IN THE SUPREME COURT OF FLORIDA

FILED

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SID J. WHITE
CLERK SUPREME COURT

By _____
Chief Deputy Clerk

TOMMY LEE RANDOLPH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 54,869

INITIAL BRIEF OF APPELLANT

On Appeal From the Circuit Court of the 19th Judicial Circuit of Florida, In and For St. Lucie County [Criminal Division].

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PRELIMINARY STATEMENT

Appellant, TOMMY LEE RANDOLPH, was the Defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and for St. Lucie County, Florida. In the brief the parties will be referred to as they appear before this Honorable Court.

The following symbols will designate the appropriate portions of the record on appeal.

"R"	Record on Appeal
"SR"	Supplemental Record on Appeal
"T"	Transcript of Trial Proceedings

STATEMENT OF THE CASE

An Indictment charging Appellant and a co-defendant with first degree murder, attempted robbery, conspiracy to commit robbery, possession of heroin and possession of narcotics paraphernalia was filed on April 13, 1978(R 3-4). Trial by jury was held on July 10-14, 1978(T 1-992). At the conclusion of the State's case, Appellant's motion for judgments of acquittal was granted as to Counts III, IV and V(T 827). On July 13, 1978, the jury returned verdicts of guilty of first degree murder and attempted robbery(R 11-12; T 919-920). The advisory sentencing proceedings were conducted on July 14, 1978. The jury returned an advisory sentence of death(R 13, T 982). Immediately thereafter Appellant was sentenced to death(T 987). A Motion to Vacate the Death Sentence was filed on November 27, 1978(R 17-18). No ruling was ever made by the trial judge. The trial judge's written findings in support of the death sentence were filed on November 27, 1978 (R 19-21).

Notice of Appeal was filed on August 14, 1978(R 22). Appellant was adjudged insolvent for appeal and the Public Defender for the Fifteenth Judicial Circuit was appointed for appellate purposes.

STATEMENT OF THE FACTS

The present case involves the shooting death of Joseph Chesser III during the early morning hours of February 25, 1978. No one witnessed the killing.

Most of what is known of this encounter comes from the testimony of co-defendant Althea Glinton, the state's chief witness, who was allowed to plead no-contest to second degree murder in exchange for her testimony. She was awaiting sentencing at the time of trial(T 353). Glinton was Appellant's girl friend and a prostitute(T 354). The money she made from her work she turned over to Appellant(T 355,755). On the evening of February 24 Glinton, Appellant, and a friend, Charles Hall, gathered at Appellant's residence and shot up two(2) bags of heroin(T 359,395). One half hour later the three left the residence and Glinton was dropped off on 9th Street(T 363).

Later that evening Appellant saw Glinton and stopped to talk with her(T 364). She told Appellant that she was not feeling well and she asked him to take her home. According to Glinton, Appellant wanted her to turn one more trick before she went home(T 365).

A short time later Glinton and another prostitute hailed a passing truck(T 366). The truck was driven by the deceased, one of Glinton's regular customers(T 366,410). She asked if the deceased wanted to rent a room but he said he did not have enough money(T 369). They then drove to Canal Terrace and parked (T 369). The deceased gave the witness nine($9.00) dollars to engage in sexual acts but the deceased was unable to do anything because he had been drinking(T 370-371). The deceased told Glinton to keep the money and asked when he could see her again (T 371). Glinton was standing outside the truck talking to the deceased when Appellant came up and pushed her away(T 372,417).

She then ran into a nearby boarding house, because she was scared (T 373). As she ran into the boarding house she heard Appellant say, "Don't try nothing ... I won't shoot"(T 372,421). When she came out of the boarding house Appellant was still over by the truck with the deceased. Shortly thereafter while walking with Edna Plain, another prostitute, she heard two gunshots(R 376-377).

After the shots the truck left its location on Canal Terrace and crashed into the boarding house(T 238,378,520). Appellant approached Glinton and Plain and asked if the deceased had any more money(T 380,428). According to Glinton, she told Appellant the deceased only had four or five dollars and Appellant then walked over to the truck(T 381). Appellant subsequently returned home with Glinton where according to her testimony he admitted shooting the deceased(T 386,451).

The deceased was shot with a bullet fired from a .25 caliber automatic weapon(T 647). The cause of death was hemorrhaging as a result of the single gunshot wound(T 459). Glinton testified that she saw Appellant with a pistol earlier that evening (T 360,442). A misfired cartridge from a .25 caliber automatic weapon was discovered at the scene of the shooting(T 252). Two searches of Appellant's residence,one pursuant to a consent to search and one pursuant to a search warrant uncovered three misfired cartridges(T 604,607-608,611). Antonio Laurito testified that based upon his examination of the three cartridges found at Appellant's residence and the one found at the scene, his opinion was that they were all fired from the same weapon(T 643). No weapon was ever recovered.

Earl Skovsgard testified as to Appellant's post-arrest statements. An objection to his testimony on the basis of a violation of the rule of witness sequestration was overruled (T 218,221). According to Detective Skovsgard when Appellant was originally arrested he was advised of his rightsand at that time he declined to make any statement. He subsequently contacted a private attorney who chose not to offer legal assistance (T 701-702). Although Appellant was offered the services of the public defender he declined(T 703). Ten hours after his arrest he asked to speak with Detective Skovsgard and thereafter made two taped statements(T 703-704). The trial judge ruled that the first taped statement was confusing and contained very little evidence and therefore the detective could testify to its substance, but the tape would be inadmissible (T 728,741). In it Appellant denied owning a weapon or having any contact with the deceased(T 747). In the second taped statement,which was played to the jury, Appellant stated he had owned a weapon, once but didn't now(T 776). Appellant further stated that he approached the truck out of concern for Glinton(T 759). The deceased became frightened and threatened Appellant with a knife(T 761). Appellant left and didn't hear any shots fired(T 766).

Joseph Chesser, Sr., the deceased's father, testified that on February 24th his son had asked him to deposit all but $100 of his paycheck. The witness gave the deceased $100 in cash (T 666-667). Appellant's objection on the grounds of relevancy was overruled(T 666).

The state's final witnesses were Kenneth Eller and Michael

Hayes. The trial judge had ruled their testimony admissible over defense objections during a proffer(T 695). Five(5) days before the deceased's death they testified that they were stopped by Althea Glinton and another black prostitute and they all went to a rooming house to engage in prostitution(T 791-792, 806,810). After about twenty(20) minutes they started to go back to their truck when they were approached by two black males, one of whom was identified as Appellant. According to the witnesses they were robbed(T 793,807). Appellant had what appeared to be a .25 caliber pistol(T 805,807).

During the advisory sentencing proceedings the State called Richard Schopp, an attorney who had represented Appellant in the past(T 927-928). Appellant's objection to the introduction of prior convictions for non-violent offenses(SR) was sustained (T 930). The judge ruled that such evidence would only be proper as rebuttal if Appellant offered evidence of no prior history of criminal activity(T 930-931). The State rested.

Appellant took the stand in his own behalf. Tommy Randolph testified that he had been taking drugs for about four (4) years and that on the night of the incident he had taken about five(5) bags of heroin and was under the influence of it (T 932-933). The defense rested.

On rebuttal the State again attempted to introduce prior convictions for non-violent offenses(T 948-949) and an offense for which there had been no conviction(T 950-951). Objections to both attempts were sustained(T 949,951-952). The State again rested.

POINT I

APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE INTRODUCTION OF COLLATERAL FACT EVIDENCE THAT WAS NOT LOGICALLY OR LEGALLY RELEVANT AND THAT WAS PREJUDICIAL TO APPELLANT.

The rule which requires the relevancy of evidence admitted into trial is fundamental and well-defined. The rule's purpose is to exclude collateral evidence which tends to draw the jury away from the point in issue. It guards against evidence which might excite prejudice or be misleading. The policy reasons underlying this rule involve some of the most fundamental principles of our criminal justice system, including the right to a fair trial and the presumption of innocence. See, e.g. Watkins v. State, 121 Fla. 58, 163 So.292(1935); Marion v. State, 287 So. 2d 419(Fla. 4th DCA 1974); Michelson v. United States, 335 U.S. 469(1948); United States v. Taglione, 546 F2d 194(5th Cir.1977).

In its benchmark decision in Williams v. State, 110 So.2d 654(Fla.1959), this Court discussed the issue regarding evidence of collateral crimes and propounded the rule that thetest of admissibility is relevancy. This broad rule of inclusion established in Williams, supra, has been further defined. In Marion v. State, supra, the court recognized the strict need for relevancy in the use of similar fact evidence. In the use of such evidence, the court required that the evidence be:

> "... relevant, that is to say, 'to prove a fact in issue in the case before the court'. If there is no fact in issue, there is no relevancy and the collateral evidence should not be admitted." Id. at 421.

In essence, for collateral fact evidence to be admissible

there must be something beyond the defendant's mere involvement in another crime. Drayton v. State, 292 So.2d 395(Fla. 3d DCA 1974); Bogan v. State, 226 So.2d 110(Fla.2d DCA 1969). The evidence must tend to establish a fact in issue such as identity, common scheme or design, motive, intent, guilty knowledge, or the absence of mistake or entrapment. Williams, supra, at 662. Florida courts have repeatedly held that mere similarity between crimes is not enough to justify the introduction of collateral fact evidence. E.g. Davis v. State, 376 So.2d 1198(Fla.2d DCA 1979); Bradley v. State, 378 So.2d 870(Fla. 2d DCA 1979); Helton v. State, 365 So.2d 1101(Fla. 1st DCA 1979); Hendry v. State, 356 So.2d 61(Fla. 4th DCA 1978).

In the present case, the prosecution sought to introduce evidence of an alleged robbery which had occurred five(5) days prior to the deceased's death. Before hearing the testimony of Kenneth Eller and Michael Hayes during a proffer, the trial judge made the following observations:

> THE COURT: I think what you're doing, Mr. McCain and Mr. Midelis, you're just trying to overpower the defense. Now that's common practice today and its a bunch of foolishness. (T 683).

According to Eller and Hayes they had just come out of a boardinghouse with two black prostitutes when they were robbed by two black assailants(T 685,690). One of the prostitutes was identified as Althea Glinton(T 687, 690) and one of the assailants as Appellant. Appellant objected to the testimony on the grounds that it was not proper under the Williams Rule(T 693). The State argued the testimony was relevant to show motive and common

scheme(T 694-695). The Court ruled that:

> I'm going to let you go to the jury with it, but with some misgivings. I think you're taking an awful risk.
>
> MR. McCAIN: Judge, for the record--
>
> THE COURT: Just a minute. Don't interrupt me.
>
> MR. McCAIN: I'm sorry.
>
> THE COURT: If there's a conviction in this case you have an awful big chance of a reversal on this very point.(T 695).

Prior to the witnesses testifying before the jury, Appellant renewed his objection to the testimony of Eller and Hayes and asked for a continuing objection(T 788-789).

The State's theory was apparently that Althea Glinton would engage in sexual activities with someone and that Appellant would rob the individual a short time later(T 821; 823-824). The theory is just that for several important reasons. First, Glinton herself denied there was any common scheme, plan or conspiracy to rob the deceased(T 436). Thus, a judgment of acquittal was granted as to the conspiracy charge at the close of the State's case(T 827). Secondly, the evidence of the collateral crime was not relevant to the charges of felony murder or the underlying felony of attempted robbery as it did not go to prove any of the elements of the offenses. In the instant case there was no more than a mere similarity between the two incidents. The alleged robbery of Eller and Hayes involved two prostitutes and two black males.[1]

[1]It bears mention here that Althea Glinton, the State's chief witness, never corroborated the testimony of Eller and Hayes as to the nature of the incident which allegedly occurred on February 19th. Indeed there was no evidence at all to support the State's theory of a common scheme to rob Glinton's customers.

Only Appellant, according to the State's own evidence, was allegedly involved in the incident wherein the deceased was shot. The State's chief witness, Althea Glinton, testified that the incident on the 24th was unplanned. Since there was no common scheme established from the evidence submitted by the prosecution, the collateral fact evidence was not sufficiently similar to be probative, and thus it should not have been admitted.

The State also contended this evidence was relevant to show Appellant's motive. The prosecution however relied solely on felony murder as a basis for finding Appellant guilty of first degree murder. See, e.g. T 860,874. Since intent to kill is not an issue in a felony-murder prosecution, the question of motive was wholly irrelevant under the State's lone theory of prosecution. Thus the collateral evidence should not have been admitted on this basis either.

In Williams v. State, 117 So.2d 473(Fla.1960)(hereinafter referred to as Williams II) this Court noted that evidence of a collateral crime may be admissible but that the prosecution could go too far in introducing evidence of other crimes. This Court stated:

> "The question then arises whether or not the state was permitted to go too far in introduction of testimony about the later crime so that the inquiry transcended the bounds of relevancy to the charge being tried, and made the later offense a feature instead of an incident. This may not be done for the very good reason that in a criminal prosecution such procedure devolves from facts pertinent to the main issue of guilt or innocence into an assault on the character of the defendant." Id. at 475.

In an effort to guide the trial courts in determining the

admissibility of Williams Rule evidence recent decisions have required the trial court to balance the probative value of the evidence against its prejudicial effect. Smith v. State, 344 So. 2d 915(Fla. 1st DCA 1977); Josey v. State, 336 So.2d 119(Fla. 1st DCA 1976); Dodson v. State, 334 So.2d 305(Fla. 1st DCA 1976); Colbert v. State, 320 So.2d 853(Fla. 1st DCA 1975). The Court in Smith v. State, supra listed three factors to be weighed in determining whether or not the evidence should be admitted:

> "One factor is the issue of relevancy itself, to what extent is the objectionable evidence relevant? ... a second factor is the necessity of the testimony. How important is the testimony to the State's case?...A third factor might be termed 'quality of testimony.' Was the testimony directly related to the material issues of the case, or was it more inclinedto demonstrate the bad character of the accused, thereby unduly prejudicing him". 344 So2d at 916.

Applying the Smith testto the case at bar, the relevance and necessity of the collateral evidence to the state's case is virtually nil. The State based its entire case on a felony-murder theory and thus the whole question of intent or motive was irrelevant. The evidence was also extremely weak in terms of the "quality of testimony" standard enunciated in Smith v. State, supra. The testimony was not relevant to any of the material issues in the case. It was "more inclined to demonstrate the bad character" of Appellant. 344 So.2d at 918. The prosecution's intent was to show that Appellant was a bad person with a propensity for violence so that the jury would convict Appellant because of his bad character.

The collateral evidence in this case was irrelevant to any material issue and did not meet the balancing test developed

in Smith v. State, supra. The testimony served no purpose but to confuse the jury as to what their limited fact-finding role was, and to persuade them to judge Appellant not on the charges for which he was indicted, but instead on the basis of his character or propensity. Further, as recognized by the trial judge, the prosecution was "just trying to overpower the defense" (T 683). See e.g. Styles v. State, 384 So.2d 703(Fla.2d DCA 1980); Pack v. State, 360 So.2d 1307(Fla.2d DCA 1978). The "prosecutorial overkill" employed in the present case requires a reversal of Appellant's conviction.

The collateral evidence in this case not only violated Appellant's due process right to a fair trial on the question of guilt or innocence but also greatly prejudiced him on the question of the appropriate sentence.

This Court in Williams II, supra recognized the special danger of collateral offense evidence in cases involving the possibility of the death penalty:

> "It[collateral offense evidence] may well have influenced the jury to find a verdict resulting in the death penalty while a restriction of that testimony might well have resulted in a recommendation of mercy, a verdict of guilty of murder of a lesser degree or even a verdict of not guilty. It is the responsibility and obligation of this Court to deal cautiously with judgments imposing the extreme penalty.... This Court must determine whether or not the interests of justice demand a new trial." 117 So2d at 476.

The grave dangers of collateral evidence in a capital case are illustrated here. It is far more than a mere possibility that the collateral evidence tipped the scalesin favor of death.

This is exactly the type of unauthorized nonstatutory factors that can lead to the freakish and arbitrary imposition of the death penalty.

The unnecessary use of the highly prejudicial "Williams Rule" testimony by the prosecution denied Appellant a fair trial and denied him due process of law on both the questions of guilt and penalty, and mandates that his conviction be reversed for a new trial.

POINT II

APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE CREATION OF SYMPATHY FOR THE DECEASED THROUGH THE INTRODUCTION OF IRRELEVANT TESTIMONY BY THE DECEASED'S FATHER.

The prosecution called Joseph Mitchell Chesser who testified that he was the deceased's father. Mr. Chesser further stated that his son worked with him and had an interest in the family-owned company(T 665-666). Appellant's objection to the testimony of the deceased's father was overruled(T 666). Mr. Chesser then testified that he last saw his son around 5:00 P.M. the day before the shooting, and he gave his son one hundred dollars in cash because his son had asked him to deposit part of his check and to give him some cash(T 666-667).

Generally, testimony by a member of a victim's family is inadmissible. It is a long and well established rule in Florida that a relative of the deceased in a homicide prosecution may not testify for the purpose of identifying the deceased where non-related witnesses are available to make such identification. E.g. Rowe v. State, 120 Fla.649,163 So.22(1935); Melbourne v. State, 51 Fla. 69, 40 So. 189(1906); Ashmore v. State, 214 So.2d

67(Fla. 1st DCA 1968); Hathaway v. State, 100 So.2d 662(Fla. 3d DCA 1958); Barnes v. State, 348 So.2d 599(Fla. 4th DCA 1977). The rule is derived from the jurisprudential acknowledgement that use of such testimony where it is not strictly necessary

> "... serves only to prejudice the jury against the defendant by interjecting issues into the trial which do not fall within the scope of the charges on which the defendant is being tried." Ashmore v. State, supra, 214 So.2d at 69.

There are recognized exceptions to this rule of exclusion which have been developed. In Furr v. State, 229 So.2d 269(Fla. 2d DCA 1969), the testimony of a relative was permitted to identify the victim because there were no other available witnesses. In Scott v. State, 256 So.2d 19(Fla. 4th DCA 1971), the Court held that the testimony of the deceased's mother formed an important link in the chain of custody of certain important evidence and thus the testimony was necessary with respect to a material point in issue. Recently, in Lewis v. State, 377 So.2d 640(Fla. 1980), this Court held the testimony of children of the deceased who were eyewitnesses to the homicide to be proper to rebut the claim of self-defense. Thus, where the testimony of a relative of the deceased is necessary to a material issue in the case and the evidence can be presented through no other means, than it is admissible.

In the instant case, the testimony of the deceased's father was not relevant to any material issue. The prosecution contended in closing argument that contrary to Appellant's assertion that the testimony was offered to evoke sympathy for the deceased, Mr. Chesser was called to show that the deceased had a

hundred dollars during the early evening hours in contrast with the twenty dollars found in the deceased's wallet after the incident(T 878). The State's theory that the discrepancy in the amounts was caused by Appellant not only is contrary to the charge for which Appellant was indicted, but further is wholly unsupported by the State's evidence. Appellant was charged with attempted robbery and thus any actual taking of money was not an issue to be proved. More importantly, the State's chief witness, Althea Glinton, testified that the deceased told her he wanted to engage in sexual relations with her in his truck, rather than renting a room, because he did not have enough money. Glinton further testified that the deceased could not engage in sexual relations because he had been drinking(T 369-371). Thus, even if the taking of money was a material issue in the case[which it clearly was not], the evidence elicited by the prosecution was not probative of that issue. Under the concept of legal relevancy the prejudicial impact of the testimony of the deceased's father far outweighed its probative value and for that reason it should not have been admitted. See Smith v. State, 344 So.2d 915(Fla.1st DCA 1977).

The only real purpose of this testimony was to seek sympathy for the witness and the deceased to the prejudice of Appellant. Barnes v. State, supra, 348 So.2d at 601. It demonstrated the State's total disregard for Appellant's constitutional right to a fair trial. As the Court stated in Hathaway v. State, supra:

> Attorneys for both the State and the accused are under a heavy responsibility to present their evidence in the manner most likely to

> secure for the accused a fair trial, free, insofar as possible, from any suggestion which might bring before the jury any matter not germane to the issue of guilt. Id. at 644.

Appellant was denied his right to a fair trial by the introduction of evidence which was germane to no issue, and thus he is entitled to a new trial.

POINT III

APPELLANT'S CUSTODIAL STATEMENTS TO POLICE AND PHYSICAL EVIDENCE SEIZED PURSUANT TO A CONSENT TO SEARCH WERE THE FRUIT OF AN ILLEGAL ARREST.

The Supreme Court of the United States has recently held that, absent exigent circumstances, a warrantless arrest at a person's home is a violation of the Fourth Amendment. Payton v. New York, ___U.S.___, 100 S.Ct. 1371(1980). In the instant case the police arrested Appellant at his home but without an arrest warrant(T 494, 582-584). Though the police may have had probable cause to arrest Appellant no exigent circumstances were shown which would have excused the warrant requirement. The arrest was therefore illegal. Payton v. New York, supra. See also State v. Santamaria, 385 So.2d 1131(Fla. 1st DCA 1980)(even where police had probable cause to arrest and probable cause to believe suspect was in the apartment, arrest was illegal since the police neither procurred an arrest warrant nor were able to demonstrate exigent circumstances).

A

APPELLANT'S STATEMENTS WERE INADMISSIBLE.

The question presented herein is whether Appellant's statements to police were the fruit of that illegal arrest. If

so they would be inadmissible. Dunaway v. New York, 442 U.S. 200(1979).

The admissibility of evidence obtained as a result of an illegal arrest depends solely upon the nexus between the evidence and the illegal conduct. Brown v. Illinois, 422 U.S. 590(1975); Norman v. State, 379 So.2d 643(Fla. 1980).[2] As this Court stated in Norman, for the evidence to be admissible there must be:

> "clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior official illegal action." Id. at 647.

In order to determine whether a confession was obtained by exploitation of an illegal arrest the Supreme Court of the United States developed a three pronged test. Factors to be considered are:

> "The temporal proximity of the arrest and the confession, the presence of intervening circumstances... and, particularly, the purpose and flagrancy of the official misconduct...." Brown v. Illinois, supra, 422 U.S. at 603-604.

In United States v. Tucker, 610 F.2d 1007(2d Cir. 1979) the Court applied this test to a case similar to the case at bar. In Tucker the defendant, a robbery suspect, was asked to go down to police headquarters where he was detained in a holding cell for three hours. He was subsequently interviewed by agents of the Federal Bureau of Investigation. At that time he was warned

[2]The inquiry here involves a Fourth Amendment analysis. Therefore voluntariness is not an issue. If it were police could cure any illegal conduct merely by a recital of the Miranda warnings. Dunaway v. New York, supra, 442 U.S. at 217-219.

of his constitutional rights and he made a confession. He gave a second confession the following day. Id. at 1009. Although finding that the police misconduct was not egregious the Court observed that the time between the illegal arrest and confessions was short and the defendant was in continuous custody throughout. Id.at 1013. The confessions were therefore inadmissible.

The instant case is factually indistinguishable from Tucker. Although Appellant herein asked to see Detective Skovsgard before he made his statement the defendant in Tucker voluntarily went down to the police station and later blurted out "You got me" before the FBI agents had asked their first question. Id. at 1009. Nor is the length of time between arrest and statement significantly different. Although the first confession in Tucker came only three hours after arrest the second statement was made the following day. In the instant case the statements were made the same day as the arrest(T 743).

The purpose of the exclusionary rule is to deter police misconduct. Dunaway v. New York, supra; United States v. Brookins, 614 F.2d 1037(5th Cir. 1980). Where however there is sufficient attenuation between the illegal conduct and the discovery of evidence the evidence is admissible on the theory that the deterence value of suppression is marginal. Id. at 1047.

Sub judice there was no event which would have either attenuated the connection between Appellant's arrest and his subsequent statements or have provided an independent source for the statements. The necessity of suppression is therefore paramount. United States v. Cruz, 581 F.2d 535(5th Cir. 1978). Appellant's

statements should not have been admitted.

B

EVIDENCE SEIZED PURSUANT TO A CONSENT TO SEARCH WAS INADMISSIBLE.

Shortly after Appellant's arrest Appellant consented to a search of his residence(T 501,514,602-603). The police thereafter went to his residence and found two cartridges(T 604-605,607-608). The cartridge found in a glass container inside the house was later determined to have been misfired. The cartridge found outside near the steps was later determined to have been a spent casing(T 640-641). Antonio Laurito testified that these cartridges were fired from the same weapon which produced the misfired cartridge found at the scene near the deceased's truck(T 643). Appellant's objections to the introduction of these items were overruled(T 487-488, 501-503, 583-584, 605).

Even before Dunaway v. New York, supra, Florida courts held that a consent to search subsequent to an illegal arrest is presumptively invalid. Pomerantz v. State, 372 So.2d 104(Fla. 3d DCA 1979). Recently in Norman, supra, this Court reiterated this principle stating:

> The voluntariness vel non of the defendant's consent to search is to be determined from the totality of circumstances. But when consent is obtained after illegal police activity such as an illegal search or arrest, the unlawful police action presumptively taints and renders involuntary any consent to search. Id. at 646-647.

Sub judice one of the cartridges was found inside Appellant's residence and one outside. Since the State has shown no evidence of an "unequivocal break in the chain of illegality"

between the arrest and the consent to search the seizure of the cartridge found inside was the fruit of the illegal arrest. Norman, supra. The discovery of the cartridge outside was equally unlawful since there was no showing that the police would have been at Appellant's residence absent the consent to search. United States v. Brookins, supra, 614 F.2d at 1048(Prosecution bears burden of showing that evidence found subsequent to an illegal arrest would have been inevitably discovered). This evidence, having been illegally obtained was inadmissible and should have been suppressed.

POINT IV

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE SEIZED PURSUANT TO AN ILLEGAL SEARCH.

On March 1, 1978, five days after the incident and four days after the last search of Appellant's residence the police sought a search warrant to again search Appellant's home. Judge Tye found that there was probable cause to believe that a .25 caliber weapon and other relevant evidence were present on the premises. Although a .25 caliber weapon was not found a .25 caliber cartridge was found on the room divider in the living room(T 611). It was subsequently determined that this cartridge had been misfired(T 641). Antonio Laurito testified that this cartridge was fired from the same weapon which produced the misfired cartridge found at the scene near the deceased's truck (T 643). Appellant's continuing objection to the introduction of any items illegally seized was overruled(T 605).

The question presented herein is whether there was sufficient probable cause to justify the issuance of the search

warrant. An examination of the affidavit upon which the warrant was based reveals that its factual allegations were provided by an informant, Edna Plain. Althea Glinton told Ms. Plain that she had been pulled from the deceased's truck by Appellant and shortly thereafter she had heard a gunshot. Ms. Plain heard Appellant ask Glinton if the deceased had any more money and she saw Appellant enter the deceased's truck. The affidavit goes on to state that Appellant was known to carry an automatic weapon but it was not found in his possession when he was arrested. He was also not dressed the same as he had been at the time of the incident(SR).

Under Florida law probable cause to arrest is not equivalent to probable cause to search. To justify a search officers must have a reasonable suspicion that contraband exists in the particular place where they desire to search. State v. Williams, 374 So.2d 609(Fla.3d DCA 1979)(Probable cause to believe gun in home where defendant had fired on police from inside); Orr v. State, 382 So.2d 860(Fla.1st DCA 1980)(No probable cause to believe marijuana in home where confidential informant did not state when marijuana was seen); Gelis v. State, 249 So.2d 509 (Fla. 2d DCA 1971)(conclusion that evidence was in home because it was not found on the defendant insufficient to justify probable cause). Accord, United States v. Gramlich, 551 F.2d 1359 (5th Cir.1979).

United States v. Charest, 602 F.2d 1015(1st Cir. 1979) is strikingly similar to the instant case. In Charest the affidavit in support of a search warrant contained information

provided by an eyewitness to a murder. In toto the information provided probable cause to believe that the assailant was the defendant. The affidavit however stated no facts which would support a conclusion that the murder weapon was present in the defendant's residence. The Court said that although a warrant must be read in a common sense fashion, "commons sense tells us that it is unlikely that a murderer would hide in his own home a gun used to shoot someone." Id. at 1017.

In the present case there were even less facts to support the issuance of a search warrant than in Charest, supra. Prior to the issuance of the warrant the residence had already been searched twice, once at the time of arrest and once pursuant to a consent to search. This case thus presents a unique situation where the police not only did not have probable cause to believe that any evidence would be on the premises, they had probable cause to believe that the evidence would not be there. Thus it was error for the Court to permit the introduction of the cartridge and testimony comparing it to the cartridge found at the scene. Charest, supra, Gelis, supra. This Court should reverse.

POINT V

THE TRIAL COURT ERRED BY EXCEPTING A STATE WITNESS FROM THE RULE OF WITNESS SEQUESTRATION AND BY FAILING TO CONDUCT A HEARING AFTER APPELLANT ALLEGED THAT HE WOULD BE PREJUDICED AS A RESULT OF THE COURT'S RULING.

Prior to the commencement of opening statements the rule of witness sequestration was invoked. The State requested that Detective Earl Skovsgard be excepted from the rule because he was the chief investigating officer(T 218). Appellant's objection was overruled by the trial judge who noted that "it's

been the practice here in this circuit ever since I can remember that the State has been permitted to have an investigating officer present...." At that point defense counsel alleged that Detective Skovsgard and Officer Walker had placed undue influence and pressure on certain witnesses and further objected to the exception from the rule(T 221).

The policy behind the witness rule is to prevent the coloring of a witness' testimony by that which he has heard from previous witnesses. Spencer v. State, 133 So.2d 729(Fla.1961); Dumas v. State, 350 So.2d 464(Fla.1977). Though judges are given wide discretion in implementing this rule there is no general exception for police officers. Jackson v. State, 177 So.2d 353(Fla. 3d DCA 1965). Recently the Fourth District Court of Appeal passed upon the legal issue presented herein. In Thomas v. State, 372 So.2d 997(Fla.4th DCA 1979), the Court reviewed the conviction of a defendant tried by the same trial judge[Honorable Wallace Sample] who employed the same traditional practice of excepting the chief investigating officer from the rule as in the present case. The Court stated:

> While it may be helpful, even necessary in some complex cases, to have a police witness to remain in the courtroom during trial and thus be excluded from the witness rule we deem it proper to advise the trial court to make a finding no real prejudice would result from this procedure if the accused objects after invoking the rule. Id. at 999.

The Court concluded that the proper way to make that finding was for the trial court to conduct a hearing to determine if the police witness' presence was necessary and non-prejudicial. Id.

See Richardson v. State, 246 So.2d 771(Fla.1971); Ramirez v. State, 241 So.2d 744(Fla. 4th DCA 1970); Cumbie v. State, 345 So.2d 1061(Fla.1977).

In the instant case the trial judge was on notice by defense counsel's allegations that excepting Detective Skovsgard from the witness rule would be prejudicial to Appellant. It was incumbent upon the trial judge at that point to conduct a hearing to determine the question of prejudice. As this Court stated in Richardson, supra, "the court's discretion can be properly exercised only after the court has made an adequate inquiry into all of the surrounding circumstances." 246 So.2d at 775. Instead, the trial judge merely relied upon his long standing practice of allowing an exception for the chief investigating officer. The failure to conduct a hearing and the exception of Detective Skovsgard from the witness rule was prejudicial to Appellant and thus he is entitled to a new trial.

POINT VI

THE EVIDENCE OFFERED BY THE PROSECUTION WAS LEGALLY INSUFFICIENT TO SUPPORT THE CONVICTIONS AND/OR THE INTERESTS OF JUSTICE REQUIRE A NEW TRIAL.

Appellant has received the ultimate penalty based upon his conviction for first degree murder. That conviction rested solely upon circumstantial evidence which did not exclude all reasonable hypotheses of innocence. In addition the conviction was based largely on the testimony of Althea Glinton, an indicted co-defendant, who was permitted to plead no contest to second degree murder in exchange for her testimony against

Appellant. There is a unique need for reliability where a life is at stake. Accordingly, this Court is committed to reviewing all the evidence in a capital case to determine whether the interests of justice require a new trial. Examination of the evidence offered by the prosecution in the present case demonstrates that it is so far from convincing as to require a new trial in the interests of justice.

The prosecution relied primarily on the testimony of Glinton to obtain the conviction. The evidence was entirely circumstantial regarding Appellant's involvement in the alleged offense. There was no direct evidence of the commission of the underlying felony of attempted robbery. The following constitutes a brief summary of the relevant testimony.

Althea Glinton testified that she was a prostitute and lived with Appellant(T 354). On the evening of February 24th she, Appellant and a friend, Charles Hall, got together at Appellant's house and shot up several bags of heroin(T 359,395). A half hour later she was dropped off on 9th Street(T 363). Later that evening Appellant saw Glinton and stopped to talk with her(T 364). She told Appellant that she was not feeling well and she asked him to take her home. According to Glinton, Appellant wanted her to turn one more trick before she went home(T 365).

A short time later Glinton and another prostitute hailed a passing truck(T 366). The truck was driven by the deceased, one of Glinton's regular customers(T 366,410). She asked if the deceased wanted to rent a room but he said he did not have

enough money(T 369). They then drove to Canal Terrace and parked (T 369). The deceased gave the witness nine($9.00) dollars to engage in sexual acts but the deceased was unable to do anything because he had been drinking(T 370-371). The deceased told Glinton to keep the money and asked when he could see her again (T 371). Glinton was standing outside the truck talking to the deceased when Appellant came up and pushed her away(T 372,417). She then ran into a nearby boarding house, because she was scared (T 373). As she ran into the boarding house she heard Appellant say, "Don't try nothing ...I wont' shoot"(T 372,421). When she came out of the boarding house Appellant was still over by the truck with the deceased. Shortly thereafter while walking with Edna Plain, another prostitute, she heard two gunshots(T 376-377).

After the shots the truck apparently left its location on Canal Terrace and crashed into the boarding house(T 238,378, 520). Appellant approached Glinton and Plain and asked if the deceased had any more money(T 380,428). According to Glinton, she told Appellant the deceased only had four or five dollars and Appellant then walked over to the truck(T 381). Appellant subsequently returned home with Glinton where according to her testimony he admitted shooting the deceased(T 386,451).

The deceased was shot with a bullet fired from a .25 caliber automatic weapon(T 647). The cause of death was hemorrhaging as a result of the single gunshot wound(T 459). Glinton testified that she saw Appellant with a pistol earlier that evening(T 360,442). A misfired cartridge from a .25 caliber automatic weapon was discovered at the scene of the shooting

(T 252). Two searches of Appellant's residence, one pursuant to a consent to search and one pursuant to a search warrant uncovered three misfired cartridges(T 604,607-608,611). Antonio Laurito testified that based upon his examination of the three cartridges found at Appellant's residence and the one found at the scene, his opinion was that they were all fired from the same weapon(T 643). No weapon was ever recovered.

Glinton's testimony in exchange for a plea should be scrutinized more closely than other such testimony because of the nature of the plea involved. Courts have recognized that testimony in exchange for a plea is often self-serving and unreliable. See e.g. United States v. McCallie, 554 F.2d 770 (6th Cir.1977). In a case where a co-defendant's plea bargain may have meant the difference between life and death no amount of skepticism is too great.

The uniquely coercive nature of the death penalty has been noted often. See Green v. United States, 355 U.S. 184, 193(1957)("incredible dilemma"); Fay v. Noia, 372 U.S. 391,440 (1963)("Russian Roulette"); Pope v. United States, 392 U.S. 651 (1968); Corbitt v. New Jersey, 439 U.S. 212(1979); United States v. Jackson, 390 U.S. 570(1968). In evaluating the trustworthiness of Glinton's testimony this Court must consider the unique power of the death penalty to coerce pleas and testimony and the life or death inducement for testifying falsely.

The State's sole theory of prosecution was felony murder based on the underlying felony of attempted robbery(T 860,874). Since the State relied solely upon felony murder it had the bur-

den of proving an underlying felony beyond a reasonable doubt. Robles v. State, 188 So.2d 789(Fla.1966); Straughter v. State, 384 So.2d 218(Fla. 3d DCA 1980). The evidence presented in the instant case was totally circumstantial. Noone saw who shot the deceased. Noone witnessed an attempted robbery. The State argued they had shown a prima facie case of attempted robbery through the testimony of the two "Williams Rule" witnesses(T 821. Yet Glinton denied any conspiracy to rob the deceased and the Court granted a judgment of acquittal as to the conspiracy charge. Additionally, the "Williams Rule" testimony was not probative of the attempted robbery charge because the two offenses were so dissimilar.(See Point I, supra). The State's theory of attempted robbery was speculative at best. Thompson v. State, 276 So.2d 218(Fla. 4th DCA 1973); Whitehead v. State, 273 So.2d 146(Fla. 2d DCA 1973).

The rule regarding circumstantial evidence is well settled and was succinctly enunciated by this Court in Davis v. State, 90 So.2d 629(Fla.1956):

> "[O]ne accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. Head v. State, Fla.1952, 62 So.2d 41, Mayo v. State, Fla. 1954, 71 So. 2d 899.
>
> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain conviction. It is

> the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt.
>
> Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence." Id. at 631-632.

The circumstantial evidence in the instant case was not inconsistent with other reasonable hypotheses of innocence.

First, Althea Glinton could have shot the deceased. Like Appellant she was with the deceased shortly before his death. Glinton lived with Appellant, so the cartridges found in and around their residence are just as probative of her guilt as Appellant's. In fact, there was no evidence presented by the prosecution which points only to Appellant, except for Glinton's testimony. That her testimony is highly suspect and should be rigidly scrutinized because of her plea to second degree murder cannot be overemphasized. But even more telling is the fact that if Glinton did nothing more than what she testified to, she was not guilty of anything, let alone second degree murder.

Secondly, even assuming for argument purposes, that Apellant did shoot the deceased, since the prosecution did not prove an underlying felony, the most the evidence will support is second degree murder. There was evidence that the deceased had threatened Appellant with a knife(T 761). Thus, the evidence presented by the prosecution does not exclude second degree

murder or even self defense. The circumstances, taken as a whole, do not exclude every reasonable hypothesis of innocence. The State has failed to meet its burden of legal sufficiency.

However, even if this Court finds the circumstantial evidence was legally sufficient, the weight of the evidence is so far from convincing as to require a new trial "in the interests of justice." Fla.R.App.P. 9.140(f); Fla.App.R. 6.16(b); Williams v. State, 117 So.2d 473(Fla.1960). This Court has often held a new trial is warranted where the evidence is uncertain or insubstantial and thus the interests of justice demanded it. See e.g. Tibbs v. State, 337 So.2d 788(Fla.1976); Cordell v. State, 157 Fla. 295, 25 So.2d 885(1946); Council v. State, 111 Fla. 173, 149 So.13(1933); Platt v. State, 65 Fla.253, 61 So.502 (1913).

Because of the irreversible nature of the death penalty this Court has recognized a correspondingly greater need for reliability in the requisite burden of proof before an individual may be convicted and sentenced to death. Examples of this unique need for reliability can be seen in several cases. In Taylor v. State, 294 So.2d 648(Fla.1974), this Court reversed the death sentence and releid in part on "at least the possibility" that the defendant did not fire the fatal shot. Id. at 652. The possibility of innocence was again weighed by this Court in Alford v. State, 307 So.2d 433(Fla.1975). The evidence in the present case was certainly not "particulary strong", as was found in Alford v. State, supra, thus raising the possibility of an innocent man being sentenced to die. At the very

least there are substantial doubts left unresolved by the evidence such that in the interests of justice Appellant should not be put to death.

The evidence as a whole is circumstantial and does not exclude every reasonable hypothesis of innocence. Appellant's conviction and death sentence cannot be upheld on the basis of such tenuous evidence. The circumstantial evidence presented by the State is not sufficiently reliable to deprive Tommy Lee Randolph of life. At the very least, the interests of justice demand that Appellant be afforded a new trial.

POINT VII

THE EXECUTION OF APPELLANT'S DEATH SENTENCE WOULD DEPRIVE HIM OF LIFE WITHOUT DUE PROCESS OF LAW AND SUBJECT HIM TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

A

THE EXTREME PENALTY WAS ASSESSED AGAINST TOMMY RANDOLPH WHERE THE TRIAL JUDGE IMPROPERLY CUMULATED AGGRAVATING CIRCUMSTANCES, ERRONEOUSLY FOUND THE AGGRAVATING CIRCUMSTANCE OF "HEINOUS, ATROCIOUS, OR CRUEL," AND FAILED TO GIVE INDEPENDENT MITIGATING WEIGHT TO ALL FACTORS IN MITIGATION.

The trial judge found three statutory aggravating circumstances: the capital felony occurred while Appellant was engaged in an attempt to commit robbery[§921.141(5)(d)]; the capital felony was committed for pecuniary gain[§921.141(5)(f)]; and the capital felony was especially heinous, atrocious or cruel[§921.141(5)(h)](R 19-21).[3]

[3]It should be noted here that the judge immediately sentenced Tommy Lee Randolph to death following the jury's advisory recom-

As to the first two aggravating circumstances found by the judge, it is now settled that such doubling of aggravating circumstances is improper. Robbery and pecuniary gain refer to the same aspect of the offense and thus cannot be cumulated and can only be considered as constituting one aggravating circumstance. Provence v. State, 337 So.2d 783,786(Fla.1976); accord Gibson v. State, 351 So.2d 948,951-953(Fla.1977); Riley v. State, 366 So.2d 19,21(Fla.1979); Menendez v. State, 368 So.2d 1278, 1281(Fla.1979). See also Cook v. State, 369 So.2d 1251,1256 (Ala.1979). Allowing such double use of a single aggravating factor would vitiate the statutory aggravating circumstances as constraints upon capital sentencing discretion and thus would violate the Eighth Amendment commands of Furman v. Georgia, 408 U.S. 238(1972). Accordingly, the cumulation of the aggravating circumstances of subsections(d) and (f) was improper.

The remaining statutory aggravating circumstance found by the sentencing judge was that the crime was "especially heinous, atrocious or cruel." The judge based this finding on the following reasoning:

> "... the crime was especially heinous, atrocious and cruel in that the defendant ordered his prostitute to pick up 'one more trick' even though she was physically ill. Also the fact the victim was gunned down for no apparent reason other than maliciousness; the defendant showed no remorse whatever during the course of his five day trial;[4] and as indicated above,

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Footnote 3 continued:

mendation and it was not until July 27, 1978, some 13 days after the sentence was imposed, that the findings purporting to justify it were filed. See Point VII D, infra.

[4]Although the judge's finding of "no remorse" appears to be part

> the attempted robbery fits into a planned pattern and scheme between the defendant and prostitute and/or other confederates."[5] (R 20).

Under the strict guidelines established by this Court, the facts of this case cannot support a finding of especially heinous, atrocious or cruel. Joey Chesser died almost instantaneously from a single gunshot(T 459). The killing was not "accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1,9(Fla.1973).

This Court has repeatedly struck findings of "heinous, atrocious or cruel" in cases involving offenses such as that in the present case. See, e.g. Cooper v. State, 336 So.2d 1133, 1141(Fla.1976); Riley v. State, 366 So.2d 19,21,(Fla. 1978); Kampff v. State, 371 So.2d 1007(Fla.1979); Fleming v. State, 374 So.2d 954,958-959(Fla.1979); Lewis v. State, 377 So.2d 640,646(Fla.1980); cf. Halliwell v. State, 323 So.2d 557(Fla. 1975). Recently this Court again ruled such a finding to be improper where the victim had "died almost instantaneously from

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Footnote 4 continued:
of his erroneous finding of heinous, atrocious or cruel, it is clear that such use of non-statutory factors in aggravation is improper. E.g. Riley v. State, 366 So.2d 19,21 n.2(Fla.1979); Menendez v. State, 368 So.2d 1278, 1281 n.12(Fla.1979); cf. Kampff v. State, 371 So.2d 1007,1009-1010(Fla.1979).

[5]Aside from the non-statutory nature of this particular aggravating factor, it also suffers from a cleark lack of proof beyond a reasonable double. For a full discussion of the evidentiary conflicts which undermine this particular factor, see Point I,

her gunshot wounds." Williams v. State, ___So2d___, Case No. 50,666, Opinion filed June 12, 1980, 1980 Fla.Lw.Wk. S.Ct. Op. 302,304.

To uphold the finding of heinous, atrocious or cruel as an aggravating circumstance would contravene State v. Dixon, supra, and its progeny and would thus constitute "such a broad and vague construction" of §921.141(5)(h) "as to violate the Eighth and Fourteenth amendments to the United States Constitution." Godfrey v. Georgia, ___U.S.___, 100 S.Ct. 1759,1762 (1980).

Accordingly, a substantial portion of the underpinnings of the sentence is invalid. Only one aggravating circumstance was arguably proper pursuant to the statute -- that the offense occurred while Appellant was engaged in an attempt to commit robbery.[6] Resting the ultimate penalty solely upon the underlying felony of attempted robbery, however, would render Appellant's death sentence disproportionate and arbitrary.

The use of the underlying felony as an aggravating circumstance, where such circumstance would apply to every felony-murder situation, would defeat the function of the statutory

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Footnote 5 continued:

supra. To the extent the judge here and in the second paragraph of his written findings(R 19) is relying upon Tommy Randolph's character in aggravation, such a practice has been consistently condemned by this Court. It is only aspects of a defendant's character which fall squarely within the confines of the factors enumerated in the statute which may be considered in aggravation.

[6]As previously discussed, the State's case regarding the underlying felony of attempted robbery was wholly circumstantial and

aggravating circumstances to confine and channel capital sentencing discretion, and so would violate Furman v. Georgia, supra. Stated differently, Tommy Randolph has received the death penalty solely because the offense involved robbery-murder, thus, if upheld inthe present case, the death sentence would be automatic for felony-murder. However, there are no guidelines provided by the statute for determining which felony-murder cases receive the death sentence and which do not. Certainly all felony-murder cases do not, and constitutionally cannot, mandate the death sentence -- a mandatory death sentence would be invalid. E.g., Woodson v. North Carolina, 428 U.S. 280 (1976). See also Note, The Constitutionality of Imposing the Death Penalty for Felony Murder, 15 Hous. L.Rev. 356, 384 (1978). To uphold a death sentence solely because it involved a robbery-murder would leave judges and juries with unfettered, unchannelled discretion, would provide no meaningful basis for distinguishing between those cases which receive the ultimate penalty and those that receive life, and would thus render the Florida statute arbitrary and capricious as applied. Cf. Proffitt v. Florida, 428 U.S. 242, 253 (1976).

Footnote 6 continued:

did not exclude every reasonable hypothesis of innocence. See Point VI, supra. If this Court agrees with this contention then of course the first degree felony murder conviction cannot stand. At the very least there would be no properly found statutory aggravating circumstances, thus mandating a life sentence. E.g. Kampff v. State, supra. For the purposes of this point however, we will assume that the attempted robbery is supported by proof beyond a reasonable doubt.

The governing legal principles in the present robbery-murder case are not unlike those expressed by this Court in reviewing capital sexual battery cases. In the present case, the sentence is based solely upon the underlying felony -- with nothing to set it apart from other robbery-murder type cases. Similarly, in Purdy v. State, 343 So.2d 4(Fla.1977) this Court found that "nothing was shown to distinguish this crime from any other violation of the same statute" and therefore concluded that "to affirm the death penalty in this instance would mean imposition of the death penalty for all individuals convicted of this crime" which would be unconstitutional. Id.at 6. See also Shue v. State, 366 So.2d 387(Fla.1978).[7] The North Carolina Supreme Court applied similar reasoning in striking the use of the underlying felony as an aggravating circumstance. State v. Cherry, 257 S.E. 2d 551 (N.C. 1979). The Cherry court found that the death penalty in a felony murder case would be disproportionately applied due to the "automatic" aggravating circumstance, and thus struck the use of the underlying felony as an aggravating circumstance. Id.

Thus, upholding Appellant's death sentence solely on the basis of the one aggravating circumstance inherent in all robbery-murder offenses would be unconstitutional.

The present case is strikingly similar to Kampff v. State,

[7]This Court implicitly recognized in McCaskill v. State, 344 So.2d 1276,1280(Fla.1977) that all felony murders involving robbery do not result in the death penalty and in fact few do. Yet there are no standards and no guidance afforded to the sentencer, both jury and judge, to distinguish which among the wide range of felony murder convictions should receive the ultimate penalty and which should not.

supra. Both cases involve the same trial judge, the Honorable Wallace Sample. Both cases involve immediate sentencing by the judge following advisory recommendations of death. In Kampff the judge had found two aggravating circumstances -- great risk of death to many persons, §921.141(5)(c) and especially heinous, atrocious or cruel, §921.141(5)(h). 371 So.2d at 1009. This Court found both findings to be erroneous and concluded that since "no aggravating circumstances were sufficiently established" the sentence of death could not stand. Id. at 1010. In the present case two of the three aggravating circumstances found by the judge are clearly erroneous. The only distinction between Kampff and the present case is the presence of one arguably proper aggravating factor -- one which is inherent in every robbery-murder. As we have discussed affirmance of Tommy Randolph's death sentence based soley upon the underlying felony would be disproportionate and arbitrary. Thus, under this Court's decision in Kampff, the death sentence cannot stand.

That the sentencing judge found no statutory mitigating circumstances does not make Appellant's death sentence valid. First, as a matter of constitutional law, a statute which mandates the death sentence for every felony-murder unless the defendant comes forward with proof of statutory mitigating circumstances would improperly shift the burden of proof to the defendant in every felony-murder case. Such a death presumption where a life is at stake would deny due process of law, Mullaney v. Wilbur, 421 U.S. 684(1975), especially in the

present case where the felony is the only aggravating circumstance. In Lockett v. Ohio, 438 U.S. 586(1978) the Court struck down the Ohio statute that presumed the death sentence unless one of the mitigating circumstances was established by the defendant. Id. at 607. Significantly, the plurality opinion reserved the question of whether the statute violated the Constitution in requiring defendants to prove mitigating circumstances. Id. at n.16. To affirm the death sentence in the present case would mean the burden of proof is shifted in felony-murder cases.

Secondly, the lack of finding of statutory mitigating circumstances by the judge does not validate the death sentence because the judge did not give independent mitigating weight to all factors in mitigation. It is uncontradicted that shortly before the incident Tommy Randolph, along with Althea Glinton, had taken several doses of heroin. While not excusing a defendant's conduct, this Court has recognized that drug or alcohol ingestion can and should be considered in mitigation. In Chambers v. State, 339 So.2d 204, 208-209(Fla.1976)(England, J. concurring), the death sentence was reversed in part because the defendant was felt to have been under the influence of some mental or emotional disturbance[§921.141(6)(b)] as a result of the use of illegal drugs even though the evidence as to that fact was conflicting. And in Buckrem v. State, 355 So.2d 111, 113(Fla.1977) this Court in reversing the defendant's death sentence recognized that intoxication can be a basis for a finding of emotional or mental disturbance. Finally in Kampff

v. State, supra, chronic alcoholism was again recognized as constituting a proper basis for finding emotional or mental disturbance in mitigation. 355 So.2d at 1008,1010. Thus the fact that Tommy Randolph was under the influence of heroin on the night in question should have been considered and weighed in mitigation. Although the judge apparently considered this evidence as it related to whether the capacity of the defendant to appreciate the criminality of his conduct was substantially impaired[§921.141(6)(f)](R 21), it was not considered in relation to emotional or mental disturbance. In any event Lockett v. Ohio, 438 U.S. 586,608(1978) requires that everything presented be given "independent mitigating weight"irrespective of whether the evidence falls within the narrow parameters of a particular statutory mitigating circumstance. See also Songer v. State, 365 So.2d 696,700(Fla.1978)(opinion on rehearing). The judge's failure to do so constitutes reversible error and the sentencing errors cannot be found harmless.

This Court considered the applicability of harmless error where the trial court admits into evidence and weighs improper aggravating factors in Elledge v. State, 346 So.2d 998(Fla.1977). In Elledge, testimony regarding a confession to another murder, for which there had been no conviction, was allowed in sentencing without objection. This Court analyzed the question of whether the error was harmless because of the lack of objection and by looking to whether there were "substantial additional aggravating circumstances"(emphasis supplied). Id. at 1002.

In the present case "substantial" additional aggravating circumstances do not exist. There is only one arguably proper aggravating circumstance, one which is applicable for all felony-murder cases and one which does not carry any "additional acts to set it apart from the norm". The ultimate penalty in this case rests on a very fine thread, a tenuous balance at best. In this respect Elledge is different than the present case since three serious aggravating circumstances had been found by the judge including prior violent felonies(murder), during the commission of a rape, and heinous,atrocious and cruel. Id. at 1000-1001.

The balance in the present case is indeed delicate. Also weighing into the balance must be the extensive testimony and argument of nonstatutory aggravating factors(See Point VII B, infra), and the effect of that improper evidence on the jury. The analysis of Elledge applies here:

> "Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factors not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court."(emphasis supplied) 346 So.2d at 1003.

We likewise cannot know in the present case. Two of the three aggravating circumstances found by the sentencing judge are invalid, with the one remaining being inherent in all such cases. The jury was allowed to hear plainly improper evidence and argument and the judge did not weigh valid mitigating evidence. The basis for Appellant's death sentence is too tenuous to find the

errors harmless.

We are not unmindful that in Elledge this Court reversed because the sentencing judge, although not specifying any, had stated he "weighed" mitigating circumstances. However, Elledge does not hold that the only time a clear sentencing error will be found harmful is when the sentencing judge finds statutory mitigating circumstances. Elledge cannot be read to set up such a rigid mathematical rule applicable to every case and every situation. While such a mechanical rule might be comforting to some or easier to apply, it cannot have a place where the ultimate penalty is imposed. The unique need for reliability where death is imposed mandates that each case be individually considered. See Lockett v. Ohio, supra, 438 U.S. at 604-605. The need for reliability and the mandate of evenhandedness would not be met if the death sentence were upheld in the present case which involves only the underlying felony -- inherent in every robbery-murder.

Affirmance of the death sentence when its underpinnings are invalid would flout the well-settled principle that a trial judge's ultimate finding or judgment cannot stand if it is based upon a combination of permissible and impermissible components in a manner which precludes assurance that the same finding would have been made on permissible components alone. E.g. Williams v. North Carolina, 317 U.S. 287, 291-292(1942); Thomas v. Collins, 323 U.S. 516, 528-529(1945); Street v. New York, 394 U.S. 576, 585-88(1969); Bachellar v. Maryland, 397 U.S. 564, 569-571(1970).

To uphold the death sentence would deny due process of law, would be disproportionate and arbitrary and constitute cruel and unusual punishment.

B

THE EXTREME PENALTY WAS ASSESSED AGAINST TOMMY RANDOLPH WHERE THE PROSECUTOR REPEATEDLY ATTEMPTED TO INTRODUCE NON-STATUTORY AGGRAVATING FACTORS INTO EVIDENCE, CROSS-EXAMINED APPELLANT ON MATTERS BEYOND THE SCOPE OF THOSE PRESENTED IN MITIGATION, AND MADE PREJUDICIAL AND INFLAMMATORY ARGUMENTS OUTSIDE THE EVIDENCE PRODUCED AT THE SENTENCING HEARING.

The only evidence offered by the prosecution during the penalty phase was the testimony of an attorney and four exhibits(SR) purporting to represent convictions for non-violent felony offenses(T 927-930). An objection by defense counsel to their introduction on the grounds there was no proof that any of the prior convictions involved violence and thus they were not proper as aggravating circumstances under the statute was sustained by the trial judge(T 930). The prosecutor argued that the jury could consider the convictions as negating the mitigating circumstance of no significant history of prior criminal activity[§921.141(6)(a), Fla.Stat.(1977)], but the trial judge agreed with defense counsel that it would only be admissible in rebuttal(T 930-931). The State then rested. After Tommy Randolph testified solely as to his use of drugs on the night in question, the prosecution again attempted to introduce the same prior convictions through the testimony of his former attorney. An objection was again sustained(T 948-950). Not content with this the prosecution next called as a

rebuttal witness Edna Plain who in response to a question as to what she was doing with Tommy Randolph and Althea Glinton in January 1978, stated they were involved in a robbery(T 950-951). Again defense counsel objected on the basis that the prosecution was offering no proof of a prior conviction for a violent felony but was merely trying to show an involvement in criminal activity. Once more the judge sustained the objection (T 951-952).

The prosecution's intent was quite clear. They were seeking to base a death sentenceupon Tommy Randolph's past record of criminal activity even though they proffered not one conviction for a violent felony(SR). The State intentionally on rebuttal sought to circumvent the trial judge's rulings on that type of evidence. The result was that the jury was erroneously apprised of highly prejudicial non-statutory aggravating factors. That the evidence was impermissible in aggravation, as recognized by the trial judge, is so well settled as not to require further elaboration. See Provence v. State, 337 So.2d 783, 786(Fla.1976). It was also improper to attempt to introduce such evidence in the guise of rebutting mitigating evidence. This Court has recognized that use of evidence of non-violent offenses is improper for any purpose, unless the defendant seeks to present evidence regarding §921.141(6)(a). Mikenas v. State, 367 So.2d 606(Fla.1978); Fla.Stat.Jury Instr.(Crim.) p. 83(1976). Similarly, Tennessee has interperted its capital sentencing statute to prohibit introduction of evidence under the guise of prospectively rebutting mitigating evidence.

Cozzolino v. State, 584 S.W. 2d 765(Tenn.1979). Nor was the evidence admissible in rebuttal as no evidence was offered during the defense case regarding that particular mitigating circumstance.

Not content with improperly apprising the jury of Appellant's criminal record, the prosecution cross-examined Tommy Randolph on matters outside those offered in mitigation, thereby attempting to force him to prove aggravating circumstances for the State. In State v. Dixon, supra, this Court condemned such a practice in the following manner:

> Another advantage to the defendant in a post-conviction proceeding, is his right to appear and argue for mitigation. The State can cross-examine the defendant on those matters which the defendant has raised, to get to the truth of the alleged mitigating factors, but cannot go beyond them in an attempt to force the defendant to prove aggravating circumstances for the State. A defendant is protected from self-incrimination through the Constitutions of Florida and of the United States. Fla. Const., art. I §9, F.S.A., and U.S. Const., Amend. V. In no event, is the defendant forced to testify. However, if he does, he is protected from cross-examination which seeks to go beyond the subject matter covered on his direct testimony and extend to matters concerning possible aggravating circumstances.

283 So.2d at 7-8.

Tommy Randolph testified in mitigation solely to his use of heroin on the night in question(T 932-933). On cross-examination the prosecution was permitted, over strenous objection, to ask Appellant how many times he had been convicted. Thus the prosecutor sought to have admitted into evidence

through the back door what he had been prevented from admitting through the front door. To allow such testimony on the theory it goes to a defendant's credibility would be to place an undeniable chill on his exercise of the right to testify in mitigation. Such a procedure alone would deny a defendant due process of law and constitute cruel and unusual punishment.

The remainder of the cross-examination consisting of more than thirteen(13) pages of testimony contains much that was intended to inflame the emotions of the jury and which was clearly beyond the scope of the two(2) pages of testimony offered in mitigation. The prosecution compounded the prejudice during its final argument by telling the jury, over objection, that it could properly find in aggravation both that Appellant was convicted of an attempted robbery and that the offense was committed for pecuniary gain(T 959-961). Further, the prosecution argued that the offense was heinous, atrocious or cruel(T 960-961). Both arguments by the State were improper as the settled law at the time of the trial would not fairly support the doubling of robbery and pecuniary gain nor that the offense was especially heinous, atrocious or cruel. The prosecution once again stressed Appellant's history of prior criminal activity which was improper(T 962-963). Throughout the remainder of the argument the prosecutor ignored the rulings of the Court, at one point so involved with his inflammatory tirade that the Court cautioned that he was flirting with a mistrial (T 968-969).

The improper testimony, evidence and argument permeated

and irreparably tainted the penalty phase of this trial.[8] "We cannot know" whether the result of the weighing process by the jury would have been different had the impermissible aggravating factors not been present. Elledge v. State, supra, 346 So.2d at 1003. This Court should reverse the death sentence imposed upon Tommy Randolph and reduce his sentence to life imprisonment or in the alternative remand for a new penalty trial.

C

THE TRIAL JUDGE LIMITED HIS CONSIDERATION AND THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE ENUMERATED IN THE STATUTE.

The requirement of individual sentencing determinations in capital cases is now well settled. E.g. Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586, 604-605 (1978). That requirement is not simply a technical matter, but rather it lies at the very heart of Eighth and Fourteenth Amendment commands. The practical effects are of great import, as recognized in Woodson v. Carolina, supra:

> A process that accords no significance to relevant facts of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be

[8] The errors occurring during the penalty phase were again raised by a Motion to Vacate the Death Sentence filed on July 27, 1978 (R 17-18). The trial court never ruled upon the motion.

> subjected to the blind infliction of the penalty of death. Id. at 305.

"An individualized sentencing determination is essential in capital cases" and because the death sentence is "profoundly different from all other penalties" the need for treating each defendant "with the respect due the uniqueness of the individual is far more important than in non-capital cases." Lockett v. Ohio, supra, 438 U.S. at 605.

Thus, individualized sentencing is more than a technical requirement, it is a constitutional command. It requires that "independent mitigating weight" be given to all aspects of the "defendant's character and record and to circumstances of the offense." To allow otherwise would create "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." That risk is "unacceptable" where "the choice is between life and death". Lockett v. Ohio, supra, 438 U.S. at 604-605.

In the present case the judge limited consideration of mitigating circumstances to only those listed in the statute. During the judge's final instructions to the jury he charged the jury as follows:

> "The mitigating circumstances which you may consider, if established by the evidence, are these: [statutory circumstances](T 976).[9]

This limiting instruction is from the Florida Standard Jury Instructions in Criminal Cases, Penalty Proceedings -- Capital

[9]The Judge further limited the jury's consideration by his gratuitous comment, prior to reading the statutory list of mitigating circumstances, that"... again, there are some which do not apply"(T 976).

Cases, 78-79(1976). The language of the instruction does not allow the jury to give "independent mitigating weight" to all factors in mitigation. The standard instruction was promulgated before the decisions in Proffitt v. Florida, supra, Roberts (Harry) v. Louisiana, supra, and Lockett v. Ohio, supra and also prior to this Court's clarifying decision in Songer v. State, 365 So2d 696,700(Fla.1978).[10]

That the judge may have allowed evidence of nonstatutory mitigating circumstances is of little avail in view of the instructions to the jury that they were to consider only the statutory mitigating factors in determining whether Tommy Randolph should live or die. Cf. Christian v. State, 272 So2d 852,856(Fla. 4th DCA 1973). Thus, the jurors may have been aware of nonstatutory mitigating factors, but they were specifically instructed not to consider them. This Court has recognized a real distinction between being "aware of" and "considering" sentencing factors and by its decision recognized a constitutional distinction. Alford v. State, 355 So2d 108(Fla. 1978), cert. den. 436 U.S. 935(1978).

The judge's sentencing order also clearly reflects that he considered only the statutory mitigating circumstances in sentencing Appellant to death. The judge reviewed the "listed mitigating circumstances" and concluded that only two "conceivably

[10]Further demonstrating the limiting nature of the present instruction is the fact that the proposed standard instructions now pending beforethis Court for approval have recognized this subsequent precedentby changing the language to read: "Among the mitigating circumstances you may consider, if established by the evidence, are: ..." Thus the restrictive "these" has been omitted. The instruction also adds an eighth paragraph allowing consider-

might have any application here..."(R 20). The judge clearly limited himself and the jury to those mitigating factors set forth in the statute. Thus, appellant was denied due process of law because of the failure of the sentencer to give independent mitigating weight to all factors offered in mitigation.[11]

D

THE TRIAL JUDGE ERRED BY GIVING UNDUE WEIGHT TO THE JURY'S ADVISORY RECOMMENDATION AND BY IMMEDIATELY SENTENCING TOMMY RANDOLPH TO DEATH FOLLOWING THAT RECOMMENDATION.

The third and fourth steps in Florida's statutory sentencing scheme require the reasoned experience of the trial judge to be interposed between the emotions of jurors and a death sentence. Section 921.141(3), Florida Statutes (1977), provides:

> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts.

This Court interpreted this section in State v. Dixon, 283 So. 2d 1 (Fla. 1973) in the following manner:

> The third step added to the process of prosecution for capital crimes is that the

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Footnote 10 continued:

ation of "any other aspect of the defendant's character or record, and any other circumstances of the offense."

[11]The judge's failure to consider nonstatutory mitigating evidence is understandable due to the ambiguity surrounding this Court's opinion in Cooper v. State, 336 So.2d 1133 (Fla. 1976). However, both Lockett v. Ohio, supra and this Court's opinion

> trial judge actually determines the sentence to be imposed--guided by, but not bound by, the findings of the jury. To a layman, no capital crime mightappear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in light of judicial experience.
>
> The fourth step required by Fla.Stat. §921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute.

The actions of the sentencing judge in the instant case derogated these important safeguards.

The jury returned an advisory verdict on July 14, 1978 recommending that Judge Wallace Sample impose the death penalty (R 13; T 982). Immediately following reception of the verdict and the polling of the jury Judge Sample sentenced Tommy Randolph to death(T 982-987). No findings of fact or conclusions of law were made at that time. It was not until 13 days

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Footnote 11 continued:

in Songer v. State, 365 So3d 696,700(Fla.1978) hold that all evidence of nonstatutory mitigating factors must be given independent mitigating weight. This trial occurred after the apparent express limitation in Cooper, but before the subsequent reinterpretation of Cooper in Songer. Therefore, at the very least a fatal ambiguity is present.

later, on July 27, 1978, that Judge Sample's Findings in Support of Sentence of Death were filed(R 19-21).

In Ross v. State, 384 So2d 1269(Fla. 1980) this Court reversed the defendant's death sentence and remanded to the trial judge because the court had given undue weight to the jury's recommendation of death. This Court found in Ross that the trial court did not make an independent judgment as to whether or not the death penalty should have been imposed; but rather felt bound by the jury's recommendation of death. Id. at 1275. Because this procedure violated the clear language of §921.141(3) as interpreted in State v. Dixon, supra, this Court reversed.

In the instant case the trial judge's actions indicate a similar procedure. Judge Sample did not make an independent judgment as to whether the death penalty should be imposed. There is nothing to show that he independently weighed the aggravating and mitigating factors before imposing sentence. To the contrary, the immediate sentencing following the jury's advisory verdict indicates the recommendation was controlling.[12] Additionally, the immediate sentencing violated the statutory safeguard requiring written findings in support of a death

[12]Tommy Randolph is the fifth person Judge Sample has sentenced to die. All five death sentences were imposed immediately following jury recommendations of death. See Adams v. State, 341 So2d 765(Fla.1977)(death sentence affirmed); Aldridge v. State, 351 So2d 942(Fla.1977)(death sentence affirmed); Kampff v. State, 371 So2d 1007(Fla.1979)(death sentence reversed to life); Vasil v. State, 374 So2d 465(Fla.1979)(death sentence reversed to life). Shortly following this case Judge Sample explained why he followed the jury's recommendations in all five cases: "I figure two heads are better than one. I don't have any God-given power to go against the majority of the jury." Palm Beach Post-Times, July 16, 1978, §B, at 2, col. 1.

sentence. Judge Sample did not "view the issue of life or death within the framework of rules provided by the statute." State v. Dixon, supra, at 8. See also Magill v. State, 383 So2d 901, 904-905(Fla.1980). The fact that the findings were not made until some thirteen days after sentencing lends support to this conclusion. [13] The summary decision to impose the death sentence was particularly inappropriate in this case in light of the existence of only one arguably proper aggravating factor which factor is inherent in all felony murders. Thus, unlike the situation in King where the existence of an overwhelming number of properly found aggravating factors makes any error which may have occurred by immediate sentencing harmless beyond a reasonable doubt, the present death sentence rests on a very tenuous base with only one arguably proper aggravating factor. Because the trial judge violated the safeguards set forth by §921.141 (3) as interpreted in State v. Dixon, supra,[14] this Court should vacate the death sentence imposed on Tommy Randolph.

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[13] This Court's decision in King v. State, ___ So2d ___ (Fla.1980) Case No. 52,185, Opinion filed May 8, 1980, 1980 Fla.Lw.Wk.S. Ct. Op. 239, wherein it was held the trial judge in that instance had not made a summary decision is distinguishable. In King the judge at the time he imposed sentence stated he would file his written findings three days later. The order was in fact filed on that date. This Court found that the judge's written findings "reflect a specific application of the facts to the statutory aggravating and mitigating circumstances." 1980 Fla. Lw.Wk.S.Ct.Op. at 241. The judge had found six aggravating circumstances to outweigh the lone mitigating circumstance of age. In affirming this Court held that all six aggravating factors were properly found.

[14] Both errors were raised in the Motion to Vacate the Death Sentence filed after the trial on July 27, 1978(R 17-18). No ruling was ever entered regarding the motion.

E

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statute and thus detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The Florida capital sentencing scheme fails to provide notice to the capital defendant of the aggravating circumstance upon which the State intends to rely, and thus denies due process of law. See Cole v. Arkansas, 333 U.S. 196(1948).

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors. Mullaney v. Wilbur, supra.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra.

Execution by electrocution is a cruel and unusual punishment.

The Florida capital sentencing statute does not mandate a unanimous jury or a substantial majority of the jury thus results in the arbitrary and unreliable application of the death

sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone denies the right to a fair cross-sectionof the community. See Witherspoon v. Illinois, 391 U.S. 510(1968).

POINT VIII

THE TRIAL ADJUDICATION AND SENTENCING OF APPELLANT FOR ATTEMPTED ROBBERY CONSTITUTED DOUBLE JEOPARDY.

Appellant was convicted of first degree murder and attempted robbery and sentenced on both charges(R 14,15). The first degree murder conviction was based solely on felony murder, the underlying felony being the attempted robbery. As we have previously discussed in Point VI, supra, the evidence regarding the attempted robbery was legally insufficient. However, assuming only for this issue that the evidence presented was sufficient to support the attempted robbery, Appellant's conviction and sentence for attempted robbery violated the double jeopardy clause and must be vacated. See State v. Pinder, 375 So2d 836(Fla.1979).

CONCLUSION

For the foregong reasons, Appellant respectfully requests this Honorable Court to Vacate the Judgment of Conviction and Sentence of Death in the above-styled cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Honorable Robert Bogen, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, this 24th day of October, 1980.

_____
Of Counsel.