IN THE SUPREME COURT OF FLORIDA

GREGORY MILLS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 59,140

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

BARBARA ANN BUTLER
ASSISTANT ATTORNEY GENERAL

125 No. Ridgewood Ave.
Fourth Floor
Daytona Beach, FL 32014
(904) 252-2005

COUNSEL FOR APPELEE

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

TABLE OF CITATIONS

AUTHORITIES CONT.

CASES — Page

AUTHORITIES CONT.

CASES — Page

AUTHORITIES CONT.

CASES — Page

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

GREGORY MILLS, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 59,140

ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Appellant was the defendant and Appellee the prosecution in the Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida. In this brief the parties will be referred to as they appear in Appellant's initial brief. The symbol "R" will be used to refer to the pages of the Record on Appeal. The symbol "A" will refer to the pages of the Supplemental Record on Appeal filed on July 21, 1980. The symbol "B" will refer to the pages of the second Supplemental Record on Appeal filed September 22, 1980.

STATEMENT OF THE CASE AND FACTS

Appellee hereby accepts Appellant's Statement of the Case. The Statement of the Facts is accepted with the following additions:

Vincent Ashley, testified that he had known Appellant for eight or nine years (R-239). On the evening of May 24, 1979 he and Appellant were drinking together in the Deluxe Bar until approximately 1:30 p.m. or 1:45 p.m. (R-244). As they were leaving the Deluxe Bar the two agreed to commit a burglary that evening (R-245). They got on their bicycles and proceeded to Appellant's house located on Locust Avenue in Sanford, Florida (Id.). They stayed there approximately forty-five (45) minutes conversing with Sylvester Davis and Viola Mae Stafford (R-240-241). When it came time to leave, Ashley testified he and Appellant left the house together and prepared to ride away on their ten-speed bicycles (R-241). However before getting on his bike, Appellant went back inside his house. Ashley waited outside and within a few minutes Appellant came out again carrying a shotgun (R-242). Appellant placed the shotgun cross-wise across the handlebars of his bicycle and the two left Locust Avenue headed toward a white neighborhood (R-243). Ashley testified that there was no prior discussion as to the specifics of the burglary other than a general decision to rob some place or to break into somebody's house (R-244). The Wright residence on Ellicott Street was selected for no reason other than its perceived accessibility as Ashley and Appellant walked their bi-

cycles down the sidewalk (R-264, 246). Ashley held the gun while Appellant took the screen off a front window and crawled inside (R-247). Ashley handed the gun to Appellant through the window and entered the house. Ashley remained in the room of entry while Appellant went into the livingroom (R-248). Ashley testified that from his vantage point he could see into the livingroom and beyond into the adjoining bedroom (R-249, 250). He saw an old man getting up out of the bed (R-249). Unable to alert the Appellant, Ashley quickly retreated out the entry window (Id.). However not wanting to leave Appellant behind, Ashley stopped approximately twenty-five (25) or thirty (30) yards beyond the house (R-250). He heard a shot from inside the house (R-251). Not knowing whether the old man or Appellant had been shot, Ashley ran back to the window (Id.). Through the window he saw the old man and heard him curse in a mumbling manner (R-251-252). Still frightened , Ashley again started to run from the house. This time he encountered Appellant approximately half way the distance between the tree and the house (Id.). Appellant was still carrying the shotgun (R-253). Ashley testified the two got on their respective bicycles and left in separate directions: Ashley departing to the right and Appellant toward the left (Id.).

Appellee hereby accepts the remainder of Appellant's Statement of Facts as presented in Appellant's brief. This acceptance is for the sole purpose of discussion of the points

raised on appeal. Certain clarifications and additions will be presented where relevant in Appellee's argument.

POINT I

THE DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL ARISING FROM AN ALLEGED CONFLICT OF INTEREST WHEREIN DEFENDANT'S COUNSEL, THE PUBLIC DEFENDER'S SERVICE, HAD EARLIER REPRESENTED THE STATE'S KEY WITNESS AND HAD ACCESS TO ALLEGED PRIOR IMPEACHING STATEMENTS (RESTATED).

ARGUMENT

On June 20, 1979 Appellant was arrested and charged in the instant case. The following day, on June 21, 1979 the first appearance in the instant cause was held and the public defender service was appointed to represent Appellant (R-526-527). At approximately the same time the state's witness, Vincent Ashley was arrested on a robbery charge and a subsequent violation of probation stemming from that robbery. The public defender service was appointed to represent him (R-270). In the course of that representation, Mr. Ashley made certain statements to Mr. Scarpello, an investigator with the public defender service, concerning those offenses and the instant case as well (R-270-272).

Subsequent to this conversation and upon further investigation, the office of the public defender moved to withdraw from representation of Mr. Ashley. The trial court granted the motion and appointed Mr. Jim Weart as court appointed counsel for Vincent Ashley (R-271). Mr. Weart continued to represent

Mr. Ashley from that point and was his attorney at the time of trial in the instant cause (Id.).

Appellant would have this Court believe, and indeed has alleged, that he was denied effective assistance of counsel due to an existing conflict of interest between representation for Vincent Ashley and himself. Appellant relies upon the recent case of Foster v. State, 387 So.2d 344 (Fla. 1980) for the proposition that dual representation is improper. In Foster, a private attorney was appointed to represent the husband and the wife in murder proceedings. At the husband's trial, the wife appeared and was questioned by her husband's attorney, who was also her own attorney. On cross-examination the attorney brought out that the wife had been charged in the incident, that charges were currently pending against her, and that he was in fact her attorney. The court reversed the conviction and ordered a new trial holding that the trial court committed error in initially making a joint appointment under the circumstances and further error was created when the trial court allowed the joint representation to continue. The court found conflict apparent at the time of the appointment and determined that the conflict became more substantial as the case continued.

The facts in the instant case are easily distinguishable. Here the public defender service was appointed to represent two indigent clients in two unrelated matters. Unlike Foster, there was no initial conflict apparent. Furthermore, joint representation was not allowed to continue in the instant

cause. Upon its own motion, the public defender service was allowed to withdraw and private counsel appointed to represent Vincent Ashley. The representation did not continue until the time of trial as it did in Foster.

Appellant also relies on the case of Olds v. State, 302 So.2d 787 (Fla. 4th DCA 1974). While the factual situation in Olds is more analogous, it does not involve an attorney-client privilege. In Olds, the public defender service represented the defendant in a homicide trial and had formerly represented the state's star witness. Through this representation, the public defender was aware of certain statements made by the former client which he sought to use for impeachment purposes. The statements in Olds however were not privilege communication between an investigator and a client. They were statements made by the witness in the presence of third party and were matters of public record. No valid attorney-client privilege existed concerning the statements.

The Fourth District Court of Appeal in Olds, supra, found no per se conflict in situations where defense counsel had previously represented a client who is called as a state witness and testifies against a current client. However the court stated that under certain circumstances potentially impeaching information received by an attorney during a prior representation could create a conflict in which the continued representation of a current client would be impermissible. Id. at 792.

Appellant advocates this logic in the instant cause. We fail to see the merit in this argument. It would require the

public defender to withdraw from representation of Appellant. Even then, private counsel could not inquire as to the alleged inconsistent statement. Those communications are protected by an attorney-client privilege. Vincent Ashley chose to exercise that privilege. Hence questions were impermissible on the issue whomsoever represented Appellant.

We submit that the record on appeal is dispositive of this issue:

> Q. You were out exercising?
>
> A. Yeah.
>
> Q. Went out to Midway and you decided to ride around some more?
>
> A. Yes.
>
> Q. Remember talking to Mr. Scarpello about this?
>
> MR. MARBLESTONE: I'm going to object, Your Honor. May we approach the bench?
>
> (Whereupon, a discussion was had out of the hearing of the Court Reporter.)
>
> THE COURT: Let the Jury be excused just for a minute, please.
>
> In fact, I think I'm going to let the Jury be excused for lunch. So, by the time we come back. . .so, ya'll be excused. Do not discuss the case among yourselves or with anyone and be back about one o'clock.
>
> (Whereupon, the Jury leaves the Courtroom.)
>
> THE COURT: All right.
>
> MR. MARBLESTONE: Your Honor, my objection is an objection that was raised before on the deposition of Mr. Ashley. He's talking about certain verbal and written statements that may or may not have been

made to Mr. Scarpello who is an investigator with the Office of the Public Defender.

At that time, Mr. Ashley was represented by the Public Defender on a robbery charge and a violation of probation charge stemming out of that robbery, and it's my contention I think the Court has previously ruled that this would be an invasion of the attorney-client privilege which applies to all members of the law firm whether it's a Public Defender firm or private concern, and its investigator and/or personnel.

Subsequent to the Court ruling in that deposition, Mr. Jim Weart, representing Mr. Ashley, has conferred with him and has indicated to me that upon his investigation, he would be recommending that his client not breach that attorney-client privilege and he invokes that that should be done out of the presence of the Jury as the Court has done.

If we need to get Mr. Weart over here, we can do that.

THE COURT: Well, of course, it's a right that's not privileged to Mr. Weart, but privileged to the witness and if the witness wants to testify as to what he told the investigator, he can. Of course, it's a privilege.

MR. MARBLESTONE: Could the Court inquire of the witness what he wants to do based upon his consultation with his lawyer, whether he wants to say what he told Mr. Scarpello, or whether he wants to invoke the attorney-client privilege?

MR. GREEN: Your Honor, I think that the Jury ought to be able to hear. If he doesn't want to say what he said to Mr. Scarpello, let him invoke the privilege himself.

MR. MARBLESTONE: It's not probative of anything because then Scarpello can't testify.

THE COURT: No, that would be --

MR. MARBLESTONE: Razing a strawman.

THE COURT: That would be an improper way.

Do you want to tell the Jury. . .answer the question as to what you told the investigator for your attorney? I mean, it's up to you. If you want . . .you have a right to testify or not testify as to what you told your attorney.

MR. MARBLESTONE: Your Honor, I would ask, you know, before he makes any decision he be allowed to consult with his attorney.

THE COURT: Probably should. I don't know.

MR. MARBLESTONE: Possibly during the recess he could consult with his attorney.

THE COURT: May have to do that because he might be testifying to something that might hold him responsible for some other crime. I don't know what he told Mr. Scarpello.

MR. GREENE: Just concerning this specific case. I'm not talking about everything under the sun.

THE WITNESS: He talking about what I told Scarpello about this murder charge? Yes, I don't mind answering that.

THE COURT: All right, fine.

MR. MARBLESTONE: Judge, I'd still ask that he have the opportunity to consult with Mr. Weart before he goes on record and makes a final decision.

THE COURT: Well, he can talk to Mr. Weart.

MR. MARBLESTONE: I mean, as long as we're taking a lunch recess, anyway.

THE COURT: Fine. Mr. Weart -- where is he at? Is he here? He was here earlier.

MR. MARBLESTONE: He's in and around the Courthouse, somewhere.

THE COURT: Because Mr. Weart. . .was he acting as private or public defender?

MR. MARBLESTONE: He's specially appointed public defender.

THE COURT: All right. Well, we can see during the lunch hour or before one o'clock if we can or at one o'clock.

All right. Court will be in recess until one o'clock.

(Whereupon, a luncheon recess was had. After which, the proceedings resumed as follows:)

THE COURT: Mr. Weart, did you converse with your former client?

MR. WEART: Yes, Your Honor, I did. As a matter of fact, I'm still actively representing him.

THE COURT: You're still --

MR. WEART: Yes, sir. I'm still representing him because there are some other outstanding charges.

Your Honor, would you like for me to put on the record what --

THE COURT: Yes, if you would, please.

MR. WEART: All right.

THE COURT: Mr. Weart informs me that he's conversed with his client, the present witness testifying. Go ahead.

MR. WEART: Your Honor, at this time, I would announce to the Court that it is Mr. Ashley's decision that he invoke the privilege in that the matters that he discussed with Mr. Scarpello were discussed under the attorney-client privilege umbrella at the time, and that Mr. Scarpello was an investigator of the Public Defender's Office and these things were said in strict confidence.

THE COURT: All right. You were representing him at that time or who was?

MR. WEART: No. The Public Defender's Office was representing him.

THE COURT: At that time?

MR. WEART: Yes, sir, and then they withdrew subsequent to that time and I was appointed.

. . .

(Whereupon, the witness was returned to the witness stand.)

THE COURT: Have you spoken with your attorney during the lunch hour, Mr. Weart?

THE WITNESS: Yes.

THE COURT: All right. Now, the question is, do you desire at this time to answer any questions concerning any statements that you made to Mr. Scarpello at the time that the Public Defender was representing you and he was an investigator for the Public Defender?

THE WITNESS: No.

THE COURT: All right. So, we won't go into that area of any statements made to Mr. Scarpello for the Public Defender's Office.

(R-269-275).

In conclusion Appellee submits that although the Public Defender's Office for a short time represented both Vincent Ashley and Appellant, this representation was terminated upon realization that a potential conflict of interest did exist. The public defender service acted in an expeditious manner in withdrawing from representation of Vincent Ashley. Therefore, this case does not fall into the category of impermissible dual

representation. Appellant was not deprived of effective assistance of counsel based on the former representation of Vincent Ashley by the Public Defender's Office. Moreover, questions concerning Ashely's communications with prior counsel were impermissible regardless of Appellant's representation.

POINT II

THE TRIAL COURT DID NOT ERR IN PRECLUDING IMPEACHMENT OF THE STATE'S KEY WITNESS BY AN ALLEGED PRIOR STATEMENT PROTECTED BY AN ATTORNEY-CLIENT PRIVILEGE.

ARGUMENT

Florida law recognizes that certain catagories of relevant evidence may not be used at trial because to allow otherwise would interfere with interest and relationships of special social importance. Among those recognized privileges is the privilege that protects the confidentiality of communications between attorneys and their clients. The privilege belongs to the client and covers confidential conversations held in the course of a professional relationship.

In the instant case Vincent Ashley chose to exercise his attorney-client privilege at trial when questioned on an alleged prior inconsistent statement made to an investigator employed by his former attorney, the Office of the Public Defender. Appellant sought to impeach the credibility of this witness through the use of the prior inconsistent statement. On appeal Appellant claims the trial court erred in precluding this impeachment on the basis of an attorney-client privilege. He argues that his fundamental right to confront, cross-examine and impeach witnesses denied by the trial court. Appellee respectfully disagrees.

While the right to cross examine witnesses is a fundamental right, it cannot be construed as suggesting that the scope of cross-examination is totally without bounds. Coxwell v. State, 361 So.2d 148, 152 (Fla. 4th DCA 1978). The attorney-client privilege is firmly established in the law of this state. Keir v. State, 11 So.2d 886 (Fla. 1943).

Admittedly the privilege is not absolute. Sepler v. State, 191 So.2d 588 (Fla. 3d DCA 1966). However, when deciding whether the attorney-client privilege is to be respected or outweighed by public interest in the administration of justice, the trial court must balance the competing interests and the circumstances involved. On one hand is the attorney and client and their right to the protection of the privilege. On the other is the public and the state and corresponding interest in the proper administration of law and justice.

Appellant argues that the instant case is a situation in which the interest of justice must prevail over the sanctity of the attorney-client privilege. Appellant makes an emotional argument, but there is no basis for this assertion. The record on appeal is completely silent as what Ashley told Investigator Scarpello. Appellant alleges these statements are inconsistent with statements made by Ashley to police officers on the early morning of May 25, 1979. However, this Court is without sufficient information, as was the trial court, to evaluate Appellant's assertion.

Appellant offered no proffer at trial as to the

silent as what Ashley told Investigator Scarpello. Appellant alleges these statements are inconsistent with statements made by Ashley to police officers on the early morning of May 25, 1979. However, this Court is without sufficient information, as was the trial court, to evaluate Appellant's assertion.

Appellant offered no proffer at trial as to the content of the privileged communications. Likewise, Appellant did not object when Ashley exercised the privilege thereby refusing to answer the questions propounded. Appellant entered no objection before the trial court and no argument was made as to whether the competing societal interest in the proper administration of justice were sufficient to override the attorney-client privilege. The burden is clearly on the parties seeking disclosure to produce evidence that the communication is either not privileged, or in the alternative, the interest of the proper administration of law and justice exceeds that of the privileged communication. Leithauser v. Harrison, 168 So.2d 95 (Fla. 2d DCA 1964).

We submit that Appellant has not met his burden under the Florida Contemporaneous Objection Rule and the point of error has not been preserved for appellate review. United States v. Jones, 554 F.2d 251 (5th DCA 1977), Castor v. State, 365 So.2d 701 (Fla. 1978), Phillips v. State, 351 So.2d 738 (Fla. 3d DCA 1977).

POINT III

THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY IN EVIDENCE OF GUNSHOT RESIDUE TESTS. (RESTATED)

ARGUMENT

Appellant has designated three (3) separate arguments under this issue. Each argument is without merit. However Appellee will address each separately.

A. The Gunshot Residue Tests Were Sufficiently Reliable And Hence The Results Were Admissible.

Evidence concerning the gunshot residue analysis, more specifically atomic absorption spectrometry, was admitted through the testimony of Robert Kopec. Mr Kopec is a microanalyst and forensic scientist with the Sanford Regional Crime Laboratory. (R-295-296) His credentials, to wit: formal educational background, training, experience, lecturing on a national basis, teaching, and publication of approximately fifteen (15) in scientific journals concerning forensic analysis, are above reproach. Mr. Kopec stated that he testified approximately five hundred (500) times as an expert witness in gunshot residue analysis in state, local, federal, district and circuit courts in forty seven (47) of the United States. (R-296-298)

Mr. Kopec testified that over a five (5) year period he had performed in excess of a hundred thousand (100,000) analyses. (R-297-298) A majority of these were made by atomic absorption spectrometry. (R-299-302) Mr. Kopec was accepted

in the instant case as an expert in the field of forensic science, specifically gunshot residue analysis, without objection by Appellant. (R-298-299). Mr. Kopec's testimony provided a learned and informative explanation of atomic absorption spectrometry. (R-299-303).

Appellant interposed an objection to testimony concerning the quantitative results of swabs submitted to Mr. Kopec for analysis. The proffered ground was that no predicate had been offered that tests performed were admissible in court. (R-304). This vague objection was overruled by the trial court. (Id.) The objection at trial was insufficient under Florida's Contemporaneous Objection Rule and failed to alert the trial court to the challenge that Appellant now raises on appeal. Castor v. State, supra; Phillips v. State, supra; United States v. Jones, supra. The question of reliability and exceptance within the scientific community was not properly raised by Appellant at trial and is therefore not properly preserved as an issue on appeal. We submit the issue is not properly before this Court.

In Coppolino v. State, 223 So.2d 68 (Fla. 2d DCA 1968), the Court states:

> [T]he rule in Flroida [is] that the trial judge enjoys wide discretion in areas concerning the admission of evidence and that his ruling on admissibility of evidence will not be disturbed unless an abuse of discretion is shown. Mutual Life Insurance Company of New York v. Bell, et.al., 3 So.2d 487 (1941).

Id. at 70.

Appellant has offered no authority which states that gunshot residue tests in general, and atomic absorption spectrometry as a specific, are inadmissible in a court of law. The failure to object and lack of notice to the trial court coupled with Appellant's extensive cross-examination of expert Kopec is, we submit, conclusive on the issue raised by Appellant.

> Q. This particular kit that has been given to you here and marked as ... this is State's Exhibit G for identification, are you familiar with this particular brand of kit?
>
> A. Yes, I am.
>
> Q. Is this kit normally used for a process called neutron activation analysis?
>
> A. Yeah. This kit is designed by Surgy is used to collect gunshot residues. I think I said that before. Now, these gunshot residues can be analyzed with this kit by two methods, one of them being neutron activation analysis which relies upon your radiating these in a neuclear furnace. Then, we can analyze for the barium and antimony, and it can also be used for analysis by atomic absorption, the technique that we now use, and most of the laboratories do this type of analysis throughout the world. There remains, at this time, only one laboratory that still uses neutron activation analysis. So, it is used for both types of tests.
>
> Q. Okay. Is the equipment necessary for neutron activation analysis considerably more expensive than that used in the atomic absorption test?
>
> A. Yes, it is. It requires the nuclear or radioactive pill. It involves extremely rigorous safety procedures, as you could expect anytime you work with radioactive materials, and the

test is, in fact, much more expensive.

Q. Okay. Is it also about ten times more sensitive than the tests that you use?

A. The neutron activation analysis and atomic absorption test, at one time when the atomic absorption was first being developed, the atomic absorption was not as good as the neutron activation analysis. However, in the last five or ten years, atomic absorption has been revolutionized by the technique of flameless atomic absorption, the one that we use, and at the present time for the elements of barium and antimony, flameless atomic absorption is just as sensitive as neutron activation analysis." (R-314-316).

Under these circumstances we submit that the burden is not with the State, but with Appellant. The presumption of reliability is rebuttable. As the court stated in State v. Bender, 382 So.2d 697 (Fla. 1980):

> [A] defendant may in any proceeding attack the reliability of the testing procedure, the qualifications of the operator, and the standards established in the zones of intoxication levels. In addition, other competent evidence may be presented to rebut the presumptions concerning whether the person was under the influence of alcoholic beverages to the extent that his or her normal facilities were imparied.

Id. at 699.

We submit the Bender rationale is applicable here. Appellant could have specifically objected to the reliability of the testing procedures, but did not. Appellant could have specifically objected to the qualifications of the microanalysist,

but did not. Through Appellee's witness list, Appellant was on notice prior to trial that Robert Kopec would offer expert testimony on this issue. Appellant could have offered other competent evidence to rebut the presumption of the reliability of the test or the manner in which the tests were taken, but he did not. Appellant could have called his own expert witness(es), but he did not.

Testimony concerning gunshot residue tests was not improperly admitted into evidence. The weight to be given the expert's testimony was entirely within the purview of the jury.

Appellant also challenges the qualification of the police officer Steve Harriett, Crime Scene Technician for the Sanford Police Department. Testimony was elicited from Officer Harriett who administered the test to Vincent Ashley and Appellant. Appellant did not object to the officer's qualifications or the methods used in taking the samples at trial. Indeed Appellant did not even cross-examine Officer Harriett. (R-295). We submit Appellant's argument is without merit and is not properly preserved for appeal. Appellee relies upon the argument submitted supra.

B. The Gunshot Residue Tests Do Not Fall Within The Provisions Of Florida Evidence Code Section 90.403 Which Covers Inconclusive, Confusing And Misleading Evidence.

Again Appellant attempts to raise an issue on appeal which was never properly before the trial court. We submit this argument is improper and is without merit.

Appellant attempts to label testimony concerning the gunshot residue tests as "inconclusive", "confusing", and "misleading". As a basis for these allegations, Appellant relies upon the "unreliability" and "inconclusive nature" of gunshot residue test results. However Appellant has not proven the test results to be unreliable or inconclusive. In fact, the converse is true. Microanalyst Robert Kopec testified at trial during the motion to suppress the gunshot residue test as follows:

> Q. How long has that belief been known in the scientific community?
>
> A. At least four years.
>
> Q. So, it's a matter of common knowledge?
>
> A. Yes. This is a common knowledge, and we instruct police officers in the technique of gunshot residue, we make them aware that the test must be done as soon as possible after the firing in order to make the test affective.

(R-166). Expert Kopec was testifying as to the time frame for loss of gunshot residue due to normal activities. He stated the loss was extremely high in the first hour and approximately ninety per cent (90%) of the gunshot residue is lost in the first hour. As time passes, light percentages of gunshot residue are removed from the hands at approximately the ninety percent rate of the first hour so that by the time the fourth to sixth hour is reached, all gunshot residue is reduced by normal activity. (R-165-166).

Therefore testimony elicited concerning residue tests taken from Appellant and Vincent Ashley approximately two hours after the alleged incident cannot be labeled "inconclusive", "confusing" or "misleading".

C. Testimony And Evidence Concerning The Gunshot Residue Test Of Appellant Were Not Improperly Admitted In Rebuttal.

At trial the court granted Appellant's motion to suppress Appellant's tests during the state's case-in-chief. (R-174). The basis was the court's ruling that Appellant had not voluntarily submitted to the residue test. During the defense presentation, Appellant took the stand and denied that he had handled or fired a firearm during the evening of May 24, or the early morning of May 25, 1979. (R-348,349). During rebuttal Appellee presented the testimony of Steve Harriett who administered the gunshot residue test to Appellant at approximately 4:00 a.m. on May 25, 1979, and testimony from Robert Kopec that he analyzed that test.

Involuntarily obtained evidence may be used for impeachment purposes where it appears that the defendant has committed perjury on the witness stand. Dornau v. State, 306 So.2d 167 (Fla. 2d DCA 1975), Walder v. United States, 347 U.S. 63 (1954), Harris v. New York, 401 U.S. 222 (1971), Franks v. Delaware, 438 U.S. 154 (1978).

On this issue the United States Supreme Court stated in Walder v. United States, supra:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment.

Id. at 65.

The Supreme Court further stated in Harris v. New York, supra,:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. [Citations omitted]. Having voluntarily taken the stand, Petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize traditional truth-testing devises of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury in the way of cross-examination and impeachment.

Id. at 225-226.

We submit that it was proper to impeach Appellant during rebuttal with testimony of an involuntarily obtained gunshot residue test.

POINT IV

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT AS THE INDICTMENT WAS LEGALLY SUFFICIENT TO PROPERLY AND ADEQUATELY CHARGE THE OFFENSES OF BURGLARY AND FELONY MURDER. (RESTATED)

ARGUMENT

Appellant claims the charging indictment is insufficient to fully apprise him of the crime with which he was charged. (See Appellant's brief page 30) He specifically alleges that the indictment failed to allege the entry was made with the intent to commit a specific offense therein. (Id.) We submit the indictment is legally sufficient. If fault exists in the charging instrument, it is that the indictment is overly broad and alleges Appellant's intent to commit several specific offenses. (See Points VI and VII, infra.)

Appellant filed a pre-trial motion to dismiss the indictment on July 18, 1979 (R-556-557). The motion was heard and denied by the trial court on July 31, 1979 (B-18). Appellant claims the trial court committed reversible error. We disagree and state that Fla.R.Crim.P. 3.140(o) was not violated.

Rule 3.140 states as follows:

> (o) Defects and Variances. No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or neutra granted on account of any defect in the form of the indictment or information or of misjoiner of offenses or for any

> cause whatsoever, unless the court shall be of the opinion that the indictment or information is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense.

At the hearing on the motion to dismiss, and again in his appellate brief, Appellant fails to allege surprise at trial. Neither does he specifically state how the indictment impeded his preparation of a defense. Appellant fails to allege prejudice in any manner.

It is interesting that in addition to the pre-trial motion to dismiss the indictment, Appellant filed a statement of particulars pursuant to Fla.R.Crim.P. 3.140(n) on June 27, 1979 and an amended motion for statement of particulars on July 18, 1979 (R-530, 551-552). In the amended motion Appellant alleged the indictment was "so vague, indefinite, and indistinct, that it tends to expose defendant, after conviction or acquittal herein, to substantial danger of a new prosecution grounded on the same facts, and without particulars requested herein, the defendant is hindered in his preparation of a defense to the charge, which carries the death penalty as a possible punishment." (R-551) Appellant continued to enumerate the particulars requested, but at no time did he request clarification of the specific offenses for which he was charged. Likewise, Appellant did not allege an inability to prepare for trial, prejudice or impediment to preparation of a defense.

Accordingly, we submit that Appellant's argument on this point is frivilous.

POINT V

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR NEW TRIAL ON THE GROUNDS THAT THE VERDICTS WERE CONTRARY TO THE WEIGHT OF THE EVIDENCE. (RESTATED)

ARGUMENT

Appellant claims in this argument that the convictions were contrary to the weight of the evidence presented at trial. He states that the evidence against him was totally unreliable and unworthy of belief. Appellant bases this allegation on the fact that witnesses who testified against him received immunity from prosecution for their testimony. For that reason Appellant claims the testimony is tainted.

Appellant particularly condemns the testimony of Vincent Ashley. He charges that Ashley fabricated testimony in an effort to save himself. (See Appellant's brief page 34.) Appellant claims that "in light of other evidence," Ashley's testimony is totally unworthy of belief. We do not know to which "other evidence" Appellant refers, but submit that the reliability of the testimony and the veracity of the witness were issues within the purview of the jury. Moreover, upon a verdict of guilty, those facts must be viewed in a light most favorable to the state.

Appellant cites Tibbs v. State, 337 So.2d 788 (Fla. 1976) in urging this Court to review the weight of evidence and credibility of witnesses. The factual circumstances in Tibbs were strikingly different than those in the instant cause. Tibbs

was charged with rape, premeditated murder and felony murder arising from an incident in which a pair of hitchhikers was picked up by a man driving a green truck. One was raped; the other murdered. At trial testimony came from the seventeen year old rape victim. There was no corroborating evidence. This Court held: that except for the conflicting testimony of the victim, not one shred of evidence was developed to place the defendant in the area at any time, much less on or near the date of the crime; that no trace was ever found of the truck which the victim stated was driven by the defendant when she and the other victim were picked up and taken to the scene of the crime; that no gun or car keys were ever found in defendant's possession, at the scene of the crime, or elsewhere; and that no evidence was presented to impune defendant's veracity. Also uncontraverted was evidence that the defendant was on the other side of the state the morning before the crime. He possessed, nor had the use of, a vehicle at that time or at the time of his arrest. Testimony was also offered by defendant's jail mate, who himself was serving a life sentence for rape, to the effect that defendant confessed to the crime while he was in jail. This Court declined to give credence to that testimony as it appeared to be the product of purely selfish considerations. We are not privy to the basis for this conclusion.

The foregoing, coupled with the defendant's full cooperation with police officers, so totally outweighed the victim's believability that this Court concluded that the evidence relied on was insufficient to identify Tibbs as the perpretator

of the crime. Appellant would have this Court believe that the testimony of Vincent Ashley and Sylvester Davis, should be excluded under this rationale. We submit the logic is inapposite to the instant case.

Although damning testimony was elicited from a co-perpretator of the crime, this testimony was not uncorroborated. Sylvester Davis gave testimony which was not inconsistent to Ashley's testimony. In fact, Davis' testimony supported and verified Ashley's testimony.

At trial Appellant sought to cast dispersion upon each witness both in argument and during cross-examination. Appellant claimed a conspiracy existed to frame him for a crime he did not commit. He also claimed that Vincent Ashley had committed the crime himself and sought to hang the blame on Appellant.

It is indeed unfortunate that the majority of the testimony in this case came from less than desirable individuals, from admitted thieves, however, this alone does not render coorborating testimony unreliable and unworthy of belief. It was a question properly presented to the jury. Appellee submits the jury's decision on the matter was proper and final.

In addition to the foregoing, ample incriminating evidence was adduced at trial. Sylvester Davis testified that shortly after the incident Appellant confessed that he had "shot some cracker". (R-106) Davis also testified that Appellant hid the weapon and planned for his sister to pickup and remove the shotgun (R-109). Davis further testified that Appellant expressed an intent to go to the place where the gun was hidden and remove

the fingerprints. Appellant then left the house and when he returned he stated that he had removed the fingerprints (R-107-108). Sylvester Davis also offered testimony concerning the shotgun shells and was instrumental in assisting police in the recovery of those shells (R-109, 117). He testified that Appellant awakened him in the early morning of March 25, 1979 by hollering and stated, "Sly, come out here and tell the policeman I been down there at the hospital about a toothache." (R-104) Davis testified that he conveyed this information to Detective Bronson. (Id.)

Gloria Robinson, a city worker, testified that on May 25, 1979 she found a shotgun hidden in the bushes (R-77). During the time the police were at the scene retrieving the gun, Miss Robinson observed an automobile drive by slowly and stop. She recalled the letters "VM" on the passenger side of the vehicle (R-181-183). She testified there was no commotion and the street was not blocked and yet the car stopped and backed up and remained in the area (R-85-86).

Vivian Mills, Appellant's sister testified through deposition that on May 25, 1979 she was in the area at the time the shotgun was found (R-177). She further testified that her boyfriend owned, and she used, a vehicle bearing the initials "VM" on one side and "MS" on the other.

Technician Steve Harriett testified that he administered a gunshot residue test to Appellant at approximately 4:00 a.m. on May 25, 1979. Robert Kopec testified that he analyzed

this test by means of atomic absorption spectrometry and the results were: .05 micrograms of antimony from Appellant's left palm; .07 micrograms atimony from his right palm; and small indications of antimony on the backs of Appellant's right and left hands (R-384).

Appellant took the stand himself (R-376) and presented an alibi defense (R-338-376). On cross-examination he stated, inter alia, that he would lie to get himself out of the electric chair (R-375).

As the foregoing indicates, Appellant's conviction is not based "entirely," as alleged, on unreliable evidence and testimony which is unworthy of belief. The conviction is properly supported by evidence notwithstanding Appellant's argument to the contrary.

POINT VI

WHETHER THE TRIAL COURT ERRED IN CONVICTING APPELLANT OF FELONY MURDER AND THE UNDERLYING FELONY BURGLARY AND AGGRAVATED BATTERY? (RESTATED)

ARGUMENT

Appellant was charged with felony murder, in violation of Florida Statute 782.04(1); burglary of a dwelling, in violation of Florida Statute 790.011(6); and of aggravated battery in violation of Florida Statute 784.45(1)(b), 790.001(6), and 775.07(2). R-483-484) The trial court instructed the jury on each charge (R-449 et seq) and the jury returned a verdict of guilty on each charge (R-619-621).

We would submit that at no time did Appellant move to dismiss the indictment on Counts II and III for the reasons stated herein. However Appellee would point out that neither defense counsel or the trial court had benefit of this Court's opinion in State v. Pinder, 375 So.2d 836 (Fla. 1979) at the time of the August 16 and 17, 1979 trial date. Pinder, which became effective only after the October 31, 1979 rehearing denial, holds that a defendant may not be convicted of both felony murder and the underlying felony where the underlying felony is an element of the offense felony murder. See also McRae v. State, 383 So.2d 289 (Fla. 2d DCA 1980).

POINT VII

WHETHER THE TRIAL COURT ERRED IN ADJUDICATING THE DEFENDANT GUILTY OF BOTH MURDER AND AGGRAVATED BATTERY WHERE THE AGGRAVATED BATTERY WAS A LESSER OFFENSE OF THE MURDER? (RESTATED)

ARGUMENT

For this position Appellee relies on the argument and case law propounded under Point VI, supra.

For clarification Appellee points out that while the record on appeal contains a judgment of conviction and imposition of sentence for Count II-burglary of a dwelling (R-644) and Count III-aggravated battery (R-645), the sentencing transcript (R-892-939) contains no reference to judgment and sentence on either of the two charges. Therefore we are without benefit of the trial court's reasoning in sentencing Appellant for the offenses of burglary and aggravated battery.

POINT VIII

APPELLANT'S DEATH SENTENCE WAS PROPERLY IMPOSED OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT. (RESTATED)

ARGUMENT

A sentencing hearing in the instant cause was held on April 18, 1980. The jury recommendation previously entered during the penalty phase of the bifurcated trial was that the Appellant be sentenced to life imprisonment. (A-123). After testimony and argument presented at the hearing and upon consideration of the pre-sentence investigation report, the trial court found six (6) aggravating circumstances:

1. The murder was committed while Appellant was under sentence of imprisonment;
2. Appellant had been previously convicted of a violent felony: to with, aggravated assault;
3. Appellant knowingly created a great risk of death to many persons;
4. That the murder was committed during the course of a burglary;
5. The murder was committed for pecuniary gain;
6. The murder was especially heinous, atrocious, or cruel.

(R-639-642, 936-938) The Trial court considered the non-statutory mitigating circumstances presented by counsel as well as those promulgated in Florida Statute 921.141(6). Upon careful consideration, the court found there to be no mitigating circumstances in the instant cause. (R-641-642) Accordingly and in

full compliance with Florida Statute 921.141, the trial court then sentenced Appellant to death for the offense of felony murder. (R-937, 642-643).

A. Jury Recommendation

The importance of the jury recommendation cannot be overstressed. Its significance was explained in Tedder v. State, 322 So.2d 908 (Fla. 1975) wherein this Court stated:

> A jury recommendation under the trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Id. at 910. Appellee submits that the jury's advisory sentencing verdict carries great weight, but is not controlling. Gardner v. State, 313 So.2d 675 (Fla. 1975); Sawyer v. State, 313 So.2d 680 (Fla. 1975); Douglas v. State, 328 So.2d 18 (Fla. 1976); Dobbert v. State, 328 So.2d 433 (Fla. 1976); Barkley v. State, 343 So.2d 1266 (Fla. 1977); Hoy v. State, 353 So.2d 826 (Fla. 1977); Ross v. State, ___So.2d___, 1980 F.L.W. 299, 300 (Fla. No. 52,929, decided 6/12/89); McCrae v. State, ___So.2d___, 1980 F.L.W. 550 (Fla. No. 45,894, decided 10/30/80).

The trial court was privy to certain relevant aggravating circumstances discussed herein, infra, which were not before the jury. Those circumstances are so clear and convincing that virtually no reasonable person could differ with

the sentence imposed by this Court. Tedder v. State, supra at 910. We submit that the action of the trial court in overriding the jury's advisory sentence of life imprisonment is therefore proper. Appellee respectfully requests this Court to affirm the sentence of the trial court.

B. Aggravating Circumstances

(1) The capital felony was committed by a person under sentence of imprisonment. Florida Statute 921.141(5)(a). (R-935-936, 639).

Appellant argues that the trial court's finding of this circumstance is arbitrary and erroneous. We disagree. Appellant was sentenced in Case No. M-76-139-CFA for the felony offense of aggravated assault to the Department of Corrections for a period of five (5) years. Appellant was to serve three (3) years incarceration and two (2) years probation. He was released from the Department of Corrections on mandatory conditional release (MCR) on March 16, 1979. During the penalty phase of trial, Mr. John Rousch, a parole officer for the Parole and Probation Service, testified that Appellant came under his supervision on that day. (A-54) Parole Officer Rousch testified that mandatory conditional release was the same as parole.

> Q. And he came under your supervision after release from the Division of Corrections on March 16th of this year as what? What type of status did he have with your department?
>
> A. Mandatory conditional release. It's the same as parole. It just means that he's in there long enough to use up all but his game time effectively.

Q. What does that mean?

A. And then he . . . well, then, he's on parole. Well, he was on mandatory conditional release until September 3rd of this year [1979]. At which time, he would change to probation for two years.

Q. Okay. Probation was scheduled to begin when?

A. September 3, '79.

Q. And on May 25th of 1979, what would his status have been with your department?

A. He was under my supervision on mandatory conditional release at that time.

Q. As what? Parole or probation?

A. Well, as parolee.

Q. As parollee?

A. However, the probation is technically in affect at the same time.

Q. So, he was under both statuses then?

A. Under both, but we supervise him under whichever is the most serious, which is the parole.

(A-54-55).

Appellant argues that he was on probation at the time the murder was committed. Testimony of the parole officer clearly contradicts this contention. Mr. Rousch explicitly stated that probation was not to begin until September 3, 1979. The murder occurred on May 25, 1979.

Appellant argues that probation is not a "sentence of imprisonment", but rather an alternative to sentencing. However

Appellant ignores the recent decision of this Court in Peek v. State, ___So.2d___, 1980 F.L.W. 545 (Fla. No. 54,226, decided 10/30/80) in which the Court stated:

> Probation is a sentence alternative but is not generally considered to be a sentence of imprisonment. An exception arises, however, if the order of probation includes as a condition a term of incarceration and a capital felony is committed while the defendant is or should be incarcerated. We find that the phrase 'persons under sentence of imprisonment' includes (a) persons incarcerated under a sentence for a specific or indeterminate time of years, (b) persons incarcerated under an order of probation, (c) persons under either (a) or (b) who have escaped from incarceration and (d) persons who are under sentence for a specific or indeterminate term of years and who have been placed on parole.

Id. at 548. Appellant falls within the aforementioned category (d) pursuant to Florida Statute Section 944.291(1) and Williams v. State, 370 So.2d 1164 (Fla. 4th DCA 1979) the trial court properly considered this aggravating circumstance in reaching the sentence.

(2) The defendant was previously convicted of a felony involving the use or threat of violence to the person. Florida Stature 921.141(5)(b). (R-936-937, 639, 659).

Appellant was convicted in the Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida in Case No. M-76-139-CFA of the folony offense of aggravated assault in March of 1979. We reject Appellant's argument that the aggravated assault conviction should not be considered because Appellant did not commit the offense by means of a "knife,

gun, or other weapon of that sort". The trial court was fully apprised of the circumstances surrounding the aggravated assault. Testimony was presented concerning the offense during the penalty portion of the trial and Appellant's counsel at the sentencing hearing again raised the circumstances surrounding the conviction. (R-924-925) Thus the trial court was fully apprised of the circumstances. The court considered the act a serious crime of violence notwithstanding Appellant's efforts to portray it otherwise. The action of the trial court in considering the prior felony as an aggravated circumstance was entirely proper under Florida Statute 921.141(5)(b).

(3) The defendant knowingly created a great risk of death to many persons. Florida Statute 921.141(5). (R-640, 936-7).

The trial court's finding in support of this circumstance was that "the wife of the deceased victim was in the proximity of the deceased victim at the time that Mills shot him in their home and could have easily been hit by some of the blast of the shotgun". (R-640) This reasoning is insufficient to support the aggravating circumstance in light of this Court's opinion in Kampff v. State, 371 So.2d 1007 (Fla. 1979), and its progeny.

(4) The murder was committed while Appellant was engaged in the commission of a burglary. Florida Statute 921.141 (d). (R-640, 936-937).

In arguing that this aggravating factor must fall, Appellant propounds a constitutional argument in which he alleges

the impropriety of "routinely applying the underlying felony as an aggravating circumstance in felony murder situations." In so doing Appellant ignores the oft-stated reasoning of this Court. In Washington v. State, 362 So.2d 658 (Fla. 1978), this Court stated:

> Although it is true that in some instances the three analytical concepts [Subsection (d)-capital felony committed while defendant engaging in committing another felony; Subsection (f)-capital felony commited for pecuniary gain; and Subsection (e)-capital felony committed for the purpose of avoiding or preventing arrest] could combine automatically in described situations, we cannot say as in Provence that circumstance (e) always occurs in a robbery/murder-kidnapping/murder situation. For example, a homicide may occur in connection with robbery or kidnapping solely because the victim attempts to resist the crime which precipitates an altercation during which the victim is killed. In recognition of this we have heretofore affirmed death sentences in cases where Subsection (e) aggravating circumstance has been found in combination with Subsection (d) aggravated circumstances involving robbery as well as kidnapping. [Citations omitted]

Id. at 666. The court also stated in Hargrave v. State, 366 So. 2d 1 (Fla. 1979):

> Although Provence v. State, 337 So. 2d 783 (Fla. 1979), condemns the doubling up of the aggravating circumstances of pecuniary gain each time a crime such as robbery is concerned, the mere recitation of both circumstances does not in all cases call for condemnation of the sentencing hearing judgment. As State v. Dixon, supra, teaches us, the statute does not comprehend a mere

> tabulation of aggravating verses mitigating circumstances to arrive at a net sum. It requires a weighing of those circumstances.

Id. at 5. James Wright was the victim of a calculated burglary which resulted in his murder. The murder occurred in the victim's own home in the dark of night. He arose from bed to investigate a noise and discovered Appellant's presence and the robbery in progress. Appellant then shot and killed the unarmed victim. The record on appeal clearly shows that Appellant was committing a burglary at the time of the murder. It is equally evident that the burglary was aborted due to the murder. We submit that the trial court's finding of the aggravating circumstances is correct. In further support of this contention, Appellee offers the following excerpt from the sentencing transcript in which Appellant's counsel conceeds the applicability of this statutory provision:

> Number (D), capital felony was committed while the Defendant was engaged in a burglary, part of the section. Now, that is applicable in this section.
>
> I'd ask the Court to recollect the testimony of Vincent Ashley, the State's star witness in all of these cases against Mr. Mills. Mr. Mills has alleged his innocence throughout. We are arguing this point as the State's case because this was brought out in the State's case.
>
> If you remember, Mr. Ashley's testimony, Your Honor, he stated that on that night, they were riding around Sanford on bicycles looking for a house to break into. I think the Court should take into consideration from Mr. Ash-

ley's testimony that the intention, at least of Mr. Ashley, was to commit a burglary, not to commit a murder, to commit a burglary.

I think you can examine the pre-sentnece investigation of Mr. Mills and you will note that there was a lot of charges of theft, burglary, that type of case. I think it would be fair for the Court to consider that Mr. Mills, if he was involved, was involved to the extent of only committing a burglary.

THE COURT: Well, can you answer the question, though, when you commit a burglary why you take a shotgun into the house to commit the burglary?

Do you have an answer on that?

MR. GREENE: Your Honor, I can only say that there was testimony that Mr. Ashley had the shotgun with him that evening also. It may have been Mr. Ashley's idea to take the shotgun along. Mr. Ashley's not here. I don't know how to answer that question.

But, I'd like to say to the Court that as the Court is aware that the burglary went bad. It was bungled. Mr. Wright, the victim in the case, awoke, surprised the burglars and that's when the crime of murder occurred.

(R-925-927) (Emphasis added)

(5) The murder was for pecuniary gain. Florida Statute 921.141(5)(f). (R-640, 928-929, 936-937).

Appellant urges the Court to strike this aggravated circumstance on the grounds that it should merge with circumstance (4)-during the course of a burglary. This Court has recently held that it is not improper to duplicate the aggravated circumstances of robbery and pecuniary gain. Brown v. State,

381 So.2d 690 (Fla. 1980). We submit the reasoning of this Court is equally applicable to the offense of burglary and pecuniary gain. The trial court specifically found Appellant that "committed the murder during the commission of a burglary of the dwelling of the deceased victim in order to steal the property of the deceased victim for pecuniary gain." (R-640) (See also R-928-929).

(6) The capital felony was especially heinous, atrocious, or cruel. Florida Statute 921.141(5)(h). (R-640, 936-7).

Appellant argues that consideration of this aggravating circumstances is improper where a "burglary victim is shot once." In State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court made the following comment concerning this aggravating circumstance:

> Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accomplished by such additional facts as to set the crime apart from the normal capital felony-the consciousless or pitiless crime which is unnecessarily tortuous to the victim.

Id. at 9. In finding the circumstance of heinous, atrocious or cruel, the trial judge can properly and effectively allude to his knowledge of other, less heinous homicides. Alfred v. State,

307 So.2d 433, 443 (Fla. 1975).

In the instant case the victim was shot in the living-room of his home by a .410 gauge shotgun at relatively close range. (R-24-25) Dr. Gumercindo Vincente Garay, who performed the autopsy, testified that the victim died of a "massive hemorrhage in the right thorax and abdominal hemorrhage due to multiple perforations of the lower lobe of the right lung, perforation of the liver and the diaphragm in the right." (R-22) Dr. Garay testified that the fatal wound was narrow, and approximately five (5) centimeters, and was located in the right flank area, between the seventh and ninth ribs (R-23-25).

It is apparent that the victim did not die instantly. The victim's wife testified that she heard a shot and overheard her husband say "He got me". (R-6) She stated that she immediately went into the Florida-room which is adjacent to the bedroom where she found her wounded husband:

> A. I turned to my husband and I said, 'Oh, Jimmy'. Let me get you to bed.
>
> Q. And did you do that?
>
> A. Blood was coming out of his side. I put his arm around my neck and walked him to the bed and got him down, and then I went to the bathroom and got a cold cloth and wiped his fact and head off. And, then, I said, 'Well, I'll call the doctor.'

(R-7). The victim's condition was such that the wife testified that she called the family doctor prior to calling the police. (Id.) Further testimony was adduced at trial that the family

doctor appeared at the home and treated the victim prior to taking him to the hospital. Police Officer Johnny Parker testified that he accompanied the doctor and the victim to the hospital (R-43).

We submit that the Appellant shot the victim unnecessarily and left him to bleed to death from a gaping would in his side. We further submit that the victim did not die quickly and in spite of the care provided by his wife, and later by his family physician, the victim suffered a painful, lingering and cruel death. This Court has repeatedly upheld the aggravating circumstance under similar conditions. See Spinkellink v. State, 313 So.2d 666 (Fla. 1975); Gibson v. State, 351 So.2d 948 (Fla. 1977); Lucas v. State, 376 So.2d 1149 (Fla. 1979).

In its finding on this aggravating circumstance, the trial court made special mention of the fact that the "deceased victim made no motions to attack Mills nor did the deceased victim have any weapons with him but only inquired what Mills was doing when Mills shot and killed him." (R-640) Thus it is evident that the court was influenced by the unnecessary nature of this death.

Appellee submits that the statutory provision of 921.141(5), Florida Statutes have been complied with fully and have not been abused as alleged by Appellant. Appellant's sentence of death is based upon sufficient and proper aggravating factors.

C. Mitigating Factors.

The trial court specifically considered and rejected mitigating factors presented during the penalty phase of the

bifurcated trial, the sentencing hearing and those provided in Florida Statute 921.141(6). Appellant argues that the trial court failed to consider non-statutory mitigating factors. However the record is clear that the trial court considered all factors presented. The fact that no mitigating circumstances are found does not mean that the factors presented in mitigation were not considered. (R-937, 641-2)

Appellant argues that the court erroneously declined to find Appellant's age as a mitigating factor. The trial court specifically considered counsel's arguments concerning this circumstance:

> The court differs from your attorney as to the mitigating circumstances as I considered that you're above the age of majority and the court does not consider the age of the defendant at the time of the crime. The court finds that you're above the age of majority. So, I do not consider your age as any mitigating cirmcumstance.

(R-46). Appellant asserts the age factor as though it were an automatic consideration for the court. This Court has recently held to the contrary:

> There is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to his circumstance depends upon the evidence adduced at trial and at the sentencing hearing. Compare Hoy v. State, 353 So.2d 826 (Fla. 1977), with Songer v. State, 322 So.2d 481 (Fla. 1975). The trial judge expressly considered but rejected Appellant's age as a mitigating factor. The record supports this finding.

Peek v. State, supra, at 548. We submit the instant cause is identical to the circumstances found in Peek. It was not improper, therefore for the trial court to consider and reject defendant's age a factor in mitigation of the murder.

Equally erroneous is the argument that the trial court erred in failing to find as mitigation the lack of a significant history of prior criminal activity. Appellant's argument has given new meaning to the word "significant" and to the phrase "proven beyond a reasonable doubt". The pre-sentence investigation report considered by the trial court prior to sentencing and incorporated into the record (R-922) indicated that although Appellant was twenty-two (22) years of age, his criminal history began at the age of eight (8) years. Since that time he has been continually, over and over again, involved in violations of the law. The violations have increased in frequency and severity. (R-933-934, 655-656)

Also considered by the trial court was evidence that the instant cause was not the only offense committed by Appellant during the time period between his March 13, 1979 parole date and the May 25, 1979 arrest. During that period Appellant committed and was subsequently convicted of four (4) separate felonies: burglary of a dwelling and grand theft of a shotgun, Case No. 79-889-CFA; armed robbery with a firearm and false imprisonment in Case No. 80-112-CFA. (R-921, 651-654) In addition testimony was presented at the sentencing hearing that during Appellant's incarceration in the County Jail during the

late summer of 1979, a straight edge razor was taken from him by correctional officer Donald A. McCullough. (R-912-918, 650)

The trial court properly failed to find Appellant's capacity to appreciate the criminality of his conduct pursuant to Florida Statute 921.141(6)(f) as a mitigating factor. We submit the following narrative is dispositive:

> Q. But the counts of aggravated assault you were convicted of, you sat on a stand and admitted you were innocent, did you not?
>
> A. Yes, because I was.
>
> ...
>
> Q. You said the first thing you had to do, you just told Mr. Greene, was look out for yourself, look out for number one in prison?
>
> A. That's right.
>
> Q. Is that why last summer you had a razor type weapon on you in the Seminole County Jail?
>
> A. A razor type of weapon?
>
> Q. A razor, straight razor. Didn't you have a straight razor in your possession?
>
> A. I was picked up at my job. It was a box cutter. We cut boxes.
>
> Q. No, sir. I'm talking about a straight razor that opens up like a switchblade knife.
>
> A. No, there wasn't one in my possession.
>
> Q. There wasn't one in your suit [Court clothes] when you were sitting in your cell talking to Lieutenant McCullough?

A. No, it wasn't. That's something ya'll done rigged up there.

Q. We rigged up?

A. Because it wasn't brought in the case. It wasn't in my possession. I wasn't told nothing about it over there, and this is the first I heard about it.

Q. You're innocent of that?

A. I am innocent of that.

Q. Just like you're innocent of this murder you were convicted of?

A. That's right.

Q. Are you also innocent of the burglary to a dwelling and grand theft of a shotgun that you were convicted of in front of Judge Dykes?

A. That's right.

Q. Are you also innocent of the robbery with a firearm and false imprisonment you were convicted of in front of Judge Waddell?

A. That's right.

The court considered the role of Vincent Ashley in the perpetration of the offense. Under statutory provision 921.141 (6)(d) the court found:

> Mills was not a mere accomplice, but was the active and aggressive perpetrator of the murder.
>
> Mills was the dominant and only person involved in the murder, although, he had a companion that was to assist him and burglarizing the deceased victime's home. There was absolutely no evidence of any form of duress of coercion [on the part of Appellant].

(R-641).

Based on the foregoing, we submit that all relevant and required mitigating and aggravating circumstances were considered by the trial court. In situtations such as this where numerous aggravating circumstances and no mitigating factors are found, the actions of the trial court in overriding the jury recommendation of life imprisonment is entirely proper. As noted in Dixon v. State, supra, the weighing process is not satisfied merely because the aggravating circumstances outnumber the mitigating circumstances. The factors in aggravation and mitigation must be individually considered and weighted. However, where the trial court finds five (5) aggravating factors and no circumstances in mitigation, there is ample evidence of the severity of the offense and justification for imposition of a death sentence.

Should less than the total number of aggravating circumstances found by the trial court be sustained, sufficient aggravating circumstances would remain to support the sentence imposed. Brown v. State, supra; Peek v. State, supra; McCrae v. State, supra.

Notwithstanding Appellant's impassioned plea in brief, the conviction and sentence in the instant cause is adequately supported by fact and law. Therefore we urge this Court to affirm both Appellant's conviction and his sentence.

POINT IX

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

ARGUMENT

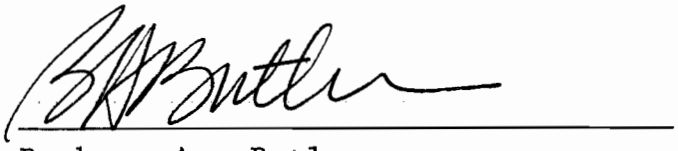
Appellant correctly notes that this Court has previously addressed and specifically or impliedly rejected challenges to the constitutionality of the Florida Capital Sentencing Statute. Appellant concedes that he raises the standard "due process of law" and "cruel and unusual punishment on its face and as applied" arguments in challenging the constitutionality of the statute. See Appellant's brief page 59. This Court has repeatedly and recently upheld the constitutionality of Florida Stature. Spinkellink v. State, 313 So.2d 666 (Fla. 1975), State v. Dixon, 283 So.2d 1 (Fla. 1973), Ford v. State, 374 So.2d 496 (Fla. 1979), Foster v. State, 369 So.2d 928 (Fla. 1979), cert. denied 100 S.Ct. 178, Songer v. State, 365 So.2d 696 (Fla. 1978), Jackson v. State, 359 So.2d 1190 (Fla. 1978), cert. denied 439 U.S. 1102, Raulerson v. State, 358 So.2d 826 (Fla. 1978) cert. denied 439 U.S. 959, Gibson v. State, 351 So.2d 948 (Fla. 1977), cert. denied 435 U.S. 1004, McCaskill v. State, 344 So.2d 1276 (Fla. 1977), Meeks v. State, 339 So. 2d 186 (Fla. 1976), Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied 431 U.S.925, Halliwell v. State, 322 So.2d 557 (Fla. 1975). We do not wish to belabor this point, however we would direct this Court's attention to Proffit v. Florida, 428 U.S. 242 (19__), Rehearing denied 429 U.S. 785; and McCrae v. State, supra and Peek v. State, supra.

CONCLUSION

Appellee, the State of Florida, in conclusion, would state that based upon the foregoing reasons and cited authorities, Appellee respectfully requests that this Honorable Court affirm the order, judgment and sentence of the trial court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



Barbara Ann Butler
Assistant Attorney General
125 No. Ridgewood Ave.
Fourth Floor
Daytona Beach, FL 32014
(904) 252-2005

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to James R. Wulchak, Assistant Public Defender, in his basket at the Fifth District Court of Appeal, this 11th day of December, 1980.

Of Counsel