IN THE SUPREME COURT OF FLORIDA

GARY TRAWICK, : CASE NO. 57,077

Appellant, :

vs. :

STATE OF FLORIDA, :

Appellee. :

:

REPLY BRIEF OF APPELLANT, GARY TRAWICK

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

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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

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STATEMENT OF THE CASE AND FACTS

The Defendant emphatically rejects the State's slanted, prejudicial and incorrect statement of the facts. The Defendant's version is correct. Where necessary, the Defendant disputes the State's version in specific instances in the body of the brief, infra.

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.

Contrary to the State's misstatement, the Defendant does not rely solely upon the actions taken by and statements of his trial counsel to prevent his threatened suicide[1] as the basis for requiring inquiry and an evidentiary hearing by the Trial Court. Rather, the whole flip-flop mood swings of the Defendant must also be considered. The Defendant first stated 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). 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). The Defendant's trial counsel offered no explanation for this abrupt and total change of mind by the Defendant. The Trial Court did not even ask the Defendant about his abrupt and pronounced mood swings and changes of mind. Then, after a brief and woefully inadequate plea colloquy (T.208-213), the Defendant's trial counsel stated that he had informed the Trial Court and the Department of Corrections of the Defendant's suicidal mental state in order that they might take the necessary steps to prevent the Defendant from committing suicide (T.214).

1/The State's characterization of this as merely the Defendant being despondent and contemplating suicide is grossly inaccurate. The Defendant's trial counsel was so concerned about the Defendant's mental state that he informed the Department of Corrections and the Trial Court in order that they might take the necessary steps to prevent the Defendant from committing suicide (T.214).

Moreover, the State's position that the existence of only one factor indicating incompetence is insufficient to warrant inquiry by the trial court is absolutely incorrect. "...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...even one of these factors standing alone may, in some circumstances, be sufficient." Drope v. Missouri, 420 U.S. 162, 180 (1975)(Emphasis Added); Lane v. State, 388 So.2d 1022, 1025 (Fla. 1980).

The State's position, that because a psychiatrist found the Defendant competent some four weeks prior to his guilty plea (R.39),[2/] inquiry by the Trial Court was not warranted, is equally erroneous. "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." Drope v. Missouri, supra, at 181 (Emphasis Added); Lane v. State, supra, at 1025. This viligence is required because: "...Competency is an extremely sensitive area of the criminal law..." State v. Green, 395 So.2d 532, 538 (Fla. 1981).

The State's position, that the Defendant's answer that he was a little nervous, but it was nothing (T.198), in response to the Trial Court's question concerning any physical or mental problem he had, established the Defendant's competence, is misleading and erroneous. It is misleading because the answer was given during the morning session, when the Defendant did not want to plead guilty (T.201-202). This was before the Defendant's suicidal mental state manifested itself and was made known to the Defendant's trial counsel, and, through him, to the

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2/The reference to a forensic team is obscure. There is no report from it.

Trial Court and the Department of Corrections (T.214). The Defendant's suicidal mental state was made known prior to the afternoon session, at which the Defendant pled guilty. It is erroneous because the Defendant's trial counsel's assessment of the Defendant's suicidal mental state, and his actions in consequence of it, by the one with "the closest contact with the Defendant," Drope v. Missouri, supra, 420 U.S. at 162, n.13, were far more than sufficient to put the Trial Court on notice of the Defendant's incompetence. And, of course, that answer and the Defendant's statement at the afternoon session (T.212)[3], fly in the face of the Defendant's trial counsel's assessment and that which the Trial Court knew.

The Trial Court's bland observation that the Defendant was not under any emotional influence, made without the benefit of any inquiry, much less an evidentiary hearing, was woefully insufficient. "While [Defendant's] demeanor at [the guilty plea hearing] might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." Pate v. Robinson, 383 U.S. 375, 386, n.24 (1966)(Brackets Added). It absolutely 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, 362 U.S. 402 (1960); Lane v. State, supra, at 1025.

The cases relied upon by the State are inapplicable.

In Walker v. State, 384 So.2d 703 (Fla. 4th DCA 1980), defense counsel made only vague and unsubstantial assertions concerning the defendant's competence to stand trial. Here, the Defendant first stated 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). After the noon recess the Defendant's trial counsel informed the Trial Court that the Defendant again had changed his mind and desired

[4] /An incompetent defendant cannot waive his incompetence. Pate v. Robinson, 383 U.S. 375, 384 (1966).

to plead guilty (T.203). The Defendant's trial counsel offered no explanation for this abrupt and total change of mind by the Defendant (T.203). The Trial Court did not even ask the Defendant about his abrupt and pronounced mood swings and changes of mind. Then after a brief and woefully inadequate plea colloquy (T.208-213), 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 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)

Thus, the Defendant's suicidal mental state was so pronounced that his trial counsel warned both the Trial Court and the Department of Corrections in order that they might take proper precautions to prevent the Defendant's suicide. The Defendant's trial counsel gave this warning to the Trial Court prior to the plea colloquy. This warning to the contrary notwithstanding, the Trial Court proceeded, oblivious to this warning which starkly pointed out the Defendant's incompetence. Then, after he had been warned again, immediately after the plea colloquy, he again ignored the warning. These warnings were far different, in both degree and kind, from the vague and unsubstantial assertions in Walker.

In Williams v. State, 396 So.2d 267 (Fla. 3d DCA 1981), a

competence examination and plenary hearing were held, post-trial, to determine the defendant's competence during the trial. After the plenary hearing the trial court held that the defendant was competent during the trial. Here, no examination was performed and no hearing was held. The State's statement that the Third District held that a competency hearing was not required is incorrect. Rather, it ruled that the trial court did not err in holding that the defendant was competent during the trial, after an examination and a plenary hearing.

In Bryant v. State, 373 So.2d 380 (Fla. 1st DCA 1979), the trial court ordered a competency examination and a plenary hearing was held. The psychiatrists testified that the defendant's mental condition did not impair his ability to adjust in life, know the difference between right and wrong, or to understand and be capable of cooperating with his attorney in the proceedings. There was no indication of incompetence after the psychiatric examinations. The psychiatric examinations, the plenary hearing on competence, and the entry of the guilty plea all occurred within ten days. The presiding judge at the sanity hearing was the same judge who accepted the defendant's guilty plea. Here, in direct contrast, the Defendant's trial counsel twice warned the Trial Court of the Defendant's incompetence long after the psychiatric examination. The Defendant's flip-flop mood swings were palpable. The Trial Court ignored the warnings, even though he received them just before and just after the entry of the guilty plea.

In State v. Tait, 387 So.2d 338 (Fla. 1980), there was not even a hint that the defendant was incompetent at trial. The only issue raised in the trial court was the defendant's sanity at the time of the offense. There is "...a clear distinction between incompetence at the time of trial and insanity at the time of the offense." State v. Tait, supra at 340.

In Owens v. Sowders, 661 F.2d 584 (6th Cir. 1981), the defendant was examined by psychiatrists and found competent to stand trial. After the examination his attorney made no further mention of the competency issue. The court noted that it was highly unlikely that an attorney who was sensitive to this issue would not have complained further had the defendant been unable to understand the proceedings or to participate in his defense. Here the Defendant's trial counsel twice warned the Trial Court of the Defendant's incompetence, after the psychiatric examination. In Owens, the defendant's chronic drug use could have accounted for his bizzarre behavior during the commission of the crimes. The questionable relevance of the defendant's behavior at the time of the crimes was diminished by the delay between the commission of the crimes and the trial. Finally, the defendant testified at his trial and his testimony did not indicate incompetence. Here, the Defendant's actions shrieked incompetence. Judge Jones, concurring, emphasized that the better practice would have been for the trial court to conduct a competency hearing.

Of course, none of the cases relied upon by the State were death penalty cases. Death is different. Woodson v. North Carolina, 428 U.S. 280, 305 (opinion of Stewart, J.); Eddings v. Oklahoma, ___ U.S. ___, ___, 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.

The State makes a telling admission. It says that the Defendant's trial counsel mentioned the Defendant's contemplation of suicide

"simply" to protect the Defendant, not to challenge his competency![5] Respectfully, it is logically and legally inconsistent to argue, on the one hand, that the Defendant was suicidal and that he must be protected from himself, and on the other hand to argue that even though that was his condition he was competent to stand trial and the Trial Court should not even have made further inquiry. Moreover, the State ignores the basic principle that the Trial Court has the responsibility to conduct an evidentiary hearing on a defendant's competency to stand trial, whether or not the Defendant's trial counsel requests it, whenever it reasonably appears necessary. State v. Green, 395 So.2d 532, 538 (Fla. 1981); Lane v. State, 388 So.2d 1022, 1025 (Fla. 1980).

A probate judge would not sustain the validity of a pauper's will executed in these circumstances. Certainly, this Court cannot sanction the Trial Court's failure to protect the Defendant's rights. This Court must reverse the Defendant's convictions and award him a new trial.

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.

The State cites Robinson v. State, 373 So.2d 898 (Fla. 1979), for the proposition that the Defendant is precluded from appealing from a guilty plea. The State is absolutely wrong.

In Robinson, this Court held that:

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[5]/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, was far more than sufficient to warn the Trial Court of the Defendant's incompetence.

> "There is an exclusive and limited class of issues which occur contemporaneously with the entry of the plea that may be the proper subject of an appeal. To our knowledge, that would include only the following...(4) The voluntary and intelligent character of the plea." (373 So.2d at 902)

It is precisely the voluntary and intelligent character of the guilty plea that the Defendant is challenging.

Additionally, as this Court held in Robinson:

> "The appellant contends that he has a right to a general review of the plea by an appellate court to be certain that he was made aware of all the consequences of his plea and apprised of all the attendant constitutional rights waived. In effect, he is asserting a right of review without a specific assertion of wrongdoing. We reject this theory of an automatic review from a guilty plea. The only type of appeal that requires this type of review is a death penalty case. See § 921.141(4), Fla. State. (1977)..."(Id.)

Here, of course, the Defendant has specifically asserted error and this is a death penalty case.

Moreover, on May 18, 1982, the Defendant moved the Court to relinquish jurisdiction to the Trial Court in order that he might file a Motion to Vacate, pursuant to Rule 3.850, RCrP, to challenge the voluntary and intelligent character of his pleas and to have the benefit of an evidentiary hearing. The Court denied the Motion on May 20, 1982. The Defendant hereby renews his Motion to Relinquish Jurisdiction.

A

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

The State's silence concerning the cases and Rule cited by the Defendant speaks volumes.

The State's position is that if the Defendant was competent to stand trial the State Court had no obligation to make any additional

inquiry of him than it would make of any other defendant in accepting a guilty plea. The State is wrong. Under the circumstances of this case, the Trial Court had the additional duty to make such additional inquiry as was necessary to determine that the Defendant's suicidal mental state had not substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea. Sieling v. Eyman, 478 F.2d 211, 215 (9th Cir. 1973); Bryant v. State, 373 So.2d 380 (Fla. 1st DCA 1979).

In Sieling, the trial court held the defendant competent to stand trial. He then entered a guilty plea. He later challenged the intelligent and voluntary nature of the guilty plea. The Court held that it was impermissible for a trial court to determine that a defendant is competent intelligently and voluntarily to waive his constitutional rights and enter a guilty plea merely because he had been held competent to stand trial. The Court made clear the additional burden placed upon the Trial Court in a case such as this:

> "...a defendant in a criminal trial cannot be deemed to abandon any fundamental constitutional protection unless there is both 'an intelligent and competent waiver by the accused.'... In the typical case -- that is, when the defendant's sanity or mental capacity has not been put in issue -- the determination of the validity of the waiver by the defendant can be assessed with an assumption that he is mentally capable of making the weighty decisions involved in giving up his right to counsel, cross-examination, trial by jury, or his privilege against self-incrimination. However, where a substantial question of a defendant's mental capacity has arisen in a criminal proceeding, it is logically inconsistent to suggest that his waiver can be examined by mere reference to those criteria we examine in cases where the defendant is presumed competent, since in the latter cases no inquiry into the defendant's mental capacity to make the waiver is made. Cf. Pate v. Robinson... If a defendant who can be presumed competent pleads guilty, a court can

> assess the adequacy of his waiver by examination of the objective evidence in the record, such as the advice given him by the court as to the nature of the charge, the waivers resulting from the plea and the sentencing prospects, as well as the defendant's statements or responses made in open court. Where the question of a defendant's lack of mental capacity lurks in the background, however, the same inquiry, while still necessary, fails to completely resolve the question of whether the defendant can properly be said to have had a 'rational, as well as a factual, understanding'...that he was giving up a constitutional right...
>
> We think Westbrook [v. Arizona, 384 U.S. 150 (1966)] makes it plain that, where a defendant's competency has been put in issue, the trial court must look further than to the usual 'objective' criteria in determining the adequacy of a constitutional waiver. In Westbrook, supra, although the state court had, after hearing, concluded that the defendant was mentally competent to stand trial, the Supreme Court deemed it essential that a further 'inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel...' was required... It was not suggested there, nor has it been in this case, that the state court's determination that the accused was competent to stand trial was incorrect. The clear implication, then, is that such a determination is inadequate because it does not measure the defendant's capacity by a high enough standard..." (478 F.2d at 214) (Emphasis and Brackets Added)

The Court concluded that:

> "The examination and inquiry into Sieling's competency, made by the state court here, was not directed at such a level of competency..." (478 F.2d at 215)

In United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976), the Court remanded the case to the trial court for a hearing on the defendant's motion to vacate on the ground that he was incompetent at the time he entered his guilty plea. The trial court had held that the defendant was not even entitled to an evidentiary hearing on the motion, the reasons being the trial court's personal observation of the defendant and the apparent understanding the defendant displayed, as evidenced

by his affirmative responses, during the guilty plea colloquy.[6] The Court of Appeals strongly disagreed:

> "...Decisions of the Supreme Court and the various courts of appeals clearly indicate that the trial court's observation of a defendant's apparent rationality and comprehension is an insufficient basis for denying a hearing on a §2255 motion raising the issue of competency..." (539 F.2d at 728) [7]

The Court of Appeals then held that the standard, rote, plea colloquy is insufficient in circumstances such as the Defendant's:

> "...although the district court addressed appellant before accepting his plea, it is apparent that the standard Rule 11 colloquy may prove an inadequate measure of the validity of a plea proferred by a defendant of questionable mental competence. As the Supreme Court observed, 'the nature of the inquiry required by Rule 11 must necessarily vary from case to case... In all such inquiries, "[m]atters of reality, and not mere ritual should be controlling."'" (539 F.2d at 729)

The Trial Court's inaction and insensitivity,[8] in the face of the Defendant's obvious incompetence, and in spite of the Defendant's

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6/In Masthers, when the trial court addressed the defendant personally, he simply responded "yes, Ma'am" or "no Ma'am" to all but one of the court's questions. When asked his age, he stated "Twenty-three." 539 F.2d at 721. Here, 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, coupled with this type of answer, are constitutionally inadequate. United States v. Masthers, supra; Cf. Monroe v. United States, 463 F.2d 1032, 1035 (5th Cir. 1972)

7/Masthers, 539 F.2d at 728, n.49, drew support from Sanders v. United States, 373 U.S. 1, 19-20 (1963):

> "However regular the proceedings at which [he] signed a waiver of indictment, declined assistance of counsel, and pleaded guilty might appear from the transcript, it still might be the case that petitioner did not make an intelligent and understanding waiver..."

8/Here, the Trial Court did not even want to go through a plea colloquy in the afternoon session, after he had been informed of the Defendant's suicidal mental state and of the precautionary actions of the Defendant's trial counsel (T.205).

trial counsel's clear warnings, 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, 395 U.S. 238, 243-244 (1969). The Trial Court did not meet its 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. The plea colloquy was woefully insufficient even for a normal person. It was even worse for the Defendant, because of his incompetence.

This Court must vacate the Defendant's guilty please and grant 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.

The State's silence concerning the cases cited by the Defendant is deafening.

The State totally fails -- or refuses -- to comprehend or acknowledge the Constitutional requirement that a defendant must receive "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. 329, 334 (1941), for a guilty plea to be voluntary. Here, the Trial Court did not inform the Defendant of the nature of the charges to which he pled guilty. The record contains not a syllable which indicates, in any way whatsoever, that the Defendant understood the nature of the charges to which he pled guilty. Indeed, the Trial Court did not even ask the Defendant if he understood the nature of the charges to which he pled guilty. Nor did the Trial Court ask the Defendant's trial counsel if he had explained the nature of the charges to him, or if the Defendant understood them.

The State's assertion that the Defendant understood the nature of the charges cannot survive even a cursory examination. The fact that the Defendant's trial counsel talked to him at length is meaningless. So too was his recognition of his responsibility to give the Defendant the best possible advice. There was not a whisper of a hint that there was any discussion of the nature of the charges. The Defendant's affirmative answer to the question whether he understood the nature of the proceedings says nothing about his understanding of the nature of the charges. The proffer did not mention the elements of the charges, particularly the mental elements of premeditation and specific intent. A proffer of objective facts does not include the mental elements of premeditation and specific intent. Therefore, an admission to having committed the objective facts is not an admission to possessing the requisite mental elements of premeditation and specific intent. Henderson v. Morgan, 426 U.S. at 645-646. The Defendant's affirmative answer to the question whether he was pleading guilty because he was guilty established nothing because he did not understand the nature of the charges to which he was pleading guilty. Henderson v. Morgan, supra, at 646.

Of course, the State ignores the clear requirements of Rule 3.172(c)(i), RCrP, which requires 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). So did the Trial Court.

Henderson v. Morgan, supra, alone refutes the State's assertion. There, the defendant had been indicted for first degree murder in New York. By agreement with the prosecution and on the advice of his two competent attorneys he entered a plea of guilty to second degree murder. In New York intent to cause death was an element of second degree

murder. Twelve years later he successfully 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. Neither his attorneys nor the trial court had informed him that intent to cause death was an essential element of second degree murder.

The defendant had worked as a farm laborer on Mrs. Francisco's farm. He obtained employment there after he had been released from a state school. After an argument, Mrs. Francisco threatened to return him to state custody. He decided to abscond. During the night he entered her bedroom with a knife, intending to collect his earned wages before leaving. She awoke, began to scream, and he stabbed and killed her. He took a small amount of money, fled in her car, and was arrested shortly thereafter.

The defendant's attorneys met in a series of conferences with the prosecutor, with the defendant, and with members of his family. The attorneys attempted to negotiate a plea to manslaughter. The prosecution would only agree to second degree murder and a minimum sentence of twenty-five years. The defendant's attorneys gave him advice about the different offenses but did not explain the required element of intent.

The defendant entered a guilty plea to second degree murder. In direct colloquy with the trial judge the defendant stated that his plea was based on the advice of his attorneys, that he understood that he was accused of killing Mrs. Francisco, that he was waiving his right to a jury trial, and that 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 whatsoever to the requirement of intent to cause the death of the victim. 426 U.S. at 642-643.

The Supreme Court held 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 required 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. Suth 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 held that the fact that the defendant admitted killing Mrs. Francisco was not sufficient to establish that he was aware of and understood the intent element of second degree murder. The fact that the jury probably would have convicted the defendant of second degree murder based upon the objective evidence was not sufficient to overcome the lack of notice given the defendant:

> "...That element [intent to cause death] of the offense might have been proved by the objective evidence even if respondent's actual state of mind was consistent with innocence or manslaughter. But even if such a decision to effect death would almost inevitably be inferred from evidence that respondent repeatedly stabbed Mrs. Francisco, it was nevertheless also true that a jury would not have been required to draw that inference. The jury would have been entitled to accept defense counsel's appraisal of the incident as involving only manslaughter in the first degree. Therefore, an admission by respondent that he killed Mrs. Francisco does not necessarily also admit that he was guilty of second degree murder." (426 U.S. at 645-646)(Emphasis Added)

Identically, here, 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 render the defendant guilty only of a lesser charge.[8A/] The underlying

8A/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 DCA 1979); 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).

felony in the felony-murder charge was robbery, which of course, requires specific intent. When the mental element of a crime is so crucial, the trial court must determine, on the record, by personally addressing the defendant, that the defendant understands the nature of the mental element. Sierra v. Govt. of Canal Zone, 546 F.2d 77, 80 (5th Cir. 1977). 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 which concluded that he was under the influence of alcohol and drugs and probably would not even have been involved but for that influence.

In Henderson, 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)

Additionally, the Trial Court not only did not inform the Defendant of the nature 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 (T.209)---a major error.

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.

The State mischaracterizes the cases cited by the Defendant. Those cases stand for the proposition that if there is a defense, known to the trial court and/or to a defendant's attorney, regardless of the method by which it becomes known, the trial court must, on the record, obtain from the defendant a statement of his knowledge of the defense and a waiver of it. They do not stand for the proposition that the trial court has this duty only if the Defendant raises a defense during the colloquy. Moreover, in Mendenhall v. Hopper, 591 F.2d 1342 (5th Cir. 1979), and Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974), there was no mention whatsoever of any defense during the plea colloquy.

Here, the guilty plea colloquy was 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 absolutely nothing which indicates that the Defendant's trial counsel informed him of the intoxication defense. The Trial Court did not even ask the Defendant if he had discussed possible defenses with his trial counsel. However, the Trial Court had actual knowledge of the intoxication defense, since he received the psychiatric report (R.38). The State's position that the Trial Court had absolutely no obligation to inform the Defendant of this defense places a premium on a defendant's ignorance. Certainly, it is not asking too much of a trial court, particularly in a capital case, when the trial court is aware of defenses, to require it to inform a defendant of the defenses that are available to him and obtain a waiver of them from the defendant before accepting a guilty plea. Here, nothing whatsoever was done to inform the Defendant of the defenses available to him or to insure that he understood that his guilty pleas waived those defenses. The Defendant's guilty pleas were involuntary and void.

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

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.

The State's silence concerning the cases cited by the Defendant is staggering.

The first plea colloquy is irrelevant. The Defendant did not want to plead guilty (T.201-202). Later, when he pled guilty, the Trial Court not only did not inform him of his right to jury trial -- as the State concedes -- it affirmatively led him to believe that he would be

tried by a jury and that he could be convicted 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 guilt phase. That egregious misstatement, the Defendant's suicidal mental state, and the Trial Court's failure to inform him that the guilty plea waived his right to trial by jury are the reasons why the Defendant was unaware that he was waiving his right to trial by jury. It might have been helpful if the State had addressed these issues. One can only assume that it had no response.

The Defendant did not waive his right to trial by jury and his guilty please were involuntary. The Court must reverse the Defendant's convictions and award him a trial.

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.

Typically, the State has misstated the issue. The issue is not whether the Defendant was informed of his right to appeal generally. Rather, the issue is whether the Defendant was informed that by pleading guilty he waived his right to appeal the denial of his Motion to Suppress. The plain language of Rule 3.172(c)(iv), RCrP, and of this Court's decision in Williams v. State, 316 So.2d 267, 271 (Fla. 1975), mandate that a defendant who pleads guilty be so informed.

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..." (Emphasis Added)

In Williams, even closer to the point, 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)

The Trial Court did not inform the Defendant that his guilty pleas waived his right to appeal the denial of his Motion to Suppress. Therefore, the Defendant's guilty pleas were involuntary. The Court must reverse the Defendant's convictions and award him a trial.

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.

Again, the State misstates what occurred. It is obvious from the statements of Defendant's trial counsel, which the State cites, that he was referring to the possible penalties for murder, not for robbery, attempted murder, and attempted robbery. Moreover, this statement by the Defendant's trial counsel came during the first plea colloquy, during which the Defendant asserted that he did not want to plead guilty, and before his suicidal mental state manifested itself.

Rule 3.172(c)(i), RCrP, requires, 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..." (Emphasis Added)

Typically, the State makes no mention of this requirement.

The Defendant's guilty pleas to robbery, attempted murder, and attempted robbery, were involuntary and must be vacated and the Court must award him a trial.

G

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

The State's silence concerning the cases cited by the Defendant is appalling.

The State's characterization of the Defendant's position as being that he did not understand the proceedings merely because of his youth is grossly incorrect. The Defendant's youth, coupled with all the other errors involved in the plea colloquy, render the plea involuntary.

A particular 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. They did not do their duty.

The black Defendant was only twenty years old (T.209). He had 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 and that he had taken precautionary steps to protect the Defendant. 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 nature 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 did not ask the Defendant's counsel if he had explained the nature of the charges to him. 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. He did not even ask the Defendant if he had discussed possible defenses with his trial counsel. The Trial Court did not inform the Defendant that he had a right to trial by jury and informed him that a jury could find him guilty of manslaughter (T.209). 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 intelligently and voluntarily pleading to the electric chair.

The Trial Court's plea colloquy would have been inadequate had the charges been misdemeanors 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)

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

H

THE DEFENDANT'S GUILTY PLEAS WERE INVOLUNTARY BECAUSE HE WAS INDUCED TO ENTER THEM UPON THE REPRESENTATION BY THE STATE, WITH THE CONCURRENCE 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.

The State again -- obviously wilfully -- misstates what occurred. When the unrelated robbery charge was dismissed, that was the end of it. Why would the Defendant agree to permit the consideration of a change that had been dismissed in assessing the penalty? There was no discussion or hint that it would be used in sentencing. It should not have been so used.

Respectfully, the State's "argument" is ridiculous.

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

III

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

The State contends that the Defendant is not entitled to raise the issue of the denial of his motion to suppress because he pled guilty. The State is wrong.

First, this Court recently has held that:

> "...Section 921.141(4), Florida Statutes (1981), provides for an automatic review of a judgment of conviction and sentence of death. Additionally, Florida Rule of Appellate Procedure 9.140(f) provides that '[i]n capital cases, the Court shall review the evidence to determine if the interest of justice requires a new trial."... Certainly, if the predicate for the judgment of conviction is substantially impaired by the inclusion of an inadmissible statement, it is proper and necessary for this Court, in a death case, to review the record and determine whether that statement was in fact inadmissible." (Anderson v. State, 420 So.2d 574, 577 (Fla. 1982))

The statements of the Defendant's trial counsel establish that he pled the Defendant guilty because of the denial of the Motion to Suppress (T.206-207).

Second, Florida Statute 921.141(1), prohibits the use, at a sentencing hearing, of confessions unconstitutionally obtained: "...this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida." Here, the Defendant's confession was admitted at his sentencing hearing (T.500;500-536). It was used to establish what the State contends were the two properly found statutory aggravating circumstances. See Point IV, infra.

The State also contends that the failure of the Defendant's trial counsel to object to the admission of his confession bars review by this Court. Again, the State is wrong. The failure to object to the admission

of improper evidence at the sentencing hearing at a capital trial does not preclude review by this Court. Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977). The cases cited by the State deal with the failure to object to the admission of a confession at a guilt or innocence trial, and thus clearly are distinguishable.

A

THE WARRANTLESS ARREST OF THE DEFENDANT WAS UNCONSTITUTIONAL.

The State concedes that the warrantless arrest of the Defendant was unconstitutional. However it argues that Payton v. New York, 445 U.S. 573 (1980) does not apply here.

First, the State argues that the Defendant did not move to suppress the confession on the ground that it resulted from a warrantless arrest in his home and thus he cannot argue this on appeal. The State is wrong. Paragraph No. 3 of the Defendant's Motion to Suppress asserts that the Defendant's confessions were obtained from him in violation of his right to be free from unreasonable searches and seizures (R.35). The warrantless arrest of a person in his home is quintessentially an unreasonable seizure. Payton v. New York, 445 U.S. 573 (1980). Moreover, in United States v. Johnson, ___ U.S. ___, 102 S.Ct. 2579 (1982), which held Payton to be retroactive, the defendant moved to suppress his statements only on the ground that they were the fruits of an unlawful arrest not supported by probable cause. ___ U.S. at ___, 102 S.Ct. at 2582. That obviously did not preclude review by the United States Supreme Court.

Second, the State argues exigent circumstances. The State is wrong.

Payton made clear that in determining the validity of a warrantless arrest in the home, the same principles apply as in determining the validity of a warrantless search in the home. Engle v. State, 391 So.2d 245, 247 (Fla. 5th DCA 1980); Brown v. State, 392 So.2d 280, 281

(Fla. 1st DCA 1980). In Payton, the Supreme Court began its analysis of the validity of a warrantless arrest in the home with the well-established rule of Fourth Amendment litigation that a warrantless search of a home, even with abundant probable cause, is per se unreasonable, absent exigent circumstances. 445 U.S. at 585-589. Payton then squarely held that:

> "...the critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home...'[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion'... In terms that apply equally to seizures of property and to seizures of people, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."
> (445 U.S. at 589-590)(Emphasis Added)

This Court squarely has held that police officers cannot delay seeking a warrant and then utilize their self-imposed delay to create exigent circumstances. In Hornblower v. State, 351 So.2d 716 (Fla. 1977), this Court held unconstitutional a warrantless search of a mobile home, notwithstanding the existence of ample probable cause. 351 So.2d at 718. After making some arrests, police officers took the arrestees to the jail. Two undercover officers went back to the mobile home to take up surveillance. At least forty-five minutes elapsed at the jail before all the officers were reunited at the mobile home. They maintained their surveillance until someone left the home and began to leave in a car. It was stopped and marijuana was found.

The officers then returned to the mobile home. Without any attempt to obtain a search warrant, the officers approached, knocked, announced their identity, and after detecting noise of scurrying activity within, forcibly entered. They seized amphetamine pills and marijuana cigarette

butts, which were the subject of the defendant's unsuccessful motion to suppress. This Court reversed and held that the warrantless search was illegal:

> "...any warrantless search is presumed to be illegal unless there are exigent circumstances in addition to probable cause. The State submits that the scurrying around by the occupant when the police knocked at the door and announced their presence supplied justification for a warrantless search. It speculates that evidence might have been destroyed had the police taken time to obtain a warrant. We reject this rationale... the officer acknowledged that he intended to enter and search the trailer before he ever approached the mobile home. To sustain respondent's argument would be to endorse the precise kind of conduct which the Fourth Amendment seeks to proscribe. Police could approach a dwelling, armed only with their own subjective suspicion that illegal activity was afoot, and wait for some suspicious movement, thereby giving them justification to break down the door and burst into the dwelling. Officers then would be equipped with the power to conduct any warrantless quest for evidence of guilt or of crime. Consequently, the suspicious movement which occurred when the police announced their presence cannot supply the exigent circumstances for the warrantless search..." (351 So.2d at 718)

This Court then clearly ruled that it would not countenance either a willful delay in attempting to obtain a search warrant or police-created "exigent circumstances":

> "Notwithstanding the existence of probable cause, to carry its burden, the state needed to show that there was insufficient time to secure a search warrant. <u>In effect, if time to get a warrant exists, the enforcement agency must use that time to obtain a warrant</u>...
>
> From the facts of the case, <u>sub judice</u>, it is apparent that no such emergency existed. The State seems to have had sufficient time to get a search warrant. There is no demonstrated attempt to secure one which was frustrated, thereby compelling action without a warrant. Deputy O'Brien was at the police station for at least forty-five (45) minutes while the petitioner's brother was being booked. Certainly a search warrant could have been obtained during that period or at the very least an attempt could have been made to obtain one...the long delay between the time probable cause vested and the commencement of

> a search belies the assertion that the police were unable to obtain a warrant. The State's contention that exigent circumstances were present because the occupant's suspicions would be raised due to [defendant's brother's]failure to return, provoking them to destroy the contraband, is untenable. Law enforcement officers may not sit and wait as here (when they could be seeking a warrant), then utilize their self-imposed delay to create exigent circumstances." (351 So.2d at 718-719)(Emphasis and Brackets Added)

In Wilson v. State, 363 So.2d 1146 (Fla. 2d DCA 1978), undercover policemen made several drug purchases from the defendant through one Noble. After the third sale, which occurred outside the defendant's apartment, the police arrested Noble. This time, one of the policemen was wearing a "body mike" and they had arranged for the presence of back-up units and had coordinated the transaction with another, independent, police organization. The police then searched the apartment without a warrant and found LSD. The trial court denied the motion to suppress on the grounds that Noble's arrest probably was viewed from the defendant's apartment, thus those inside the apartment would destroy the contraband, and therefore it would have been an unreasonable burden on the police to leave the premises to obtain a search warrant.

The Second District rejected this argument. Noting that the police had plenty of time (six hours) to set up an elaborate surveillance, the Second District held that the State's position that the police did not have time to obtain a search warrant because of the late hour and the fear that contraband would be destroyed while a judge was located "...does not wash." 364 So.2d at 1148. Moreover:

> "Even conceding, for the sale of argument, that there may have been exigent circumstances due to the fact that the occupants of the apartment may have observed Noble's arrest, the police created their own exigent circumstances. As was made clear in Hornblower this sort of police activity cannot and will not be condoned..." (363 So.2d at 1151)(Emphasis Added)

Therefore:

> "In the absence of exigent circumstances, and as said before, such circumstances did not exist here except those created by the police themselves, the only key the police would have to a person's home would be the search warrant..." (Id.)

The principles governing a warrantless search of a home govern a warrantless arrest in a home. Payton v. New York, supra, at 585-590; Engle v. State, supra, at 247; Brown v. State, supra, at 281. If police officers may not sit and wait, when they could be seeking a warrant, and then utilize their self-imposed delay to create exigent circumstances to justify a warrantless search of a home, then certainly they may not utilize their self-imposed delay to create exigent circumstances to justify a warrantless arrest inside a home. Yet, that is precisely what they did here.

The police officers went to the Defendant's residence on January 6, 1979 (T.87), over three weeks after the date of the incidents involved in this case, December 13, 1978 (T.86). They had a tentative identification (T.169). The tentative identification was from Linda Gray (T.114). She never made a positive identification (T.114). The deceased, Robert Hayes, had not identified the Defendant (T.115). They went to the Defendant's residence to follow up a lead (T.87). They already knew about the Defendant's past from the City of Miami Police Department records (T.126). Detective Martin had run a criminal history check of the Defendant about three days before the detectives went to the Defendant's residence (T.125)

Thus, on January 6, 1979, the police officers had had plenty of time to obtain an arrest warrant for the Defendant.[9/] The time lapse here was far greater than the forty-five minutes in Hornblower and the

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9/If they lacked probable cause to obtain an arrest warrant, obviously they could not make a warrantless arrest anywhere.

six hours in Wilson. In the absence of an arrest warrant, they could not arrest the Defendant in his home. Since the police officers had far more than ample time to obtain an arrest warrant, it was totally improper and impermissible for them to sit and wait, when they could be seeking a warrant, and then utilize their self-imposed delay to create exigent circumstances.[10/] Hornblower v. State, supra; Wilson v. State, supra. When the police officers went to the Defendant's residence there simply were no exigent circumstances.

The State's position that the Defendant's "flight" created exigent circumstances is totally untenable.

It is well-settled that a police officer may not enter onto private premises to conduct a search or seizure, without a warrant. Payton v. New York, supra; United States v. Johnson, supra; Fixel v. Wainwright, 492 F.2d 480 (5th Cir. 1974); State v. Morsman, 394 So.2d 408 (Fla. 1981); State v. Rickard, 420 So.2d 303 (Fla. 1982); DeMontmorency v. State, ___ So.2d ___, 1982 F.L.W. 485 (Fla. 1982); Jennings v. State, ___ So.2d ___, 1982 F.L.W. 2061 (Fla. 2d DCA 1982); Brown v. State, 392 So.2d 280 (Fla. 1st DCA 1980). Here it is clear that the police officers had to enter onto the Defendant's premises to see him and to see his flight. Detective Martin, Singleton, and Pontigo went up to the front door of the Defendant's residence and met with the Defendant's sister, Nadine Berry (T.87). Mrs. Berry told them that the Defendant was at a laundromat, gave them the address of the laundromat and a description of the Defendant's clothing (T.88). Not content, Detective Singleton entered onto the Defendant's residence and began walking to the rear of the Defendant's residence, along the West side (T.118). Detective Singleton started running toward the backyard (T.88). They could not see into the backyard from the front of the residence (T.119). While he was at the rear of the Defendant's residence, Detective Singleton saw the Defendant looking out

10/ In Graham v. State, 406 So.2d 503 (Fla. 3d DCA 1981), a three day delay between the crime and the warrantless arrest in the Defendant's hotel room doomed the arrest.

from his residence (T.544). Detective Martin started running after Detective Singleton (T119). By the time Detective Martin got to the backyard, he saw that Detective Singleton had the Defendant in custody at the rear fence of the backyard, the Northeast section of the backyard (T.88). They handcuffed the Defendant and took him to the police car in front of the residence (T.544). After he was arrested in his backyard, the Defendant was not free to leave (T.123-124;544).

Detective Singleton went onto the Defendant's premises, without a warrant, looking for the Defendant, after being told that the Defendant was not there. Detective Singleton would never have seen the Defendant, the Defendant's "flight", much less have been able to arrest him, if he had not entered onto the Defendant's premises. Since he obtained his information of the Defendant's presence and of the Defendant's "flight" only through his illegal entry onto the Defendant's premises, that illegally obtained information is as much the fruit of the poisonous tree as tangible evidence would be. The State may not utilize it to establish either "flight" or probable cause. Wong Sun v. United States, 371 U.S. 484-487 (1963).

Additionally, it is clear that the presence and actions of the unidentified detectives, dressed in plain clothes, on the Defendant's premises, created the "flight". There was no testimony whatsoever that any of the detectives even identified themselves to the Defendant as police officers, prior to arresting him. They had ample time to obtain an arrest warrant. Detective Singleton's unannounced entry onto the Defendant's premises created the "flight". Here, as in Hornblower and Wilson, law enforcement officers may not sit and wait, when they could be seeking a warrant, and then utilize their self-imposed delay to create exigent circumstances.

The State's argument that a confession obtained as the result of a warrantless arrest in the home is not subject to the exclusionary rule is totally incorrect. In United States v. Johnson, supra, Secret Service agents arrested the defendant without a warrant, in his home. The agents warned the defendant of his rights and interrogated him. He admitted his involvement in the crime. He later signed a written statement to the same effect. The Supreme Court held that Payton was retroactive, the warrantless arrest of the defendant in his home was unconstitutional, and therefore both his verbal and written statements should have been suppressed.

Since Payton, Florida courts consistently have suppressed evidence obtained through a warrantless arrest in the home. Engle v. State, supra; Brown v. State, supra; Graham v. State, supra; Johnson v. State, 395 So.2d 594 (Fla. 2d DCA 1981); and State v. Jennings, 396 So.2d 1231 (Fla. 4th DCA 1981). This Court must do the same here.

B

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

The cases cited by the State were decided long before Gerstein v. Pugh, 420 U.S. 103 (1975), and this Court's decisions in Oliver v. State, 250 So.2d 888 (Fla. 1971); and State ex rel. Carty v. Purdy, 247 So.2d 480 (Fla. 1970).

The State conveniently overlooks the facts. 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 statement (T.131). The Detectives never even attempted to obtain a judicial determination of probable cause, just as they never even attempte to obtain an arrest warrant.

Detective Martin admitted that the Detectives 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 only a tentative identification (T.169). He did not have much explicit information regarding the Defendant's involvement (T.169).

This is precisely the type of conduct forbidden by Gerstein v. Pugh:

> "'...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."'..." (420 U.S. at 120, n.21)

C

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

Since the Defendant's main brief was filed, the United States Supreme Court once again has condemned arrests for "investigative" purposes. Florida v. Royer, ___ U.S. ___, 51 U.S.L.W. 4293 (3/23/83).

The State blandly asserts that there was probable cause to arrest the Defendant. The State is wrong. Probable cause is: "...defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'" Gerstein v. Pugh, supra, at 111.

Here, Detective Martin conceded that the Defendant was arrested because they wanted to talk to him concerning the incidents (T.124) and to conduct a records check (T.124). Detective Martin admitted that he only had a tentative identification when he went to the Defendant's

residence (T.169). He did not have much explicit information regarding the Defendant's involvement (T.169). No positive identification was even made (T.114). The State argues that the police officers also had the hat which the Defendant left at the scene. Of course, at the time they went to the Defendant's residence, they did not know who owned the hat. The name "Pig" was in the hat band. However, Detective Martin admitted that he was aware of no less than seventy-five (75) people identified with the name "Pig"! No further content was given to the vague term "tentative identification". The Funk & Wagnalls New Comprehensive International Dictionary of the English Language defines tentative as: "provisional or conjectural". Surely that falls short of warranting a prudent man in believing that the Defendant was involved in any of the incidents that the police officers were investigating.

Indeed, Detective Martin as much as conceded that the police officers lacked probable cause to arrest the Defendant because he refused to admit the obvious, i.e., that the police officers arrested the Defendant. He euphemistically spoke of the Defendant as being "detained" (T.122;124) and of going to the Defendant's residence to follow up a lead concerning the "investigation" (T.87). This case is strikingly similar to Brown v. Illinois, 442 U.S. 590 (1975). There, the United States Supreme Court held that the Defendant's statements must be suppressed because they were obtained after the Defendant had been arrested without probable cause. As to the illegality of the arrest, the Court held that:

> "The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was 'for investigation' or for 'questioning.'... The arrest, both in design and in execution, was

> investigatory. The Detectives embarked upon this expedition for evidence in the hope that something might turn up..." (422 U.S. at 605)

The State attempts to bootstrap the Defendant's "flight" into a determination of probable cause. It cannot. First, as shown supra in Subpoint A, the information itself concerning the "flight" was obtained only through Detective Singleton's illegal entry onto the Defendant's premises and, thus, that illegally obtained information is as much the fruit of the poisonous tree as is tangible evidence. The State may not utilize it to establish probable cause. Wong Sun v. United States, supra, at 484-487.

Moreover, even if the evidence of "flight" could be used, it is clear that, under these circumstances, the "flight" does not constitute probable cause. In Wong Sun, acting on information as vague as that involved in this case, police officers went to the defendant's laundry at 6:00 A.M. One of the police officers rang the bell. When the Defendant appeared and opened the door, the police officers told him that he was calling for laundry and dry cleaning. The defendant replied that he didn't open until 8:00 A.M. and told the police officer to come back at that time. The defendant then started to close the door. The police officer took his badge from his pocket and identified himself. The defendant immediately slammed the door and started running down the hallway through the laundry to his living quarters at the back where his wife and child were sleeping in a bedroom. The police officer broke open the door, followed the defendant down the hallway through the living quarters and arrested him in the bedroom. The Government argued that however vague the information was in the possession of the police officers when they went to the laundry, the defendant's flight down the hallway when the police officer identified himself furnished the requisite probable cause for the arrest. The Supreme Court disagreed. The court held that the defendant's refusal, under the circumstances, to

admit the officers and his flight down the hallway signified a guilty knowledge no more clearly that it did a natural desire to repell an apparently unauthorized intrusion. The Court concluded:

> "A contrary holding here would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked... That would have the same essential vice as a proposition we have consistently rejected -- that a search unlawful at its inception may be validated by what it turns up..." (371 U.S. at 484)

Here, when he entered onto the Defendant's premises, Detective Singleton never identified himself to the Defendant. He was dressed in plain clothes. Here, as in Wong Sun, the State cannot create probable cause through ambiguous conduct which the arresting officers themselves have provoked.

In Reid v. Georgia, 448 U.S. 438 (1980), a police officer, at the Atlanta Airport, became suspicious of the defendant and several others. He asked them if they would agree to return to the terminal and consent to a search of their persons and their shoulderbags. The defendant nodded his head affirmatively. As the three of them entered the terminal, however, the defendant began to run. Before he was apprehended he abandoned his shoulderbag. The bag, when recovered, was found to contain cocaine. The state court held that after the defendant had attempted to flee and had discarded his shoulderbag furnished probable cause for the search of the bag. The United States Supreme Court disagreed and reversed.

Florida courts also have refused to find that flight constitutes probable cause in similar situations. Kearse v. State, 394 So.2d 272 (Fla. 4th DCA 1980); Lower v. State, 348 So.2d 410 (Fla. 2d DCA 1977); Jackson v. State, 319 So.2d 617 (Fla. 1st DCA 1975).

The State attempts to argue that the police officers in this case

were engaged only in a stop authorized by Florida Statute 901.141(2)(4). That argument is totally untenable. First, the initial entry onto the Defendant's premises was illegal, as set forth fully in Subpoint A, supra. Second, those type situations were meant only for on the street situations, not situations arising in a defendant's home. In Engle v. State, supra, the court held that:

> "...A cursory view of the statute and Terry quickly reveals that neither applies or is intended to apply to a warrantless invasion of a person's residence. Both the statute and the Terry decision rest on the exigent circumstances of a street confrontation -- 'necessarily swift action predicated upon the on-the-spot observation of the officer on the beat, which historically has not been and as a practical matter could not be subjected to the warrant procedure.'..." (391 So.2d at 247)

Finally, the State's contention that the Defendant spontaneously made unqualified and incriminating statements is literally beyond belief. The record is clear that the Defendant gave an incriminating statement after Detective Martin gave him an insufficient warning of his rights and asked him if he would answer his questions without having an attorney present. Clearly, Detective Martin told the Defendant that they considered him a viable suspect in the case and felt that he was actively involved in the homicide (T.127). There can be no spontaniety in these circumstances. Certainly, the statements were the result of the illegal arrest of the Defendant. The Defendant was not free to leave (T.123-124;544).

D

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

The Court argues that the Trial Court ruled that the testimony was clear and convincing that the Defendant's statements were voluntary (T.173). That, however, is not the standard. Rather, the: "...standard for admissibility is establishing beyond all reasonable doubt that the confession was freely and voluntarily made..." DeConongh v. State, ___ So.2d ___, 1983 F.L.W. 153 (Fla. 4/21/83).

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 State's silence concerning the importance of the jury recommendation and of this Court's review function is overwhelming.

A

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

The State has ignored Kampff v. State, 371 So.2d 1007 (Fla. 1979); Jones v. State, 332 So.2d 615 (Fla. 1976); and Mann v. State, 420 So.2d 578 (Fla. 1982), all of which were decided after Thompson v. State, 328 So.2d 1 (Fla. 1976). The State's position is contrary to this Court's view that:

> "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. Discrimination 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." (State v. Dixon, 283 So.2d 1, 8 (1973))

Here, the Trial Court refused to make the required written findings. The written sentence is totally silent as to aggravating and mitigating circumstances (R.60). Rather than following the clear statutory requirements, 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 error led him into many other errors.

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.

The State's silence concerning the devestating effect that non-statutory aggravating circumstances have on the sentencing process and the cases cited by the Defendant is deafening.

The State lamely argues that because the Defendant's trial counsel did not object to some of the evidence or arguments concerning non-statutory aggravating circumstances that this Court cannot consider these errors. The State is wrong. In Elledge v. State, supra, evidence of a murder for which the defendant had not been convicted was admitted at the sentencing hearing, without objection. This Court held that it could consider the error and reversed the death sentence because of the admission of the evidence of a non-statutory aggravating factor:

> "The testimony concerning appellant's confession of the Gaffney murder and argument by the prosecutor thereon presents an entirely different question. Admittedly the testimony by the police officer related to that confession was not objected to by appellant's trial counsel, but that should not be conclusive of the special scope of review by this Court in death cases. Admission of the Gaffney murder is proscribed by our decision in Provence, supra, because the charge had not resulted in a conviction at the time of the trial in the instant case. It was, therefore, a non-statutory aggravating factor. But was the error harmless because of the lack of objection and the existence of substantial additional aggravating circumstances? We believe not..." (346 So.2d at 1002)

Ferguson v. State, 417 So.2d 639 (Fla. 1982), and Clark v. State, 363 So.2d 331 (Fla. 1978), cited by the State, dealt with the failure to object at the guilt phase of a trial, not with the failure to object to the admission of evidence of non-statutory aggravating circumstances at the sentencing phase of a capital case. Thus, they clearly are distinguishable.

1) LACK OF REMORSE

The State's silence concerning Menendez v. State, 368 So.2d 1278 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1978); and McCampbell v. State, 421 So.2d 1072 (Fla. 1982), is deafening.

The State's reliance upon Sireci v. State, 399 So.2d 964 (Fla. 1981), and Hargrave v. State, 366 So.2d 1 (Fla.1978)[11/] is misplaced.

First, those cases are aberations.

Second, the Defendant did express remorse. (T.623). Thus, the Trial Court's "finding" of the non-statutory aggravating circumstance was not even established by a preponderance of the evidence, much less beyond a reasonable doubt.

Third, Sireci held that lack of remorse is a non-statutory aggravating circumstance. 399 So.2d at 971. There, the trial court did not find lack of remorse as an aggravatint circumstance. Id. Sireci merely held that lack of remorse is a factor which can go into the equation of whether or not the homicide was especially heinous, atrocious, or cruel.

However, lack of remorse cannot transform an ordinary homicide into one which is especially heinous, atrocious, or cruel. As shown in the Defendant's main brief, under Sub Point E of Point IV, the homicide in this case was not especially heinous, atrocious, or cruel, as a matter of law. That aggravating circumstance applies only to those capital felonies: "...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.

11/Hargrave will be addressed specifically under subpoint #2, infra.

Dixon, 283 So.2d 1, 9 (Fla. 1973)(Emphasis Added). "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. Lewis v. State, 377 So.2d 640, (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976)...Tedder v. State, 322 So.2d 908 (Fla. 1975)." Lewis v. State, 398 So.2d 432, 438 (Fla. 1981); 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). That the deceased lived for thirty-six hours does not establish this aggravating circumstance. Lewis v. State, 377 So.2d 640, 646 (Fla. 1980); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Demps v. State, 395 So.2d 501, 506 (Fla. 1981).

A comparison of this case with relevant decisions of this Court clearly establishes that lack of remorse is totally irrelevant here and thus constitutes a non-statutory aggravating circumstance.

In Menendez v. State, supra, also a robbery-homicide, "...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 the murder was especially heinous, atrocious, or cruel. 368 So.2d at 1282. Therefore, the finding of lack of remorse constituted a non-statutory aggravating circumstance, 368 So.2d at 1281, n.12, which voided the death penalty. 368 So.2d at 1282.

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 the trial. This Court held that the homicide was not especially heinous, atrocious, or cruel, even though the son had to see his father's execution death. 366 So.2d at 21. Therefore,

the finding of lack of remorse constituted a non-statutory aggravating circumstance, 366 So.2d at 21, n.2, which voided the death penalty. 366 So.2d at 22.

In McCampbell v. State, supra, the defendant and four others robbed a convenience store. All had pistols. The defendant shot and killed the security guard. The trial court did not find that the murder was heinous, atrocious, or cruel. He did find lack of remorse as an aggravating circumstance. 421 So.2d at 1075. This Court held that the finding of lack of remorse was a non-statutory aggravating circumstance, 421 So.2d at 1075, and voided the death penalty.

In direct contrast, Sireci involved a murder which was especially heinous, atrocious, or cruel. There, the defendant first hit the victim on the back of the head with a wrench. When the victim turned around, a struggle ensued. The victim suffered multiple stab woulds, lacerations and abrasions. There were fifty-five stab and incisive wounds, all located on the chest, back, head and extremities. The stab wounds evoked massive external and internal hemorrhages which were the cause of death. The neck was slit.

Accordingly, if a homicide by itself is not especially heinous, atrocious, or cruel, lack of remorse is a non-statutory aggravating circumstance whose consideration voids a death penalty.

Finally, if lack of remorse, which is only a mental state displayed long after a homicide, and has absolutely nothing to do with the method of commission of the homicide, could transform any ordinary homicide into one which is especially heinous, atrocious, or cruel, then this aggravating circumstance is unconstitutionally vague and standardless. Godfrey v. Georgia, 446 U.S. 420, 428-429 (1980).

2) PROPENSITY FOR VIOLENCE

The State's silence concerning Miller v. State, 373 So.2d 882

(Fla. 1979), is overwhelming. See also Norris v. State, ___ So.2d ___, Case No. 60,711, 1983 F.L.W. 60, 61 (2/3/83), decided after the filing of the Defendant's main brief.

The State totally mischaracterizes the answer given by the Defendant to the police officer's question.[12/] The question was: "Do you think it's wrong for one person to kill another person?" The answer was: "Yes - it depends." (T.536). The Defendant's answer meant only that circumstances determined whether killing another person was wrong.[13/] The Defendant never even hinted that this homicide was not wrong, or that he would do it again.

Of course, the law recognizes justifiable and excusable homicide. The State asserts that it is not wrong for one person to pull a switch and electrocute another person who has been convicted of a capital felony. Killing in war is celebrated as heroism. That is what the Defendant meant by his answer to the open-ended question. Thus, the non-statutory aggravating circumstance was not even established by the evidence beyond a reasonable doubt.

The State asserts that the Defendant argues that this answer shows a propensity for violence. The State is wrong. Rather, the Trial Court and the prosecutor interpreted and utilized the answer as such. The Defendant's position is that the answer does not show a propensity for violence, and thus does not show a lack of remorse, and thus has no evidentiary value at all as to these two non-statutory aggravating circumstances.

12/ Cf. Kampff v. State, supra at 1010.

13/ The Defendant's answer was at least as susceptible to this interpretation as it was to an adverse interpretation. Therefore, it must be so interpreted. Fiske v. State, 366 So.2d 423, 424 (Fla. 1978).

The State relies upon Hargrave v. State, supra, in an attempt to bootstrap the Defendant's answer into a showing of a propensity for violence, to convert the propensity for violence into a lack of remorse, and thus transform this ordinary homicide into one which is especially heinous, atrocious, or cruel. The attempt fails. Even if the answer did show lack of remorse, that cannot transform an ordinary homicide into one which is especially heinous, atrocious, or cruel, as set forth fully supra, in Subpoint #1 of Subpoint B of Point IV.

Hargrave involved a murder which, in and of itself, was especially heinous, atrocious, or cruel. The defendant robbed a convenience store. He shot the clerk twice in the chest and rendered him helpless. He then shot the clerk in the head and killed him.

Accordingly, if a homicide by itself is not especially heinous, atrocious, or cruel, a propensity for violence is a non-statutory aggravating circumstance whose consideration voids a death penalty.

Finally, if a propensity for violence, which is only a mental state displayed long after a homicide, and has nothing to do with the method of commission of the homicide, could transform any ordinary homicide into one which is especially heinous, atrocious, or cruel, then this aggravating circumstance is unconstitutionally vague and standardless. Godfrey v. Georgia, 446 U.S. 420, 428-429 (1980).

3) HEINOUS, ATROCIOUS, AND CRUEL ATTEMPTED MURDER

The State's silence concerning Lucas v. State, 376 So.2d 1149 (Fla. 1979), is staggering.

The State's "argument" is untenable. Actions which are not part of the actual commission of the homicide are irrelevant in determining if the homicide was especially heinous, atrocious, or cruel. That aggravating circumstance applies only to those capital felonies: "...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).

The incident involving Linda Gray simply had nothing to do with the homicide.[14/]

4) CRIMES FOR WHICH THE DEFENDANT HAD NOT BEEN CONVICTED

The State's silence concerning Mikenas v. State, 367 So.2d 606 (Fla. 1978); Perry v. State, 395 So.2d 170 (Fla. 1981); Spaziano v. State, 393 So.2d 1119 (Fla. 1981); Odom v. State, 403 So.2d 936 (Fla. 1981), is deafening.

The State asserts that since the prosecutor said at the plea colloquy that the State would be presenting evidence of the charges which it dismissed, that legitimizes the use of such evidence. The State is wrong.

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, 421 So.2d 1072, 1075 (Fla. 1982)(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, supra, at 610; 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 1149, 1153

14/Additionally, the Medical Examiner's testimony was hearsay, since he testified from records of another (T.570-571) and thus inadmissible. Florida Statutes 90.801(1)(c); 90.802. On cross-examination, it was revealed that the Medical Examiner had never seen Linda Gray (T.573). The Defendant's trial counsel's motion to strike this testimony was denied (T.577-578; 580).

(Fla. 1979); Spaziano v. State, 393 So.2d 1119, 1123 (Fla. 1981); Perry v. State, supra, at 175; Odom v. State, supra, at 942. It is clear error for either the trial court or the jury to consider evidence of non-statutory aggravating circumstances. Maggard v. State, 399 So.2d 973, 977-978 (Fla. 1981); Perry v. State, supra, at 176; Elledge v. State, supra, at 1002-1003. Thus, the statements, intents, and desires of the prosecutor cannot supersede the clear limitations of Florida Statute 921.141(5). Nor can the acquiescence and incompetence of defense counsel. Elledge v. State, supra, at 1002.

The State's reliance upon Ruffin v. State, 397 So.2d 277 (Fla. 1981) is misplaced. The State cites Ruffin for the proposition that crimes which are committed along with the homicide may be considered even if the defendant is not charged or convicted of those other crimes. The State is wrong. In Ruffin, evidence of the dismissed charges of robbery and kidnapping, which directly involved the homicide itself, was permitted to establish the aggravating circumstance that the murder was committed while the defendant was engaged in robbery and kidnapping.[15/]

Here, the evidence of the charges which had been dismissed had no evidentiary value. As shown in the Defendant's main brief, under Subpoint D of Point IV, this evidence did not establish that the Defendant knowingly created a great risk of death to many people,[16/] because "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)(Emphasis Added).

15/Florida Statute 921.141(5)(d)

16/Florida Statute 921.141(5)(c)

Thus, this evidence was merely evidence of crimes for which the Defendant had not been convicted and thus constituted a non-statutory aggravating circumstance whose consideration voids the death sentence. Mikenas v. State, supra; Perry v. State, supra; Spaziano v. State, supra; Odom v. State, supra.

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

The State's silence concerning McCampbell v. State, 421 So.2d 1072, (Fla. 1982); Miller v. State, 373 So.2d 882 (Fla. 1979); and Riley v. State, 366 So.2d 19 (Fla. 1978), speaks volumes.

The State's position that this evidence was relevant and admissible to establish the aggravating factor that the homicide was especially heinous, atrocious, or cruel, because the deceased died thirty-six hours after being shot once, is totally untenable.

This aggravating circumstance applies only to those homicides 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 especially heinous, atrocious, or cruel. This aggravating circumstance applies only to those capital felonies: "...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). "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. Lewis v. State, 377 So.2d 640 (Fla. 1979); Cooper v. State...Tedder v. State..." Lewis v. State, 398 So.2d 432, 438 (Fla. 1981); accord 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). That the deceased survived for thirty-six hours after being shot once does not establish this aggravating circumstance. 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, despite victim's brief survival nothing to set accused's conduct apart from the norm of capital felonies).

Moreover, the deceased's wife's testimony was cumulative as to the facts concerning the homicide,[17] because of the Defendant's confession, and it was cumulative as to the deceased's injuries, because of the Medical Examiner's testimony.[18] The deceased's wife's testimony concerning the deceased's suffering, his personal background, her suffering, and the portrait of him in the hospital are all non-statutory aggravating circumstances of an obviously inflammatory nature,[19] whose consideration voids the death penalty. The deceased's wife's testimony was improper and inadmissible. Cf. Rowe v. State, 120 Fla. 649, 163 So. 22 (Fla. 1935); Barnes v. State, 348 So.2d 599 (Fla. 4th DCA 1977); Scott v. State, 256 So.2d 19 (Fla. 4th DCA 1971).

6) THE DECEASED'S INJURIES

The Defendant adopts his argument under Subpoint No. 5 of Subpoint B of Point IV, supra.

Additionally, the Medical Examiner's testimony was hearsay, since he merely testified from the notes and records of another.(T.568),

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17/It was also hearsay and thus inadmissible. Florida Statutes 90.801 (1)(c); 90.802.

18/The Defendant does not mean even to intimate that the Defendant's confession or the Medical Examiner's testimony was admissible.

19/The Trial Court obviously considered this testimony:

> "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 resistence during the course of the robbery." (T.626)

and thus inadmissible. Florida Statutes 90.801(1)(c); 90.802. The Medical Examiner had never examined or seen the deceased alive (T.573). The Defendant's trial counsel's motion to strike this testimony was denied (T.580).

7) PAINLESSNESS OF ELECTROCUTION

The State concedes that the Medical Examiner's testimony concerning the alleged painlessness of electrocution was evidence of a non-statutory aggravating circumstance. The Defendant's trial counsel's motion to strike this testimony was denied (T.579). The State's position is that since the Defendant did not object to the testimony, or move for a mistrial, the admission of this testimony concerning a non-statutory aggravating circumstance was proper. The State is wrong. Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977). Moreover, the Defendant's trial counsel's motion to strike was denied (T.579). The fact that the Trial Court instructed the prosecutor not to refer to that testimony in closing argument is meaningless, since the jury obviously heard and considered the testimony. Indeed, the Trial Court did not even instruct the jury not to consider the testimony.

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

The State misstates that which occurred in the Trial Court. The transcript is clear that the Trial Court's statement that the individual in the photograph was not the Defendant was made at a sidebar conference, outside the hearing of the jury (T.476). Accordingly, the State's assertion that it was clear to the jury that the Defendant was not the individual in the photograph is palpably wrong.

Additionally, the State's use of these photographs was particularly pernicious since the person in the photograph was not the Defendant and because Detective Martin was permitted to testify about another photograph which allegedly showed the Defendant's brother holding a weapon pointed into a dwelling.

9) PAROLE AND THE GOOD LIFE IN PRISON

The State has not responded to this portion of the Defendant's argument. The Defendant assumes that the State agrees with his position. Additionally, Norris v. State, ___ So.2d ___, ___, Case No. 60,711, 1983 F.L.W. 60, 61 (Fla. 2/3/83), decided after the Defendant's main brief was filed, supports the Defendant's argument.

10) MINIMIZATION OF JURY RECOMMENDATION

The State's silence concerning the cases cited by the Defendant is overwhelming.

None of the statements of the prosecutor mentioned by the State are anything more than standard comments during closing argument. They do not, in the least, counter the minimizing effect of his statements during voir dire and in his closing argument that the jury need not be concerned if it made the wrong decision and recommended the death penalty, because the Trial Court could overrule the recommendation and sentence the Defendant to life imprisonment. These remarks were absolutely contrary to this Court's repeated emphasis 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. LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978); Tedder v. State, 322 So.2d 908 (Fla. 1975); Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974).

11) "PIG"

The State's reliance upon Darden v. State, 329 So.2d 287 (Fla. 1976) is woefully misplaced. The "fair comments" in Darden were made during the closing argument of the guilt or innocence trial, not at the sentencing trial. Moreover, defense counsel in Darden made the first such comment, which opened the door for the prosecutor.

Here, the prosecutor used the Defendant's nickname in the

sentencing trial in an extremely inflammatory manner. Defendant's trial counsel never mentioned it.

The inflammatory use of a nickname is a non-statutory aggravating circumstance whose consideration voids a death penalty.

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.

The State concedes that the Defendant is correct.

However, the State ignores the obvious. First, the error entitles the Defendant to a new sentencing hearing. Provence v. State, 337 So.2d 783 (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). Second, the State overlooks the prejudice to the Defendant resulting from the erroneous argument by the prosecutor, instructions by the Trial Court, and "findings" by the Trial Court.

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.

The State's silence concerning the cases cited by the Defendant is deafening.

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, supra, at 337; Elledge v. State, supra, at 1004. Thus the other incidents are irrelevant. Here the Defendant the co-Defendant, Johnson, waited until the customers had left the area (T.469). Then they went inside (T.469). There was no one else in the store when the homicide occurred (T.409). Quite clearly, the incident involving Linda Gray (N.W. 7th Avenue and 103rd Street)(T.452), was at least sixteen blocks from the incident at the Big Daddy's Lounge [20/] (N.W. 7th Avenue and 119th Street), which was several miles from the incident involving the deceased (N.W. 28th Avenue and 135th Street). The incident involving the off-duty police officer occurred outside the store, where the incident involving the deceased occurred, after it had occurred, after the Defendant and the co-Defendant, Johnson, had left the store (T.526). "...It is clear from this record that at the time [of the homicide] no one else was arround..." Mines v. State, supra, at 337 (Emphasis and Brackets Added). The State may not tie together separate incidents in an attempt to manufacture this aggravating circumstance.

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.

The State's silence concerning the cases cited by the Defendant is deafening.

The fact that the deceased died thirty-six hours after he was

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20/Contrary to the State's misstatement, the Defendant did not shoot at the people outside the Big Daddy's Lounge. The uncontradicted evidence was that the Defendant shot at a wall and car near a Big Daddy's Lounge, not at people (T. 518). He hit the wall and car (T.518). Moreover, there is no evidence whatsoever concerning the number of people outside the Big Daddy's Lounge.

shot once does not establish this aggravating circumstance. This Court consistently has held that even when the deceased does not die immediately, the homicide does not become especially heinous, atrocious, or cruel. In Tedder v. State, 322 So.2d 908 (Fla. 1975), 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 murder was not especially heinous, atrocious, or cruel. In Demps v. State, 395 So.2d 501 (Fla. 1981), 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 and 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 acknowledged that he was dying. This Court held that the murder was not especially heinous, atrocious, or cruel. In Swan v. State, 322 So.2d 485 (Fla. 1975), the defendant, a nineteen year old boy, administered a severe beating to the victim. She was last seen alive in the evening. About 9:30 A.M. the following morning she was found in a semi-conscious condition on the floor, badly beaten. Her hands, neck, and left foot were tied so that any efforts she might have made to free herself could have choked her to death. She was tied with strips of cloth from a bedspread, and her mouth was gagged with a stocking. She lived for a week. Although it did not specifically hold the murder was not especially heinous, atrocious, or cruel, this Court reversed the death sentence. In McCray v. State, 416 So.2d 804 (Fla.1982), the defendant

approached a van, with a gun in his hand. The victim was seated in the van, talking to another person. The defendant yelled "This is for you, mother fucker," and shot the victim three times, killing him. This Court held that the murder was not especially heinous, atrocious, or cruel.

The State asserts that the "additional acts surrounding" the homicide, i.e., the incident with Linda Gray, the incident at the Big Daddy's Lounge, the Defendant's alleged laughter, the misinterpretation of the Defendant's answer to the police officer's question,[21/] and the casual method by which the robberies were planned, conceived, and executed, constituting evidence of a flagrant disregard for the dangerous consequences of the actions, rendered the homicide "especially heinous, atrocious, or cruel." The State is wrong. Long ago, this Court held that this aggravating circumstance applies only to those capital felonies: "...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). "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 murder, is as a matter of law not heinous, atrocious, or cruel. Lewis v. State, 377 So.2d 640 (Fla. 1979); Cooper v. State...Tedder v. State..." Lewis v. State, 398 So.2d 432, 438 (Fla. 1981); accord Kampff v. State, 371 So.2d 1007, 1010 (Fla. 1979); Williams v. State, 386 So.2d 538, 543 (Fla. 1980); Riley v. State, supra, at 21. The "additional acts" had nothing whatsoever to do with the actual commission of the capital felony and did not render it especially heinous, atrocious, or cruel.

21/See Subpoint #2 of Subpoint B of Point IV, supra, at pp. 45.

It thus is clear that this aggravating circumstance is applicable only to those capital felonies in which the method by which the capital felony was perpetrated was unnecessarily torturous or depraved. Unintended suffering following the act of firing a gun once, and other matters unrelated to the commission of the capital felony, do not make a capital felony "especially heinous, atrocious, or cruel." This Court repeatedly has evaluated the defendant's torturous intent during the capital felony in upholding this aggravating circumstance, as the Defendant clearly showed in pp. 90-91 of his main brief.

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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 State ignores the innumerable errors committed during the sentencing hearing and blandly asserts that these errors present no difficulty for this Court and that it can review the "findings" of the Trial Court. The State is wrong. A comparison of this case with some of the relevant decisions clearly establishes that this Court cannot review the "findings" of the Trial Court and that a new sentencing hearing, at the very least, is mandatory.

In Elledge v. State, 346 So.2d 998 (Fla. 1977), the touchstone dealing with the consideration of non-statutory aggravating circumstances, the defendant choked the victim for fifteen to twenty minutes. The victim was gasping for air. During this time he was raping her. The next day he killed a Mr. Gaffney. He had not been convicted for this murder. He took a bus to another city. There, on the next day, he committed another murder during an armed robbery, for which he had been convicted.

The trial court found the following aggravating circumstances: 1) the defendant had a significant history of prior criminal activity, 2) the defendant knowingly created a great risk of death to many persons in committing the murder and in attempting to escape apprehension. In this finding the trial court noted that the defendant had confessed to killing Mr. Gaffney (for which he had not been convicted) and the third murder in another city, for which he had been convicted 3) the murder was committed during the course of a rape 4) the murder was committed for the purpose of avoiding arrest, as the rape victim had threatened to notify the police, and 5) the murder was especially heinous, atrocious, and cruel.

The trial court did not find any mitigating circumstances, found that the jury's recommended death sentence was persuasive, and further found that: "...there are sufficient aggravating circumstances existing to justify the sentence of death, and this Court, after weighing the aggravating and mitigating circumstances, being of the additional opinion that insufficient mitigating circumstances exist to outweigh the aggravating circumstances..." 346 So.2d at 1001, imposed the death sentence.

This Court found that:

> "...Admission of evidence of the Gaffney murder is proscribed by our decision in Provence, supra, because the charge had not resulted in a conviction at the time of the trial in the instant case. It was, therefore, a non-statutory aggravating factor. But was the error harmless because of the lack of objection and the existence of substantial additional aggravating circumstances? We believe not..." (346 So.2d at 1002)(Emphasis Added)

This Court noted, 346 So.2d at 1003, that the trial court took into account the Gaffney murder, for which the defendant had not been convicted, a non-statutory aggravating circumstance, in finding that the defendant had knowingly created a great risk of death to many

persons.[22] This Court held that it could not ignore the consideration of this non-statutory aggravating circumstance, notwithstanding the existence of many statutory aggravating circumstances and no specific finding of any mitigating circumstances:

> "...regardless of the existence of other authorized aggravating factors 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 of 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 at which the factor of the Gaffney murder shall not be considered... This result is dictated because, in order to satisfy the requirements of Furman v. Georgia,...the sentencing authority's discretion must be 'guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt v. Florida,..." (346 So.2d at 1003)

In Mikenas v. State, 367 So.2d 606 (Fla. 1978), the defendant and two others robbed a convenience store. The defendant carried a pistol. There were no customers in the store during the robbery. The defendant and the two others forced the store clerk into a backroom of the building. Unknown to them, an auxiliary deputy sheriff observed the robbery from a hidden position in the store. When an automobile unexpectedly arrived at the front of the store, the defendant and the two others tried to leave through a back door. The auxiliary deputy sheriff, with drawn gun, stopped them and placed them under arrest. Seconds later, an off-duty police officer came into the store through

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22/This was an improper finding of this statutory aggravating circumstance, 346 So.2d at 1003-1004.

the front door. The first officer called to the second one for help and told about the robbery. The defendant and the first officer immediately fired at each other, with both missing. The first officer then shot and killed one of the defendant's companions and wounded the defendant, as they ran toward the front of the store. As the defendant was falling to the floor, he shot and killed the second police officer. The defendant was then arrested.

The trial court found the following aggravating circumstances: 1) The murder was committed while the defendant was engaged in the commission of a robbery 2) The murder was for pecuniary gain 3) The defendant had been previously convicted of a crime of violence, robbery 4) The defendant was on parole at the time of the murder and there was outstanding against him a parole violation warrant 5) The defendant knowingly created a great risk of death to many people 6) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody 7) The defendant had a substantial history of prior criminal activity.

The trial court found that the only mitigating circumstance shown by the defendant was his age, twenty-two.

The trial court ruled that: "the aggravating circumstances far outweigh the mitigating circumstances in this case and, therefore, the jury's recommendation of the death penalty is appropriate..." 367 So.2d at 610 (Emphasis Added).

This Court reversed the death sentence because of the consideration of the non-statutory aggravating circumstance of a substantial history of prior criminal activity, notwithstanding the existence of five valid statutory aggravating circumstances and the existence of only one mitigating circumstance, the defendant's age, twenty-two,[23/]

23/Here, of course, the Defendant was only twenty.

to which the trial court had not attached much significance:

> "...When the trial judge entered under aggravating circumstances: '(F) that the defendant, Mark Mikenas, has a substantial history of prior criminal activity,' he placed into the balance established by the statute, a nonstatutory aggravating factor. The inclusion of this non-statutory aggravating circumstance indicates that the weighing process dictated by statute was not followed... Elledge v. State..." (367 So.2d at 610)

Then, in language written for this case, this Court re-emphasized that it is the duty of the trial court, not of this Court, to follow the statutory requirements in sentencing:

> "...It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court. It was not done in this case. A substantial history of prior criminal activity is not an aggravating circumstance under the statute. Since mitigating circumstances are present, Elledge, supra, dictates resentencing." (367 So.2d at 610) (Emphasis Added)24/

In Riley v. State, 366 So.2d 19 (Fla. 1978), the defendant and another entered a business establishment for the purpose of robbing it. The only persons then present were the father and son co-owners of the business and the manager. All three were threatened with pistols, forced to lie on the floor, bound, gagged, and then shot in the head, one after the other. The son co-owner survived.

The trial court found six aggravating circumstances: 1) The defendant had no remorse 2) The length of the defendant's premeditation for the crime was great 3) The father's murder was especially heinous, atrocious, or cruel 4) the murder was committed during the course of a robbery 5) the murder was for pecuniary gain and 6) the murder was to eliminate a witness and thereby avoid lawful arrest.

24/The remedy is a new trial when one or more non-statutory aggravating circumstances are present, even if there are no mitigating circumstances. Proffitt v. Wainwright, 685 F.2d 1227, 1266-1269 (11th Cir.1982); Henry v. Wainwright, 686 F.2d 311, 314 (11th Cir.

The trial court found one mitigating circumstance: the lack of any significant history of prior criminal activity.

This Court held that: the first two aggravating circumstances were non-statutory and had to be disregarded, 366 So.2d at 19, n.2, the murder was not especially heinous, atrocious, or cruel, 366 So.2d 19, the findings that the murder was during a robbery and for pecuniary gain constituted only one aggravating circumstance under Provence v. State, 337 So.2d 783 (1976), Id., and the finding that the murder was committed to eliminate a witness and avoid lawful arrest was proper, 366 So.2d at 22.

Even though there were two valid aggravating circumstances and only one mitigating circumstances, this Court reversed the death sentence because of the consideration of the non-statutory aggravating circumstances:

> "Since the trial court improperly considered aggravating factors outside the statutory list and there was present at least one mitigating circumstance, we must remand this case for reconsideration of the sentence by the trial judge. Elledge v. State..." (366 So.2d at 22)

In McCampbell v. State, 421 So.2d 1072 (Fla. 1982), the defendant and four others robbed a convenience store. All had pistols. The defendant shot and killed the security guard.

The trial court correctly found three statutory aggravating circumstances: 1) the defendant was under sentence of imprisonment at the time of the murder 2) the defendant had been previously convicted of a felony involving the use of or threat of violence to the person, and 3) the murder was committed during the course of a robbery.

The trial court found none of the statutory mitigating circumstances and did not give substantial weight to the other mitigating evidence presented by the defendant. The trial court considered the

fact that the defendant never acknowledged his guilt or showed any remorse. Additionally, the trial court concluded that the defendant had procured the perjury of his girlfriend to establish an alibi defense.

This Court, in reversing the death sentence, noted and held that:

> "This Court has held that aggravating circumstances must be limited to those provided for by statute. Miller v. State, 373 So.2d 882 (Fla. 1979); Purdy v. State, 343 So.2d 4 (Fla. 1977)...Neither the failure of the appellant to acknowledge his guilt nor demonstration of remorse is a valid statutory aggravating circumstance. To the degree that the trial judge justified his position that the appellant had procured the perjured testimony of his girlfriend to buttress the alibi defense, his conclusion is unsupported by law or fact. There is neither any evidentiary support in the record for this conclusion, nor is it a statutorily-enumerated aggravating circumstance." (421 So.2d at 1075)(Emphasis Added)

In Lucas v. State, 376 So.2d 1149 (Fla. 1979), the defendant killed his girlfriend and wounded two of her companions in a raging gun battle.

The trial court found the following aggravating circumstances: 1) the murder was especially heinous, atrocious, or cruel 2) the defendant knowingly created a great risk of death to many people 3) the defendant previously had been convicted of a felony involving the use of or threat of violence to the person, and 4) the attempted murders of the victim's companions were heinous, atrocious, or cruel.

The trial court found one mitigating circumstance, that the defendant had no past criminal record.

Even though there were three valid aggravating circumstances and only one mitigating circumstance, this Court reversed the death sentence because of the consideration of the non-statutory aggravating circumstance:

> "...the finding that the attempted murders of the victim's companions were heinous and atrocious is a non-statutory aggravating factor and should not have been considered. Under Elledge v. State, we must remand for resentencing..." (376 So.2d at 1153)

In Perry v. State, 395 So.2d 170 (Fla. 1980), the defendant robbed, shot and killed the victim, who was seated in a parked car.

The trial court found these aggravating circumstances: 1) the defendant was previously convicted of a felony involving the use or threat of violence 2) the murder was committed while the defendant was engaged in the commission of a robbery 3) the murder was committed for pecuniary gain.

The trial court found no mitigating circumstances, stating that the defendant's age, twenty, was the only one that arguably could be present and he rejected it.

This Court reversed the death sentence.[25/] It held that the trial court erred in doubling up the aggravating circumstances of pecuniary gain and robbery and that it erred in allowing the prosecutor to present as evidence of aggravation to both the jury and the trial court the existence of pending criminal charges against the defendant, for which he had not been convicted:

> "...Clearly, the death penalty statute expressly limits what may be considered concerning a defendant's prior criminal record to only those offenses for which 'the defendant was previously convicted,' and those convictions are limited to 'another capital felony or... felony involving the use or threat of violence to the person.'..." (395 So.2d at 174-175)(Emphasis Added)

In Spaziano v. State, 393 So.2d 1119 (Fla. 1981), the defendant mutilated and killed the victim.

25/There was also a Lockett violation.

The trial court found that the murder was especially heinous, atrocious, and cruel and that the defendant previously had been convicted of felonies involving the use or threat of violence to the person. The trial court based the second finding upon convictions listed in the presentence investigation report, including two convictions discussed in a confidential section of the report.

The trial court found that there were no mitigating circumstances.

This Court reversed the death sentence.[26/] The confidential section of the report contained information that the defendant had been a suspect in four homicides and three bombings, was a member of the "Outlaws" motorcycle gang, had been convicted of rape and sentenced to the state prison, had been charged with forcible carnal knowledge, rape, and false imprisonment for another incident, but allegedly escaped prosecution because of harassment and threats towards the victim by gang members, and had been convicted of other nonviolent felony and misdemeanor offenses.

This Court held that:

> "Secion 921.141(5), Florida Statutes, limits the factors in aggravation which may be considered by the trial judge in imposing the death sentence. In consideration a defendant's prior criminal record, the trial judge is limited to only those offenses for which 'the defendant was previously convicted.' Provence v. State, ... Further, these underlying convictions are also limited to 'another capital felony or ... felony involving the use or threat of violence to the person.' §921.141(5)(b) Fla. Stat. ... the convictions for nonviolent offenses and misdemeanors and charges for which there was no convictions must be excluded as aggravating factors." (393 So.2d at 1122-1123)

This Court concluded that:

26/There was a Gardner violation, of course.

"...the Gardner violation and the statutory limiting factors in aggravation require this cause to be remanded to the trial judge for resentencing." (393 So.2d at 1123)(Emphasis Added)

In Miller v. State, 373 So.2d 882 (Fla. 1979), the trial court found three statutory aggravating and three mitigating circumstances. The trial court also found and considered a non-statutory aggravating circumstance, the defendant's propensity for violence. This Court reversed the death sentence, holding that:

"...the aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose...This court, in Elledge v. State,...stated:

> 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.

Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be 'guided and channeled' by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition. Proffitt v. Florida..." (373 So.2d at 885)

Accordingly,

"...The trial judge'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)

In Menendez v. State, 368 So.2d 1278 (Fla. 1979), the defendant killed a jewelry store owner during a robbery. The trial court found

seven aggravating circumstances, three of which the State conceded were non-statutory aggravating circumstances, one being a lack of remorse. The State also conceded that the trial court improperly doubled up the aggravating circumstances that the murder was committed during a robbery and was for pecuniary gain. The trial court also found that the murder was especially heinous, atrocious, or cruel, and that it was committed for the purpose of avoiding or preventing a lawful arrest.

The trial court found one mitigating circumstance, that the defendant had no significant history of prior criminal activity.

This Court held that only one of the statutory aggravating factors was properly found, that the murder was committed during a robbery.

This Court reversed the death sentence:

> "There is, therefore, only one properly found aggravating circumstance and one mitigating circumstance. Since the trial judge has committed error in considering matters outside the permissible range of legal standards set by the statute, and because it is impossible for us to evaluate the weight given by the trial judge to those factors which were proper to consider in imposing the death penalty, we can only vacate the sentence of death and remand this case for resentencing." (368 So.2d at 1282)

In Odom v. State, 403 So.2d 936 (Fla. 1981), the defendant shot the victim through his bedroom window. Two women were in the room with the victim and one of them suffered a minor gunshot wound.

The trial court found that the murder involved great risk of death to many persons and that it was especially heinous, atrocious, or cruel. The trial court also considered the defendant's prior record, including numerous arrests and charges which did not culminate in convictions.

This Court held that the finding of the two aggravating circumstances was improper. This Court also held that the consideration of

the defendant's arrests and charges without convictions was improper. This Court reversed the death sentence and held that:

> "...aggravating considerations must be limited to those provided for by the Statute, and information must relate to one of the statutory aggravating circumstances in order to be considered an aggravation. Evidence of past criminality, offered by the state for the purpose of aggravating the crime, is inadmissible unless it tends to establish one of the aggravating circumstances listed in section 921.141(5). Therefore, consideration of mere arrests and accusations, as aggravating circumstances is precluded. Perry v. State,... Provence v. State,... (403 So.2d at 942)

In Blair v. State, 406 So.2d 1103 (Fla. 1981), the trial court found four aggravating circumstances: 1) the defendant committed the murder from a premeditated design 2) the defendant knowingly created a great risk of death to many persons 3) the murder was committed for the purpose of avoiding a lawful arrest, and 4) the murder was especially heinous, atrocious, or cruel.

The trial court found one mitigating circumstance, that the defendant had no significant history of prior criminal activity.

This Court held that the first finding was not intended to represent the aggravating factor found in the amended version of the Florida Statute 921.141(5)(i). Thus it was a non-statutory aggravating circumstance. 406 So.2d at 1108. This Court held that the trial court improperly held that the defendant created a great risk of death to many persons and that the murder was especially heinous, atrocious, or cruel. Therefore:

> "Because of the existence of a mitigating factor, and the improper inclusion of several aggravating factors, we must vacate the death sentence..." (406 So.2d at 1109)

Since this case was so similar to Halliwell v. State, 323 So.2d 557 (Fla. 1975), this Court imposed a life sentence.

Additionally, this Court has not hesitated to reverse death sentences and to remand for a new sentencing hearing when statutory aggravating circumstances improperly were found.

This Court consistently has reversed death sentences when the statutory aggravating circumstance of knowingly creating a great risk of death to many people improperly was found. Elledge v. State, 346 So.2d 998 (Fla. 1977); Mines v. State, 390 So.2d 332 (Fla. 1980), Kampff v. State, 371 So.2d 1007 (Fla. 1979); Lewis v. State, 398 So.2d 432 (Fla. 1981); Blair v. State, 406 So.2d 1103 (Fla. 1981); Lewis v. State, 377 So.2d 640 (Fla. 1979); Williams v. State, 386 So.2d 538 (Fla. 1980); Johnson v. State, 393 So.2d 1069 (Fla. 1980); Jacobs v. State, 396 So.2d 713 (Fla. 1981); Odom v. State, 403 So.2d 936 (Fla. 1981).

This Court consistently has reversed death sentences when the statutory aggravating circumstance that the murder was especially heinous, atrocious, and cruel improperly was found. Riley v. State, 366 So.2d 19 (Fla. 1978); Lewis v. State, 377 So.2d 640 (Fla. 1980); Tedder v. State, 322 So.2d 908 (Fla. 1975); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Williams v. State, 386 So.2d 538 (Fla. 1980); Fleming v. State, 374 So.2d 954 (Fla. 1979); McCray v. State, 416 So.2d 804 (Fla. 1982); Menendez v. State, 368 So.2d 1278 (Fla. 1979); Lewis v. State, 398 So.2d 432 (Fla. 1981); Odom v. State, 403 So.2d 936 (Fla. 1981).

This Court consistently has reversed death sentences when there was an improper doubling up of the statutory aggravating circumstances of the murder being committed during the course of a robbery and for pecuniary gain. Provence v. State, 337 So.2d 783 (Fla. 1976); Gafford v. State, 387 So.2d 333 (Fla. 1980); Ross v. State, 386 So.2d 1191 (Fla. 1980); and Perry v. State, 395 So.2d 170 (Fla. 1981).

Here, as has been fully set forth, there were at least eleven non-statutory aggravating circumstances that were found, two statutory aggravating

circumstances that improperly were found, and two other statutory aggravating circumstances that were improperly doubled up. All the evidence concerning these improper findings was considered by the jury. The prosecutor argued the improper evidence in his closing argument. The jury instructions provided no guidance. The jury's function not only was damaged, it was utterly destroyed. The Defendant is entitled to a new sentencing hearing before a newly impaneled jury. Simmons v. State, 419 So.2d 316, (Fla. 1982); 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).

In addition to the errors concerning the non-statutory aggravating circumstances, the Trial Court erred in considering matters outside the record, without informing the Defendant that he intended to do so, and without affording the Defendant an opportunity to rebut them, in reaching his decision to impose the death sentence. Apparently, although it is less than crystal-clear, the Trial Court rejected the statutory mitigating circumstance of no significant history of prior criminal activity predicated upon the fact that the Defendant previously had been charged with robbery (T.628).27/ The record is silent concerning this unproven allegation, which was dismissed (T. 205), and of which the Defendant must be presumed innocent. Apparently, although again it is less than crystal-clear, the Trial Court rejected the statutory mitigating circumstance of acting under the substantial domination of of another, predicated upon something he heard: "...at the preliminary

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27/The Trial Court may have considered this as a non-statutory aggravating circumstance. If so, that obviously was improper. This confusion confirms Mikenas v. State, supra, which held that the trial court, not this Court, must cull through the aggravating and mitigating circumstances and determine which are proper for consideration and which are not, and Mann v. State, 420 So.2d 578, (Fla. 1982), which emphatically held that: "The trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found..."

negotiations it was suggested that Mr. Trawick dominated the other young people." (T.628).[28] The Trial Court erred in considering this non-record evidence. Gardner v. Florida, 430 U.S. 349 (1977); Porter v. State, 400 So.2d 5 (Fla. 1981); Spaziano v. State, 393 So.2d 1119 (Fla. 1981).[29]

The combination of the errors concerning the non-statutory aggravating circumstances, the improperly found statutory aggravating circumstances, the improperly doubled up statutory aggravating circumstances, and the Gardner violation overwhelmingly mandates that the Defendant receive a new sentencing hearing before a new jury.

The State's argument that the Defendant's age, twenty, was not given much weight by the trial court is untenable. The Trial Court "weighed" the Defendant's age against at least eleven non-statutory aggravating circumstances, two improperly found statutory aggravating circumstances, two improperly doubled up statutory aggravating circumstances, and the "information contained in the Gardner violation. A proper weighing process was impossible. The scales irreparably, overwhelmingly, and improperly were tipped toward death.[30]

The State would have the Court simply line up whatever number of properly found aggravating circumstances it can cull from the record -- ignore all the errors -- and, if there are more statutory aggravating

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28/The Defendant has no idea of what it was the Trial Court was referring to. What preliminary negotiations? Who made the suggestion? Even if this "information" were admissible, a "suggestion" cannot serve as a substitute for proof.
And again, the Trial Court may have considered this as a non-statutory aggravating circumstance.

29/The Gardner error was addressed in Subpoint H of Point IV of the Defendant's main brief. It is also addressed in Subpoint H of Point IV, infra.

30/The Trial Court and the jury did not consider the mitigating evidence, which the Defendant addresses, infra. The weighing process was further improperly tipped toward death by the exclusion of the mitigating evidence.

circumstances than whatever statutory mitigating circumstances the Court can cull from the record, the State would have the Court impose the death sentence. That cannot be done. This Court's duty is not to impose sentence, but to: "...'review', a process qualitatively different from sentence 'imposition.'" Brown v. Wainwright, 392 So.2d 850, 855 (Fla. 1982). "...It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court..." Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978). The culling process is not:

> "...a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present..." (State v. Dixon, 283 So.2d 1, 10 (Fla. 1973)) (Emphasis Added)

Here, where there have been such egregious errors, there can be no such reasoned judgment. This Court has rejected the State's argument in the past, in similar cases, which did not present such compelling reasons for reversal. For instance, in Mikenas, the trial court found five statutory aggravating circumstances. It found that the only mitigating circumstance was the defendant's age, twenty-two, two years older than the defendant. The trial court held that: "the aggravating circumstances far outweigh the mitigating circumstances..." 367 So.2d at 610 (Emphasis Added). This Court reversed the death sentence because of the trial court's consideration of and finding of one non-statutory aggravating circumstance. In Perry, the trial court found three aggravating circumstances and no mitigating circumstances, rejecting the Defendant's age,

twenty. This Court reversed the death sentence because of the consideration of one non-statutory aggravating circumstance, the improper doubling up of two statutory aggravating circumstances, and a Lockett violation. Time and again, as shown throughout this brief and the Defendant's main brief, this Court has reversed death sentences where there were errors concerning non-statutory aggravating circumstances, statutory aggravating circumstances improperly found, improperly doubled up aggravating circumstances, and Gardner violations. The Court can do no less here, where all these errors are present.

Additionally, the Trial Court's weighing of the Defendant's age, twenty, further was improperly adversely affected by his consideration of the non-record "suggestion" that, rather than being a normal twenty year old, the Defendant dominated the other young people (T.628).[31/]

The cases cited by the State clearly are distinguishable. In Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982), there was one non-statutory aggravating circumstance. Here, there are at least eleven non-statutory aggravating circumstances, two improperly found statutory aggravating circumstances, an improper doubling up of two statutory aggravating circumstances, and three Gardner violations. The difference between Jackson and this case is greater than day and night. Additionally Jackson was a habeas corpus proceeding, rather than a direct appeal, in which the petitioner attempted to establish ineffective assistance of appellate counsel. In Meeks v. State, 339 So.2d 186 (Fla. 1976), there were no non-statutory aggravating circumstances, no improperly found statutory aggravating circumstances, no doubling up of statutory

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31/Thus, this Gardner violation was directed against two statutory mitigating circumstances, age, and substantial domination by another. The Gardner errors alone mandate reversal.

aggravating circumstances, and no Gardner violation. Here, all these errors are present. In Demps v. State, 395 So.2d 501 (Fla. 1981), there were no non-statutory aggravating circumstances, no improper doubling up of statutory aggravating circumstances, no Gardner violation, and no mitigating circumstances. Here, all these errors and mitigating circumstances are present.

The State has not responded to the Defendant's argument that the jury and the Trial Court overlooked mitigating evidence. The Defendant assumes that the State agrees with his position.

The Defendant has no significant history of prior criminal activity (T.62). Florida Statute 921.141(6)(a). Menendez v. State, supra, at 1281, n.14; Lewis v. State, 377 So.2d at 642; 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 his conduct and to conform his conduct to the requirements of law was substantially impaired. Florida Statute 921.141(6)(f). Cannady v. State, 427 So.2d 723, 731 (Fla. 1983); Norris v. State, ___ So.2d ___, ___, 1983 F.L.W. 60, 61 (Fla. 2/3/83), Case No. 60,711. The psychiatric report, submitted directly to the Trial Court (R.38), clearly established 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 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...32/
>
> * * * * *

32/ This explains -- nothing else does -- the irrational incidents, particularly the one involving the Big Daddy's Lounge.

> 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 psychiatric report also establishes, as quoted, supra, that the Defendant was under the influence of extreme mental or emotional disturbance. Florida Statute 921.141(6)(b). Kampff v. State, supra, at 1008 and 1010; Buckram v. State, 355 So.2d 111, 113 (Fla. 1978); Cannady v. State, supra, at 731.

The failure of 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 (Fla. 1976)(Sundberg, J., concurring); Huckaby v. State, 343 So.2d 29, 34 (Fla. 1977)(England, J., concurring). Indeed, it is error not to consider any evidence which tends to establish any mitigating circumstance. Moody v. State, 418 So.2d 989, 995 (Fla. 1982); Kampff v. State, supra, at 1010; Miller v. State, 332 So.2d 65, 68 (Fla. 1976); Messer v. State, 330 So.2d 137, 142 (Fla. 1976).[33/]

Even if the Trial Court would not have found these statutory mitigating circumstances, the jury would have. Cannady v. State, supra, at 731. At the very least, the psychiatric report contained valid non-statutory mitigating evidence which both the jury and the Trial Court should have considered Moody v. State, 418 So.2d 909, 995 (Fla. 1982); Holmes v. State, ___ So.2d ___, ___, 1983 F.L.W. 56, 57 (Fla. 2/3/83), Case No.

33/The Defendant's trial counsel must be faulted for his total failure to bring out this or any of the other evidence of mitigation. Holmes v. State, ___ So.2d ___, ___, 1983 F.L.W. 56, 57 (Fla. 2/3/83), Case No. 61,672; McCampbell v. State, 421 So.2d 1072, 1075-1076 (Fla. 1982). See also the Defendant's Motion to Relinquish Jurisdiction filed May 18, 1982, denied by the Court on May 20, 1982.

61,672; Norris v. State, supra, at ___, at 61; Lockett v. Ohio, 438 U.S. 586 (1978).

The Defendant acted under the substantial domination of the co-Defendants. Florida Statute 921.141(6)(e). Neary v. State, 384 So.2d 881, 885-888 (Fla. 1980). The psychiatric report established that the Defendant's friends induced him to consume more alcohol on the evening of the offenses than he normally did (R.39). 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), and he devised the robbery at the U-Tote'M Store (T.521). The co-Defendant, Anthony Johnson was the leader during the incident at the gas station (T.452). Johnson spoke to Linda Gray, and ordered her to give him the money she had (T.453; 515). Johnson ordered the Defendant to shoot her (T.455). At the U-Tote'M Store, Johnson again was in charge and ordered Robert Hayes to give him the money he had (T.469; 523), and grabbed for the cash register (T.423). Of course, the Defendant's impaired and intoxicated mental condition heightened the domination.

The co-Defendants, who dominated and directed the Defendant, were all permitted to plead guilty to lesser charges and thus avoid the death penalty (T.538; 561-562). It is entirely appropriate to consider the sentences of co-Defendants in determining whether a particular defendant will be sentenced to death or life imprisonment. Gafford v. State, 387 So.2d 333, 337 (Fla. 1980).

The Defendant expressed remorse (T.623). This is an entirely appropriate mitigating circumstance, particularly when considered in conjunction with the Defendant's guilty plea, which universally is recognized as the first step on the road to rehabilitation.

The other Defendants were apprehended through the Defendant's help and cooperation and the information he supplied the police (T.550; 551;

555). Certainly, assisting law enforcement is a mitigating circumstance. Indeed, it is no secret that a defendant's cooperation with law enforcement is taken into account every day in scores of sentencing decisions, and the Defendant is entitled to no less.

Although the jury heard some of this evidence, they were not informed that they could consider it in mitigation. The Trial Court's jury instructions on mitigating circumstances improperly limited the jury's consideration to those mitigating circumstances listed in the statute. That was error. Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981).

The Trial Court's comments (T.628-629), reveal that he labored under the mistaken belief that he was required to impose the death penalty and that he was precluded from considering any non-statutory mitigating evidence. That was error. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, ___ U.S., 50 U.S.L.W. 4161 (1982).

Even if the Trial Court did consider statutory and non-statutory mitigating evidence, it cannot be discerned from his "findings." (T. 628-629). The Defendant is entitled to a new sentencing hearing. Magill v. State, 386 So.2d 1188, 1191 (Fla. 1980); Moody v. State, supra, at 995.

Finally, the State asserts that there were two properly found statutory aggravating circumstances. Presuming arguendo that the State is correct, those two circumstances were obtained through the Defendant's confession, which, as fully set forth in Point III of the Defendant's main brief and in Point III, supra, illegally was obtained and should have been suppressed. Thus, there were no properly established statutory aggravating circumstances.

G

THE TAINTED JURY RECOMMENDATION PRECLUDES REVIEW OF THIS DEATH SENTENCE.

The State has not responded to the Defendant's argument. The Defendant assumes that the State agrees with his position.

Additionally, the Defendant adopts his argument under Subpoint B, C, D, E, and F, of Point IV, supra.

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.

The State totally and completely misses the point.

The issue is not whether or not a defendant knows of "information" used by a trial court in imposing a death sentence. Rather, the clear requirement is that notice must be given to a defendant that the "information" will be used and he must be given an opportunity to confront the "information", to cross-examine witnesses, if there are any, and to present evidence in rebuttal. As this Court held in Porter v. State, 400 So.2d 5, 7 (Fla. 1981):

> "...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." (Emphasis Added)

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.[34/] During his verbal "findings", during the sentencing, 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)

34/Presuming arguendo that this "information" was admissible for any reason whatsoever.

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)

Moreover, the State's assertion that the Defendant "knew" of these matters is incorrect. The robbery charge was dismissed and, in any event, it was merely an allegation, for which the Defendant must be presumed innocent, and, therefore, presumably he knew nothing of it. The "suggestion", made by some unknown party or attorney, during some unspecified "preliminary negotiations", most respectfully, is not only beyond the knowledge of the Defendant, it also had to be beyond the knowledge of the Trial Court.

The Trial Court's actions clearly run afoul of Porter, Gardner v. Florida, 430 U.S. 349 (1977), and Spaziano v. State, 393 So.2d 1119 (Fla. 1981), and, because of this 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 PRE-SENTENCE INVESTIGATION.

The State has not responded to the Defendant's argument. The Defendant assumes that the State agrees with his position.

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.

The State's silence concerning the cases cited by the Defendant

speaks volumes.

The State's argument that the various veniremen were properly excused is absolutely incorrect.

The failure of the Defendant's trial counsel to object to the excusal of many of the jurors does not preclude review by this Court. A Witherspoon violation taints a jury at least to the same degree as does the admission of evidence of non-statutory aggravating circumstances. The propriety of the admission of evidence of non-statutory aggravating circumstances is open to review by this Court, even in the absence of an objection by a defendant's trial counsel, particularly when the jury is impaneled only for the purpose of recommending a sentence. Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977).

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.

The Defendant replies to the State's defense of the unconstitutional and reprehensible practice of utilizing peremptory challenges to exclude prospective black jurors simply by saying that if the State desires to defend this pernicious practice, the shame is its.

This Court must end this pernicious practice of the Dade County State Attorney's office. The Defendant's death sentence must be reversed and he must be given a new sentencing hearing before a new jury.

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 impaneled 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 19 day of May, 1983, to: Carolyn M. Snurkowski, Assistant Attorney General, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128.

By: LOUIS M. JEPEWAY, JR.
LOUIS M. JEPEWAY, JR.