IN THE SUPREME COURT OF FLORIDA

FILED

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SID J. WHITE
CLERK SUPREME COURT
By _____
Chief Deputy Clerk

EDWARD CLIFFORD THOMAS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 61,170

APPELLANT'S BRIEF

On Appeal From the Circuit Court of the
Seventeenth Judicial Circuit of Florida,
In and For Broward County, Florida
(Criminal Division)

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PRELIMINARY STATEMENT

Jurisdiction vests in this Court pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida, and Florida Statutes 921.141(4) and 924.06 (1977) in that this is a direct appeal from an imposition of the death penalty upon the Defendant's conviction for one of two murders, life sentence having been imposed for the other, and both appeals having been consolidated. The convictions and sentences were imposed in the Seventeenth Judicial Circuit, in and for Broward County, Florida.

Appellant was Defendant and Appellee was prosecution in the trial court. The parties will be referred to as they appeared in the trial court.

The following symbols, followed by the appropriate page numbers will designate that portion of the record to which this Brief refers:

T	Transcript
R	Record
D	Deposition

STATEMENT OF THE CASE

Defendant was indicted and tried for two murders, the murder of James P. Walsworth by stabbing on the street outside a homosexual bar in downtown Fort Lauderdale and a subsequent beating of Russell L. Bettis at a nearby location.

Defendant was taken into custody for interrogation by Fort Lauderdale detectives as a result of information supplied by Tom Woods, who later appeared as a witness at trial. During the interrogation which lasted several hours, Defendant confessed to both crimes.

Defendant was indicted and his appointed counsel filed and argued a motion to suppress the confession which was denied. The State introduced no physical evidence linking Defendant to the crimes. Tom Woods and the Defendant's father testified on behalf of the State that Defendant had made inculpatory statements.

Defendant testified on his own behalf recanting the confession claiming that he was easily intimidated by the investigating officer and the environment of the interrogation atmosphere. Further testimony was presented by the defense as to the youth of the Defendant, twenty years old, with a textbook improper childhood; wherein his mother had left him at age seven (T 1052), he was raised by a very dominating, brutal father who

could easily be classified as an alcoholic, all of which caused Defendant to do poorly in school, appear socially maladjusted, leave home at age fourteen (T 1053), never progress beyond a fifth grade intelligence level and to display his own propensity toward alcoholism. (T 1034).

Further testimony was presented on behalf of the Defendant as to the implausibility of the content of the Defendant's confession. The Court made a negative remark in the presence of the jury referring to one of Defendant's witnesses.

The jury deliberated a number of hours and delivered a verdict of guilty on both counts of murder. On June 26, 1981 a hearing was had as to the recommendation of sentence by the jury. On August 20, 1981 post-trial motions were set for hearing. At that time counsel for Defendant moved to continue said hearing and set forth adequate reasons to support his contention that he was incompetent to proceed at that hearing. The Court denied his motion and proceeded to conduct the hearing without delay. The jury unanimously recommended life sentences. The Court imposed a sentence of life for the stabbing murder, but imposed a sentence of death for the beating murder.

This appeal is taken from both the verdicts of guilt and the sentence of death imposed by the Court.

STATEMENT OF THE FACTS

This case came before the trial court pursuant to an indictment of the Defendant, Edward Clifford Thomas, accusing him in Count I of the murder of James P. Walsworth, and in Count II of the murder of Russell L. Bettis.

On December 2, 1980 members of the Fort Lauderdale Police Department were called upon to examine the body of a white male upon the street in downtown Fort Lauderdale. Their investigation revealed that the body was that of James P. Walsworth, that he had apparently received multiple stab wounds and died as a result thereof. The scene provided evidence that the victim had been stabbed in or near his automobile, and that there was a great deal of blood in and about the vehicle and the ground where the body lay.

On December 3, 1980 officers of the Fort Lauderdale Police Department were called upon to examine the body of a white male in an alleyway in downtown Fort Lauderdale. Their examination and investigation revealed that the body was that of Russell L. Bettis and that he died as a result of a blow upon the head with a cement block, or as a result of a wound to the head from striking his head upon the cement block.

The investigation continued and as a result of information

provided by a citizen, the investigation centered on Defendant. The Defendant was taken into custody on December 8, 1980 and interrogated for several hours. During that interrogation the Defendant made a taped admission of having stabbed James P. Walsworth and of having beaten Russell L. Bettis.

The indictment was filed on December 18, 1980. The pretrial discovery was conducted and pretrial motions were filed. A motion to dismiss was filed January 13, 1981 challenging the constitutionality of the statute under which the Defendant was indicted. The motion was denied on May 1, 1981. A motion to suppress the confession was filed May 5, 1981 and denied May 14, 1981.

On June 15, 1981 trial commenced. The State presented no physical evidence connecting Defendant to the crimes. The evidence the State presented connecting Defendant to the crimes consisted of testimony from a witness, Tom Woods, and the Defendant's father, that Defendant had made statements of an incriminating nature. In addition thereto a tape of Defendant's confession taken during interrogation was played for the jury.

The Defendant testified in his own behalf, denying the commission of the crimes, recanting the confession and claiming that he was emotionally immature, and drunk while interrogated

by the police. Other witnesses testified on behalf of the Defendant challenging the credibility of the content of the taped confession. At the conclusion of one witness for the defense, the Judge commented in the hearing of the jury "get him out of here", in an obvious derrogatory manner.

At the conclusion of the trial the jury delivered its verdict of guilty as to both counts of murder in the first degree. On June 25, 1981 the Court convened for the purpose of presenting further evidence for obtaining an advisory sentence by the jury. The defense indicated to the Court that it was not prepared, but the Court proceeded. The jury heard evidence on behalf of the Defendant, and argument from the State and the defense. The jury delivered a unanimous advisory sentence of life imprisonment. The Court sentenced the Defendant to life imprisonment on Count I, and imposed the death sentence on Count II.

On August 20, 1981 defense was called upon to argue a motion for new trial that had been filed on July 2, 1981. Defense counsel asked for a continuance primarily based on his inability to prepare due to his own preoccupation with a Grand Jury considering indicting him. The Court denied his motion for continuance and defense counsel was forced to argue

same while unprepared. Defense motions for a new trial were denied.

We are before this Court to appeal the verdict and sentence in this cause.

ARGUMENT

POINT I

THE DEATH PENALTY IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Defendant acknowledges at the outset that the constitutionality of the Florida death penalty has been upheld in State v. Dixon, 283 So.2d 1 (Fla. 1973) and Proffitt v. State, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976). Defendant, however, urges reconsideration of that decision, especially as applied to Defendant. However, Defendant submits that, as applied, the death sentence was not constitutional and, further, there are State constitutional provisions which must be considered.

Unlike the Eighth Amendment to the United States Constitution, which prohibits cruel and unusual punishment, Article I, Section 17 of the Florida Constitution prohibits cruel or unusual punishment. It is Defendant's position that the Florida provision in its disjunctive form enunciates a stricter standard than does the federal proscription. It is settled that each word of the Constitution should be given its intended effect. E.g., Weinberger v. Board of Public Instruction, 93 Fla. 470, 112 So. 253 (1927). Language must be presumed to

have been deliberately used and it is presumed that words have been used according to their natural and popular meaning. E.g., Wilson v. Crews, 160 Fla. 169, 34 So.2d 114 (1948); Schooley v. Judd, 149 So.2d 587 (2D.C.A. Fla. 1963). Therefore, the Florida Constitution proscribes punishment which is either cruel or which is unusual.

Cruelty in the constitutional sense means punishment disproportionate to the offense and which does not serve the needs of society. Eger v. State, 291 So.2d 676 (3 D.C.A. Fla. 1974); Weems v. United States, 217 U.S. 349, 368, 381 (1910); Robinson v. California, 370 U.S. 660, 666-667 (1962); Commonwealth v. O'Neal, 339 N.E.2d 676, 679 (1975) (Tauro, C.J., concurring). Capital punishment, involving as it does the taking of life, is qualitatively different from other punishments. Furman v. Georgia, 408 U.S. 238, 287, 306 (1972) (Brennan, J. and Stewart, J., concurring); State v. Dixon, supra, at 7.

Studies show that the convicted felon suffers extreme anguish in anticipation of the extinction of his existence. See Bedeau, The Death Penalty in America, 194, 201 (1967); Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting.

It is submitted that in order to uphold the constitutionality of punishment which inflicts such suffering and absolutely extinguishes all rights, the State must advance a substantial justification to demonstrate that the penalty of death is not disproportionate or unnecessary and is thus not cruel in a constitutional sense. See People v. Anderson, (1972) 6 Cal.3d 628, 493 P.2d 880, 100 Cal.Rptr. 152; Furman v. Georgia, 408 U.S. 238 (1972) at 331-332 (Marshall, J., concurring). It is submitted that the required showing is that of a compelling state interest.

While it is acknowledged that the State has an interest in protecting society, the issue, however, is whether the means chosen, the death sentence, is compelled as the least restrictive means available to further these ends. If the interests can be served by means which do not impair fundamental constitutional rights, here the right to life, to the extent the death penalty does, the punishment is cruel. Cf. Roe v. Wade, 410 U.S. 113 (1973). See also Trop v. Dulles, 356 U.S. 86, 102 (1958).

The penal system can serve three interests: 1) deterrence; 2) isolation/incapacitation; and 3) retribution (rehabilitation is of course not relevant to the death sentence). Packer, The Limits of the Criminal Sanction 35-38 (1968);

Grupp, Theories of Punishment 3-10 (1971). Again the inquiry is not whether death serves these interests but whether it serves them more effectively than imprisonment. See Furman v. Georgia, supra, at 303 (Brennan, J., concurring).

Despite the most exhaustive research by noted experts, there is simply no definitive evidence that the death penalty is a deterrent superior to lesser punishments. In fact, the most convincing studies point in the opposite direction. Bowers, Executions in America, 19-20, 134-135, 137-163, 193-196 (1974); Grupp, supra, at 181-195.

While isolating murderers in order to prevent similar crimes in the future is a legitimate objective, it is clear that it can be served by less restrictive means. Furman v. Georgia, supra, at 300-301 (Brennan, J., concurring). Murderers have been shown to be among the lease recidivistic of offenders, either on parole or while in prison. Bedeau, supra, at 395; Packer, supra, at 52-53. Thus, the State interest can adequately be served by less onerous means.

Defendant submits that while retribution may be a valid objective, grading of punishments according to the crime "does not require that the upper limit of severity be the death penalty". Bedeau, supra, at 268. No assessment of the degree

of punishment necessary to effect retribution is possible, and it cannot be shown that any particular penalty is more supportable in light of these purposes than any other. Further, it is incompatible with an enlightened society to attempt to justify the taking of a life merely for the purpose of vengeance.

Accordingly, Defendant submits that a compelling State interest has not and cannot be shown. The death penalty is not a necessary and least restrictive means for accomplishment of valid State objectives. The death sentence is cruel in the constitutional sense.

Further, Defendant submits that the death sentence in Florida is "unusual" in the constitutional meaning in that it is arbitrarily administered, notwithstanding Proffitt v. State, supra.

Arbitrary selectivity under the death penalty statute is also aggravated by the lack of standards for the operation of the Governor's commutation power. Florida Constitution, Article IV, Section 8(a); Davis v. State, 123 So.2d 703 711 (Fla. 1960).

Therefore, the discretion allowable under the Florida death penalty provision condemns it as "unusual" in the constitutional sense. Defendant also submits that the death sentence

as applied to Defendant was both cruel and unusual. There remains a doubt as to whether Defendant was competent to aid and assist Defense counsel. Such doubt makes the death sentence in this case fundamentally unfair and arbitrary.

Finally, in addition to the question of whether Florida has eliminated arbitrary selectivity in imposing the death penalty, Defendant submits that the death penalty is per se unconstitutional. It is inconsistent with contemporary standards of decency in a maturing society. Trop v. Dulles, supra, at 100; Spinkellink v. State, 313 So.2d 666 (Fla. 1975).

In summary, Defendant's position is that the Florida statute is both cruel and unusual, either of which would condemn capital punishment under the Florida disjunctive constitutional provision. The death penalty is cruel and unusual as applied to Defendant and is unconstitutional per se.

POINT II

THE COURT ERRED BY IMPROPERLY ADMITTING EVIDENCE OVER THE DEFENDANT'S OBJECTION.

In 1966 the Supreme Court of the United States in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, at 1629 (1966) held that "the prosecution may not use statements, whether exculpatory, stemming from custodial interrogation of the Defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination". The courts have steadfastly maintained their position and have actually extended the exclusionary rule as applied to confessions. Brown v. Illinois, 422 U.S. 590 (1975) 17 CrL 3145.

The primary test for admissibility of a confession is whether it is freely and voluntarily made. Howell v. State, 66 Fla. 210, 63 So. 421 (1913); Jarriel v. State, 317 So.2d 141 (Fla. 4 D.C.A. 1975) cert.den. 328 So.2d 845 (Fla. 1976).

In the case sub judice there is little doubt that the interrogation of the Defendant was custodial rather than investigatory. We have a twenty year old of low intellect, having had no previous experience with the police, who allegedly confessed during an interrogation by two experienced detectives. As the United States Supreme Court stated in Blackburn v. Alabama,

361 U.S. 199, 80 S.Ct. 274, 4 C.Ed. 2d 242 (1960) "This court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition".

We are faced with admission into evidence of a taped "confession" less than thirty minutes duration taken over a period in excess of three hours. (T 33-37). There are gaps and interruptions in the tape, and the content of the tape consists of approximately 85 "questions" wherein the police officer sets forth the facts and to 50 of which the Defendant hardly more than grunts an affirmative response. The officers stated that the information which framed their questions was supplied by Defendant during the interlude in the tapes. It should be further noted that the original interrogation of the Defendant concerned an alleged aggravated battery and that when the interrogation proceeded to the subject homicide the Defendant was not again advised of his rights nor asked to sign another waiver form. (T 41).

The totality of the circumstances support the testimony of the Defendant to the effect that he couldn't cope with the mental pressure of the interrogation. Where an unintelligent, inexperienced youth is in the hands of experienced police officers; where that youth has been under the influence of

alcoholic beverages for a prolonged period of time prior to the interrogation; where that youth has not been intelligently apprised of his rights or the consequences of his statements, there is a great question as to an intelligent waiver or voluntariness of such a confession.

The burden of proof is on the State to establish the voluntariness of a confession by a preponderance of the evidence. Lego v. Twomey, 92 S.Ct. 619 at 626-627 (1972). In McDole v. State, 283 So.2d 553 (Fla. 1973) the court stated "we are now in agreement with our highest federal court that proof of voluntariness by a preponderance of the evidence is a more appropriate requirement". The motion to suppress the confession should have been granted.

It is also well established that the right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. Drope v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 904, 43 L.Ed.2d 103, 113 (1975). The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126, (1976).

In 1895, the Supreme Court stated:

> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481, 491 (1895).

To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368, 375 (1970).

The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But, the Supreme Court of the United States has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965). In Re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience. Estelle v. Williams, supra, 96 S.Ct. at 1693.

In the case sub judice, there are many subtle errors by the trial court, one of the more significant of which is when the State made a proffer to the Court (T 710) that the witness George Duncan of the Broward Sheriff's Office crime lab was going to testify as to a shirt upon which there were blood stains even though the State could not show that the stains were from the date of the incident or belonged to the victim, James P. Walsworth. The Court being aware that the shirt and blood stains could not be connected to the crime should not have allowed that physical evidence to be introduced. Failing to exclude it provided the State and the jury the ability to make and inference upon and inference.

As the court held in Ellis v. State, 86 Fla. 50, 97 So. 287, if after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice, or that because of the error complained of the judgment or decree rendered is illegal or does not accord with substantial justice under the law, the appellate court should reverse the judgment or decree or make appropriate orders in the case.

Any individual error may be harmless, but when the process of inference upon inference is allowed to mushroom, it pervades the whole atmosphere of fairness. Dukes v. State, 356 So.2d 883 (1978).

It is difficult for a jury to remember its function is to drain the swamp, when it is up to its armpits in alligators.

The introduction of non probative evidence only compounds the inability of the accused to receive a fair and impartial trial.

POINT III

THE COURT ERRED BY PREJUDICIAL CONDUCT PRECLUDING A FAIR AND IMPARTIAL TRIAL FOR DEFENDANT.

In 1975, the Court of Appeals for the Fifth Circuit held that the harmless error standard requires a court to be able to declare that the constitutional error was harmless beyond a reasonable doubt; if on reading of the trial record the reviewing court is firmly convinced (emphasis supplied) that the evidence of guilt was overwhelming and that the trier of fact would have reached the same result without the tainted evidence, then the conviction will stand. Null v. Wainwright, 508 F.2d 340, certiorari denied 95 S.Ct. 1964, 421 U.S. 970, 44 L.Ed.2d 459.

Section 59.041, Florida Statutes (1977), provides:

> "No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed."
> (Emphasis supplied)

And, Section 924.33, Florida Statutes (1977), provides:

> "No judgment shall be reversed unless the Appellate Court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the Appellant. It shall not be presumed that error injuriously affected the substantial rights of the Appellant." (Emphasis supplied)

If after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice, or that because of the error complained of the judgment or decree rendered is illegal or does not accord with substantial justice under the law, the Appellate Court should reverse the judgment or decree or make appropriate orders in the case. Ellis v. State, supra.

In Cornelius v. State, 40 So.2d 332 (Fla. 1950), the Supreme Court of Florida stated "This court has specifically held that a reversal should not be ordered unless the error complained of was prejudicial or harmful to the substantial rights of the accused and that the introduction of improper or inadmissible evidence must be prejudicial in order to warrant a reversal." Id. at 335 (Emphasis supplied). And, the Court continued, "In determining whether the error of which complaint is made was harmful or prejudicial, we must decide upon examination of all

the evidence whether the result would have been different had the improper evidence been excluded." Id.

Since the cases and the courts, when confronted with an issue of harmful error, always include a requirement of examination of the entire record with a view to a determination of the effect on the substantial rights of the accused, it is submitted that either a single error or a number of errors in combination can rise to the level of harmful and thus require reversal of a conviction. It logically follows, therefore, that the cumulative effect of a number of errors, which in and of themselves might not individually be considered to be harmful to the substantial rights of an accused, would when one is heaped upon another create error. This exact principle has been finally recognized in the recent case of Dukes, supra, wherein it was held that a trial with no necessarily reversible error was harmful error where the cumulative (emphasis supplied) effect of improprieties by the prosecutor may be so prejudicial as to deprive defendant of a fair trial, requiring reversal, even though defense counsel fails several times to object.

During the course of the trial, the Court improperly admitted evidence in the State's case as more fully set forth in Point II. Case law has clearly established the necessity

of the court maintaining a carefully balanced atmosphere of neutrality during the trial. As the court stated in U.S. v. Candelaria-Gonzalez, 547 F.2d 291 (1977): "The trial judge must exhibit neutrality in his language and in conduct of trial before jury".

In the case sub judice the defense presented a witness, Robert Redding (T 957) to establish the basic challenge to the content of Defendant's so-called confession. Defense counsel felt this witness to be most integral to the thrust of the defense. (T 1321) At the conclusion of that witness' testimony the Judge commented in the hearing of the jury, "get him out of here" (T 966) in a manner and voice that clearly depicted a negative attitude to the jury. (T 1346-1347).

As this Court held in Raulerson v. State, 102 So.2d 281 (1958), remarks about a witness were comments on the evidence and in context had a damaging effect on the defense and was prejudicial error; again in Williams v. State, 143 So.2d 484 (1962), the court held that the judge should not lean to prosecution or defense, and his neutrality should be such that even defendant will feel that his trial was fair.

At the hearing on the post-trial motions on August 20, 1981, defense counsel advised the court that he was not prepared to proceed on the motions, having been otherwise personally

preoccupied by a thirty day grand jury investigation of his own conduct, which terminated approximately forty eight hours prior to the hearing. (T 1334). Defense counsel clearly advised the court that he had been unable to contact witnesses necessary to establish the prejudicial effect of that remark on the jury, and the transcript of the trial was yet unavailable. (T 1335). However, the court denied counsel's motion for continuance and required counsel to proceed though he was admittedly incompetent to proceed.

It is the obligation of the court to provide a reasonable time to prepare for trial, for a hearing on pre-sentence investigation reports for sentencing, or post-trial motions. Barclay v. State, 362 So.2d 657; Kampff v. State, 371 So.2d 1007. The court denied defense counsel's motion to continue even though advised of the extraordinary circumstances. The court required counsel to proceed without the availability of necessary witnesses, or the opportunity to examine and rebut the pre-sentence investigation report. (T 1334-1338) As this Court said in D. W. Gardner v. State, 313 So.2d 675, 96 S.Ct. 3219, 428 U.S. 908:

> "Petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information that he had no opportunity to deny or explain".

Independently each act of the court could be considered reversible error. Considering the totality of the court's conduct only amplifies the prejudicial effect on the Defendant. Clearly the entire atmosphere precluded a fair and impartial trial.

POINT IV

THE WEIGHT OF THE EVIDENCE DOES NOT SUPPORT A CONVICTION OF FIRST DEGREE MURDER ON COUNT II IN THE INDICTMENT OF THE DEFENDANT.

It is well established that the evidence introduced in any prosecution must be sufficient to support the conviction to the degree the jury renders its verdict.

In the case sub judice the Defendant was charged in Count II with murder in the first degree. Florida Statute 782.04(1) states in Subsection (a): "the unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being.... shall be murder in the first degree...".

The evidence introduced by the State did not establish that the victim Russell L. Bettis died from wounds inflicted by the Defendant rather than by the victim's head striking an object upon falling. (T 467). The confession of Defendant established that the Defendant struck the victim with his fists and left the victim lying unconscious in an alley, but does not contain any statement that Defendant struck the victim with any object. In fact, Defendant stated the victim struck his head upon falling. (Taped confession).

Premeditated design to effect the death of a human being is more than a mere intention to kill. It means a design to

effect death, that was thought on for any length of time, however short, before the commission of the act. It is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. Savage v. State, 18 Fla. 909 (1882); Stokes v. State, 54 Fla. 109, 44 So. 759 (1907); Barnhill v. State, 56 Fla. 16, 48 So. 251 (1908); Miller v. State, 75 Fla. 136, 77 So. 669 (1918); Buchanan v. State, 95 Fla. 301, 116 So. 275 (1928); Rhodes v. State, 104 Fla. 520, 140 So. 309 (1932); McCutchen v. State, 96 So.2d 152 (1957, Fla.); Polk v. State, 179 So.2d 236 (1965, Fla.App.D2) reh.den.; Littles v. State, 384 So.2d 744.

The Defendant struck the victim, Bettis, with his hands, but the fatal injury was the head wound created when the victim struck his head on a bottle or cement block in falling. (Taped confession) According to the State's evidence (Taped confession) the victim was alive when the Defendant left the scene and did not appear to be fatally wounded. The Defendant engaged in no additional act to insure the death of the victim.

Clearly, had the Defendant intended to effect the death of the victim he would not have left him alive in the alley. Unless the State clearly demonstrates that the Defendant

intended to kill the victim, it cannot satisfy the definition of Florida Statute 782.04(1)(a). The lesser included offense of 782.04(2), murder in the second degree, is the most serious charge upon which the facts could have supported a conviction.

POINT V

THE COURT ERRED BY IMPOSING THE DEATH SENTENCE FOR THE DEFENDANT'S CONVICTION ON COUNT II.

The existing case law in Florida at this time clearly reflects that a death sentence should not be imposed unless the facts are "so clear and convincing that no reasonable person could differ". Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Ergo, the trial court must consider strongly the recommendation of the jury. Buckram v. State, 355 So.2d 111 (Fla. 1978).

In the recent case of Welty v. State, 402 So.2d 1159 (Fla. 1981), this Court has set forth the existing law in clear terms. In the case sub judice the jury having heard all the evidence and having been presented with the State's evidence and argument in aggravation, recommended life imprisonment, unanimously (T 1314 - R 1538) for Defendant's conviction on Count II, in spite of the fact that Defendant's counsel was unprepared to present all of the evidence it might muster toward that end. Manifestly, twelve reasonable persons did not differ in the conclusion that the aggravating factors did not outweigh the mitigating factors.

However, the trial court ignored the recommendation of the jury and based a sentence of death almost entirely on a

simple numerical balance in the number of aggravating factors over the mitigating factors. It is submitted that the trial court used an improper test concerning the weighing of the mitigating and aggravating circumstances in imposing the death penalty. In State v. Dixon, supra, it was stated:

> "It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating 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...".

and in Alvord v. State, 322 So.2d 533, 540 (Fla. 1975) it was stated:

> "The statute contemplates that the trial jury, the trial judge and this Court will exercise reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence...".

Firstly, the trial court erred in doubling up the aggravating circumstances by finding that the murder was committed to avoid arrest, and committed to disrupt or hinder enforcement of the law. Welty v. State, supra. Secondly, the trial court did merely count the number of aggravating

circumstances and compared these to the number of mitigating circumstances, the exact procedure proscribed by State v. Dixon, supra, and Alvord v. State, supra.

Further, the trial court did not provide defense counsel with a reasonable opportunity to present all mitigating factors it might. As was held in Eddings v. Oklahoma, U.S. S.Ct. 80-5727, 30 CrL 3051:

> "In order to ensure that the death penalty was not erroneously imposed, the Lockett plurality concluded that 'the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death'".

Further, there was nothing contained in the presentence investigation report supporting a sentence of death beyond the aggravating circumstances earlier referred to, while there were many circumstances regarding the Defendant's background, such as the home life background, his propensity to alcoholism, his clean record, which were obviously not considered by the trial court.

The imposition of the death penalty was improper.

CONCLUSION

The trial court did not provide Defendant a fair trial, the facts do not support the conviction of the Defendant in Count II for first degree murder, the death sentence was improperly imposed and the death penalty is on its face unconstitutional.

This Court should reverse the conviction of the Defendant for the aforesaid reasons.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U. S. Mail to: HON. JIM SMITH, ATTORNEY GENERAL, The Capitol, Tallahassee, Florida 32301, and original to Hon. Sid J. White, Clerk, Supreme Court Building, Tallahassee, Florida 32301, this 1st day of February, 1982.

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