SUPREME COURT OF FLORIDA

GARY TRAWICK, : CASE NO. 57,077

Appellant, :

vs. :

STATE OF FLORIDA, :

Appellee. :

:

BRIEF OF APPELLANT, GARY TRAWICK

****

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

****

Louis M. Jepeway, Jr.
JEPEWAY AND JEPEWAY, P.A.
Attorney for Appellant
619 Dade Savings Building
101 East Flagler Street
Miami, Florida 33131
(305) 377-2356

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES AND STATUTES

INTRODUCTION

The Appellant, Gary Trawick, was the Defendant in the Trial Court. He will be referred to as the Defendant. The Appellee, the State of Florida, was the Plaintiff in the Trial Court. It will be referred to as the State, and, when necessary, as the prosecutor and/or Assistant State Attorney.

References to the Record on Appeal will be designated by the symbol "R." References to the Transcript will be designated by the symbol "T."

STATEMENT OF THE CASE AND FACTS

On January 19, 1979, an indictment was filed against the Defendant, Gary Trawick, and co-defendants, Eddie Miller, Anthony Johnson, and Roosevelt George (R.1-7A). On March 1, 1979, a superceding indictment was filed against the Defendant and the co-defendants (R.8-14A). This indictment charged the Defendant and the co-defendants with first degree murder (Count I), armed robbery (Count II), attempted first degree murder (Count III), attempted armed robbery (Count IV), attempted first degree murder (Count V), aggravated assault (Count VI), and possession of a firearm during the commission of felonies (Counts VII and VIII).

On March 6, 1979, the Defendant was adjudged insolvent and counsel was appointed to represent him (R.18). On March 8, 1979,

the Defendant entered pleas of not guilty to all charges (R.19).

On April 12, 1979, the Trial Court ordered a psychiatric evaluation of the Defendant (R.20). On April 12, 1979, the psychiatric report was submitted to the Trial Court (R.38-42). The contents of the psychiatric report will be dealt with at length in the Argument portion of this brief.

On April 12, 1979, the Defendant filed a motion to suppress his confessions, admissions and statements (R.34-35). On April 26, 1979, a hearing was held on the Defendant's motion to suppress. The facts elicited at the hearing will be dealt with in the Argument portion of this brief.

THE GUILTY PLEAS

On May 8, 1979, the day of trial, the State announced that the Defendant had decided to plead guilty to all counts of the indictment (T.188-189). The Defendant's trial counsel stated that: "It was only this morning that the defendant finally made an affirmative and definitive decision." (T.196)(Emphasis Added). At the end of a brief and constitutionally deficient plea colloquy, the Defendant renounced his decision to plead guilty:

> "A. Well--No, I don't want to plead guilty.
> THE REPORTER: What was that, sir?
> THE DEFENDANT: No, I don't want to plead guilty.
> * * * * *
> Q. What is it that you don't want to plead to?
> A. I don't want to plead guilty.
> Q. You don't want to plead at all? Do you want to go to trial on this case?
> A. Yes, sir.
> * * * * *
> THE COURT: We will take a lunch break, and then we will start picking a jury..." (T.201-202)

This hearing ended at 12:15 P.M. (T.214).

After the recess, the Defendant's trial counsel stated that the Defendant "just indicated to me" (T.203)(Emphasis Added) that he again had changed his mind and wanted to plead guilty (T.203). After conferring with the Assistant State Attorney (T.204), the Defendant's trial counsel announced that the Defendant would enter guilty pleas to Count I, first degree murder, Count II, robbery, Count IV, attempted robbery, and Count V, attempted first degree murder (T.205). The State would dismiss Count III, attempted first degree murder, Count IV, attempted robbery, Count VI, aggravated assault, Counts VII and VIII, possession of a firearm during the commission of felonies (T.204-205). The State also dismissed an unrelated robbery charge, Case No. 78-16124 (T.205).

The Trial Court then stated that: "...I don't believe that we need to go through the entire colloquy all over again." (T.205).

The State proffered a brief factual basis for the pleas (T.207).

The plea colloquy was very brief. The Defendant, who had never been convicted of a crime, (T.62), was twenty years old (T.209). He was entering guilty pleas to first degree murder, robbery, attempted robbery, and attempted first degree murder (T.209).

Then the following occurred:

> "Q. Do you understand that there will be a second phase of this proceeding where a jury will hear certain facts and decide and recommend to the Court what penalty should be imposed, whether it is for the crime of manslaughter with a minimum of 15 years or death, and in the event that there is a recommendation of death, if the Court decides to follow the jury's recommendation, you will have a right to appeal that recommendation." (T.209) (Emphasis Added)

The Trial Court only informed the Defendant of the following rights:

"Do you understand that you have a right to proceed with the trial of this matter, to be represented by counsel throughout a trial, to confront the State's witnesses, to call witnesses in your own behalf, but by entering this plea you are giving up those rights?

Do you understant that?

A. Yes, sir.

Q. You also have the valuable right to remain silent and to leave the burden on the State to prove your guilt.

Do you understand that you also give up that right by entering into this plea?

A. Yes, sir.

The Trial Court asked the Defendant the standard questions about any problems he might have (T.212), whether he had had sufficient time to discuss the matter with his attorney, (T.213), and whether he was satisfied with the representation he had received (T.213), and received the standard answers (T.212; 213). The entire colloquy was very short (T.208-213). The Defendant gave no answer of more than two words. He used no word of more than one syllable.

Immediately after the Trial Court accepted the guilty pleas and adjudicated the Defendant guilty (T.213-214), the following remarkable event occurred:

"MR. McCRARY: During my interview with the defendant Trawick, after this morning's hearing which ended at approximately 12:15 I spoke to Mr. Trawick again, and Mr. Trawick had indicated to me at that time that he was very despondent about the proceedings that were taking place.

He had thought about the death penalty which could have been imposed on him and that he did not find it beyond his capability to take his own life.

I then notified the Court and have notified the Department of Correction (sic) of this statement so that whatever precautions can be taken will be taken and that in that light, I could not, in light of the many instances when these kind (sic) of remarks have been taken lightly, I do not take it as a light remark,

> and hopefully it will not happen, but certainly we want to take whatever precautions are necessary." (T.214)(Emphasis Added)

The Trial Court then merely asked the State if it cared to respond (T.214). It did not (T.215). Then the Trial Court stated:

> "I would add for the record though that I have observed him this morning and this afternoon, and he gives an appearance of being very collective in his thoughts, and that during the plea that was entered it appears to have been an intelligent one and not one made with the appearance of any emotional influence other than nervousness, of course, as he indicated." (T.215)

This portion of the proceedings ended in this bizarre fashion.

VOIR DIRE

During voir dire many potential veniremen and venirewomen improperly excused for cause in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968) (T.229; 231-233; 236-237; 288; 291; 304; 315-316; 373-376; 380-383; 385-387).

The State consistently utilzed its peremptory challenges systematically to exclude all blacks (T.305; 306; 308; 354; 396) from the sentencing jury.

THE SENTENCING HEARING

The testimony, evidence, and occurrances at the sentencing hearing will be dealt with in some detail in the Argument portion of the brief. However, an overview at this juncture will be helpful to the Court.

Detective Timothy Martin of the Dade County Public Safety Department testified.

He was permitted to testify at great length and in gruesome detail about the heinous, atrocious, and cruel attempted murder of Linda Gray (T. 448-455). The State also introduced photographs, Exhibits 1-14 (R.61-74)(T.258), over the Defendant's objection (T.257).

After the incident involving Linda Gray at the Exxon service station at N.W. 7th Avenue and 103rd Street, the Defendant and co-defendants drove North on N.W. 7th Avenue. They turned left at N.W. 7th Avenue and N.W. 119th Street, and drove West on N.W. 119th Street. After turning left, the Defendant shot three or four times at a wall and car near a Big Daddy's Lounge to scare some people outside (T.518). He shot the wall and car (T.518).

From there, they continued West on 119th Street (T.519). They turned North on N.W. 22nd Avenue and went to N.W. 135th Street and then turned left (West) again (T.519). There, they bought some gas (T.520).

From there, they drove to a U-Tote'M convenience store located at 2891 N.W. 135th Street in Opa Locka (T.460; 468). The Defendant and the co-defendant, Johnson, waited until the customers inside the store had left the area (T.469). They then went inside (T.469). The Defendant shot and killed the night manager, Robert Hayes (T.469).

After they left the store they saw a white car coming towards the light and the Defendant shot at him (T.526).

Detective Martin was permitted to testify that the word "Pig" was over the entrance to the door of the Defendant's residence (T. 471-472).

The detective took photographs from the Defendant's residence. He testified, erroneously, that the Defendant appeared in the photograph holding a submachine gun whose possession was illegal (T.473;

475). The Trial Court noted that it was not the Defendant (T.476).

The Defendant's statement was then read (T.500-536).

The detective testified that the Defendant showed no remorse (T.537).

The State called Sara Hayes, widow of the deceased. She was permitted to testify about the deceased's suffering, his personal background, her suffering, his condition in the hospital, and his recitation of what occurred (T.565-566).

The Medical Examiner was permitted to testify in gruesome detail about the deceased's injuries (T.568-572). He also testified about Linda Gray's injuries (T.572). He also testified that electrocution is painless (T.572-573).

The Defendant testified that he is twenty years old (T.576).

The Assistant State Attorney gave his closing argument, which was peppered with comments about non-statutory aggravating circumstances, aggravating circumstances not supported by the record, and other highly inflammatory and improper comments (T.586-603).

The Trial Court gave inadequate and constitutionally deficient instructions (T.613-619).

After deliberation, the jury recommended the death sentence (T.621).

The Trial Court immediately went to sentencing (T.622). The Defendant expressed his remorse (T.623). The Trial Court then entered his verbal "findings" (T.625-629), and sentenced the Defendant to death (T.628-629). The Trial Court found one mitigating circumstance, the Defendant's age, twenty (T.628). The Trial Court's written sentence was absolutely silent as to aggravating and mitigating circumstances (R. 60).

The Trial Court ignored mitigating evidence.

The Defendant's motion for new trial (R.110-111), was denied (R.111A).

The Trial Court ordered a post sentence investigation (R.43).

This appeal followed (R.114).

POINTS ON APPEAL

I

THE TRIAL COURT ERRED IN ACCEPTING THE DEFENDANT'S GUILTY PLEAS AND IN SENTENCING THE DEFENDANT BECAUSE THERE WAS A BONA FIDE DOUBT AS TO THE DEFENDANT'S COMPETENCE AND THE TRIAL COURT DID NOT MAKE ANY INQUIRY, MUCH LESS CONDUCT AN EVIDENTIARY HEARING, ON THE QUESTION OF DEFENDANT'S COMPETENCE.

II

THE TRIAL COURT ERRED IN ACCEPTING THE DEFENDANT'S GUILTY PLEAS BECAUSE THE PLEAS WERE NOT VOLUNTARILY AND INTELLIGENTLY ENTERED AND THE DEFENDANT WAS NOT AWARE OF THE CONSEQUENCES OF THE PLEAS.

III

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS.

IV

THE APPLICATION OF FLORIDA STATUTE 921.141, IMPOSING THE DEATH SENTENCE UPON THE DEFENDANT, VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

V

THE TRIAL COURT ERRED IN EXCLUDING FOR CAUSE THOSE VENIREMEN WHO WERE OPPOSED TO CAPITAL PUNISHMENT BUT WHO COULD NOT STATE UNAMBIGUOUSLY THAT THEY WOULD VOTE AGAINST IT REGARDLESS OF THE FACTS, THAT THEY WOULD BE UNWILLING TO CONSIDER ALL OF THE PENALTIES AVAILABLE, AND THAT THEY WERE IRREVOCABLY COMMITTED AGAINST AND WOULD AUTOMATICALLY VOTE AGAINST THE DEATH PENALTY.

VI

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION SYSTEMATICALLY TO EXCLUDE PROSPECTIVE BLACK JURORS BY THE USE OF ITS PEREMPTORY CHALLENGES, WHICH DENIED THE DEFENDANT, A BLACK, THE EQUAL PROTECTION OF THE LAWS, AND DUE PROCESS OF LAW.

ARGUMENT

I

THE TRIAL COURT ERRED IN ACCEPTING THE DEFENDANT'S GUILTY PLEAS AND IN SENTENCING THE DEFENDANT BECAUSE THERE WAS A BONA FIDE DOUBT AS TO THE DEFENDANT'S COMPETENCE AND THE TRIAL COURT DID NOT MAKE ANY INQUIRY, MUCH LESS CONDUCT AN EVIDENTIARY HEARING, ON THE QUESTION OF DEFENDANT'S COMPETENCE.

It is apodictic that the State cannot proceed against a person accused of a crime while he is incompetent. Scott v. State, ___ So.2d ____, 1982 F.L.W. 451 (Fla. 9/30/82); Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966); Dusky v. United States, 362 U.S. 402 (1960); Bishop v. United States, 350 U.S. 961 (1956); Jones v. State, 362 So.2d 1334 (Fla. 1978); Lane v. State, 388 So.2d 1022 (Fla. 1980); State v. Green, 395 So.2d 532 (Fla. 1981); Fowler v. State, 255 So.2d 513 (Fla. 1971).

If a bona fide doubt of a defendant's competence to stand trial is raised, the trial court sua sponte must inquire into the defendant's competence. Rule 3.210(b), RCrP;[1] Pate v. Robinson, supra, Drope v. Missouri, supra, Lane v. State, supra; State v. Green, supra; Lokos v. Capps, 625 F.2d 1258, 1261-1262 (5th Cir. 1980); Lee v. State of Alabama, 386 F.2d 97 (5th Cir. 1967) (en banc); Acosta v. Turner, 666 F. 2d 949 (5th Cir. 1982). In Green this Court held that:

> "...Competency is an extremely sensitive area of the criminal law which the United States Supreme Court and this Court have discussed at length. Drope v. Missouri... Lane v. State... The United States Supreme Court and this Court

---

1/Rule 3.210(b), RCrP, provides that:

> "If before or during the trial the court of its own motion, or upon motion of counsel for the defendant or for the State, has reasonable ground to believe that the defendant is not mentally competent to stand trial, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition..."

> have made it clear that the trial judge has the responsibility of conducting an evidentiary hearing on the defendant's competency to stand trial whenever any reasonable indication of incompetency arises, whether or not trial counsel requests such a hearing..." (395 So.2d at 538)

In Lane, this Court held that:

> "...the law is now clear that the trial court has the responsibility to conduct a hearing for competency to stand trial whenever it reasonably appears necessary, whether requested or not, to ensure that a defendant meets the standard of competency set forth in Dusky..." (388 So.2d at 1025)

It is also obligatory that the trial court fix a time for a competence hearing if there is a reasonable ground to believe that the defendant is not competent to stand trial. Rule 3.210(b), RCrP; Fowler v. State, supra, 255 So.2d at 514-515. It is not sufficient for a trial court merely to find that: "...the defendant is oriented to time and place and has some recollection of evidence." Dusky v. United States, supra, 362 U.S. at 402; Lane v. State, supra, 388 So.2d at 1025. Rather, before proceeding, the trial court must find, after an evidentiary hearing, that the defendant has a sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and that he has a rational as well as a factual understanding of the proceedings against him. Dusky v. United States, Id.; Lane v. State, Id.

When a reasonable indication of incompetence arises, and the trial court does not conduct an evidentiary hearing to determine the defendant's competence to stand trial, the conviction must be reversed. Scott v. State, supra, ___ So.2d at ___, 1982 F.L.W. at 452; Pate v. Robinson, supra, 383 U.S. at 386-387; Drope v. Missouri, supra, 420 U.S. at 183; Dusky v. United States, supra, 362 U.S. at 403; Lane v. State, supra, 388 So.2d at 1024-1026; State v. Green, supra, 395 U.S. at 538-539; Jones v. State, supra, 362 So.2d at 1336.

Of course, these principles apply equally to competence to enter a guilty plea. Baker v. State, 408 So.2d 686 (Fla. 2d DCA 1982); Alleluio v. State, 338 So.2d 1137 (Fla. 1st DCA 1976); Osborne v. Thompson, 610 F.2d 461 (6th Cir. 1979).

There is no litmus test to determine when an inquiry should be made. The United States Supreme Court held in Drope [2] that:

> "The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated ...
>
> * * * *
>
> Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." (420 U.S. at 180-181)(Emphasis Added)

Death is different. [3] Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(opinion of Stewart, J.); Eddings v. Oklahoma, 50 U.S. L.W. 4161, 4165 (1982)(O'Connor, J., concurring). Accordingly, a trial court in a capital case must be particularly sensitive to any indication of incompetence. Here, the Trial Court was not.

Here, the Defendant's trial counsel informed the Trial Court that the Defendant desired to plead guilty. After a brief and woefully inadequate plea colloquy (T.208-213), the Defendant's trial counsel then informed the Trial Court:

---

[2] This Court quoted this holding with approval in Lane v. State, supra, 388 So.2d at 1025.

[3] That this has become a cliche does not make it any less true or any less important.

> "During my interview with the defendant Trawick, after this morning's hearing which ended at approximately 12:15, I spoke to Mr. Trawick again, and Mr. Trawick had indicated to me at that time that he was very despondent about the proceedings that were taking place.
>
> He had thought about the death penalty which could have been imposed on him and that he did not find it beyond his capability to take his own life. I then notified the Court and have notified the Department of Correction (sic) of this statement so that whatever precautions can be taken will be taken and that in that light, I could not, in light of the many instances when these kind (sic) of remarks have been taken lightly, I do not take it as a light remark, and hopefully it will not happen, but certainly we want to take whatever precautions are necessary." 4/ (T. 214)(Emphasis Added).

The red flag having been waved, the Trial Court then asked the assistant state attorney if the State cared to respond. It did not (T.214). 5/ The Trial Court's only reaction was:

> "I would add for the record though that I have observed him this morning and this afternoon, and he gives an appearance of being very collective in his thoughts, and that during the plea that was entered, it appears to have been an intelligent one and not one made with the appearance of any emotional influence other than nervousness, of course, as he indicated." (T.215)

Manifestly, this mere observation, made without benefit of any examination, was inadequate. Lane v. State, supra, 388 So.2d

---

4/ Defendant's trial counsel obviously recognized the Defendant's incompetence. However, because of his incompetence, he did not ask for an examination and a hearing. Nevertheless, his assessment of the Defendant's suicidal mental state, made by the one with "the closest contact with the defendant," Drope v. Missouri, supra, 420 U.S. at 162, n.13; Scott v. State, supra, ___ So.2d at ___, 1982 F.L.W. at 452, was far more than sufficient to put the Trial Court on notice of the Defendant's incompetence.

5/ It is inconceivable that the assistant state attorneys did not recognize the difficulty. Yet, they did nothing. Thus, they betrayed their trust.

at 1205; Dusky v. United States, supra, 362 U.S. at 402. The Trial Court did not take the necessary steps.[6/] The Defendant was deprived of his due process right not to be tried while incompetent. Scott v. State, supra, ___ So.2d at ___, 1982 F.L.W. at 452.

This Court must reverse the Defendant's convictions and award him a new trial. Scott v. State, supra; Pate v. Robinson, supra; Drope v. Missouri, supra; Dusky v. United States, supra; Lane v. State, supra; State v. Green, supra; Jones v. State, supra; Baker v. State, supra; Alleluio v. State, supra; Osborne v. Thompson, supra.

6/The Trial Court's error is magnified, since the Defendant's trial counsel informed him prior to the plea colloquy of the Defendant's incompetence. (T.214). Yet, the Trial Court did not take the necessary steps.

II

THE TRIAL COURT ERRED IN ACCEPTING THE DEFENDANT'S GUILTY PLEAS BECAUSE THE PLEAS WERE NOT VOLUNTARILY AND INTELLIGENTLY ENTERED AND THE DEFENDANT WAS NOT AWARE OF THE CONSEQUENCES OF THE PLEAS.

It is error for a trial court to accept a defendant's guilty plea "...without an affirmative showing that it was intelligent and voluntary." Boykin v. Alabama, 395 U.S. 238, 242 (1969); McCarthy v. United States, 394 U.S. 459, 466 (1969); Rule 3.172, RCrP. The trial court's solemn, sober, serious duty is clear:

> "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences..." (395 U.S. at 243-244)(Emphasis Added)

This Court has held that the taking of a guilty plea is:

> "...an extremely important step in the criminal process and should not be hurried or treated summarily." (Williams v. State, 316 So.2d 267, 271 (Fla. 1975))

Here, the Trial Court extended absolutely no solicitude, much less the "utmost solicitude," in accepting the Defendant's guilty pleas. The Trial Court rushed the proceedings and treated them in summary fashion. The Defendant first adamantly insisted that he did not want to plead guilty and that he wanted a trial (T. 201-202). After the noon recess, the Defendant's trial counsel informed the Trial Court that the Defendant desired to plead guilty (T.203). The Trial Court's response was "...I don't believe that we need to go through the entire colloquy all over again." (T.205). Then, during the plea colloquy (T.208-213), which was obviously constitutionally

defective, as shown infra, the Trial Court did not even ask the 20 year old Defendant why he so suddenly had changed his mind. Then, at the end of the totally inadequate plea colloquy, the Defendant's trial counsel stated that the Defendant's mental state was suicidal and that he had so informed the Trial Court during the recess, prior to the acceptance of the guilty pleas (T. 214). The Trial Court made no inquiry.

Consequently, the record not only does not affirmatively show that the Defendant's guilty pleas were intelligent and voluntary, rather, it affirmatively reveals that they were involuntary and that the Defendant was unaware of the consequences of the pleas.

A

THE DEFENDANT'S GUILTY PLEAS WERE INVOLUNTARY BECAUSE HE WAS INCOMPETENT DUE TO HIS SUICIDAL MENTAL STATE.

A guilty plea is involuntary and void when entered by an incompetent defendant.[7/] Sanders v. United States, 373 U.S. 1, 5-6 (1962); Baker v. State, 408 So.2d 686 (Fla. 2d DCA 1982); Alleluio v. State, 338 So.2d 1137 (Fla. 1st DCA 1976); Manley v. United States, 396 F.2d 699 (5th Cir. 1968); Doyle v. State, 411 A.2d 907 (R.I. 1980).

Here, the Defendant first indicated that he wanted to plead guilty (T.188-189). Then, he adamantly insisted that he did not want to plead guilty and that he wanted a trial (T.201-202). Then,

7/As set forth fully, in Point I, supra, the Trial Court erred in failing to inquire into the Defendant's competence and in failing to hold a competence hearing. That failure and the question of the voluntariness of the Defendant's guilty pleas vel non, although inextricably intertwined, are separate grounds requiring reversal.

after the noon recess, the Defendant's trial counsel informed the Trial Court that the Defendant again had changed his mind and desired to plead guilty (T.203) During the resulting plea colloquy (T.208-213), the Trial Court did not even ask the Defendant about his abrupt mood swings and changes of mind. Then, at the end of the inadequate plea colloquy, the Defendant's trial counsel made the following remarkable statement:

> "During my interview with the defendant Trawick, after this morning's hearing which ended at approximately 12:15, I spoke to Mr. Trawick again, and Mr. Trawick had indicated to me at that time that he was very despondent about the proceedings that were taking place.
>
> He had thought about the death penalty which could have been imposed on him and that he did not find it beyond his capability to take his own life.
>
> I then notified the Court and have notified the Department of Correction (sic) of this statement so that whatever precautions can be taken will be taken and that in that light, I could not, in light of the many instances when these kind of remarks have been taken lightly, I do not take it as a light remark, and hopefully it will not happen, but certainly we want to take whatever precautions are necessary." (T.214)(Emphasis Added)

The Defendant's suicidal mental state was so pronounced that his trial counsel informed the Trial Court and the Department of Corrections so that proper precautions could be taken prior to the plea colloquy. Yet, notwithstanding this observation and the actions of the Defendant's trial counsel, the person "with the closest contact with the defendant", Drope v. Missouri, 420 U.S. 162, 177, n. 13; Scott v. State, ___ So.2d ___, ___, 1982 F.L.W. 451, 452 (Fla. 9/30/82), the Trial Court made no further inquiry of the Defendant to determine if the guilty pleas were intelligently

and voluntarily entered with an awareness of the consequences. Even though the Trial Court was on notice of the Defendant's incompetence prior to the plea colloquy (T.214), the Trial Court asked the Defendant nothing about his suicidal mental state other than the standard, rote question which evoked the standard, rote monosyllabic answer (T.212). [8]

This inaction by the Trial Court, in the face of the Defendant's obvious incompetence, could not possibly constitute: "... the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences." Boykin v. Alabama, supra, 395 U.S. at 243-244. It does not satisfy the Trial Court's duty to determine: "... that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness ..." Rule 3.170(j), RCrP. It requires this Court to vacate the Defendant's guilty pleas and award him a trial.

B

THE DEFENDANT'S GUILTY PLEAS WERE INVOLUNTARY BECAUSE HE WAS IGNORANT OF, AND THE TRIAL COURT DID NOT INFORM HIM OF, THE ELEMENTS OF THE CRIMES TO WHICH HE ENTERED GUILTY PLEAS.

An essential requirement for the acceptance of a guilty plea is that the defendant must understand the nature of the charge.

8/ The Defendant gave no answer of more than two words throughout the brief plea colloquy. Every word was monosyllabic (T.208-213). Boilerplate questions by the Trial Court, particularly in these circumstances, are constitutionally inadequate. C.f. Monroe v. United States, 463 F.2d 1032, 1035 (5th Cir. 1972).

State v. Green, ___ So.2d ___, Case No. 61,517, 1982 F.L.W. 480 (Fla. 10/28/82); Rule 3.172(c)(i), RCrP. [9] A plea is involuntary if the defendant has such an incomplete understanding of the charges that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary. Henderson v. Morgan, 426 U.S. 637 (1976); Smith v. O'Grady, 312 U.S. 329 (1940); Sierra v. Goverment of Canal Zone, 546 F.2d 77 (5th Cir. 1977); Burden v. State of Alabama, 584 F.2d 100 (5th Cir. 1977); Harned v. Henderson, 535 F.2d 1399 (2d Cir. 1976); appeal after remand, Harned v. Henderson, 588 F.2d 12 (2d Cir. 1978); Rinehart v. Brewer, 421 F. Supp. 508 (S.D. Iowa 1976), aff'd. Rinehart v. Brewer, 561 F.2d 126 (8th Cir. 1977); Alessi v. United States, 593 F.2d 476 (2d Cir. 1979).

In Henderson, a particularly strong case on the facts, the defendant had been indicted for first degree murder. By agreement with the prosecution and on advice of his two competent, court-appointed attorneys, he entered a plea of guilty to second degree murder. Twelve years later he attacked his guilty plea on the ground that it was involuntary because he was not aware that intent to cause death was an element of second degree murder. He had not been advised by counsel or the court that intent to cause death was an essential element of second degree murder.

9/ Rule 3.172(c)(i), RCrP, provides, inter alia, that the trial court: "...shall address the defendant personally and shall determine that he understands...the nature of the charge to which the plea is offered..." (Emphasis Added)

During the plea colloquy, the defendant stated that his plea was based on the advice of his attorneys, that he understood that he was accused of killing the victim, Mrs. Francisco, that he was waiving his right to a jury trial, and that he knew he would be sent to prison. There was no discussion of the elements of the offense of second degree murder, no indication that the nature of the offense had ever been discussed with the defendant, and no reference of any kind to the requirement of intent to cause the death of the victim. 426 U.S. at 642-643.

The Supreme Court noted that:

> "...The lawyers were certainly familiar with the intent requirement and evidently were satisfied that the objective evidence available to the prosecutor was sufficiently strong that the requisite intent could be proved beyond a reasonable doubt; accordingly had this precise issue been discussed with respondent, his lawyers no doubt would have persisted in their advice to plead guilty...there is no way one could be sure that he would have refused to enter the plea following advice expressly including a discussion of this precise question. Indeed, we assume that he probably would have pleaded guilty anyway. Such an assumption, is, however, an insufficient predicate for a conviction of second degree murder." (426 U.S. at 644 n.12)(Emphasis Added)

The Supreme Court assumed that the state had overwhelming evidence of guilt. It also accepted the characterization of the defendant's attorneys as competent and of their advice to enter the guilty plea to second degree murder as competent. However:

> "...such a plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense.[13] And clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received 'real

notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.' Smith v. O'Grady, 312 U.S. 392, 324." (426 U.S. at 645-646)

This is so because:

> "A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving...Johnson v. Zerbst...or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense. Smith v. O'Grady..." (426 U.S. at 645, n.13)(Emphasis Added)

Therefore, since there was nothing in the record to establish that the defendant was aware of the nature of the charge to which he had pled guilty, his plea was invalid:

> "There is nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that respondent had the requisite intent. Defense counsel did not purport to stipulate to that fact; they did not explain to him that his plea would be an admission of that fact; and he made no factual statement or admission necessarily implying that he had such intent. In these circumstances it is impossible to conclude that his plea to the unexplained charge of second degree murder was voluntary." (426 U.S. at 646)(Emphasis Added)

In Sierra, the defendant had entered guilty pleas to second degree murder and to possession of marijuana with intent to distribute. He contended that he did not have notice of or knowledge of the elements of the crimes to which he had entered guilty pleas and, therefore, the guilty pleas were involuntary. The Fifth Circuit agreed. It reached this conclusion notwithstanding the

defendant's statements during the plea colloquy that he understood the nature of the charges:

> "...Routine questions on the subject of understanding are insufficient, and a single response by a defendant that he 'understands' the charge is no assurance or basis for believing that he does..." (546 F.2d at 79)

The defendant appeared before the trial court on three occasions before pleading guilty. At the first hearing, the court appointed counsel. No inquiry was made of him concerning his understanding of the charges against him. During the second hearing, the court recited to him the informations charging him with first degree murder and possession of marijuana with intent to distribute. Again, there was no explanation of or questioning concerning the defendant's understanding of the nature of the charges. The third time the defendant appeared before the court he entered pleas of guilty to second degree murder and possession of marijuana with intent to distribute. At this hearing, the court did question the defendant briefly regarding this understanding of the charges:

> "The Court: Now first of all, do you fully understand the charges against you?
> The Defendant: Yes, your Honor.
> The Court: Are you entering these pleas of guilty freely and voluntarily?
> The Defendant: Yes, your Honor.
> The Court: Are you entering these please of guilty because you did do as charged in these informations, 1, kill Ovidio DeJesus Marin, a human being; and 2, possess approximately 20 pounds of marijuana in violation of the law?
> The Defendant: Yes, your Honor." (546 F.2d at 80)

The Fifth Circuit held that this was insufficient:

"We think the court should have done more. The court referred to the murder charge as being embodied in the information read at the December 7 hearing, but that information charged Sierra with first degree murder. Moreover, in its questioning the court gave only one element of second degree murder - the act of killing. No inquiry at all was made regarding intent to kill. When mens rea is such a crucial element of an offense, the district court must determine, on the record by personally addressing the defendant, that the defendant understands the nature of the mental element. McCarthy...; cf. Henderson v. Morgan... (failure to apprise defendant of nature of mental element of second degree murder) (habeas corpus)." (546 F.2d at 80)

The Court also held that the defendant's guilty plea to the charge of possession of marijuana with intent to distribute it was also entered without knowledge of the elements of the crime:

"...At the December 7th hearing, the court read to Sierra the information charging him with knowing possession of marijuana 'with intent to distribute for remuneraton.' The court did not ask whether Sierra understood the nature of the charge. A week later, during the hearing at which Sierra pleaded guilty, the court gave an incomplete paraphrase of the charge; 'Are you entering [this guilty plea] because you did as charged in these informations...two, possess approximately 20 pounds of marijuana in violation of the law? Sierra responded in the affirmative. No further effort was made to ascertain whether Sierra understood the marijuana charge. The information was not reread to give Sierra an opportunity to respond.

Sierra's affirmative answer to the question posed by the court certainly did not shown an understanding of the information. The 'intent to distribute' element, so crucial to the federal offense, was not included at all in the colloquy, and the misleading content of the court's question would make hazardous any reliance on the December 7 reading of the charge to Sierra.

The court could have required Sierra to acknowledge his understanding of the marijuana charge at the December 7 proceeding or could have reread the

> information fully and accurately in the questioning of Sierra. None of these was done, and as a result Rule 11's purpose of assuring a complete record of the determination of the plea's voluntariness was frustrated." (546 F.2d at 80-81)

In Burden, the defendant pled guilty to a charge of "carnally knowing, or abusing in the attempt to carnally know, Charlene Burden, a girl under the age of 12." He filed a Federal Habeas Corpus petition, alleging, inter alia, that his guilty plea was involuntary because he was not informed prior to sentencing of the elements of the crime to which he pled guilty. The Federal District Court denied relief. The Fifth Circuit reversed:

> "The due process clause of the fourteenth amendment requires that a guilty plea must be voluntarily given; such a plea inherently involves a waiver of defendant's constitutional rights. A recent Supreme Court decision handed down after the denial of Burden's habeas petition held that a guilty plea cannot be voluntary if the defendant is not informed of the elements of the crime with which he is charged. Henderson v. Morgan ... Burden contends that he was not informed of the elements of the crime of carnal knowledge prior to his guilty plea, and that, in fact, he never understood what carnal knowledge meant.
>
> The district court concluded that Burden's guilty plea was voluntary since he had signed an 'Ireland Form.' An examination of the form Burden signed shows that it does not contain a recital of the elements of the crime, nor does it contain any representations made by the judge or Burden's appointed counsel concerning the information Burden received. Moreover, the record of the guilty plea proceedings contains no reference to the elements of the crime..." (584 F.2d at 101-102)

Accordingly, the Fifth Circuit held that:

> "...this case must be remanded to the district court for determination of the voluntariness issue in light of Henderson. If, in

> that hearing, the State does not come forward with some proof that Burden was informed of the elements of the crime prior to sentencing, then the district court should vacate the state sentence and allow Burden to replead in state court..." (584 F.2d at 102)(Emphasis Added)

In Harned, the Second Circuit vacated the dismissal of a Federal Habeas petition and remanded in light of:

> "...Henderson v. Morgan,... There the court held that a guilty plea cannot be voluntary (and hence is violative of due process) unless the defendant was informed by court or counsel of the elements of the offense to which he pleads. In the instant case the petitioner pleaded guilty in state court to burglary in the first degree, one element of which is the causation of physical injury...the record before us does not indicate whether or not Harned was advised of all the elements of burglary in the first degree..." (535 F.2d at 1399)

Upon remand, the Federal District Court granted the petition. It concluded, after a full evidentiary hearing, that the defendant did not understand, and was not advised by his attorney, that in pleading guilty to burglary in the first degree he was admitting the commission of a crime of violence in which the causation of physical injury was an essential element. The Second Circuit affirmed:

> "The record on this appeal either supports Harned or fails to prove him wrong. The indictment does indeed refer to physical injury as an element of the crime of first degree burglary, but the transcript of the arraignment shows that the judge referred only to the 'charges' -- he did not read to Harned the text of the indictment. Similarly, the transcript of the hearing at which Harned pleaded guilty shows that he admitted only to intending to rape the resident of the house which he burglarized--there was no admission of violence..." (588 F.2d at 23) (Emphasis Added)

In Rinehart, the Eighth Circuit granted relief from a guilty plea to second degree murder because:

> "Rinehart understood neither the nature of the charge nor the consequences of his guilty plea because of the inadequate explanation of the law given to him by defense counsel and the court. There is uncontradicted evidence in the record which suggests that Rinehart was not informed of the elements of the crime of second degree murder. Since his own defense counsel were confused as to the distinctions among first and second degree murder, and manslaughter, it is inconceivable to conclude that Rinehart would have known of the intent element required to convict him of second degree murder or that a guilty plea would be an admission of the items of the intent to kill. In addition, the trial judge did not explain the charge to Rinehart. If the defendant was not informed that intent to cause the victim's death is an essential element of the crime charged, his guilty plea was not voluntarily entered. Henderson v. Morgan..." (561 F.2d at 131)(Emphasis Added)

In Alessi, the defendant was granted relief from a guilty plea entered to income tax and narcotics charges because he did not understand the nature of the charges to which he pled guilty. The Second Circuit relied upon Henderson v. Morgan, supra, in granting relief.

State Courts have been equally diligent in insuring that a defendant who pleads guilty has real notice of the true nature of the charges against him. When he does not, State Courts have not hesitated to set aside guilty pleas. E.g., Thomas v. Leverette, 239 S.E.2d 500 (W.Va. 1977)(defendant not informed that intent a necessary element of second degree murder); Commonwealth v. Hare, 404 A.2d 388 (Pa. 1979)(defendant not informed of nature of element of malice in pleading guilty to murder generally); Commonwealth

v. Edwards, 410 A.2d 841 (Pa. Super. 1979)(defendant not informed of nature and elements of charge of operating a lottery). Indeed, even before Henderson, State Courts set aside guilty pleas when the defendant did not have real notice of the true nature of the charges against him. E.g., People v. Riney, 489 P.2d 1304 (Colo. 1971)(defendant not informed of elements of aggravated battery); People v. Colosacco, 493 P.2d 650 (Colo. 1972)(defendant not informed that intent to utter and pass counterfeit instruments with intent to defraud an element of possession of counterfeit checks); People v. Mason, 491 P.2d 1383 (Colo. 1971)(defendant not informed of elements of charge of simple robbery); Clewley v. State, 288 A.2d 468 (Me. 1972)(defendant not informed that under "continuing larceny" rule in Maine, in order to constitute larceny in Maine, there must have been an unlawful taking by the defendant in such circumstances as to make him legally responsible for the unlawful taking in the other state).

Here, the Trial Court made absolutely no attempt whatsoever to inform the defendant of any of the elements of the charges of First Degree Murder, Robbery, Attempted First Degree Murder, and Attempted Robbery, or to determine if the Defendant understood the nature of the extremely serious charges to which he was pleading guilty. The Trial Court did not even ask the Defendant if he understood the nature of the charges or if the Defendant's trial counsel had explained the nature of the charges to him. This total silence alone requires that the Defendant's guilty pleas be set aside. The requisite affirmative showing that they were intelligent and

and voluntary, Boykin v. Alabama, supra, 395 U.S. at 242, has not been made--and cannot be made.

The Trial Court's and Defendant's trial counsel's failure to inform the Defendant of the nature of the charges against him were particularly damaging in this case. Intoxication and/or drug misuse can negate the premeditation and specific intent required to convict of first degree murder, attempted first degree murder, robbery, and attempted robbery, or at least render the defendant guilty only of a lesser charge.[10/] The underlying felony in the felony-murder charge was robbery, which of course requires specific intent. Since the Defendant was not informed of the elements of the charges to which he pled guilty, he obviously was unaware of the significance of the psychiatric report.

The psychiatric report, submitted to the Trial Court (R.38), provided that:

> "...The defendant stated that if he had not been drinking and smoking marijuana, the offenses would never have occurred... He explained that he had about 3 1/2 glasses of whisky on the evening of the offense as well as a half quart of beer. He states that he usually only drinks about one or two six packs a day, but that his friends had induced him to drink more. He states the weather was somewhat cold and they told him to drink whisky to warm up. He also smoked about four marijuana cigarettes that day. This was not unusual for him... He described driving past a lounge and firing outside of the car. He explains that he did this because he was drunk...

10/ Garner v. State, 28 Fla. 113, 9 So.835 (Fla. 1891); Jenkins v. State, 58 Fla. 62, 50 So. 582 (Fla. 1909); Ekman v. State, 161 So. 716 (Fla. 1935); Britts v. State, 30 So.2d 363 (Fla. 1947); Russell v. State, 373 So.2d 97 (Fla. 2d DCA1979); Presley v. State, 388 So. 2d 1385 (Fla. 2d DCA 1980); Graham v. State, 406 So. 2d 503 (Fla. 3d DCA 1981); Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981).

* * * *

> The defendant states that all of this happened because he was intoxicated..." (R.39-40)(Emphasis Added)

The section of the report entitled "Recommendations" states that:

> "He feels that his difficulties grew out of his intoxication of alcohol and marijuana. This in fact may be substantially true...he certainly may have been suffering from the effects of alcohol and drugs." (R.42)(Emphasis Added)

Thus, the Trial Court's failure to inform the Defendant of the nature of the charges was more than fatal here, because without knowledge of the elements of the charges, or of his defenses,[11/] which clearly were available, the Defendant could not possibly make an informed decision concerning his pleas.

As if all this were not bad enough, the Trial Court further confused the proceedings by misleading the Defendant into thinking that he was pleading guilty to manslaughter:

> "Q. Do you understand that there will be a second phase of this proceeding where a jury will hear certain facts and decide and recommend to the Court what penalty should be imposed, whether it is for the crime of manslaughter with a minimum of 15 years or death, and in the event that there is a recommendation of death, if the Court decides to follow the jury's recommendation you will have a right to appeal that recommendation." (T.209)(Emphasis Added)

Thus, the Trial Court not only did not inform the Defendant of the elements of the charges to which he pled guilty, he affirmatively misled the Defendant into thinking that he was pleading guilty to manslaughter, rather than first degree murder-- an error

---

11/See subpoint C, infra.

of staggering proportions. The Trial Court's mistake is similar to that which occurred in Commonwealth v. Jasper, 372 A.2d 395 (Pa. 1976). In Jasper, the defendant pled guilty to murder generally and the prosecutor stipulated that the evidence rose no higher than second degree murder. The prosecutor explained the elements of second degree murder to the defendant. He then misinformed the defendant that manslaughter was the highest degree of homicide for which he could be convicted. The trial court found him guilty of second degree murder. The Pennsylvania Supreme Court vacated the guilty plea, holding that the defendant had not properly been informed of the nature of the charges.

This Court must vacate the Defendant's guilty pleas and award him a trial.

C

THE DEFENDANT'S GUILTY PLEAS WERE INVOLUNTARY BECAUSE HE WAS IGNORANT OF, AND THE TRIAL COURT DID NOT INFORM HIM OF, THE DEFENSES THAT CLEARLY WERE AVAILABLE TO HIM, OR THAT HIS GUILTY PLEAS WAIVED THESE DEFENSES.

When accepting a guilty plea, the trial court must determine that the defendant understands that he waives his defenses by pleading guilty. State v. Lyles, 316 So.2d 277 (Fla. 1975); Williams v. State, 316 So.2d 267 (Fla. 1975); State v. Kendrich, 336 So.2d 253 (Fla. 1976); Mendenhall v. Hopper, 591 F.2d 1342 (5th Cir. 1979); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974); People v. Jimenez, 73 A.D.2d 533, 422 N.Y.S.2d 414 (1979).

In Lyles, as here, the plea colloquy was limited. The trial court made only the following inquiry concerning the waiver of any

possible defenses:

> "THE COURT: By pleading guilty you have admitted that the State can prove each essential allegation of the crime. Do you understand that?
> MR. LYLES: (Nods head.)
>
> * * * *
>
> THE COURT: Have you had an opportunity to talk to...your attorney, about...any possible defenses you may have for this charge and the consequences of your entering a guilty plea today?" (316 So.2d at 278)

The defendant answered "yes, sir." 316 So.2d at 278.

Three weeks later, at the sentencing, the following occurred:

> "THE COURT: The victim in this case, which you decided that you would beat up seriously --
> MR. LYLES: I assaulted the man because he was trying to take my money. He was cheating me.
> THE COURT: ...Did you think of calling the police?
> MR. LYLES: No, sir. At the time, I was under the influence of alcohol and marijuana.
> THE COURT: Well, I think I'm going to put you away where you're not going to get either one. Anything else?
> MR. LYLES: No, sir." (316 So.2d at 278)

This Court held that:

> "When such circumstances are present, the trial judge should make a searching inquiry to determine whether the defendant understands that the plea waives any asserted defense..." (Id.)(Emphasis Added)

This Court remanded the case to the trial court for a hearing to determine what discussions occurred, if any, between the defendant and his attorney concerning the defenses to the charge, to receive evidence of a factual basis for the plea, and to allow the defendant an opportunity to establish manifest

injustice.

In Williams, this Court held that, when pleading guilty, a defendant should know that:

> "...If he has raised defenses in the proceeding, such as a motion to suppress evidence, he should understand that he has waived these defenses by pleading guilty..." (316 So.2d at 271)

More specifically,

> "...if the defendant claims a defense during the course of the guilty plea proceedings, e.g., lack of criminal intent or self-defense, the plea is subject to attack unless the defendant specifically and understandingly waives that defense..." (316 So.2d at 273)(Emphasis Added)

In Kendrich, the defendant pled guilty to aggravated assault. At sentencing, the trial court considered the pre-sentence investigation report and depositions, in which witnesses stated that the defendant possessed a knife at the time of the aggravated assault, in determining the factual basis for the plea. The defendant denied possession of a knife. The presence of a deadly weapon is an essential element of aggravated assault. 12/ This Court noted and held that:

> "This Court recently recognized that where a defendant claims a defense during the course of a guilty plea proceeding, the plea may be subject to attack. Williams v. State... Where a defendant raises the possibility of a defense to his guilty plea, the potential prejudice is apparent. In such circumstances, a trial judge should make extensive inquiry into factual basis before accepting the guilty plea..." (336 So.2d at 355)

12/ Goswich v. State, 143 So.2d 817, 820 (Fla. 1962)

This Court remanded the case to the trial court for proceedings consistent with Lyles.

In Mendenhall, the absence of a waiver of a defense, brought about by the ineffective assistance of counsel, rendered the defendant's guilty plea involuntary. The defendant entered guilty pleas to two counts of first degree murder and one count of aggravated assault. A psychiatric report, prepared prior to the entry of the guilty pleas, concluded that the defendant suffered from schizophrenia, schizo-affective type, with some paranoid trend. The trial court was notified of this finding. Fourteen months later, another psychiatric report concluded that the defendant probably was suffering from an acute psychosis on the day of the crimes and, therefore, he could not control his actions and could not distinguish right from wrong. The trial court was notified of this finding. The defendant's attorney did not follow up on these reports at all.

The defendant challenged the voluntariness of his guilty pleas in a Federal Habeas proceeding. The district court held that the defendant's attorney had not informed him of the possible insanity defense, the trial judge had not done so and, therefore, the defendant's guilty pleas were involuntary:

> "The record discloses that Mr. Mendenhall was not aware of the results of the psychiatric evaluation. The advisability of pursuing a defense of not guilty by reason of insanity was not adequately discussed with him or with his wife by counsel. The judge did not raise the issue or question Mr. Mendenhall on the subject. 'An accused who does not receive reasonably effective assistance of counsel in connection with his decision to plead guilty cannot be said to have made that decision either intelligently or voluntarily.'...
>
> * * * *

> The plea of guilty entered by Mr. Mendenhall was not entered voluntarily, knowingly, and intelligently as required by the United States Supreme Court. Boykin v. Alabama, supra[7]" (453 F.Supp. at 982-983)(Emphasis Added)

Footnote 7, appended to the district court's holding, was:

> "...Boykin v. Alabama...held that there must be an affirmative showing of the plea being intelligently and voluntarily made." (453 F.Supp. at 983, n.7)(Emphasis Added)

The Fifth Circuit summarily affirmed. Mendenhall v. Hopper, 591 F.2d 1342 (5th Cir. 1979).

In Herring, relied upon by Mendenhall, the defendant entered a guilty plea to robbery by assault. His attorney did not inform him of a defense, which, if sustained would have rendered him liable for a lesser offense than that charged. The Fifth Circuit held that:

> "...It is the lawyer's duty to ascertain if the plea is entered voluntarily and knowingly... He must actually and substantially assist his client in deciding whether to plead guilty... It is his job to provide the accused an 'understanding of the law in relation to the facts.'... His advice should permit the accused to make an informed and conscious choice...if the quality of counsel's service falls below a certain minimum level, the client's guilty plea cannot be knowing and voluntary because it will not represent an informed choice..." (491 F.2d at 128)

The Fifth Circuit concluded that:

> "...reasonably effective counsel either would have advised Herring to plead not guilty or, at the very least, would have explained to him the Texas law of robbery... By failing to advise Herring how the facts of this case related to the Texas law of robbery, counsel made certain that his client's plea could not be knowingly and voluntarily entered." (491 F.2d at 129)

In Jimenez, the defendant entered a guilty plea to attempted second degree murder. The prosecutor recited a lengthy, detailed, and comprehensive factual basis. Then, during the plea colloquy, the following occurred:

> "THE COURT: ...Now tell me...what did you do that now caused you to withdraw your plea of not guilty and to plead guilty? What is your involvement in this incident?
> THE DEFENDANT: ...I really can't recall what happened because I was drinking. I had been drinking for nine hours; from 9 in the morning until it happened. I just remember, you know, a few things, but I can't remember everything.
> THE COURT: ...I want you to remember the particular part that you played in this incident... What did you do?
> THE DEFENDANT: I don't know. I was there. I was trying to break up the fight. I was shot. I can't recall.
> THE COURT: You better talk to your lawyer about this or find out because I will not take a plea from a person who claims that he doesn't know what took place.
> THE DEFENDANT: I was there. There was a fight and I was involved.
> THE COURT: And what part did you play in this involvement? What did you do?
> THE DEFENDANT: I guess I must have stabbed the guy.
> THE COURT: All right. I'll accept the plea." (422 N.Y.S.2d at 415-416)

The New York Supreme Court, Appellate Division, reversed the conviction based upon the guilty plea because:

> "...Defendant's answers during the allocution did not establish his guilt of the crime of attempted murder in the second degree, which at a minimum requires an intent to cause the death of another person... His claims that he had been drinking for many hours before the occurrence raised a serious question whether he was intoxicated when he stabbed [the victim] and, if so, whether his intoxication was of such degree as to negate an intent to kill the victim...

> It does not appear from this record that defendant intelligently and knowingly entered the guilty plea, as there is no indication that he was aware intoxication was a potential 'defense' to the crime to which he pleaded guilty..." (422 N.Y.S.2d at 416)(Brackets Added)

As established in subpoint B, supra, intoxication and/or drug misuse can negate the premeditation and specific intent required to convict of first degree murder, attempted first degree murder, robbery, and attempted robbery. The Defendant had these defenses available. The psychiatric report, submitted to the Trial Court (R.38), provided that:

> "...The defendant stated that if he had not been drinking and smoking marijuana, the offenses would never have occurred... He explained that he had about 3 1/2 glasses of whisky on the evening of the offense as well as a half quart of beer. He states that he usually only drinks about one or two six packs a day but that his friends had induced him to drink more. He states that the weather was somewhat cold and they told him to drink whisky to warm up. He also smoked about four marijuana cigarettes that day. This was not unusual for him... He described driving past a lounge and firing outside of the car. He explains that he did this because he was drunk...
>
> * * * *
>
> The defendant states that all of this happened because he was intoxicated..." (R.39-40)(Emphasis Added)

The section of the report entitled "Recommendation" states that:

> "He feels that his difficulties grew out of his intoxication of alcohol and marijuana. This in fact may be substantially true...he certainly may have been suffering from the effects of alcohol and drugs." (R.42)(Emphasis Added)

Here, the guilty plea colloquy is totally devoid even of a hint that the Defendant was aware of the intoxication defense, much less that he waived it. (T. 208-213). There is nothing to indicate that the Defendant's trial counsel informed him of the intoxication defense. However, the Trial Court had actual knowledge of it, since he received the report (R. 38). Thus, the Trial Court was in the same position as were the Lyles, Williams, Kendrich, Mendenhall, Herring and Jimenez trial courts. Here, as in these cases, nothing was done to inform the Defendant of the defenses available to him or to insure that he understood that his guilty pleas waived these defenses. Here, as in these cases, the Defendant's guilty pleas were involuntary and void.

D

THE DEFENDANT'S GUILTY PLEAS WERE INVOLUNTARY BECAUSE HE WAS IGNORANT OF, AND THE TRIAL COURT DID NOT INFORM HIM OF, HIS RIGHT TO TRIAL BY JURY, OR THAT HIS GUILTY PLEAS WAIVED THIS RIGHT.

Boykin v. Alabama, 395 U.S. 238 (1969), held that:

> "...The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In Carnley v. Cochran, 369 U.S. 506, 516, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.'
>
> We think that the same standard must be applied to determining whether a guilty plea is voluntarily made... The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards...

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment... Second, is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145. Third, is the right to confront one's accusers... We cannot presume a waiver of these three important federal rights from a silent record.[5]" (395 U.S. at 242-243)(Emphasis Added)

In footnote 5, appended to this quote, [13] Boykin adopted the holding of McCarthy v. United States, 394 U.S. 459, 466 (1969):

> "A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid, under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void..."

Accordingly, a defendant who pleads guilty must be informed of these and other fundamental rights, Rule 3.172(c)(iii), RCrP [14]

---

13 / Boykin v. Alabama, supra, 395 U.S. at 243, n.5

14 / Rule 3.172(c)(iii), RCrP, provides, inter alia, that:

> "...the trial judge...shall address the defendant personally and shall determine that he understands... That he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to compel attendance of witnesses on his behalf, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself." (Emphasis Added)

and the failure of the trial court to so inform the defendant renders the guilty plea involuntary. State v. Esquer, 546 P.2d 849. (Ariz. App. 1976)(defendant only informed of his right to a "public and speedy trial", not of his right to trial by jury); Commonwealth v. Dello Buono, 414 A.2d 631 (Pa. Super. 1979)(defendant informed of his right to jury trial, but not informed of the elements of a jury trial, i.e., that the verdict must be unanimous); Smith v. Director, Patuxent Institution, 280 A.2d 910 (Md. App. 1971)(defendant informed only of right to trial, not right to jury trial); People v. Jaworski, 194 N.W. 2d 868 (Mich. 1972)(defendant must be informed of all three Boykin rights); State v. Findley, 239 N.E.2d 852 (Iowa, 1976)(defendant not informed of his right against self-incrimination); Barfell v. State, 399 N.E.2d 377 (Ind. App. 1979) (defendant not informed of requirement that prosecution prove his guilt beyond a reasonable doubt); People v. Wilkes, 254 N.W.2d 598 (Mich. App. 1977)(defendant not informed of his right to confront his accusers).

Here, the Defendant's guilty pleas were involuntary and void because the Trial Court did not inform him of his right to trial by jury. The Trial Court informed the Defendant only that:

> "Q. Do you understand that you have a right to proceed with the trial of this matter, to be represented by counsel throughout a trial, to confront the State's witnesses, to call witnesses in your own behalf, but by entering into this plea you are giving up those rights? Do you understand that?
> A. Yes, sir.
> Q. You also have the valuable right to remain silent and to leave the burden on the State to prove your guilt.
> Do you understand that you also give up that right by entering into this plea?
> A. Yes, sir." (T.211)

The Trial Court further erred by telling the Defendant that the jury could find him guilty of manslaughter:

> "Do you understand that there will be a second phase of this proceeding where a jury will hear certain facts and decide and recommend to the Court what penalty should be imposed, whether it is for the crime of manslaughter..." (T. 209) (Emphasis Added)

Thus, the Defendant was misled into thinking that the jury could convict him only of manslaughter. The jury could reach such a verdict only after a jury trial on the question of guilt.

The Defendant did not waive his right to trial by jury and his guilty plea was involuntary.

E

THE DEFENDANT'S GUILTY PLEAS WERE INVOLUNTARY BECAUSE HE WAS IGNORANT OF, AND THE TRIAL COURT DID NOT INFORM HIM OF, HIS RIGHT TO APPEAL THE DENIAL OF HIS MOTION TO SUPPRESS, OR THAT HIS GUILTY PLEAS WAIVED THIS RIGHT.

Rule 3.172(c)(iv), RCrP, provides, inter alia, that:

> "...the trial judge...shall address the defendant personally and shall determine that he understands... That if he pleads guilty...without express reservation of right to appeal, he gives up his right to appeal all matters relating to the judgment..."

In Williams v. State, 316 So.2d 267, 271 (Fla. 1975), this Court held that, when pleading guilty, a defendant should know that:

> "...If he has raised defenses in the proceeding, such as a motion to suppress evidence, he should understand that he has waived these defenses by pleading guilty..."

As set forth in sub-point C, supra, a defendant who pleads guilty must be informed of the fundamental rights he waives. The failure of the trial court to inform a defendant that his guilty plea waives his right to appeal the denial of his motion to suppress voids the guilty plea. Here, the Trial Court did not mention this right, or its waiver, to the Defendant (T. 208-213). Therefore, the Defendant did not waive his right to appeal the denial of his motion to suppress his statements and his guilty pleas were involuntary.

F

THE DEFENDANT'S GUILTY PLEAS TO ROBBERY, ATTEMPTED MURDER, AND ATTEMPTED ROBBERY, WERE INVOLUNTARY BECAUSE HE WAS IGNORANT OF, AND THE TRIAL COURT DID NOT INFORM HIM OF, THE MAXIMUM POSSIBLE PENALTIES PROVIDED BY LAW.

Rule 3.172(c)(i), RCrP, provides, inter alia, that when accepting a guilty plea, the trial court:

> "...shall address the defendant personally and shall determine that he understands...the maximum possible penalty provided by law..."

The Constitution requires that a guilty plea be set aside if the defendant was unaware of the maximum sentence provided by law. Lewellyn v. Wainwright, 593 F.2d 15 (5th Cir. 1979); Cheely v. United States, 535 F.2d 934, 935 (5th Cir. 1976); Wade v. Wainwright, 420 F.2d 898, 900 (5th Cir. 1969). In Lewellyn, the defendant entered a guilty plea to breaking and entering with intent to commit a felony (rape). At no time prior to the plea was he informed of the maximum sentence that could be imposed.

He was sentenced to imprisonment for six months to twenty years. He subsequently challenged the voluntariness of his plea in a Federal Habeas Corpus proceeding. The District Court held that the plea was involuntary because he was not aware of the maximum sentence that he could receive. The Fifth Circuit agreed:

> "...Ignorance of the consequences of the plea is a factor that may require its rejection. Boykin v. Alabama...Wade v. Wainwright... Because Lewellyn was ignorant of the maximum sentence which he could receive upon entering a guilty plea, his plea was involuntary and invalid under the due process clause. See Cheely v. United States... (guilty pleas involuntary if made in ignorance of its consequences, including length of possible sentence, citing Wade.)" (593 F.2d at 17)

Here, the Trial Court sentenced the Defendant to life imprisonment on Count II of the indictment, robbery, the maximum,[15] to fifteen years imprisonment on Count IV of the indictment, attempted robbery, the maximum,[16] consecutive to the sentence imposed on Count II, and to thirty years imprisonment on Count V of the indictment, attempted murder, the maximum,[17] consecutive to the sentence imposed on Count IV. (R.60). But, the Trial Court never informed the Defendant of the maximum possible sentence which could be imposed for these crimes. In fact, the Trial Court's only reference to these charges occurred at the very beginning of the plea colloquy, when he merely asked the Defendant if he was entering guilty pleas to those charges (T.209).

---

15 / Florida Statutes 812.13(2)(a) and 775.082(3)(a).

16 / Florida Statutes 774.04(4)(b) and 775.082(3)(c).

17 / Florida Statutes 774.04(4)(a) and 775.082(3)(b).

The Defendant's guilty pleas to robbery, attempted murder, and attempted robbery, were involuntary and must be vacated.

G

THE DEFENDANT'S GUILTY PLEAS WERE INVOLUNTARY BECAUSE OF HIS YOUTH.

Courts typically — and properly — carefully scrutinize guilty pleas entered by youthful defendants. Ross v. Wainwright, 451 F.2d 298 (5th Cir. 1971); Smith v. Director, Patuxent Institution, 280 A.2d 910 (Md. 1971); United States ex rel. Rosner v. Warden, 520 F.2d 1206 (2d Cir. 1975); State v. Smith, 606 P.2d 86 (Hawaii, 1980); Rinehart v. Brewer, 561 F.2d 126 (8th Cir. 1977); People v. Lawson, 42 A.D.2d 672, 344 N.Y.S.2d 303 (1973).

Ross and Rinehart are typical of these decisions.

In Ross, a seventeen year old defendant had pled guilty to and had received a life sentence for rape. He subsequently claimed that he had pled guilty in return for a promise of a ten year sentence. The Fifth Circuit concluded that the record demonstrated a full, good faith effort by the trial court to determine the voluntariness of the plea. Nevertheless, it remanded the case for an evidentiary hearing:

> "...Ross's present contentions appear highly implausible. However, these contentions are not so utterly inconsistent with the record that we are willing to risk the remainder of a 17-year-old's life on the supposition that they cannot be established..." (451 F.2d at 301)

In Rinehart, the Eighth Circuit held that:

> "Rinehart was only 15 years old at the time he made the guilty plea and was somewhat immature for his age. Although he had

> at least average intelligence, he had no prior experience with the legal system and no other basis for understanding what was happening to him. In addition, Rinehart had difficulty in communicating with respect to the underlying events... Under these circumstances, a particularly stringent duty is imposed upon both defense counsel and the trial court to make certain that the defendant understands the charges and the consequences of his plea. That duty was not fulfilled..." (561 F.2d at 130) (Emphasis Added)

Identically, here, a particularly stringent duty was imposed upon both defense counsel and the trial court to make certain that the Defendant understood the charges, what the guilty pleas connoted, and their consequences. Identically, here, that duty was not fulfilled.

Here, the black Defendant was only twenty years old (T.209). He had only gone to the eleventh grade (R.85). He was charged with several extremely serious crimes, including a capital charge. Notwithstanding these circumstances, the Trial Court made no inquiry at all concerning the Defendant's mental state after the Defendant's trial counsel informed him, both informally and on the record, that the Defendant was suicidal. The Trial Court made no inquiry into the question of why the Defendant first wanted to enter a guilty plea, then adamantly insisted that he did not want to plead guilty and wanted a trial (T.201-202) and then suddenly changed his mind and pled guilty. The Trial Court made absolutely no effort whatsoever to inform the Defendant of the elements of the charges to which he pled guilty, all of which were specific intent crimes, and one of which carried the death penalty. Indeed, the Trial Court did not

even ask the Defendant if he understood the nature of the charges. The Trial Court further erred by informing the Defendant that he could be found guilty of manslaughter (T.209). The Trial Court never informed the Defendant of the defenses that were available to him nor did he determine that the Defendant understood that by entering the guilty pleas he waived the defenses. The Trial Court did not inform the Defendant that he had a right to trial by jury. The Trial Court did not inform the Defendant that he waived his right to appeal the denial of his motion to suppress by pleading guilty. The Trial Court did not inform the Defendant of the maximum sentences provided by law for robbery, attempted robbery, and attempted murder.

During the very brief plea colloquy (T.208-213), the Defendant gave no answer of more than two words and used no word of more than one syllable. The scene is closer to that of a robot programmed to answer the questions of Disneyland visitors than of a twenty year old pleading to the electric chair.

The Trial Court's plea colloquy would have been inadequate had the charges been misdeamenors and the Defendant a law school professor. The plea colloquy cannot validate guilty pleas to first degree murder, carrying the death penalty, robbery, attempted first degree murder, and attempted robbery, by a twenty year old, poorly educated, inexperienced, semi-literate black youth. The plea colloquy flies in the face of Boykin's absolute requirement that when a trial court accepts a guilty plea, it must extend:

> "...the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences..." (395 U.S. at 243-244) (Emphasis Added)

H.

THE DEFENDANT'S GUILTY PLEAS WERE INVOLUNTARY BECAUSE HE WAS INDUCED TO ENTER THEM UPON THE REPRESENTATION BY THE STATE, WITH THE CONCURRANCE AND APPROVAL OF THE TRIAL COURT, THAT THE UNRELATED ROBBERY CHARGE WOULD BE DISMISSED AND WOULD NOT BE USED AGAINST HIM; HOWEVER THE TRIAL COURT UTILIZED THE UNRELATED ROBBERY CHARGE IN IMPOSING THE DEATH SENTENCE.

A guilty plea is void when a plea bargain agreement is violated. Thompson v. State, 351 So.2d 701 (Fla. 1977); Surace v. State, 351 So.2d 702 (Fla. 1977); Costello v. State, 260 So.2d 198 (Fla. 1972); Brown v. State, 245 So.2d 41 (Fla. 1971); Bilger v. State, 247 So.2d 721 (Fla. 2d DCA 1971); Kirlin v. State, 262 So.2d 713 (Fla. 2d DCA 1972); Odom v. State, 310 So.2d 770 (Fla. 2d DCA 1975).

Here, in addition to the charges to which he pled guilty, the Defendant had been charged in an unrelated, separate robbery case, Case No. 78-1612. As part of the "plea bargain," sanctioned by the Trial Court, the unrelated robbery charge was dismissed by the State (T. 205). However, in total violation of this agreement, the Trial Court considered the unrelated robbery charge in imposing the death penalty. In his verbal "findings," the Trial Court said:

> "The jury is not aware of it, but I'm aware that the defendant was on trial or awaiting trial for robbery at the time of this offense; that is how the case came to this division." (T. 628)

The Trial Court's violation of the "plea Bargain" renders the Defendant's guilty pleas void.

III

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS.

A

THE WARRANTLESS ARREST OF THE DEFENDANT WAS UNCONSTITUTIONAL.

In Payton v. New York, 445 U.S. 573 (1980), the Supreme Court held that a warrant was required for the arrest of any person in his home in the absence of exigent circumstances. Payton is retroactive. United States v. Johnson, ___ U.S. ___, 102 S.Ct. 2579 (1982); State v. Rickard, ___ So.2d ___, ___, 1982 F.L.W. 453, 455 (Fla. 1982).

The expectation of privacy in the home traditionally has been extended to include the area surrounding and related to the dwelling. Fixel v. Wainwright, 492 F.2d 480 (5th Cir. 1974); State v. Morsman, 394 So.2d 408 (Fla. 1981); State v. Rickard, supra; DeMontmorency v. State, ___ So.2d ___, 1982 F.L.W. 485 (Fla. 1982); State v. Parker, 399 So.2d 24 (Fla. 3d DCA 1981); Huffer v. State, 344 So.2d 1332 (Fla. 2d DCA 1977); Jennings v. State, 1982 F.L.W. 2061 (Fla. 2d DCA 1982); Brown v. State, 392 So.2d 280 (Fla. 1st DCA 1980).

In Fixel, in upholding a privacy expectation of a defendant who occupied one unit of a four-unit apartment building in the enclosed rear yard or curtilage not normally used as a common passageway, the Fifth Circuit held that:

> "...the sacredness of a person's home and his right of personal privacy and individuality are paramount considerations in our country and are specifically protected by the Fourth Amendment. The Fourth Amendment's protection, however, extends further than just the walls of the physical structure of the home itself. The area immediately surrounding and closely related to the

> dwelling is also entitled to the Fourth Amendment's protection. In defining the surrounding area entitled to such protection, the courts historically have found helpful the common law concept of curtilage, meaning 'yard, courtyard or other piece of ground included within the fence surrounding a dwelling house'...When officers have physically invaded this protected area... we have readily condemned such an invasion as violative of the Fourth Amendment." (492 F.2d at 483)(Emphasis Added)

In Morsman, the defendant's backyard was not enclosed. It could not be seen from the front yard or from the street. A police officer received a report that the defendant was growing marijuana in his backyard. He went to the defendant's home. No one was there. He walked around into the backyard and saw the marijuana. The defendant asserted an expectation of privacy as to the area adjacent to the rear of his residence. The State argued that an unenclosed yard is not subject to Fourth Amendment protection.

The Second District, relying upon Fixel, held that the defendant's right to privacy had been violated:

> "...the yard adjacent to a residential dwelling, particularly the part of the backyard blocked from view from the front yard or street by the dwelling, is clothed with a reasonable expectation of privacy from unreasonable governmental intrusion..." (Morsman v. State, 360 So.2d 137, 139 (Fla. 2d DCA 1978))

This Court affirmed. Noting that the backyard was not fenced in and that the plants could not be seen from the street or the front yard, 394 So.2d at 408, this Court held that:

> "...the backyard of a residence is more private because passersby cannot generally view this area. In Fixel... this concept was extended to the backyard of a four-unit apartment building. Although not as exclusive as the backyard of a private residence,

> the backyard was not a common passageway normally used by tenants or businessmen who might approach the tenants..." (394 So.2d at 409)

This Court then confirmed the utilization of property rights in determining privacy expectations:

> "...Property rights should be considered in determining whether an individual's expectations of privacy are reasonable. One who controls property, whether owner or tenant, will in all likelihood have a legitimate expectation of privacy by virtue of his right to exclude. Respondent's privacy expectation in the backyard was valid where objects placed there were not visible from outside." (394 So.2d at 409)

In Rickard, police officers saw marijuana growing in the defendant's backyard from a place where they legally had a right to be. Thus, as this Court noted, that distinguished Rickard from Morsman, in which the police found the marijuana only after illegally entering the defendant's backyard. Nevertheless, this Court held that the warrantless seizure of the plants was unconstitutional.

In approving the holding of Huffer v. State, supra, this Court held, in language particularly apropos here, that:

> "In Huffer... the Court held that since the protection afforded to 'houses' by the Fourth Amendment and by the Declaration of Rights of the Florida Constitution includes the curtilage surrounding a dwelling, the search of the backyard hothouse intruded upon Huffer's right to privacy.
>
> ...the privacy of a Florida backyard is generally protected by law, even the backyard of an apartment complex surrounded only by a chain link fence. One may not enter that area to observe occupants inside the residence. Fixel..." (___ So.2d at ___, 1982 F.L.W. at 454)

In DeMontmorency, acting on a tip that marijuana was being grown

on the defendant's property, two officers drove through an open gate into a pasture adjacent to the property in question. Then they parked their car and crossed over a fence into a rough wooded area of the defendant's property. Prior to crossing the fence, they did not see marijuana growing. It was seen by them only after traveling a distance of some 300 feet inside the fence. They saw the defendant watering the plants and arrested her. This Court held that the police officers' initial entry and search was unlawful.

In Jennings, police, while investigating grand theft and stolen property charges, entered the defendant's backyard to take a closer look at trailers which they saw from the street. Upon close inspection, they notided that the trailers had been partially sanded and the stenciling and license tags had been removed. The police ran a check on the trailers and learned that they had been stolen. They seized the trailer and arrested the defendant. The Second District, relying upon Morsman, held that the search and seizure was unconstitutional:

> "...Here, while the officers could see the trailers from the street, they were unable to determine whether the trailers were stolen until after they entered appellant's backyard. Inasmuch as there was no showing of exigent circumstances, they did not have a right to enter the appellant's backyard to inspect the trailers without a search warrant..." (1982 F.L.W. at 2061)(Emphasis Added)

These principles converge in Brown. There, police officers drove through a gate and into the premises. As one of the police officers got out of the car, the defendant came out of the back door of the house. Upon leaving the car, one police officer was standing at the back of the house. The defendant was standing on a small

back porch or stoop. The police officer identified himself and arrested the defendant.

The First District held that under Payton the warrantless arrest of the defendant was unconstitutional. The Court noted that the State:

> "...contends that Payton is not applicable to the factual situation sub judice because appellant had stepped out of the backdoor of his house onto the porch when arrested; that the intent of Payton was to protect intrusion into one's home. We are unable to agree under the facts of this case..." (392 So.2d at 284)

The First District held that:

> "...the officers in the case sub judice drove into Brown's enclosed yard at approximately 1:45 A.M. and arrested him when he came out on his back porch. Both the officers and Brown were in a place where Brown, particularly at that time of night at his back door, could expect privacy. He was on his back porch, a part of his house, and the officer had driven into his enclosed private yard..." (Id.)

Here, Detectives Martin, Singleton, and Pontigo went to the Defendant's residence on January 6, 1979 (T.87). They went up to the front door and met with the Defendant's sister, Nadine Berry (T. 87). Mrs. Berry told them that the Defendant was at a laundromat and she gave them a clothing description (T.88).

Detective Singleton had been walking to the rear of the residence, along the West side, [18] while they were talking to the Defendant's sister (T.118). At the end of the conversation, Detective Singleton started running towards the back yard (T.88). Detective Martin started running after Detective Singleton (T.119). By the time he

---

18/State's exhibit No. 24 (R.82) is a picture of the residence.

got to the backyard, Detective Martin saw Detective Singleton detaining the Defendant at the rear fence of the yard, the Northeast section of the backyard (T.88). They placed handcuffs on the Defendant and took him back to the police car in the front of the residence (T.544).

Respectfully, it is clear that this warrantless arrest of the Defendant, in his backyard, made by police officers who had to trespass onto the backyard to locate him, violates the principles of Payton, Fixel, Morsman, Rickard, DeMontmorency, Parker, Huffer, Jennings, and Brown. Since the warrantless arrest of the Defendant was unconstitutional, his statements, the direct product of the illegal arrest, were inadmissible. United States v. Johnson, supra; Wong Sun v. United States, 371 U.S. 471 (1963).

B

THE DEFENDANT'S STATEMENTS WERE OBTAINED DURING THE TIME HE WAS ILLEGALLY DETAINED WITHOUT A PROMPT JUDICIAL DETERMINATION OF PROBABLE CAUSE.

In Gerstein v. Pugh, 420 U.S. 103 (1975), the Supreme Court held that:

> "...the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest." (420 U.S. at 114)(Emphasis Added)

Moreover:

> "...this determination must be made by a judicial officer either before or promptly after arrest." (420 U.S. at 103)

In reaching its decision, the Supreme Court relied upon its previous decisions in McNabb v. United States, 318 U.S. 322 (1943)

and Mallory v. United States, 354 U.S. 449 (1957).

The Court noted that the reason for the McNabb-Mallory requirement that police officers must take an arrested person before a magistrate without unnecessary delay for a determination of probable cause, was based upon a requirement that the judicial and police functions be separated:

> "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of suberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." (McNabb v. United States, 318 U.S. at 343)

In concluding that the issue of probable cause can be determined reliably without an adversary hearing, Gerstein noted that:

> "...ordinarily there is no need for further investigation before the probable cause determination can be made. 'Presumably, whomever the police arrest they must arrest on "probable cause." It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on "probable cause."' Mallory v. Untied States, 354 U.S. 449, 456..." (420 U.S. at 120, n.21)

Gerstein's holding that a prompt judicial probable cause determination must be made after arrest and its reliance upon McNabb and Mallory lead to the inexorable conclusion that the McNabb-Mallory Rule has now become a rule of federal constitutional law, as part of

the Fourth Amendment, and therefore it is applicable to the states.

The constitutional requirement that a judicial officer determine probable cause before an arrestee may be held and questioned is neither new nor novel. E.g., Watts v. Indiana, 338 U.S. 49 (1949). There, although the Supreme Court did not expressly apply the McNabb-Mallory Rule, it did reverse a state court conviction on constitutional grounds because the defendant had been held, interrogated and an incriminating statement obtained from him, before a judicial officer had determined the existence of probable cause, as was required by Indiana law. The Court noted that:

> "Although the law of Indiana required that Petitioner be given a prompt preliminary hearing before a magistrate, with all the protection a hearing was intended to give him, the Petitioner was not only given no hearing during the entire period of interrogation, but was without friendly or professional aid and without advice as to his constitutional rights.
>
> * * * * *
>
> The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights -- these are all characteristic of its demands.
>
> * * * * *
>
> In holding that the due process clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the due process clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken." (338 U.S. at 53-55)(Emphasis Added)

The McNabb-Mallory Rule stems from the decisions of the Supreme Court in the McNabb and Mallory cases. The Rule requires that evidence obtained from a defendant, during a period of unnecessary delay in taking the defendant before a judicial officer, be suppressed. Relevant Federal decisions applying the McNabb-Mallory Rule compel the conclusion that the Defendant's statements should have been suppressed. E.g., Seals v. United States, 325 F.2d 1006 (D.C. Cir. 1963); Gross v. United States, 393 F.2d 667 (D.C. Cir. 1968); Ginoza v. United States, 279 F.2d 616 (9th Cir. 1960); Tatum v. United States, 313 F.2d 579 (D.C. Cir. 1962). See also State ex rel. Carty v. Purdy, 240 So.2d 480 (Fla. 1970); Olivera v. State, 250 So.2d 888 (Fla. 1971); Jacobs v. State, 248 So.2d 515 (Fla. 1st DCA 1971). In Lively v. Cullinane, 451 F.Supp. 1000 (D.D.C. 1978), relying upon Gerstein, the Court enjoined the District of Columbia police from detaining arrestees without presenting them promptly to a judicial officer for a probable cause determination.

Even when proper Miranda warnings are given, the requirement of a prompt probable cause determination by a judicial officer remains. Miranda v. Arizona, 384 U.S. 436, 463, n.32 (1966). Cf. Brown v. Illinois, 422 U.S. 590 (1975); Dunaway v. New York, 442 U.S. 200 (1979).

Here, the Detectives went to the Defendant's home to follow up a lead (T.87). After they arrested the Defendant in his backyard, they took him back to the police car (T.122). The Defendant was not free to leave (T.124). The Defendant was questioned in the police car (T.90). The Detectives drove around with the Defendant prior to going to the homicide office (T.91). They arrived at the homicide office at approximately 2:45 P.M. (T.93). He was there for ten or eleven hours of questioning,

culminating in his written statement (T.131). Of course, the Detectives never even attempted to obtain a judicial determination of probable cause.

Detective Martin admitted that they arrested the Defendant to conduct a records check and to question him (T.124). He did not have positive information of the Defendant's involvement. He had a tentative identification (T.169). He did not have much explicit information regarding the Defendant's involvement (T.169).

It is precisely this type of conduct which Gerstein forbids:

> "'...It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on "probable cause."' Mallory v. United States..." (420 U.S. at 120, n.21)

The Defendant's statements should have been suppressed.

C

THE DEFENDANT'S STATEMENTS WERE OBTAINED WHILE HE WAS ILLEGALLY UNDER ARREST, FOR INVESTIGATIVE PURPOSES, IN THE ABSENCE OF PROBABLE CAUSE.

An illegal arrest which results in an incriminating statement renders the statement inadmissible. Wong Sun v. United States, 371 U.S. 471 (1963). Miranda warnings do not dissipate the taint of the illegal arrest. Brown v. Illinois, 422 U.S. 590 (1975); Taylor v. Alabama, ___ U.S. ___, 50 U.S.L.W. 4783 (1982). Arrests for "investigatory" purposes are particularly condemned. Taylor v. Alabama, supra, Dunaway v. New York, 442 U.S. 200 (1979).

Here, Detective Martin conceded that the Defendant was arrested because they wanted to talk to the Defendant concerning the incidents

(T.124) and to conduct a records check (T.124). This was investigation, pure and simple.

There was no probable cause. Detective Martin admitted that he only had a tentative identification when he went to the Defendant's home (T.169). He did not have much explicit information regarding the Defendant's involvement (T.169). No positive identification was ever made (T.114). Detective Martin knew that they lacked probable cause to arrest the Defendant because he refused to admit the obvious, that the Defendant was under arrest. He euphemistically spoke of the Defendant as being "detained" (T.122;124).

The Defendant's statements should have been suppressed.

D

THE DEFENDANT'S STATEMENTS WERE OBTAINED IN VIOLATION OF MIRANDA, WERE INVOLUNTARY, AND WERE OBTAINED IN THE ABSENCE OF HIS ATTORNEY.

A careful review of the purported warnings given to the Defendant reveals that they do not meet the requirements of Miranda v. Arizona, 384 U.S. 436 (1966). The statements were also involuntary. E.g., Clewis v. Texas, 386 U.S. 707 (1967); Fikes v. Alabama, 352 U.S. 191 (1957). The statements were also obtained from the Defendant when he was represented by counsel on the other robbery charge and thus his right to counsel was violated. Brewer v. Williams, 430 U.S. 387 (1977).

The Defendant's statements should have been suppressed.

IV

THE APPLICATION OF FLORIDA STATUTE 921.141, IMPOSING THE DEATH SENTENCE UPON THE DEFENDANT, VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Florida Statute 921.141, the death penalty can only be imposed upon the reasoned judgment of the trial jury, trial judge, and this Court, that the particular factual situation involved, in light of the totality of the circumstances present, cannot be satisfied by the lesser penalty of life imprisonment. Proffitt v. Florida, 428 U.S. 427, 251-259 (1976); State v. Dixon, 283 So.2d 1, 7-8 (Fla. 1973). Both the trial jury and judge "must weigh the evidence of aggravating and mitigating circumstances delineated in the statute to determine whether death is an appropriate sentence." Brown v. Wainwright, 392 So.2d 850, 855 (Fla. 1982). This Court's duty is different from that of the trial jury and trial court. The exercise of this Court's reasoned judgment is not to impose sentence, but to:

> "... 'review', a process qualitatively different from sentence 'imposition'. It consists of two discrete functions. First we determine if the jury and judge acted with procedural rectitude in applying Section 921.141 and our case law...
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too severe..." (Brown v. Wainwright, supra, 392 So.2d at 1331)

This Court's review function is absolutely dependent upon both the jury and the trial court fulfilling their functions. If

either, or both, do not, this Court cannot fulfill its function.

This Court cannot fulfill its review function without a jury recommendation, or, in its absence, the appearance on the record of the defendant's knowing, intelligent, and voluntary waiver of his right to a jury recommendation. Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974). The jury is the "conscience of the community", McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977), and this Court accords "great weight" to its recommendation. Odom v. State, 403 So.2d 936, 942 (Fla. 1981); Neary v. State, 384 So.2d 881, 885 (Fla. 1980). Moreover, the standard employed by this Court to review a death sentence where the jury recommendation was life requires that the death sentence be reversed unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). However, when a jury recommends the death sentence, this Court has held that the death sentence should not be disturbed "unless there appears strong reasons to believe that reasonable persons could not agree with the recommendation." LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978). Finally, in exercising its review function, this Court considers jury recommendations in other similar cases in order to insure relative proportionality among death sentences.

The sum and substance of these legal principles is that this Court cannot perform its review function without a valid jury recommendation. 19/ This Court repeatedly has vacated death sentences

---

19/ The trial court cannot exercise reasoned judgment and weigh the evidence when the jury recommendation is invalid. Miller v. State, 332 So.2d 65,68 (Fla. 1976); Messer v. State, 330 So.2d 137, 142 (Fla. 1976). Brown holds that this Court can only review that which the trial court imposes. Such review is impossible when the trial court's sentencing judgment was impaired by the invalidity of the jury recommendation.

and remanded for resentencing before new juries where jury death recommendations have been tainted by the admission of non-statutory aggravating evidence or the exclusion of mitigating evidence. Simmons v. State, ___So.2d ___, Case No. 58,183, 1982, F.L.W. 368 (Fla. 8/16/82); Maggard v. State, 399 So.2d 973, 978 (Fla. 1981); Perry v. State, 395 So.2d 170, 176 (Fla. 1981); Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); Miller v. State, 332 So.2d 65, 68 (Fla. 1976); Messer v. State, 330 So.2d 137, 142 (Fla. 1976).

This Court cannot fulfill its review function without clear, written findings by the trial court concerning the statutory aggravating circumstances and the mitigating circumstances, as required by Florida Statute 921.141(3). In State v. Dixon, 283 So.2d 1 (Fla. 1973), in emphasizing the protections afforded by Florida Statute 921.141 and the duties of this Court and the trial court, this Court held:

> "The fourth step required...is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discimination or caprice 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." (283 So.2d at 8)(Emphasis Added)

Dixon further held that the most important safeguard in the statute is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed, 283 So.2d at 8, and which, of course, must be embodied in the written findings.

Written findings facilitate the requirement that: "...The trial judge's findings in regard to the death penalty should be of

unmistakable clarity so that we can properly review them and not speculate as to what he found..." Mann v. State, ___ So.2d ___, 1982, F.L.W. 395, 396 (Fla. 9/2/82), Case No. 60,569. "...the trial court must exercise a reasoned judgment in weighing the appropriate aggravating and mitigating circumstances in imposing the death sentence. To satisfactorily perform our responsibility we must be able to discern from the record that the trial judge fulfilled that responsibility." Lucas v. State, ___ So.2d ___, 1982 F.L.W. 299 (Fla. 7/1/82), Case No. 51,135.

Here, the sentencing trial was rendered invalid through the admission of non-statutory aggravating evidence, the prosecutor's inflammatory argument, the omission of mitigating evidence, the Trial Court's erroneous jury instructions and the Trial Court's erroneous verbal findings in which he found and relied upon non-statutory aggravating circumstances, aggravating circumstances not supported by the evidence, and did not find mitigating circumstances which were supported by the evidence. The Defendant now considers these errors seriatim.

A

THE TRIAL COURT ERRED IN NOT ENTERING WRITTEN FINDINGS CONCERNING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AS REQUIRED BY FLORIDA STATUTE 921.141(3)

Florida Statute 921.141(3) requires the trial court to enter written findings as to the aggravating and mitigating circumstances when imposing a death sentence. Kampff v. State, 371 So.2d 1007, 1008 (Fla. 1979). It is error for a trial court to impose a death sentence without first entering these written findings. Jones v. State, 332 So.2d 615, 619 (Fla. 1976). These findings should be of

"unmistakable clarity", Mann v. State, ___ So.2d ___, 1982 F.L.W. 395, 396 (Fla. 9/2/82), Case No. 60,569.

Here, the Trial Court refused to make these required written findings. The written sentence is totally silent as to aggravating and mitigating circumstances (R.60). Rather than following the crystal clear requirements of the statute, the Trial Court, immediately at the conclusion of the sentencing hearing, verbally expressed his thoughts and sentenced the Defendant to death (T.625-629). This cannot, by any stretch of the due process imagination, be considered compliance with the statutary requirement. This error led him into many other errors, as shown infra.

B

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO HEAR TESTIMONY OF, IN PERMITTING THE PROSECUTOR TO ARGUE, AND IN FINDING, NON-STATUTORY AGGRAVATING CIRCUMSTANCES.

Florida Statute 921.141(5) specifies the aggravating circumstances which may be considered in the sentencing process. "... aggravating circumstances must be limited to those provided for by statute." McCampbell v. State, ___ So.2d ___, ___, Case No. 57,026, 1982 F.L.W. 492, 494 (Fla. 10/28/82). (Emphasis Added) "...The aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose." Miller v. State, 373 So.2d 882, 885 (Fla. 1979)(Emphasis Added); accord Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978); Riley v. State, 366 So.2d 19, 21 (Fla. 1978); Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977); Lucas v. State, 376 So.2d 1153 (Fla. 1979); Spaziano v. State, 393 So.2d 1119,

1123 (Fla. 1981); Perry v. State, 395 So.2d 170, 175 (Fla. 1981); Odom v. State, 403 So.2d 936, 942 (Fla. 1981). It is clear error for either the trial court or the jury to consider non-statutory aggravating evidence. Maggard v. State, 399 So.2d 973, 977-978 (Fla. 1981); Perry v. State, 395 So.2d 170, 176 (Fla. 1981); Elledge v. State, 346 So.2d 999, 1002-1003 (Fla. 1977).[20/]

It is error, because, as this Court held in Elledge:

> "...we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.
>
> * * * * *
>
> Would the result, the weighing process by both the jury and the judge have been different had the impermissible aggravating factor 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 for a new sentencing trial... This result is dictated because, in order to satisfy the requirements of Furman ... the sentencing authority's discretion must be 'guided and channeled by requiring examination of specific factors that argue in favor of or against the imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.' Proffitt..." (346 So.2d at 1003)

Here, non-statutory aggravating circumstances predominated:

1) LACK OF REMORSE

Here, Detective Martin was permitted to testify that the Defendant had shown no remorse:

20/The remedy is a new trial even if there are no mitigating factors. Proffitt v. Wainwright, 685 F.2d 1227, 1266-1269 (11th Cir. 1982). Here, the Trial Court found the Defendant's age to be a mitigating factor (T. 629).

"Q. At any time during the entire time that you were with the defendant in this case, Gary Trawick, did he ever express even the slightest bit of remorse over what he had done?
A. No, he did not." (T. 537)

In his final argument, the prosecutor argued that:

"...this is probably the most ruthless, the most vicious, the most senseless, the most outrageous, cold-blooded murder you have ever seen in your life, just absolutely senseless by a person who shows no remorse at the time he admitted doing it.

At the time he concludes his act by hiding, hiding the gun right after the murder, and not even when he took the stand in this case did he say, 'I'm sorry'.

You didn't even hear him get up here today and say, 'I'm sorry'. You didn't see one tear. You didn't hear any remorse whatsoever out of this person who chooses to be called 'Pig'." (T. 602-603)(Emphasis Added)

In his "findings", the Trial Court found that:

"Other than those words that were uttered here today, I am convinced that there has not been any demonstration of real remorse or contrition since the apprehension of the defendant..." (T. 627) 21/

Lack of remorse is a non-statutory aggravating circumstance whose consideration voids a death sentence. Menendez v. State, 368 So.2d 1278, 1281 (Fla. 1979); Riley v. State, 366 So.2d 19, 21 (Fla. 1978). Very recently, in McCampbell v. State, supra, this Court reversed a death sentence and remanded the case for the imposition of a life sentence, and held that:

"...Neither the failure of the appellant to acknowledge his guilt nor demonstration of remorse is a valid statutory aggravating circumstance..." (___ So.2d at ___, 1982 F.L.W. at 494) (Emphasis Added)

21/The Defendant did express remorse (T.623). Thus, the Trial Court's "finding" of the non-statutory aggravating circumstance was not established by the evidence.

2) PROPENSITY FOR VIOLENCE

Here, when the Defendant's statement was read to the jury, a question and answer were read which the State and the Trial Court used to conclude that the Defendant had a propensity for violence:

> "QUESTION: Do you think it's wrong for one person to kill another person?
> ANSWER: Yes - it depends." (T.536)

In his final argument, the prosecutor argued that:

> "Is it wrong to kill somebody? Well, says Mr. Trawick on page 20 or 21:
> 'Do you think it's wrong for one person to kill another person?'
> 'Yes - it depends.'
>
> It depends on what? It depends on whether they can come into court later and identify you. It depends on whether there's twenty-eight bucks to be gained by killing somebody. That condones that. That's what it depends on." (T. 597)

And again:

> "You're talking about a man who doesn't know really, know, really, that - well, what it takes, 'it depends'.
>
> It depends on what you're talking about when he asked him the question as to whether it's wrong to kill another person." (T. 599)

In his "findings", the Trial Court found that:

> "...It was especially shocking to hear from the confession, a suggestion that there may be other circumstances where he could just as easily take the life of another person." (T. 628) 22/

22/The prosecutor's and Trial Court's interpretation was erroneous. The only thing the Defendant said was that whether or not killing another person was wrong depended on circumstances (T.530). Killing in war is celebrated as heroism. Taking a life in self-defense or to prevent another's death is not wrong. Thus, the non-statutory aggravating circumstance was not even proven.

A propensity for violence is a non-statutory aggravating circumstance whose consideration voids a death sentence. Miller v. State, 373 So.2d 882 (Fla. 1979). In Miller, this Court held that:

> "...the trial court's use of the defendant's...resulting propensity to commit violent acts, as an aggravating factor favoring the imposition of the death penalty appears contrary to the legislative intent as set forth in the statute..." (373 So.2d at 886)

This Court concluded that:

> "...it was reversible error for the trial court to consider as an additional aggravating circumstance, not enumerated by the statute, the possibility that Miller might commit similar acts of violence if he were ever to be released on parole..." (373 So.2d at 886)

3) HEINOUS, ATROCIOUS, AND CRUEL ATTEMPTED MURDER

Here, Detective Martin was permitted to testify at great length and in gruesome detail about the heinous, atrocious, and cruel attempted murder of Linda Gray (T. 448-455).[23/]

The Medical Examiner was permitted to testify about Linda Gray's pain and suffering:

> "Q. Would you tell the members of the jury, what kind of pain and suffering she endured?
> A. Basically we have an injury of rather massive fracturing of the right mandible, the jawbone, and in itself any type of fracture of the jawbone causes excrutiating pain.
> It's like having a tooth pulled, and some of her teeth were displaced.
> Not only that, but the procedures that she subsequently went through in order to retain the integrity of the jawbone and, in other words, pulling those bones back together with pieces of wire and tightening them up so they would fit back together causes rather intense pain.
> Q. How long would that pain have lasted?

23/The State also introduced photographs, Exhibits 1-14 (R.61-74) (T.258), over the Defendant's objection (T.257).

A. I'm sure that she has problems still. She has had pain throughout the entire time that she was in the hospital; no doubt about it." (T. 571-572)

The Defendant's motion to have the jury disregard this testimony was denied. (T. 577-578; 580)

In his final argument, the prosecutor argued that:

"'Number eight. That the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.

* * * * *

You know, that's why I called in someone from the Dade County Medical Examiner's Office so you would hear about the pain and suffering that these people had." (T. 592-593) (Emphasis Added)[24]

In his "findings," the Trial Court found that:

"The shooting in the face of Linda Gray, a young female, was unnecessary. It was pitiless. It was cruel..." (T.625-626)

A heinous, atrocious, and cruel attempted murder is a non-statutory aggravating circumstance whose consideration voids a death sentence. Lucas v. State, 376 So.2d 1149 (Fla. 1979). In Lucas, this Court held that the trial court's finding that the attempted murders of the deceased's companions were heinous and atrocious should not have been considered. Therefore: "Under Elledge, ...we must remand for resentencing..." 376 So.2d at 1153.

4) CRIMES FOR WHICH THE DEFENDANT HAD NOT BEEN CONVICTED

Here, Detective Martin was permitted to testify about charges which had been dismissed, the three or four shots the Defendant fired in the direction of a Big Daddy's Lounge while several customers were outside (T. 460).[25] Additionally, in the Defendant's statement,

---

24/The prosecutor also went into great detail in his opening statement (T. 407-410).

25/The State also introduced photographs, Exhibits 16-18 (R.75-77) (T.272).

he admitted shooting at an individual in a white car, approaching the U'Tote'M convenience store, after he was outside the store (T.426).

The prosecutor, in his argument, argued the Big Daddy's incident (T. 599),[26] and in his "findings," the Trial Court found this as an aggravating circumstance (T. 626).

These charges had been dismissed by the State (T. 205).

Evidence of crimes for which a defendant has not been convicted is a non-statutory aggravating circumstance whose consideration voids a death sentence. Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978); Perry v. State, 395 So.2d 170, 175 (Fla. 1981); Spaziano v. State, 393 So.2d 1119, 1123 (Fla. 1981); Odom v. State, 403 So.2d 936, 942 (Fla. 1981). Moreover, this testimony did not establish that the Defendant knowingly created a great risk of death to many people,[27] since "it is only conduct surrounding the capital felony for which the defendant is being sentenced which properly may be considered in determining whether" this aggravating circumstance is present. Mines v. State, 390 So.2d 332, 337 (Fla. 1980).[28]

5) DECEASED'S SUFFERING, PERSONAL BACKGROUND, CONDITION IN HOSPITAL, WIFE'S SUFFERING

Here, the deceased's widow was permitted to testify about the deceased's suffering, his personal background, her suffering, his condition in the hospital, and his recitation of what occurred:

> "Q. How long had he been working at the U-Tote'M Store?
> A. Approximately four years.
> Q. After the incident took place, did you have an occasion to go to the hospital and visit him?
> A. Yes.

---

26 /The prosecutor also argued both these in his opening statement (T. 410-411; 414-415).
27 /Florida Statute 921.141(5)(c).
28 /See infra, subpoint D.

Q. When you went to the hospital to visit him, was he able to talk to you at all?
A. Not talk, but he could write down but not...
Q. Are you okay, Mrs. Hayes? Look over at me.
A. I don't know. Yes.
Q. Was he able to write anything out on a piece of paper for you?
A. Yes, Anything I asked him.
Q. What did you ask him? What did he write out on a piece of paper for you? Did you ask him anything about the incident that took place inside the store?
A. Yes, I did.
Q. What did you ask him?
A. I asked him what happened and he said, he said two guys came into the store. He wrote down that they was robbing the store.
I asked him, I said, did you resist and try to stop him?
He said, 'no'. So he said that he just shot me for nothing.
'He shot me for nothing'.
I said, 'who did it?'
He said, 'I don't know. I don't know the guy that did it; only maybe I know his face.'
Q. Did he write anything else out on the paper to you?
A. Yes.
Q. What else did he write?
A. He said, 'I'll be all right. I'll probable be able to talk tomorrow when they take the tube out.' And then that 'I love you and don't worry about it.'" (T. 565-566)

In his final argument, the prosecutor argued that:

"Did he give a break to Robert Hayes?..." (T. 599)

And again:

"What type of mercy did this person give anybody else?...
What type of mercy did Mr. Hayes get during this thirty-eight years of life when shot in the back, when he wrote something down on a note as he couldn't converse with his wife except to say, 'I love you' by writing it on a piece of paper after saying, 'I don't know why he shot me. I didn't resist at all.'
Is that the same kind of mercy that this person deserves given to this same person?
Did he show that to the other person?

Think not of this person but of the victims in the case, for once, which is what they deserve, I think." (T. 600-601)

In his "findings", the Trial Court found that:

"The deceased, Robert Hayes's injuries, were very moving by the testimony of his wife. He was her husband and evidently a reliable and long-time employee of the U-Tote'M Store, being there four years, was a manager there... He offered absolutely no resistance during the course of the robbery." (T. 626)

The deceased's suffering, his personal background, his wife's suffering, and the portrait of him in the hospital are all non-statutory aggravating circumstances of an obviously inflammatory nature, whose consideration voids a death sentence. "...aggravating circumstances must be limited to those provided for by statute." McCampbell v. State, supra, ___ So.2d ___, 1982, F.L.W. at 494. "...the aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose." Miller v. State, supra, 373 So.2d at 885. The deceased's wife's seeing the deceased in the hospital, while obviously upsetting to her, is not an aggravating circumstance. Riley v. State, 366 So.2d 19, 21 (Fla. 1979).

6) THE DECEASED'S INJURIES

Here, the Medical Examiner was permitted to testify in gruesome detail about the deceased's injuries:[29/]

"Q. As a result of the gunshot wound that you observed, would you basically tell us what type of internal injuries were suffered by Mr. Hayes which eventually led to his death?
A. Yes, sir.
Q. Would you tell us so, please.
A. He had a perforated gunshot wound of the chest with with (sic) is called extensive

---

29 /This testimony did not establish that the homicide was heinous, atrocious and cruel. See infra, subpoint E. The Defendant's objection (T.491-494), was overruled (T.494).

damage to the right lung and causing a rather abundant amount of hemorrhage in the lung tissue itself and into the chest cavities where the lungs lie, and marked fragmenting of the sixth rib near the back, and basically that's the kind of injury where we have a massive injury to the lung.

* * * * *

Q. As a result of those injuries and your review of the notes of the autopsy performed by Dr. Wetli, are you able to express an opinion as to how much pain and suffering Mr. Hayes suffered during the thirty-six hours between the time he was shot and the time he subsequently died?

A. Yes.

Q. ...Tell us...what this man endured for thirty-six hours prior to the time that he died.

A. Well, the most painful thing to this type of wound is the rather marked fragments or shattering of one of the ribs.

It's like having a rib broken which causes an excruciating pain.

There was marked fragmenting of the sixth rib where the rib joins on to the spinal column for the thoracic spine, and with this type of fragment injury to the bone itself, it causes rather excruciating pain.

Q. During the entire thirty-six hours?

A. Yes." (T. 568-572)30/

In his final argument, the prosecutor argued that:

"You know, that's why I called in someone from the Dade County Medical Examiner's Office so you would hear about the pain and suffering that these people had.

If this killing wasn't 'shockingly evil' and with 'utter indifference...pitiless,' absolutely without justification, then there has never been any murder committed anywhere on this earth." (T. 593)

The pain and suffering of the deceased is a non-statutory aggravating circumstance whose consideration voids a death sentence. McCampbell v. State, supra; Miller v. State, supra. This testimony did not establish the aggravating circumstance that the homicide

30/The State also introduced photographs, Exhibits 19-22 (R.78-81) (T.276;280). The Defendant's motion to strike the testimony (T.577) was denied (T.578).

was especially heinous, atrocious, or cruel.[31] That aggravating factor applies only to those capital felonies: "...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)(Emphasis Added). "...the legislature intended to authorize the death penalty for the crime that is 'especially heinous' --the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Lewis v. State, 377 So.2d 640, 646 (Fla. 1980). Directing a gun shot at the victim does not establish this aggravating factor. Kampff v. State, 371 So.2d 1007, 1010 (Fla. 1979); Williams v. State, 386 So.2d 538, 543 (Fla. 1980); Riley v. State, 366 So.2d 19, 21 (Fla. 1978). The fact that the victim lived for thirty-six hours does not establish this aggravating circumstance. Lewis v. State, 377 So.2d 640, 646 (Fla. 1980)(accused shot victim several times; as victim fled, shot again); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975)(accused fled after shooting victim, death four weeks later); Demps v. State, 395 So.2d 501, 506 (Fla. 1981)(multiple stabbing where despite victim's brief survival nothing to set accused's conduct apart from norm of capital felonies).

7) PAINLESSNESS OF ELECTROCUTION

Here, the Medical Examiner was permitted to testify that death in the electric chair is painless:

> "Q. By comparison to the amount of pain and suffering by Linda Gray and the amount of pain suffered by Robert Hayes, have you done sufficient studies to be able to tell the members of the jury what type of pain, if any, someone would suffer as a result of death in the electric chair?

31/Florida Statute 921.141(5)(h).

A. None.
Q. How much pain would that cause?
A. Absolutely none.
Q. Are you familiar with a proposal before the Legislature of the State of Florida to substitute the legal injection or an injection of sodium penthothal for the electric chair?
A. Yes.
Q. How much pain, if any, would that cause to the person put to death, if, in fact, it was done by this injection, penthothal?
A. None." (T. 572-573)

The Trial Court denied the Defendant's motion to strike this testimony and ruled that it could not be referred to in closing argument. (T. 579).

The alleged lack of pain caused by death in the electric chair is a non-statutory aggravating circumstance whose consideration voids a death sentence. McCampbell v. State, supra; Miller v. State, supra. Cf. White v. State, 403 So.2d 331, 340 (Fla. 1981). (Defendant's attorney's vivid description to jury of effects of electrocution calculated to influence an improper life sentence through emotional appeal). If it is improper for a defendant to argue this, then certainly it is improper for the State to elicit this type of testimony, particularly since the State is strictly limited to the statutory aggravating circumstances.

8) NON-VIOLENT CRIME FOR WHICH DEFENDANT NEITHER CHARGED NOR CONVICTED

Here, Detective Martin was permitted to testify about photographs taken from the Defendant's residence[32] which allegedly showed him illegally in possession of a weapon:

"Q. Once inside, did you have an occasion to take into custody certain photographs of the defendant?
A. Yes, I did.

32/These photographs, obtained through the warrantless search of the Defendant's home, clearly were the fruits of an unconstitutional search.

* * * * *

Q. ...can you identify that?
A. Yes. That is the defendant, Gary Trawick holding what appears to be a .45 caliber Thompson submachine gun.
The picture below is his brother, Leonard Sams, who is also holding a weapon pointed into a dwelling.
Q. Are those the photographs that you recovered from the defendant's residence?
A. Yes.
Q. By the way, is it permissible for any person other than a law enforcement personnel to have a submachine gun in their possession?
A. They are illegal.
Q. Illegal?
A. Yes." (T.472-474)

The Defendant successfully objected to the introduction of the photographs (T.474). The Court instructed the jury to disregard the testimony (T.475). The State persisted and the witness then testified that the Defendant told him that it was he (the Defendant) in the photographs (T.475). The Trial Court noted that: "Unless there has been a tremendous change in this man in the last six months, that is clearly not Gary Trawick." (T.476). However, the Trial Court was prepared to admit the photographs (T.476-477). After further wrangling (T.477-479), the State decided not to introduce the photographs (T.479). The damage, of course had been done. The Defendant's motion for mistrial (T.483-486), was denied (T.622).

A non-violent crime,[33/] for which a defendant has neither been charged nor convicted, is a non-statutory aggravating circumstance whose consideration voids a death sentence. Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978) (finding that defendant had "a substantial history of prior criminal activity" a non statutory aggravating circumstance); Perry v. State, 395 So.2d 170, 175 (Fla. 1981) (evidence of existence of pending criminal charges against the defendant, of which he had not been convicted, was evidence of a non-statutory aggravating circumstance requiring a new sentencing jury.); Spaziano

33/Although this would have been a non-violent crime if the Defendant had been the person in the photograph, its highly inflammatory nature is obvious. Additionally, here again is a non-statutory aggravating circumstance not even supported by the evidence.

v. State, 393 So.2d 1119, 1123 (Fla 1981)(finding that defendant had been convicted for nonviolent offenses and misdemeanors and had been charged but not convicted in other matters a non-statutory aggravating circumstance.) Odom v. State, 403 So.2d 936, 942 (Fla. 1981) (finding that defendant had numerous arrests and charges which did not culminate in convictions a non-statutory aggravating factor.).

9) PAROLE AND THE GOOD LIFE IN PRISON

Here, in his final argument, the prosecutor argued that:

> "He will be out of jail at the age of forty-five if he is sentenced to life imprisonment so he will be eligible for parole at the age of forty-five..." (T. 598)

And, again:

> "When he asks you for a break, he wants you to reward him and give him his life, give him his life so he can be out on parole any time. He'll be forty-five years, and give him a break. Let him go to prison and stay there.
>
> Let him have his color T.V. Let him watch football games, let him have his clothes and his food paid for by the State of Florida for God knows how much." (T. 600)

The possibility of parole, and the interim "luxury" of prison life, are non-statutory aggravating circumstances whose consideration voids a death penalty. Miller v. State, 373 So.2d 882, 885 (Fla. 1979). Indeed, even under the pre-1972 death penalty statute, such argument was not permitted. In Burnette v. State, 157 So.2d 65, 68 (Fla. 1967), this Court held that: "...it is not the province of a jury to allow the question of whether a prisoner may or may not be paroled to enter into its deliberations." In Grant v. State, 194 So.2d 612, 614-615 (Fla. 1963), this Court held it to be reversible error for a prosecutor to refer to the possibility of parole in a capital trial. Such comments are even more improper in a bifurcated

capital sentencing system, as the Supreme Court of North Carolina has held under its death penalty statute, which is virtually identical to the Florida statute:

> "...Neither the State nor the defendant should be allowed to speculate upon the outcome of possible appeals, paroles, executive commutations or pardons. The jury's sentence recommendation should be based solely on their balancing of the aggravating and mitigating factors before them. The possibility of parole is not such a factor, and it has no place in the jury's recommendation of the sentence to be imposed." (State v. Jones, 296 N.C. 495, 251 S.E.2d 425, 429 (1979))

10) MINIMIZATION OF JURY RECOMMENDATION

Here, the prosecutor also argued in his final argument that:

> "In conclusion, again, I ask you to remember what you all do when you walk out of this room is simply to make a recommendation, not to pass a sentence because you simply don't have the power to do it." (T.601)

And, even worse, he argued that:

> "The law requires you to make a certain recommendation to Judge Ferguson who, if you're wrong, he can always overrule it." (T.602)34/

Prosecutorial argument which seeks to minimuze the importance of the advisory verdict is a non-statutory aggravating circumstance whose consideration voids a death sentence. This Court repeatedly has emphasized that the advisory verdict of the jury is a key component of the death-sentencing process, and one which weighs heavily in determining the proper penalty to be imposed. See, e.g. LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974). It is fundamental "that the jury recommendation under our trifurcated death penalty statute should be given great weight and serious

34/The prosecutor made similar remarks during voir dire (T.290;330; 346;349).

consideration" in the imposition of sentence by the court. Ross v. State, 386 So.2d 1191, 1197 (Fla. 1980).

Comments by the State which seek to minimize the importance of the advisory verdict are therefore improper. This Court has held, under the pre-1972 death penalty statute, that comments by the prosecutor indicating that any error in the verdict could be corrected on appeal were prejudicial, finding that "...the purpose and effect of this remark was to suggest to the jury that they need not be too greatly concerned about the result of their deliberations, because if they committed an error in forfeiting the lives of the prisoners, the Supreme Court could correct it." Blackwell v. State, 76 Fla. 124, 79 So. 731, 735-36 (1918). The holding of Blackwell is fully applicable to the current death penalty statute, and to efforts by the State to have the jury lightly regard its responsibility to return a reasoned advisory verdict.

Other jurisdictions with virtually identical capital sentencing statutes have so held. In State v. Jones, 296 N.C. 495, 251 S.E. 425, 429 (1979), the Supreme Court of North Carolina noted that it had previously prohibited the same comments as were condemned in Blackwell, and held the same rule fully applicable to a bifurcated capital trial:

> "We are of the opinion that in the sentencing phase of a bifurcated trial, a reference to any statutory provision, which would have the effect of minimizing in the jurors' minds their role in recommending the sentence to be imposed, is precluded. ...This Court has held that in a capital case any argument which suggests to the jurors that they can depend upon judicial or executive review to correct any errors in their verdict and to share their responsibility for it is an abuse of privilege and prejudicial to the defendant. Prior to the advent of the bifurcated trial, the sole responsibility of the jury was to determine the issue of guilt. In a bifurcated trial, the jury has the

> additional responsibility of determining the sentence to be imposed. We hold that the rule precluding any argument which suggests to the jurors that they can depend on judicial or executive review to correct an erroneous verdict and thereby lessen the jurors' responsibility applies with equal force to a sentence recommendation in a bifurcated trial."

See also Hawes v. State, 240 Ga. 327, 240 S.E.2d 833, 839 (1977); Fleming v. State, 240 Ga. 142, 240 S.E. 37, 40 (1977); State v. Tyner, 259 S.E.2d 559, 566 (S.C. 1979).

The "inevitable effect" of such remarks is "to encourage the jury to attach diminished consequence to their verdict, and to take less than full responsibility for their awesome task of determining life or death." Prevatte v. State, 233 G. 929, 214 S.E. 365, 368 (1975). Florida law, on the other hand, requires that this Court give the advisory verdict great weight. See, e.g., Ross v. State, supra. The jury cannot be encouraged to do less.

11) "PIG"

Here, Detective Martin was permitted to testify that the Defendant used the "alias" "Pig" (T.455). He further was permitted to testify that the name "Pig" was written over the door leading to the Defendant's residence (T.472).[35/] He was further permitted to testify that the word "Pig" was carved inside a hat found at the scene (T.528).

In his closing argument, the prosecutor argued that:

> "Give him a break for what he did. That's what he's asking you people right now: the kind of person who choses a nickname like 'Pig'. He's proud of it. He's proud enough to put the letters 'Pig' outside the door. This is the kind of person now who sits here and after shooting and maiming one person and shooting another who asks you for a break. He's the person who wants to be considered

35/The State also introduced photographs, Exhibits 24-26 (R.82-84) (T.285).

> an animal, a pig, and comes to you and says, 'Give me a break. 'Let me off. Let me have it easy.' I submit to you that you shouldn't do it." (T. 600)

Later, the prosecutor argued that:

> "You didn't even hear him get up here today, and say 'I'm sorry.' You didn't see one tear. You didn't hear any remorse whatsoever. Out of this person who chooses to be called 'Pig." (T. 603)[36]

An alias or nickname, quite obviously, is a non-statutory aggravating circumstance whose consideration voids a death penalty. McCampbell v. State, supra; Miller v. State, supra. The inflammatory nature of this argument is obvious -- and reprehensible.

The existence of even one non-statutory aggravating circumstance voids a death penalty. Elledge v. State, supra. Here, where there are eleven non-statutory aggravating circumstances, this Court must reverse the death penalty and remand this case for a new sentencing hearing before a new sentencing jury. Perry v. State, supra.

C

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO ARGUE IN FAVOR OF, IN INSTRUCTING THE JURY THAT IT COULD FIND, AND IN FINDING THAT THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF A ROBBERY AND THAT THE MURDER WAS FOR PECUNIARY GAIN, SINCE THIS WAS AN IMPROPER "DOUBLING UP" OF THESE AGGRAVATING CIRCUMSTANCES.

This Court consistently has held that it is error to find both the aggravating circumstances that the murder was committed during the course of a robbery[37] and that it was for pecuniary gain.[38] This

---

36/The prosecutor also argued this in his opening statement (T.409;414)
37/Florida Statute 921.141(5)(d).
38/Florida Statute 921.141(5)(f).

is an improper "doubling up" of these two aggravating circumstances, which both "refer to the same aspect of the defendant's crime", which requires a new sentencing hearing. Provence v. State, 337 So.2d 783, 786 (Fla. 1976); Maggard v. State, 399 So.2d 973 (Fla. 1981); Gafford v. State, 387 So.2d 333 (Fla. 1980); Ross v. State, 386 So.2d 1191 (Fla. 1980); Perry v. State, 395 So.2d 170 (Fla. 1981).

Here, the prosecutor argued in final argument[39] that both of these aggravating circumstances were present (T. 590; 591-592). The Trial Court's instructions permitted the jury to consider both aggravating circumstances (T. 614). In his "findings," the Trial Court found that:

> "...the crimes for which the defendant is to be sentenced was committed while he was engaged in the commission of an armed robbery." (T. 626)

He also found that:

> "The crime for which the defendant is to be sentenced was for pecuniary gain..." (T. 626-627)

Respectfully, this error is so palpable that no further argument is required. The Defendant is entitled to a new sentencing hearing before a new jury. Elledge v. State, supra; Perry v. State, supra.

D

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO ARGUE IN FAVOR OF, IN INSTRUCTING THE JURY THAT IT COULD FIND, AND IN FINDING, THAT THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PEOPLE.

Florida Statute 921.141(5)(c) establishes as a potential aggra-

---

39 /The prosecutor also argued the existence of these aggravating circumstances in his opening statement (T. 417).

vating circumstance that "the defendant knowingly created a great risk of death to many persons." The scope of this subsection was narrowly circumscribed by this Court in Kampff v. State, 371 So.2d 1007 (Fla. 1979):

> "When the legislature chose the words with which to establish this aggravating circumstance, it indicated clearly that more was contemplated than a showing of some degree or risk of bodily harm to a few persons. 'Great risk' means not a mere possibility but a likelihood or high probability. The great risk of death created by the capital felon's actions must be to 'many' persons. By using the word 'many', the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance..." (371 So.2d at 1009-1010)

In Kampff, the victim was shot and killed at her place of employment, a bakery and retail store. The defendant fired five shots. Two other people were present in the store at the time of the shooting. There were other people in the building and in the general area. One of the bullets fired by the defendant ricocheted and lodged in a wall. All this was insufficient to establish the aggravating circumstance.

This Court consistently has so limited subjection (5)(c). Lewis v. State, 398 So.2d 432, 438 (Fla. 1981)(two other persons were in the room with the victim at the time of the homicide. This Court ruled that "although the evidence showed that appellant acted with total disregard for the safety of these two bystanders, this is not enough to establish this aggravating circumstance."); Johnson v. State, 393 So.2d 1069, 1073 (Fla. 1980)(three persons present in the drug store at the time of the shooting were "not 'many persons'" under Kampff); Williams v. State, 386 So.2d 538, 541-542 (Fla. 1980)

(the attempted murder of the second victim did not establish the aggravating circumstance. This Court held that "under our statute, the risk of death must be to 'many' persons, not just one or two."); Lewis v. State, 377 So.2d 640, 646 (Fla. 1979)(the aggravating circumstance was not established although the "decedent's daughter and son were standing in the yard in the possible path of bullets when their father was shot."); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981)(the defendant and two co-defendants were involved in the shooting of two police officers in a rest area adjacent to a major interstate highway. This Court held that subsection (5)(c) was inapplicable because "although the shooting occurred in a rest area close to a major highway, it was done with pistols at close range where few, not many, suffered a risk of injury."); Odom v. State, 403 So.2d 936, 942 (Fla. 1981)(the trial court based the finding of great risk of death to many persons on the fact that two women were present in the victim's bedroom. This Court held that: "the presence of two persons in immediate proximity to the victim of a murder by shooting is, as a matter of law, insufficient to establish the aggravating circumstance.").

Additionally, this Court consistently has held that: "It is only conduct surrounding the capital felony for which the defendant is being sentenced which properly may be considered in determining whether the defendant 'knowingly created a great risk of death to many persons.' ..." Mines v. State, 390 So.2d 332, 337 (Fla. 1980)(Emphasis Added); Elledge v. State, 346 So.2d 998, 1004 (Fla. 1977).

In Mines, the defendant first killed a woman and left her body in a van alongside a road. The defendant flagged down a passing motorist. The defendant then threatened the motorist, and the motorist attempted to flee. After a brief chase, the defendant caught the motorist and struck him with a machete blade on the side of the head. He

then drove away in the motorist's car. The defendant drove to a motel, where he took a woman hostage. He threatened her life. This Court held that:

> "...We have previously held that this type of conduct does not fall within the aggravating type of conduct intended by the legislature in Section 821.141(5)(c)...Elledge... It is clear from this record that at the time appellant stabbed the victim no one else was around..."(390 So.2d at 337)(Emphasis Added)

Here, the Defendant and the co-defendants went to an Exxon gas station at N.W. 7th Avenue and 103rd Street (T.452). The Defendant and a co-defendant, Johnson, went to the glass enclosed booth where Linda Gray was working (T.452). The Defendant aimed the gun at her (T.452). The co-defendant, Johnson, asked her for money (T.452). The Defendant shot her (T.455).

After leaving the Exxon station, the Defendant and co-defendants drove north on N.W. 7th Avenue. They turned left at N.W. 7th Avenue and N.W. 119th Street, and drove West on N.W. 119th Street. After turning left, the Defendant fired three or four times at a wall and car near a Big Daddy's Lounge to scare some people outside (T.518). He shot the wall and car (T.518).

From there, they continued West on N.W. 119th Street (T.519). They turned North on N.W. 22nd Avenue and went to N.W. 135th Street and then turned left (West) again (T.519). They drove to a gas station at N.W. 135th Street and 27th Avenue. There, they bought some gas (T.520).

From there, they drove to a U-Tote'M convenience store located at 2891 N.W. 135th Street (T.460; 468). The Defendant and the co-defendant, Johnson, waited until the customers inside the store had left the area (T.469). Then they went inside (T.469). The Defendant shot and killed the night manager, Robert Hayes (T.469).

After they left the store they saw a white car coming towards

the light and the Defendant shot at him (T.526).

In his closing argument, the prosecutor argued:

> "'Aggravating circumstance number three. The Defendant in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons.'
>
> There is absolutely no doubt about that fact that this applies to this case. There was a risk of death to Linda Gray, there was a risk of death to many people outside of Big Daddy's, and there was a risk of death to the off-duty police officer who was passing by the U-Tote'M whom the defendant took a shot at so beyond any doubt, without anything further being mentioned, aggravating circumstance number three applies to this case." (T. 589-590) 40/

In his instructions, the Trial Court merely instructed the jury that the aggravating circumstance that they could find was that in committing the crime for which he is to be sentenced, the Defendant knowingly created a great risk of death to many persons (T.614). The Trial Court did not instruct the jury that it: "is only conduct surrounding the capital felony for which the defendant is to be sentenced which properly may be considered in determining whether the defendant 'knowingly created a great risk of death to many persons'..." Mines v. State, supra, 390 So.2d at 337. Nor did he instruct them that "great risk" means "not a mere possibility but a likelihood or high probability." Kampff v. State, supra, 371 So.2d at 1009. Nor did he instruct them that "By using the word 'many', the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance..." Kampff v. State, supra, 371 So.2d at 1009-1010. Thus, the Trial Court's instructions gave absolutely no guidance concerning the meaning of any of the terms of this aggravating circumstance, and were constitutionally deficient. Godfrey v. Georgia, 446 U.S. 420, 429 (1980).

40/The prosecutor also argued this in his opening statement (T.406; 407-415).

In his "findings", the Trial Court found that:

> "...Mr. Trawick, in committing the crime for which he is sentenced did not only create a great risk of death to many persons preceding, during and even after committing the felony of robbery of the U-Tote'M Store." (T.625)

Clearly, this aggravating circumstance was inapplicable. There was no one else in the store when the murder occurred (T.409). "'It is only conduct surrounding the capital felony for which the defendant is being sentenced which properly may be considered in determining whether..!" this aggravating circumstance applies. Mines v. State, supra, 390 So.2d at 337. Even if the unrelated acts could be considered, they do not meet Kampff's definitions of "great risk" or "many people".

The Defendant is entitled to a new sentencing hearing. Elledge v. State, supra.

E

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO HEAR TESTIMONY OF, IN PERMITTING THE PROSECUTOR TO ARGUE, IN INSTRUCTING THE JURY THAT IT COULD FIND, AND IN FINDING, THAT THE MURDER WAS HEINOUS, ATROCIOUS, OR CRUEL.

Florida Statute 921.141(5)(c) establishes, as a potential aggravating circumstance, that the homicide "was especially heinous, atrocious, or cruel." All homicides are heinous, Lewis v. State, 377 So.2d 640, 646 (Fla. 1980), and atrocious, Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). However, this aggravating circumstance only applies to those homicides:

> "...where the actual commission of the capital felony was 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))(Emphasis Added)

Accordingly, this Court consistently has held that "...directing a pistol shot straight to the head of the victim" does

not establish an "especially heinous, atrocious, or cruel" homicide. Kampff v. State, 371 So.2d 1007, 1010 (Fla. 1979); accord Williams v. State, 386 So.2d 538, 543 (Fla. 1980); Riley v. State, 366 So.2d 19, 21 (Fla. 1978).

In Kampff v. State, supra, the defendant murdered his former wife at her place of employment. He fired five shots, three of which struck her; the final shot "was a direct shot to her head". 371 So.2d at 1008. When told that the victim was dead, the defendant replied: "'good'," 371 So.2d at 1009. This Court held that this was not an "especially heinous" homicide:

> "...Directing a pistol shot straight to the head of the victim does not tend to establish this aggravating circumstance. The appellant's expression of satisfaction at his former wife's death can be interpreted as an indication of concern over whether she died quickly or lingered and suffered..." (371 So.2d at 1010)

In Riley v. State, supra, three robbery victims were "forced to lie on the floor, bound, gagged, and then shot in the head." 366 So.2d at 20. One of the persons, the son of one of the deceased, survived and testified at trial. This Court held that the two homicides were not within the scope of subsection (5)(h):

> "...Here the atrocity described by the prosecutor and apparently accepted by the trial judge was the son's having to see his father's execution death. There was nothing atrocious (for death penalty purposes) done to the victim, however, who died instantaneously from a gunshot in the head." (366 So.2d at 21)

In Fleming v. State, 374 So.2d 954 (Fla. 1979), the defendant and an accomplice entered a building and committed a robbery. Police were notified and, upon observing their arrival, the defendant and his companion took one of the robbery victims as a hostage in an

effort to escape. Numerous shots were exchanged as the two men attempted to reach their automobile. At one point, the hostage seized their guns, and, during the struggle for control of the weapons, the defendant fired two shots, one of which killed a police officer.

The trial court found that subsection (5)(h) was applicable. 374 So.2d at 958. This Court disagreed:

> "Appellant next contends that the trial court erred in designating the crime especially heinous, atrocious, and cruel, arguing that the killing of Deputy Yahl was no more shocking than the 'majority of murder cases reviewed by this Court.' We agree...
>
> * * * *
>
> The evidence in this case shows that the murder was committed by a single shot, fired when the hostage grabbed appellant's gun. As human beings, we are appaled by such senseless killings. As judges, however, we must unemotionally apply the law to the facts. We therefore hold that the trial court erred in finding the murder in this case 'especially heinous, atrocious or cruel.'" (374 So.2d at 958-59)

In Menendez v. State, 368 So.2d 1278 (Fla. 1979), which involved a robbery-murder, "...the storekeeper was shot twice and died," and there was evidence to indicate that "his arms may have been in a submissive position at the time he was shot". 368 So.2d at 1281-1282. This Court held that "there is nothing to set this execution 'apart from the norm of capital felonies'" and that this aggravating circumstance was inapplicable. 368 So.2d at 1282.

In Lewis v. State, 398 So.2d 432 (Fla. 1981), the defendant and an accomplice murdered the victim in his home by "simultaneously

firing upon him from outside the bedroom window using a .30-.30 rifle and a 12-guage shotgun." The victim was struck numerous times and died as a result of the wounds. The trial court applied subsection (5)(h). This Court disagreed:

> "The trial court judge based his finding that the murder was heinous, atrocious, and cruel on the fact that the murder was premeditated, cold and calculated, and stealthily carried out. Early in the history of the capital felony sentencing law, this Court provided an interpretation of this statutory factor. 'What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crimes apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' ...Under this standard, a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, or cruel... We hold, therefore, that the finding of this factor was erroneous." (398 So.2d at 438) (Emphasis Added)

In Maggard v. State, 399 So.2d 973 (Fla. 1981), the defendant had been involved in a disagreement with his former employer and killed him by shooting him through a window of his home with a shotgun. The trial court found subsection (5)(h) applicable. This Court disagreed:

> "...In State v. Dixon... we defined heinous to mean 'extremely wicked or shockingly vile'; and cruel to mean 'infliction of a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.' The evidence reveals that the victim died quickly from a single gunshot blast fired through a window, and that there is no evidence indicating that the victom was aware that he was going to be shot. The record does not reveal that this capital felony 'was accompanied by such additional acts as to set it apart from the norm

> of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim'..." (399 So.2d at 977)

Even when the victim does not die immediately, this Court has found that shooting deaths are not "especially heinous, atrocious, or cruel." Tedder v. State, 322 So.2d 908 (Fla. 1975); Lewis v. State, 377 So.2d 640 (Fla. 1979); Demps v. State, 395 So.2d 501 (Fla. 1981).

In Tedder, the defendant fired at his wife and mother-in-law, pursued them into their home, shot his mother-in-law and forced his wife to leave with him, refusing to allow her to attend to her mother. The mother-in-law died four weeks later. This Court held that the homicide was not "especially heinous, atrocious, or cruel":

> "It is apparent that all killings are atrocious, and that appellant exhibited cruelty, by any standard of decency, in allowing his injured victim to languish without assistance or the ability to obtain assistance. Still, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." (322 So.2d at 910)

In Lewis, the defendant had been involved in an ongoing quarrel with the victim. During a discussion with him, the defendant pulled out a gun and shot the victim several times. The defendant continued to shoot the victim as the victim attempted to flee. This Court held that the murder was not within the purview of subsection (5)(h):

> "...The finding under Section 921.141(5)(h) was predicated upon the fact that appellant shot the victim in the chest and, as the latter attempted to flee, shot him several more times in the back...
>
> * * * *
>
> It is apparent that all killings are heinous -- the members of our society have deemed the intentional and unjustifiable taking of a

> human life to be nothing less. However, the legislature intended to authorize the death penalty for the crime which is 'especially heinous' -- 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' The killing in the case at bar simply does not fall within that category when viewed in the context of the published decisions of this Court." (377 So.2d at 646) (Emphasis Added)

In Demps, the defendant, an inmate of the state prison, stabbed the victim, another inmate, many times. The victim was discovered in a cell, bleeding profusely from the stab wounds. He was rushed first to the hospital at Union Correctional Institute, then to the state prison at Lake Butler. Because of inadequate facilities at both institutions, he was taken to Shands Teaching Hospital in Gainesville, where he died soon after arrival. In the ambulance, on the way to the hospital, the victim gave a statement to an investigator in which he (the victim) acknowledged that he was dying.

The trial court found that the murder was heinous, atrocious, or cruel. This Court disagreed:

> "...We do not believe this murder to have been so 'conscienceless or pitiless' and thus set 'apart from the norm of capital felonies' as to render it 'especially heinous, atrocious, or cruel.' See Lewis v. State, 377 So.2d 640 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976); Tedder v. State,..." (395 So.2d at 506)

It thus is clear that subsection (5)(h) is applicable only to those murders in which the method by which the homicide was perpetrated was unnecessarily torturous or depraved. Unintended suffering following the act of firing a gun does not make a homicide heinous, atrocious, or cruel. This Court repeatedly has evaluated the defendant's torturous intent during the homicide in upholding this aggravating factor. The difference between those cases and this case is

greater than night and day. See, e.g., Ruffin v. State, 397 So.2d 277 (Fla. 1981) (female victim was abducted, driven to secluded area, sexually assaulted, pistol whipped and robbed, after which she was shot to death); Straight v. State, 397 So.2d 903 (Fla. 1981) (defendant bound victim with wire, placed him in a large box, and "tormented him with hammer blows and stabbings for approximately half an hour before he died from the knife wounds"); McCrae v. State, 395 So.2d 1145, 1153 (Fla. 1980) (victim, a 67 year old woman, was brutally beaten about the head and chest, after which defendant threw her onto the floor crushing her ribs and causing death by asphyxiation, victim was raped either shortly before or after her death); Thompson v. State, 389 So.2d 197, 198 (Fla. 1980) (after female victim failed to obtain money for defendants, she was beaten with a chain belt, sexually abused with a chair leg and a night stick, tortured with lit cigarettes, and beaten again with the chair leg, club and belt); Foster v. State, 369 So.2d 928, 931 (Fla. 1979) (defendant cut throat of victim, dragged him into undergrowth and left him, then returned and cut his spine); Smith v. State, 365 So.2d 704, 706-07 (Fla. 1978) (defendant forced victim into trunk of car at knifepoint, drove to a secluded location, opened trunk and beat victim with a tire iron, saturated car with gasoline, lit it and burned victim to death); Hoy v. State, 353 So.2d 826, 833 (Fla. 1977) (defendant and accomplice raped young girl in presence of her fiance, then killed him, shot her twice, raped her a second time, and then killed her); Adams v. State, 341 So.2d 765, 769 (Fla. 1976) (victim murdered by beating him "past the point of submission and until his body was grossly mangled); Henry v. State, 328 So.2d 430, 431, (Fla. 1976) (victim bound and gagged, blunt trauma inflicted upon his face and head and deep razor cuts inflicted upon his neck);

Gardner v. State, 313 So.2d 675 676 (Fla. 1975) (victim suffered approximately one hundred bruises to his body, sexual mutilation and massive hemorrhages of the head.).

Here, there was absolutely nothing to set this homicide apart from the norm of capital felonies. The description of the homicide, from the Defendant's own statement, confirms the banality of the crime. The Defendant entered the convenience store with the weapon (T. 524). He raised the weapon a little bit after the co-defendant started questioning the deceased (T. 525). He aimed the weapon in the deceased's direction (T. 525). The Defendant fired one shot at the deceased (T. 525). This homicide, as a matter of law, was not heinous, atrocious, or cruel. Kampff v. State, supra, 371 So.2d 1010; Riley v. State, supra, 366 So.2d at 21; Fleming v. State, supra, 374 So.2d at 958; Menendez v. State, supra, 368 So.2d at 1281-1282; Lewis v. State, supra, 398 So.2d at 438.

The testimony of the deceased's widow concerning his suffering in the hospital (T. 565-566), the Medical Examiner's testimony concerning the deceased's injuries (T. 568-572) and his testimony about the painlessness of electrocution (T. 572-573), was all inadmissible and irrelevant. None of it had anything to do with the method of the homicide. That the deceased lived for thirty-six hours does not establish this aggravating circumstance. Tedder v. State, supra, 322 So.2d at 910; Lewis v. State, supra, 377 So.2d at 646; Demps v. State, supra, 395 So.2d at 506. The painlessness of electrocution is a totally irrelevant non-statutory aggravating circumstance. McCampbell v. State, supra, ___ So.2d at ___, 1982 F.L.W. at 494; Miller v. State, supra, 373 So.2d at 885. The only purpose of this testimony was to inflame the jury and judge. It succeeded.

In his final argument, the prosecutor argued that:

"'...the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.'

* * * * *

I don't think I need to say much more about that than to again refer you back to the words of the defendant himself, 'Where did you shoot this man?' He had his hands raised.

'Did you shoot him in the eye?

'I shot him in the back.

'Do you think it's wrong for one person to kill another person?

'Yes -- it depends.'

You know, that's why I called in someone from the Dade County Medical Examiner's Office so you would hear about the pain and suffering that these people had.

If this killing wasn't 'shockingly evil' and with 'utter indifference...pitiless,' absolutely without justification, then there has never been any murder committed anywhere on this earth." (T. 592-593)

Again, the prosecutor argued:

"What type of mercy did this person give anybody else?...

What type of mercy did Mr. Hayes get during his thirty-eight years of life when shot in the back, when he wrote something down on a note as he couldn't converse with his wife except to say, 'I love you' by writing it on a piece of paper after saying, 'I don't know why he shot me. I didn't resist at all.'

Is that the kind of mercy that this person deserves given to this same person?

Did he show that to the other persons?

Think not of this person but of the victims in the case, for once, which is what they deserve, I think." (T. 600-601)

And again, the prosecutor argued:

"You're not wrong in both your minds and your hearts because you know darned well that this is probably the most ruthless, the most vicious, the most senseless, the most outrageous, cold-blooded murder you have ever seen in your life, just absolutely senseless by a person who shows no remorse at the time he admitted doing it." (T. 602)

Absolutely none of this even begins to approach this aggravating circumstance. The prosecutor's argument was grossly improper and highly inflammatory.

The Trial Court gave the jury only boiler plate instructions (T. 614-615). They were woefully inadequate. The jury was not even told that this aggravating circumstance applied only to those homicides "...where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies..." State v. Dixon, supra, 283 So.2d at 9. They were not told that the firing of a single gunshot, as a matter of law, does not make a homicide heinous, atrocious, or cruel. Kampff v. State, supra, 371 So.2d at 1010; Riley v. State, supra, 366 So.2d at 21; Fleming v. State, supra, 374 So.2d at 958; Menendez v. State, supra, 368 So.2d at 1281-1282; Lewis v. State, supra, 398 So.2d at 438. They were not told that the suffering and concern of the deceased's wife could not be considered. Riley v. State, supra, 366 So.2d at 21. They were not told that they could not consider that the deceased lived for thirty-six hours after the shooting, during which he suffered. Tedder v. State, supra, 322 So.2d at 910; Lewis v. State, supra, 377 So.2d at 646; Demps v. State, supra, 395 So.2d at 506. In sum, their discretion was not limited or channelled at all.

In Godfrey v. Georgia, 446 U.S. 420 (1980), the Supreme Court declared unconstitutional an almost identical provision in the Georgia death death penalty statute, which provided that the death penalty could be imposed if the murder "was outrageously or wantonly vile, horrible or injuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. The Supreme Court held that:

> "...the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact have been one to which the members of the jury in this case subscribed. If so, their pre-conceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the statute's] terms. In fact, the jury's interpretation of [the statute] can only be the subject of sheer speculation." (446 U.S. at 428-429)(Emphasis and Brackets Added)

Quite clearly, the jury instruction was erroneous and requires that the death penalty be reversed.

In his "findings," the Trial Court found this aggravating circumstance. It is difficult to discern precisely what factors the Trial Court relied upon. However, the Trial Court did say:

> "The deceased, Robert Hayes's, injuries, were very moving by the testimony of his wife. He was her husband and evidently a reliable and long-time employee of the U-Tote'M Store, being there four years; was a manager there, and their policy was to plan a robbery with give up the money and save your life.
>
> He offered absolutely no resistence during the course of the robbery.
>
> * * * * *
>
> I think the crime for which the defendant is to be sentenced was especially heinous, was atrocious, was cruel." (T. 626-627) (Emphasis Added)

This "finding" was error. The Defendant is entitled to a new sentencing hearing. Elledge v. State, supra.

F

THE ERRORS, INDIVIDUAL AND CUMULATIVE, REGARDING NON-STATUTORY AGGRAVATING CIRCUMSTANCES AND STATUTORY AGGRAVATING CIRCUMSTANCES NOT SUPPORTED BY THE EVIDENCE, WERE OVERWHELMINGLY PREJUDICIAL AND HARMFUL, PARTICULARLY SINCE THE JURY AND THE TRIAL COURT OVERLOOKED MITIGATING EVIDENCE.

The errors regarding non-statutory aggravating circumstances and statutory aggravating circumstances not supported by the evidence were overwhelmingly prejudicial and harmful. Additionally, the jury and the Trial Court overlooked mitigating evidence.[41/]

The Defendant has no significant history of prior criminal activity (T.62). Florida Statute 921.141(6)(a). Menendez v. State, 368 So.2d 1278, 1281, n.14 (Fla. 1979); Lewis v. State, 377 So.2d 640, 642 (Fla. 1979); Fleming v. State, 374 So.2d 954, 958 (Fla. 1979); Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979).

The capacity of the Defendant to appreciate the criminality of of his conduct and to conform his conduct to the requirements of law was substantially impaired. Florida Statute 921.141(6)(f). The psychiatric report, submitted to the Trial Court (R.38), clearly establishes this mitigating factor:

> "...The defendant stated that if he had not been drinking and smoking marijuana, the offenses would never have occurred... He explained that he had about 3 1/2 glasses of whiskey on the evening of the offense as well as a half quart of beer. He states that he usually only drinks about one or two six packs a day, but that his friends had induced him to drink more. He states the weather was somewhat cold and they told him to drink whiskey to warm up. He also

---

41/The Trial Court found one mitigating factor, the Defendant's age, twenty (T.628). Florida Statute 921.141(6)(g).

> smoked about four marijuana cigarettes that day. This was not unusual for him...He described driving past a lounge and firing outside of the car. He explains that he did this because he was drunk...
>
> * * * * *
>
> The defendant states that all of this happened because he was intoxicated..." (R.39-40)(Emphasis Added)

The section of the report entitled "Recommendations" states that:

> "He feels that his difficulties grew out of his intoxication of alcohol and marijuana. This in fact may be substantially true...he certainly may have been suffering from the effects of alcohol and drugs." (R.42)(Emphasis Added)

The failure of both the jury and the Trial Court to consider the psychiatric report was error. Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615, 620 (Sundberg, J., concurring); Huckaby v. State, 343 So.2d 29, 34 (England, J., concurring).

The psychiatric report also establishes that the Defendant was under the influence of extreme mental or emotional disturbance. Florida Statute 921.141(6)(b).

The Defendant acted under the substantial domination of the co-defendants. Florida Statute 921.141(6)(e). The co-defendant, Eddie Miller drove the car (T.407), he chose the gas station to rob (R.511), he devised the plan (T.514), he devised the robbery at the U-Tote'M store (T.521). The co-defendant, Anthony Johnson, took the lead during the incident at the Exxon station (T.452). Johnson spoke to Linda Gray and requested money from her (T.453;515); Johnson ordered the Defendant to shoot her (T.455). At the U-Tote'M store, Johnson again was in charge and requested that Robert Hayes give them the money (T.469;523), and grabbed for the cash register (T.523). Of course, the Defendant's impaired mental condition heightened the domination.

The Defendant expressed remorse (T.623). Quite clearly, remorse is entirely appropriate and normal when a defendant pleads guilty.

The other defendants were apprehended through the Defendant's help and the information he supplied to the police (T.550; 551; 555). Certainly, aiding law enforcement must be considered in imposing sentence. Indeed, it is common knowledge that this is taken into account every day in sentencing.

It was error -- egregious error -- not to consider these mitigating circumstances. 42/

G

THE TAINTED JURY RECOMMENDATION PRECLUDES REVIEW OF THIS DEATH SENTENCE.

The review function described in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), which this Court is required to perform, is predicated upon a valid jury recommendation. Here, the jury's recommendation was irreparably tainted by the admission of evidence of non-statutory aggravating circumstances, by prosecutorial argument on non-statutory aggravating circumstances, by prosecutorial argument that the jury could "double up" the aggravating circumstances that the homicide was for pecuniary gain and that it was committed during the cause of a robbery, by prosecutorial argument that the Defendant created a great risk of death to many people, by prosecutorial argument that the homicide was heinous, atrocious, or cruel, by erroneous and misleading jury instructions on these aggravating circumstances, and by its failure to consider mitigating circumstances. Since the Trial Court presumably gave great wright to this tainted recommendation,

42/The Defendant's trial counsel must be faulted for his total failure to bring all this out. See also the Defendant's Motion to Relinquish Jurisdiction filed May 18, 1982, denied by the Court on May 20, 1982.

review of the death sentence by this Court is impossible. Accordingly, this Court must remand for a new sentencing hearing before a new jury.

H

THE TRIAL COURT ERRED IN CONSIDERING MATTERS OUTSIDE THE RECORD, WITHOUT NOTICE TO THE DEFENDANT, IN REACHING HIS DECISION TO IMPOSE THE DEATH SENTENCE.

In Gardner v. Florida, 430 U.S. 349 (1977), the Supreme Court once gain held that the sentencing process, as well as the trial itself, must meet due process requirements. Gardner held that the trial court erred, in imposing the death sentence, when he used portions of a presentence investigation report without notice to the defendant and without an accompanying opportunity for the defendant to rebut or challenge the report.

In Porter v. State, 400 So.2d 5 (Fla. 1981), the jury recommended a life sentence. The trial court found three aggravating circumstances and no mitigating circumstances and imposed a death sentence. The first two aggravating points were that the felonies were committed for pecuniary gain and for the purpose of avoiding or preventing lawful arrest. A substantial portion of the basis of these findings was the testimony of an acquaintance of the defendant. This testimony did not come from the acquaintance's trial testimony but, rather, from testimony he had given in a deposition. The trial court never informed the defendant of his intention to utilize the deposition d never afforded the defendant an opportunity to rebut, contradict, or impeach the deposition testimony.

This Court reversed the death sentence and held that:

> "...Gardner...should extend to a deposition or any other information considered by the court in the sentencing process which is not presented in open court. Should a sentencing judge intend to use any information not presented in open court as a factual basis for a sentence, he must advise the defendant of what it is and afford the defendant an opportunity to rebut.
>
> In the instant case the trial judge sentenced Porter to death, relying in part on information concerning appellant's alleged discussion of a plan to select newly arrived residents, steal their automobiles, and, if necessary, kill them. These facts were not proved at trial. Neither Porter nor his counsel was advised that this information, gleaned from the deposition, was going to be used. By proceeding in this manner, the trial judge deprived Porter of due process of law." (400 So.2d at 7)

Here, in addition to his innumerable other errors, the Trial Court considered matters outside the record, which the jury never heard, without informing the Defendant that he intended to do so, and without affording the Defendant an opportunity to rebut them.[43/] For reasons that are very unclear, during his verbal "findings", the Trial Court stated that:

> "The jury is not aware of it, but I'm aware that the defendant was on trial or awaiting trial for a robbery at the time of this offense; that is how the case came to this division." (T.628)(Emphasis Added)

Not content with utilizing only this non-record information, the Trial Court also considered that:

> "...at the preliminary negotiations it was suggested that Mr. Trawick dominated the other young people." (T.628)(Emphasis Added)

There can be no doubt that the Trial Court considered these

43/Presuming arguendo that these matters were admissible for any reason whatsoever.

matters. Ironically, after making his verbal "findings" and imposing the death sentence, the Trial Court stated, in response to a request by the Assistant State Attorney that:

> "Other than those matters that I have made part of the record, I have considered nothing else." (T.629)(Emphasis Added)

The Trial Court's actions clearly run afoul of Gardner and Porter and, because of that error alone, the Defendant is entitled to a new sentencing hearing.

I

THE TRIAL COURT KNEW THAT IT HAD ERRED IN IMPOSING THE DEATH SENTENCE AND SOMEHOW ATTEMPTED TO CORRECT ITS ERROR BY ORDERING A POST-SENTENCE INVESTIGATION.

The Trial Court ordered a post-sentence investigation (R.43) two weeks after sentencing the Defendant to death (R.16). Neither the Rules nor the Statutes make any provision for such an extraordinary investigation. One can only speculate as to the Trial Court's reason for doing this. The Defendant submits that the Trial Court realized its error in sentencing the Defendant to death and somehow sought to rectify the damage.

This Court must reverse the Defendant's death sentence and remand this cause to the Trial Court for a new sentencing hearing before a new jury.

V

THE TRIAL COURT ERRED IN EXCLUDING FOR CAUSE THOSE VENIREMEN WHO WERE OPPOSED TO CAPITAL PUNISHMENT BUT WHO COULD NOT STATE UNAMBIGUOUSLY THAT THEY WOULD VOTE AGAINST IT REGARDLESS OF THE FACTS, THAT THEY WOULD BE UNWILLING TO CONSIDER ALL OF THE PENALTIES AVAILABLE, AND THAT THEY WERE IRREVOCABLY COMMITTED AGAINST AND WOULD AUTOMATICALLY VOTE AGAINST THE DEATH PENALTY.

Witherspoon v. Illinois, 391 U.S. 510 (1968), held that:

> "...a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." (Id., at 521-523) (Emphasis Added)

In determining whether a venireman may be excluded for cause:

> "...The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out..." (391 U.S. at 522), n.21) (Original emphasis)

The reason for this test is that:

> "It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nevertheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State..." (391 U.S. at 515, n.7)

The Supreme Court also held that a venireman's answers must establish, with total clarity, that he comes within the narrow class which can be excused for cause:

> "...it cannot be assumed that a juror who describes himself as having 'conscientious or religious scruples' against the infliction of the death penalty or against the infliction 'in a proper case'...thereby affirms that he could never vote in favor of it or that he would not consider doing so in the case before him...Obviously many jurors 'could, notwithstanding their conscientious scruples [against capital punishment], return...[a] verdict [of death] and...make their scruples subservient to their duty as jurors.'...
>
> The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood - or misunderstood - by prospective jurors. Any 'layman [might] say he has scruples if he is somewhat unhappy about death sentences...[Thus] a general question as to the presence of... reservations [or scruples] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases.' ...Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position." (391 U.S. at 515,n.9)(Emphasis Added)

Therefore, the only veniremen who can be excluded for cause are those who make:

> "...unmistakably clear...that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them..." (391 U.S. at 522, n.21) (Emphais Original and Added)

Witherspoon's vitality consistently has been confirmed. Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); Wilson v. Florida, 403 U.S. 947 (1971); Davis v. Georgia, 429 U.S. 122 (1976); Adams v. Texas, 448 U.S. 38 (1980); Burns v. Estelle

626 F.2d 396 (5th Cir. 1980) (en banc); Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981); Chacon v. People, 73 Cal.Rptr. 10, 447 P.2d 106 (Cal. 1968); Beaver v. State, 475 S.W.2d 557 (Tenn. Ct. App. 1972); Monk v. State, 212 S.E.2d 125 (N. Car. 1975); O'Brien v. People, 79 Cal.Rptr. 313, 459 P.2d 969 (Cal. 1969); Washington v. People, 458 P.2d 479 (Cal. 1968); Vaughn v. People, 455 P.2d 122 (Cal. 1969); Goodridge v. People, 452 P.2d 637 (Cal. 1969); Risenhoover v. People, 447 P.2d 925 (Cal. 1968).

A death penalty cannot stand if even a single venireman has been improperly challenged for cause under Witherspoon. David v. Georgia, supra; Wigglesworth v. Ohio, 403 U.S. 947 (1971); Harris v. Texas, 403 U.S. 947 (1971); Adams v. Washington, 403 U.S. 947 (1971). Witherspoon applies to a bifurcated procedure. Adams v. Texas, supra.

Here, many potential veniremen and venirewomen improperly were excused for cause in violation of Witherspoon.

The venirewoman, Stephanie Jordan, improperly was excused for cause (T. 229; 231). The venireman, Robert Weinstein, improperly was excused (T. 231-232). So was Marguerite Arlt (T. 232). So was Virginia Colucci (T. 232-233). So was George Cummings (T. 236-237).

The venirewoman, Mrs. Kosta improperly was excused for cause. She said she did not think she could vote for the death penalty (T. 288). She did not feel she could follow the Trial Court's instructions (T. 288). She could not be objective (T. 291). She was excused (T. 304).

The venireman, Edwin Parrotte, improperly was excused for cause. He stated merely that he could not impose the death penalty (T. 315). He was excused (T. 315).

The venirewoman, Robbie Clark, improperly was excused (T. 315-316). So was the venireman Carlton Brown (T. 315).

The venirewoman, Mrs. Machado, improperly was excused (T. 373-376). She did not "feel" she could vote for the death penalty (T. 375). She was excused (T. 375).

The venireman, Mr. Smith, improperly was excused (T. 380-383).

The venireman, Mr. Rios, improperly was excused (T. 385-387). The State did not even move to challenge for cause, the Trial Court did it on his own (T. 387).

A Witherspoon violation taints a jury at least to the same degree as does the admission of evidence of non-statutory aggravating circumstances. Accordingly, the Defendant's death sentence must be reversed and he must be given a new sentencing hearing before a new jury.

VI

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION SYSTEMATICALLY TO EXCLUDE PROSPECTIVE BLACK JURORS BY THE USE OF ITS PEREMPTORY CHALLENGES, WHICH DENIED THE DEFENDANT, A BLACK, THE EQUAL PROTECTION OF THE LAWS, AND DUE PROCESS OF LAW.

A trial jury which is representative of a fair cross-section of the community is a fundamental requirement of the Sixth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. See, e.g., Duren v. Missouri, 439 U.S. 357 (1979); Ballew v. Georgia, 435 U.S. 223 (1978); Taylor v. Louisiana, 419 U.S. 522 (1975); Apodaca v. Oregon, 406 U.S. 404 (1972); Williams v. Florida, 399 U.S. 78 (1970); Hernandez v. Texas, 347 U.S. 475 (1954). Equal protection guarantees ensure that members of a cognizable group of which the accused is a member will not be excluded from jury service, see, e.g., Smith v. Texas, 311 U.S. 128 (1940), and the Sixth Amendment requirement of a fair cross-section forbids the systematic exclusion of any distinctive group of persons from the pool of prospective jurors, see, e.g., Taylor v. Louisiana, supra. Under either principle, a constitutional violation occurs of a distinctive group is systematically excluded in the jury selection process, and neither proof of invidious discrimination nor a showing of actual pejudice to an accused is required. Duren v. Missouri, supra at 364-68; see also Taylor v. Louisiana, supra; Peters v. Kiff, 407 U.S. 493 (1972).

In Taylor v. Louisiana, supra, the Supreme Court elucidated the essential meaning of a "fair cross-section":

> "The unmistakable import of this Court's opinions, at least since 1980... is that the selection of a petit jury from a representative cross section of the

> community is an essential component of the Sixth Amendment right to a jury trial
>
> * * * * *
>
> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is guard against the exercise of arbitrary power -- to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of a jury trial. 'Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case...[T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.'" 419 U.S. at 530-31

The concept of an "impartial" jury as one drawn from a representative cross-section of the community -- the principle of "diffused impartiality" -- is critical to the right to a jury trial:

> "...The Court repeatedly has held that meaningful community participation cannot be attained with the exclusion of minorities or other identifiable groups from jury service. 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.' The exclusion of elements of the community from participation 'contravenes the very idea of a jury...composed

> of "the peers or equals of the person whose rights it is selected or summoned to determine."'" Ballew v. Georgia, 435 U.S. 223, 236-37 (1978)

These traditional due process considerations underpin recent decisions which have forbidden single-trial systematic exclusion of prospective black jurors, either under state constitutional provisions or the Due Process Clause. People v. Wheeler, 22 Cal. 3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979); People v. Payne, ___ Ill.App.3d ___, ___ N.E.2d ___, 31 Cr.L. 2229 (1982); State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980); People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981).

Here, the State consistently utilized its peremptory challenges systematically to exclude all blacks (T.305; 306; 308; 354; 396) from the sentencing jury. The time is long past due for this Court to end this pernicious practice of the Dade County State Attorney's office.

CONCLUSION

This Court must vacate the guilty pleas, vacate the adjudications of guilt and remand for a trial, vacate the sentence of death and remand for a new sentencing hearing before a newly impanelled jury, reduce the sentence of death to life imprisonment, reverse the Trial Court's order denying the Defendant's motion to suppress, and grant such other, further relief as may be just and proper.

JEPEWAY AND JEPEWAY, P.A.
Court-Appointed Attorneys
for Appellant
619 Dade Savings Building
101 East Flagler Street
Miami, Florida 33131
(305) 377-2356

By: Louis M. Jepeway, Jr.
LOUIS M. JEPEWAY, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 10th day of December, 1982, to: Jim Smith, Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128.

By: Louis M. Jepeway, Jr.
LOUIS M. JEPEWAY, JR.