appellant's disturbance, in their opinion, did not reach that point. (R1136-1139,1157-1158) However, psychiatrist Tin Myo Than concluded that both circumstances definitely applied to Appellant's situation and condition. (R1115-1123) The psychiatrist explained Appellant's mental condition as follows:

> A. He has a disorder of personality where his way of thinking and his motivations are only for his own benefit to the exclusion of concentrations of other people. And most of his behavior, his thinking and feeling are more in an immature way, or shall we call it 'childlike' than mature or adultlike.
> Pedophilia is a condition where an adult person has abnormal sexual tendencies and behavior against children. (R1115)
>
> * * *
>
> Q. And what would your opinion be, sir?
>
> A. That he is--or he was under the influence of extreme mental and emotional disturbance at the time the felony was committed.
>
> Q. And explain again--you and I are talking; it is to the jury--again explain to them, please, why you make that conclusion?
>
> A. When I say an extreme mental and emotion disturbance, as I have described to you earlier about his narcissistic or personality disturbance where this person doesn't have the capacity or regard for other people's needs, but only highly self-centered and expecting all others to fulfull his immediate gratifications, which means his immediate needs only and has no capacity to postpone his needs to gratify his needs.
> And secondly, this person has a clearly overcompensated condition of his inadequate

and very poor self-esteem. He is overcompensating his poor self-esteem and poor feelings using self-denial reaction formation which is acting directly opposite of what he thinks he is capable of and grandiose preoccupation, which is he is always thinking or preoccupied with grandoise ideas about himself with self-importance, how important he is, how he is self-important rather than about anybody else and about his skill, preoccupied with the skill, with employing people to gratify his immediate needs. (R1117-1118)

* * *

A. Yes, sir, I believe the capacity of this Defendant to appreciate, I would say to fully understand the criminality of his conduct--when I use the word 'appreciate' I'm using it to fully understand the extent, the criminality of his conduct or to conform his conduct to the requirements of the law was definitely impaired.

Q. Explain to the jury why.

A. As I have stated earlier, because of that person's self-centeredness, thinking only about himself and nothing else, and not really considering about any other people's feelings or needs. And also because of his desire to fulfill his own immediate needs only at a particular time, not really considereing about any other needs that he might have later.

This person is not able to appreciate or conform his conduct by thinking a little further ahead of what he is doing at a particular time. (R1119)

In spite of this testimony, the trial court did not find or weigh the two mitigating circumstances involved. (R1273-1279,1346-1352) The court did find mitigating circumstances of age and no significant history of prior criminal

activity (R1276,1349), but made no reference to circumstances provided for in Section 921.141(6)(b)(f) Florida Statutes. This was error as all this evidence in mitigation should have been considered. State v. Dixon, 283 So.2d 1 (Fla.1973); see also, Burch v. State, 343 So.2d 831 (Fla.1977); Miller v. State, 332 So.2d 65 (Fla.1976); Jones v. State, 332 So.2d 615 (Fla. 1976) Appellant submits the trial court may have improperly required evidence in mitigation to be proven by a perponderance of the evidence before considering it in sentencing. (See point VII). This Court should reverse.

CONCLUSION

WHEREFORE, Appellant respectfully requests this Honorable Court to reverse the judgment and sentence below based on the foregoing arguments. In any event, the sentence of death should be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was duly furnished to the Attorney General's Office, The Capitol, Tallahassee, Florida, 32304, by mail this 26th day of September, 1976.

W.C McLain
W. C. McLAIN