IN THE SUPREME COURT OF FLORIDA

DANIEL KARR JOHNSON,

Appellant,

v. CASE NO. 61,937

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR CLAY COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS (cont.)

TABLE OF CITATIONS

TABLE OF CITATIONS (cont.)

TABLE OF CITATIONS (cont.)

TABLE OF CITATIONS (cont.)

CONSTITUTIONS AND STATUTES (cont.)

MISCELLANEOUS

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	:	

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant was the defendant below, and will be referred to as "appellant" in this brief. An eight volume record on appeal, including transcripts of proceedings below, is sequentially numbered at the bottom of each, and will be referred to as "R" followed by the appropriate page number in parenthesis. A one volume supplemental record will be referred to as "SR."

This Court has jurisdiction over this appeal pursuant to Art. V, §3(b)(1), Florida Constitution and Section 921.141(4), Florida Statutes (1981). All proceedings below were before Circuit Judge Lamar Winegeart, Jr.

II STATEMENT OF THE CASE

By indictment filed August 13, 1981, appellant was charged with the premeditated first degree murder of Jacqueline Propster by strangulation (R 12-13). The Public Defender of the Fourth Judicial Circuit had previously been appointed to represent appellant on July 29 (R 15-17), but withdrew due to a conflict, and private counsel John Kopelousos of Orange Park, Florida, was appointed and entered a plea of not guilty on August 18 (R 18; 20-24). On September 18, 1981, counsel filed a motion to dismiss, alleging that Clay County had no jurisdiction over the crime, because it was committed in Georgia (R 32-33). The state responded (R 34-36) and after a short hearing on March 5, 1982, the motion was denied (R 182, ¶3; 477-481). Counsel waived speedy trial on January 15, 1982 (R 59).

Counsel filed a motion for production of favorable evidence (R 83-85), a motion for individual and sequestered voir dire (R 86-90), a motion to dismiss the indictment (R 91-92), a motion in limine (R 128), and a motion to suppress oral and written statements (R 180-181). These were all disposed of after the March 5 hearing (R 182; 481-503; 581).

The cause proceeded to jury trial on March 8-10, 1982, and at the conclusion thereof appellant was found guilty as charged (R 345;1067). Penalty phase proceedings were held on March 11, 1982, and at the conclusion thereof the jury returned a death recommendation (R 365; 1171-1173). Counsel filed a motion for new trial (R 396-397) which was heard on March 30, 1982, and denied (R 430-433). The court adjudicated appellant guilty and imposed the death sentence (R 424-429; 443-445).

On April 9, 1982, a timely notice of appeal was filed (R 467). On May 17, 1982, the Public Defender of the Second Judicial Circuit was designated to represent appellant (R 1176). On July 12, 1982, this Court granted appellate counsel's motion to reconstruct the record. On July 29, 1982, a supplemental record was filed (SR 1-4). This appeal follows.

III STATEMENT OF THE FACTS

(A) GUILT PHASE

During jury selection, appellant moved for a mistrial because appellant was handcuffed in the presence of the prospective jurors before an afternoon recess. The court denied the motion (R 667-668).

State witness Linda Jean Warren was a bartender at the Out-Of-Sight Lounge, a topless bar, in Jacksonville, on July 21, 1981. At 2:30 or 3:00 a.m., after the bar was closed, appellant came to the outside of the bar and spoke to her through a window. Appellant asked if the blonde-haired Jackie was still there and said he was to give her a ride. After conferring with Jackie, Ms. Warren told appellant that Jackie was not there and appellant left. Jackie left the bar shortly thereafter (R 859-864).

At 10:00 a.m. on July 21, Randy Garland Thomas, a resident of Maxville, walked out of his house with his wife and daughter and heard a car coming up the road. Appellant was driving a blue Buick Regal at 30 or 40 miles per hour and had torn up the exhaust system due to deep ruts in the road (R 877-880). Appellant stopped and said he had killed a man and needed help in disposing of the car. Thomas obtained a gallon

jug of gasoline and went with appellant to a borrow pit. Appellant said he killed a girl because, "She said she was going to send me back" (R 881-884). Appellant dumped a pocketbook on the ground and took some bracelets and a few dollars. He also dumped a carrying case on the ground and a thin gold belt fell out, which appellant threw into the woods (R 885-886). Appellant wanted Thomas to go with him to look under a house on McClellan Road to see if the victim was dead. Thomas declined but told appellant how to burn the car. He drove appellant to appellant's brother's house on Nathan Hale Road in Duval County. Thomas returned home and took his daughter to a restaurant at the intersection of 228 and 301 in Maxville (R 886-889).

After they ordered lunch, appellant drove up in a brown Audi and wanted Thomas to go for a ride. Thomas declined, and appellant left, but returned to the restaurant in the Audi at 1:00 or 1:30 p.m. (R 889-892). At that time appellant said in the presence of Thomas and Andy Padgett that the girl was dead and that he had choked her three times, after she had gotten out of the car, and he had run her down, and he got a piece of rope and tied it around her neck (R 892-893). Thomas looked inside the Audi and saw some jewelry scattered on the floorboard which he had not seen in the car earlier (R 893-895). Thomas made anonymous phone calls to the police, describing where the car and body were. He then told former Police Officer Bob Cisco about the incident at 5:30 p.m. (R 897-898).

State witness Benjamin Anthony Padgett testified that he overheard appellant talking to Randy Thomas at the restaurant. He also looked inside the Audi and saw the jewelry (R 918-923). Randy's wife, Sharon,

also testified that appellant drove up to their home at 10:00 a.m. in a blue car (R 928-929). State witness Robert Marshall Cisco was a former Jacksonville police officer. He called the Jacksonville Sheriff's Office with the information given to him by Randy Thomas (R 933-934). Thomas Michael Wilkens, the victim's step-father, identified a photo of her and of her car and her gold belt (R 935-939). The belt was later entered into evidence over objection (R 982).

Jacksonville Deputy Sheriff Michael Paul Bartlett located the Buick in a borrow pit in Duval County on the morning of July 24. The car had a loose muffler and license tag. Photos of the car were entered into evidence without objection and described to the jury (R 751-757). Deputy Bartlett also found the victim's body near an abandoned house on McClellan Road at its intersection with Longbranch Road just inside Clay County. He identified photos of the scene and of the body and they were entered into evidence; some were objected to as inflamatory; all of the photos were published to the jury (R 758-775).

Dr. Peter Lipkovic, Chief Medical Examiner, was declared to be an expert without objection (R 780-783). He went to the crime scene on July 25. The body was in an advanced state of decomposition. It had bluejeans and a tank top which was pulled down to the waist level. The upper body was nude and a rope was tied around the neck twice and knotted with a single knot at the left front of the neck. He found a number of similar ropes in the area. He also found a wadded piece of tissue paper in the vagina (R 783-786). Dr. Lipkovic concluded that the cause of death was ligature strangulation by the rope (R 787) or a similar instrument (R 798-790). He found no evidence of needle wounds on the arms and legs, and no presence of alcohol or drugs (R 791-792). He found no evidence

of sexual intercourse and could only say that death had occurred four days prior to his examination of the body (R 796). FDLE forensic serologist Steven Russell Platt found no semen on the tissue paper (R 943-945).

Orange Park dentist, Harry Lee Graham, identified the victim by use of dental x-rays (R 801-809). Clay County Deputy Sheriff John Moore identified a Department of Transportation aerial photo of the scene to show the boundary between Clay and Duval Counties and it was entered into evidence over objection and displayed to the jury (R 810-822). He collected samples of rope from the area; they were normally used to bale hay (R 824-825). These samples and the rope from the victim's neck were examined by FDLE micro-analyst Mary Lynn Henson. She concluded that they could have come from the same source. She also testified that they were commonly used in farming (R 833-838). FDLE latent fingerprint examiner Ernest D. Hamm compared a thumbprint taken from the victim with a fingerprint card on file in the Jacksonville Sheriff's Office in her name and found them to be identical (R 839-850). He compared latent fingerprints from the Buick with fingerprint cards of appellant and Randy Thomas and found the latents did not match either man (R 855-859).

Clay County Sheriff's Detective Aaron Gary Newman testified that appellant had been arrested at a motel in Jacksonville on July 28. He interviewed appellant at the Jacksonville Sheriff's Office in the presence of Detective Pruett. Appellant was advised of his constitutional rights and signed a waiver form, which was entered into evidence over objection (R 950-952). Appellant's counsel renewed his objection to the statement from the suppression hearing (R 180-181; 505-581) and

it was overruled (R 955). Detective Newman testified that during the July 28 interview appellant stated that he had no knowledge of the victim's death, did not know her, and was not at the bar on the night of her disappearance. Appellant was then taken to Clay County (R 956).

On August 6, Newman received a note that appellant wanted to speak with him, and it was entered into evidence over objection that Newman knew appellant had been appointed an attorney (R 957-960). Newman advised appellant of his constitutional rights, and appellant said he wanted to talk (R 961). Counsel was granted a continuing objection to any statements because of his prior motion to suppress (R 962). At this interview, appellant said he went to the bar at 10:00 p.m. and talked to the victim. She said she would like to meet him later and get high, so appellant purchased some drugs and picked her up at 2:00 a.m. They drove to Manning's cemetery in the victim's car and injected THC and cocaine into their arms with needles. They both passed out, and the next morning when appellant awoke the girl was dead (R 962-964).

Appellant then told Newman another story on August 6. It began the same, from the bar to the cemetery. The girl passed out and appellant drove to Randy Thomas' house in the girl's car at 4:00 a.m. Both appellant and Randy returned to the cemetery, and when the girl woke up, Randy was to have sex with her while appellant walked down the road to return 30 minutes later. When appellant returned, Randy said the girl had objected to having sex with him so Randy strangled her with his hands. Both men took the girl's body to the abandoned house on McClellan Road and took her car to the pit off 301 (R 964-966).

(4) Newman talked with appellant again on August 6 at 9:00 or 9:30 p.m. Appellant's counsel again renewed his prior objection. At this time, appellant wrote out a statement which was entered into evidence over objection as state's exhibit #24 (R 967-968). In this statement, appellant wrote out the earlier version that the girl had apparently died from the drugs and added that he had taken her body to the abandoned house and had enlisted Randy's aid in burning her car (R 968-972).

(5) Newman spoke with appellant again on August 27, after receiving word from a correctional officer that appellant wanted to talk. Appellant stated that Clay County had no jurisdiction over the case because the girl was actually killed in Georgia and her body brought back to Florida. Appellant signed another waiver form,and it was entered into evidence over appellant's continuing objection (R 972-974). Appellant met the girl at the bar and shot drugs. He told the girl he was wanted for a robbery in south Florida,and she suggested they go to California. He needed to go to the Atlanta airport to pick up some items,so they drove the girl's car up 301 into Georgia. The girl produced a bag of cocaine which appellant thought she had stolen from his brother. They argued,and the girl threatened to turn him in for the robbery charges. The girl slapped him,and he choked her to death with his hands in the backseat of her car. He became scared and drove back through Jacksonville to the abandoned house on McClellan Road where he placed her body. He saw some black rope nearby and tied it around her neck and dragged her body through the bushes. He then disposed of the car at the pit with Randy Thomas' help (R 978-981).

The state rested (R 997). Appellant moved for a judgment of acquittal because there was no evidence of premeditation. Appellant also renewed all prior motions, including the motion to suppress all of the statements. All defense motions were denied (R 997-1001). Appellant rested without presenting any testimony, and renewed his motion for judgment of acquittal, which was again denied (R 1001-1003).

During a charge conference, appellant objected to a special requested instruction by the state (R 317) which said that exculpatory statements, if false, are an indication of guilt. The court modified the instruction and granted the state's request over appellant's objection (R 1004-1011).

After closing arguments (R 1015-1063) the jury was charged from the written instructions in the record (R 320-340; 1064-1066). After 50 minutes of deliberation, the jury returned its guilty verdict (R 345; 1067-1068). The trial was recessed until the next day.

(B) PENALTY PHASE

State witness Marion Wainwright, the custodian of the criminal court records in Duval County, produced two judgments and sentences bearing appellant's name, and they were entered into evidence without objection as state's exhibit #27. On December 2, 1977, appellant was adjudicated guilty of robbery by Judge Nimmons and sentenced to 15 years; he was also adjudicated guilty of burglary of a dwelling and sentneces to 10 years consecutively (R 1076-1080). Fingerprint examiner Hamm testified that appellant's fingerprints were on the judgments and sentences (R 1084-1085). State witness Newman testified over objection that, when appellant was booked into the Clay County Jail, he stated that he was on

parole (R 1086-1088).

Defense witness Brian McClendon had known appellant since 1979. He thought appellant was a nice, non-violent, young man with whom he had gone on three fishing trips (R 1090). Defense witness Delores Pacetti had known appellant all his life and thought of him as a normal child (R 1095). Defense witness Harry Pringle knew appellant had been imprisoned and employed him as a plumber's helper. He thought appellant to be a very reliable, dependable, and good worker (R 1100-1102). Defense witness Doris Van Camp knew appellant when he and she were teenagers. Appellant was a normal adolescent (R 1108-1110).

Herbert Edwin Johnson, appellant's father, testified that appellant, age 23, was the fourth son of six children. Mr. Johnson was a bricklayer and had to work out of state during the 12 summers when appellant was out of school (R 1112-1114). Mr. Johnson regretted that he could not be with his son during those summers (R 1115). Betty J. Johnson, appellant's mother, testified that she never had any problem with appellant until he was 12 years old. At that time, she started work at the state hospital at night while his father was taking evening college courses (R 1122). She testified that a murder is not consistent with her son's behavior (R 1125).

During a charge conference, appellant's counsel objected to the jury being instructed on the following aggravating circumstances because there was no evidence to support them: prior violent felonies; avoiding lawful arrest; heinous, atrocious and cruel; and cold, calculated and premeditated (R 1131-1139).

Before the jury, the prosecutor argued that he had proven five aggravating circumstances and there was no mitigation (R 1143-1156). Appellant's counsel disagreed (R 1157-1165). The jury was instructed (R 346-363; 1165-1169). After 20 minutes of deliberation, the jury returned its death recommendation (R 365; 1171-1173).

At sentencing, the court found no mitigating circumstances as set forth in the statute. The court found the following aggravating circumstances: under sentence of imprisonment; preventing lawful arrest; heinous, atrocious and cruel; and cold, calculated and premeditated (R 424-429; 444-445). This appeal follows.

IV ARGUMENT

ISSUE I

APPELLANT WAS DENIED DUE PROCESS AND EQUAL PROTECTION IN VIOLATION OF THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION, AND A FAIR TRIAL IN VIOLATION OF THE SIXTH AMENDMENT, UNITED STATES CONSTITUTION, WHEN HE WAS HANDCUFFED IN THE PRESENCE OF PROSPECTIVE JURORS DURING VOIR DIRE.

The record reflects that, when an afternoon recess was taken during jury selection, a bailiff handcuffed appellant. Even though appellant's counsel stated that at least one juror had seen the incident, the court made no inquiry into the matter and summarily denied appellant's motion for mistrial (R 667-668).

It is clear that the state cannot compel a defendant to proceed to trial in prison garb or in any manner which suggests his status as a dangerous prisoner. To do so is to violate due process and the right to a fair trial because it destroys the presumption of innocence to which

any criminal defendant is entitled. It also is a violation of equal protection because it reflects upon the status of the defendant as an incarcerated indigent, unable to make bond. Estelle v. Williams, 425 U.S. 501 (1976). As this Court so eloquently stated in Shultz v. State, 131 Fla. 757, 179 So.764 (1938):

> Every person is presumed to be innocent of the commission of crime and that presumption follows them through every stage of the trial until they shall have been convicted. It is therefore, highly improper to bring a person who has not been convicted of crime, clothed as a convict and bound in chains, into the presence of a venire or jury by whom he is to be tried for any criminal offense and when such condition is shown by the record to have obtained in many cases it might be sufficient ground for a reversal.

131 Fla. at 758.

The rules governing the imposition of physical retraints, whether they be handcuffs, shackles, manacles, or leg irons, upon criminal defendants find their origin in the English common law. Blackstone wrote:

> [T]hough under an indictment of the highest nature, [the prisoner] must be brought to the bar without irons or any manner of shackles or bonds, unless there be evident danger of escape and then he may be secured with irons.

IV Blackstone's Commentaries at 322. See also II Hale, Pleas of the Crown at 219; Krauskopf, Physical Restraint of the Defendant in the Courtroom, 15 St. Louis U.L.J. 351 (1971). It must be remembered that there is nothing in this record to show that appellant was a security risk, or that he had been disruptive in the courtroom. Compare: Illinois v. Allen, 397 U.S. 337 (1970). See also Montoya v. People, 141 Colo.9, 345 P.2d 1062 (1959)(defendant handcuffed during jury selection); McKenzey v. State, 138 Ga. 88,225 S.E.2d 512 (Ct.App. 1976)

(defendant seen in handcuffs by prospective jurors); Commonwealth v. Cruz, 226 Pa. 241, 311 A.2d 691 (1973)(defendant brought into courtroom while handcuffed in presence of the jury); and Walthall v. State, 505 S.W.2d 898 (Tex.Ct.Crim.App. 1974)(defendant handcuffed and chained before jury deprived defendant of the presumption of innocence).

Appellant brought the matter to the trial court's attention via a motion for mistrial. The trial court summarily denied the motion without further inquiry into the matter. The trial court had a duty to inquire of all the prospective jurors present in the courtroom whether seeing appellant in handcuffs had prejudiced them against appellant. The observations of Justices Brennan and Marshall in Estelle v. Williams, 425 U.S. at 533, n. 13, are appropriate to the instant case:

> In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. . . . Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings. . . . If the law relating to trial in prison garb was so clear, . . . the devastating impact of such garb on the presumption of innocence so pervasive, and the trial judge's sensitivity so genuine, invocation of the 'adversary system' . . . cannot justify the trial judge's failure to inquire into the matter, which certainly did not escape his attention. [I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts. (citations ommitted).

This Court must reverse for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT JURISDICTION MUST BE PROVEN BEYOND A REASONABLE DOUBT.

In homicide cases, there is a statutory presumption that Florida has jurisdiction over the offense if the victim's body is found within this state. Section 910.005(2), Florida Statutes (1981). This presumption can be rebutted, and was in the instant case, where in appellant's August 27 statement to the police, he stated that he had strangled the girl in Georgia (R 972-981). Thus, under these particular circumstances, he was entitled to have the jury instructed that the state must prove beyond a reasonable doubt that Florida had jurisdiction over this crime.

In Lane v. State, 388 So.2d 1022 (Fla. 1980), the defendant robbed the victim in Florida, hit him several times over the head and placed the victim in the trunk of his car. He then drove to Alabama, where he beat the victim again and struck the fatal blow. This Court held that Florida had jurisdiction over the defendant because either premeditation or the underlying felony had occurred in Florida. But importantly, this Court in Lane adopted the majority view and held that where territorial jurisdiction is in dispute, it must be proven by the state beyond a reasonable doubt. This Court relied upon the decision of the Supreme Court of Maine in State v. Baldwin, 305 A.2d 555 (Me. 1973). There a rape occurred in a gravel pit at the Maine-New Hampshire border. The court held that the state must prove territorial jurisdiction in Maine beyond a reasonable doubt in order to protect the defendant's right against double jeopardy under the Fifth Amendment, United States Constitution, if he were to be prosecuted again in New Hampshire. This result is

constitutionally required because New Hampshire was not required to give full faith and credit to Maine's determination of jurisdiction under Art. IV, §1, United States Constitution and Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873).

The same is true in the instant case. Because the jury was not charged that it must find jurisdiction in Florida beyond a reasonable doubt, there is nothing to preclude the state of Georgia from prosecuting appellant for murder on the basis of his August 27 statement. This Court formulated the following jury instruction in Lane:

> Given the facts in this cause, we find that the jury instructions were too general. Upon any retrial of this cause, specific instructions must be given which require the jury to find beyond a reasonable doubt that either: (1) the fatal blow to the victim occurred in Florida, (2) the death of the victim occurred in Florida, or (3) an essential element of the offense which was part of one continuous plan, design and intent leading to the eventual death of the victim occurred in Florida.

388 So.2d at 1029. The trial court erred in failing to give such an instruction in the instant case. This Court must reverse for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN GRANTING THE STATE'S REQUESTED JURY INSTRUCTION NO. 1, AS MODIFIED, AND IN CHARGING THE JURY THAT INCONSISTENT EXCULPATORY STATEMENTS CAN BE USED TO AFFIRMATIVELY SHOW CONSCIOUSNESS OF GUILT AND UNLAWFUL INTENT BECAUSE THE INSTRUCTION GIVEN CREATED A CONCLUSIVE OR MANDATORY PRESUMPTION OF GUILT IN VIOLATION OF THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION.

The state requested a special jury instruction regarding false exculpatory statements (R 317). Appellant's counsel objected to it

and to the modified instruction which the court announced would be given (R 1004-1011). The jury was subsequently instructed as follows:

> Inconsistent exculpatory statements can be used to affirmatively show consciousness of guilt and unlawful intent (R 337).

This instruction was given immediately after the standard instruction regarding a defendant's statements (R 336).

The instruction given was a dramatic alteration by the trial court of the instruction requested by the state, which was:

> Exculpatory statements, which are explanations tending to explain or excuse an act by an accused, if shown to be false, such proof of falsity is a separate circumstance tending to show defendant's guilt and has independent probative force (R 317).

The wording of the state's request was apparently derived from the federal cases cited in support thereof, and, indeed, a similar federal instruction has achieved widespread use and approval. See, e.g., Government of Virgin Islands v. Lovell, 378 F.2d 799, 806 (3rd Cir. 1967); and Samuels v. United States, 397 F.2d 31 (10th Cir. 1968). However, the instruction given in the instant case was unconstitutional because it informed the jury as a matter of law that: (1) appellant's statements were inconsistent; (2) they were exculpatory; and (3) as a result of that inconsistency, appellant was guilty of first degree murder. In short, the instruction left no facts for the jury to determine, and it created either a conclusive or mandatory presumption of guilt in violation of the due process clause of the Fourteenth Amendment, United States Constitution. Moreover, it was also an impermissible judicial comment upon the evidence.

A conclusive presumption is one which results when the ultimate

fact (of guilt) is presumed to be true upon proof of another fact (that appellant's statements were inconsistent and exculpatory), and no evidence, no matter how persuasive, can rebut that presumption of guilt. The United States Supreme Court found an unconstitutional conclusive presumption in Morissette v. United States, 342 U.S. 246 (1952). There the defendant was charged with willfully and knowingly taking government property. The trial judge ruled that intent was presumed by the defendant's own act. The Court held:

> It follows that the trial court may not withdraw or prejudice the issue by instruction that the law raises a presumption of intent from an act. . . . A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. . . . [T]his presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.

Id. at 274-275. Likewise, in United States v. United States Gypsum Co., 438 U.S. 422, 435, 446 (1978), the Court held:

> [A] defendant's state of mind or intent is an element of a criminal . . . offense which . . . cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent . . . .
>
> . . .
>
> [U]ltimately the decision on the issue of intent must be left to the trier of fact alone. The instruction given invaded this fact finding function.

Because conclusive presumptions do not require the state to prove each element of a crime beyond a reasonable doubt, they are unconstitutional.

A similar result occurs when mandatory presumptions are used. They arise when a jury is required to find an ultimate fact (guilt)

to be true upon proof of another fact (inconsistent exculpatory statements) unless they are otherwise persuaded by a preponderance of evidence offered in rebuttal. They are unconstitutional because they shift the burden to the defendant to prove his innocence. Thus, in Mullaney v. Wilbur, 421 U.S. 684 (1975), a mandatory presumption was found to be unconstitutional. There, the state law provided that malice was presumed in a homicide unless the defendant proved that he acted in the heat of passion. Because due process does not permit the defendant to have the burden of proving his innocence, this mandatory presumption was unconstitutional. The instruction in the instant case created a mandatory presumption because if shifted the burden to appellant to prove why his inconsistent exculpatory statements did not show that he was guilty of first degree murder.

The Supreme Court found a presumption in Sandstrom v. Montana, 442 U.S. 510 (1979) to fit both categories. There a defendant was charged with deliberate homocide, and the jury instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts." Id. at 512. The Court held this presumption to be both conclusive and mandatory, and thus unconstitutional, because it did not require the state to prove all elements of the homicide beyond a reasonable doubt:

> First, a reasonable jury could well have interpreted the presumption as 'conclusive', that is, not technically a presumption at all, but rather an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences) unless the defendant proved the con-

> tary by some quantum of proof which may well have been considerably greater than 'some' evidence - thus effectively shifting the burden of persuasion on the element of intent.
>
> . . .
>
> Thus, the question before this Court is whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in Winship [397 U.S. 358 (1970)] on the critical question of the petitioner's state of mind. We conclude that under either of the two possible interpretations of the instructions set out above, precisely that effect would result, and that the instruction therefore represents constitutional error.

Id. at 517, 521 (emphasis in original). The same result is constitutionally mandated in the instant case, whether the instruction is viewed as a conclusive presumption, which removes an element of proof from the state, or whether it is viewed as a mandatory presumption, which requires the defendant to prove his innocence.

The only type of presumption which is constitutional is a permissive presumption or inference. For example, in County Court of Ulster County v. Allen, 442 U.S. 140 (1979), four defendants were charged with illegal possession of loaded handguns which were visible on the seat of the car in which they were riding. The trial court charged the jury that it was entitled to infer the defendants' possession of the handguns from their presence in the car, but that the jury must consider all circumstances tending to support or contradict such an inference, and that the jury must decide the issue for itself without regard to how much evidence the defendants had introduced. The instruction was held to be a permissive presumption or inference, and not a conclusive or mandatory presumption, because:

> The instructions plainly directed the jury to consider all the circumstances tending to support or contradict the inference that all four occupants of the car had possession of the two loaded handguns and to decide the matter for itself without regard to how much evidence the defendants introduced.

Id. at 162 (footnote ommitted). The instruction in the instant case creates no such permissive presumption or inference, because it leaves no room for the jury to consider all the circumstances and does not permit the jury to decide the issue of guilt for itself.

In Fitzgerald v. State, 339 So.2d 209 (Fla. 1976), this Court was faced with a statutory presumption which provided that it was prima facie evidence of intent to deprive the true owner of his property when the defendant failed to return a rental car on time. This Court held:

> In criminal litigation, it is well recognized that only a permissive presumption may be applied, i.e., a presumption which allows the jury to find the presumed fact once the basic fact is proven but does not require such a finding by the jury. Application of other types of presumptions, such as mandatory or conclusive, would substitute the proof of the basic fact for that of the presumed fact, and the proof of the basic fact would be the only issue tried. In criminal cases, the jury must be allowed to determine whether a reasonable doubt exists for any element of the crime.

Id. at 211 (emphasis in original). This Court must apply Fitzgerald and the United States Supreme Court cases discussed above and find the instruction in the instant case to be an unconstitutional conclusive or mandatory presumption.

The invalidity of the instruction here can be plainly seen when compared with an instruction used in California concerning false state-

ments as evidence of guilt:

CONFESSIONS OF GUILT-FALSEHOOD

> If you find that before this trial the defendant made false or deliberately misleading statements concerning the charge upon which he is now being tried,you may consider such statements as a circumstance tending to prove a consciousness of guilt but it is not sufficient of itself to prove guilt. The weight to be given to such a circumstance and its significance, if any, are matters for your determination.

I Cal. Jury Inst. Crim. [CALJIC] No. 2.03 at 26 (4th ed.). This instruction creates only a permissive presumption or inference because it allows the jury to: (1) make a determination whether the statements are false; (2) make a determination whether they are misleading; (3) consider them only as circumstantial evidence; (4) determine whether they tend to prove guilt, but they do not require a finding of guilt; and (5) weigh the value to be given to the statements. Thus, this instruction does not substitute itself for an element of the offense, thereby creating a conclusive presumption, nor does it require the defendant to prove his innocence, thereby creating a mandatory presumption.

The invalidity of the instruction here can also be plainly seen when compared to an instruction used in the federal courts concerning exculpatory false statements as evidence of guilt:

EXCULPATORY STATEMENTS - LATER SHOWN FALSE

> When a defendant voluntarily and intentionally offers an explanation, or makes some statement tending to show his innocence, and this explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt. Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his innocence.

> Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury.
>
> . . .
>
> The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

I Devitt and Blackmar, Fed. Jury Practice and Instructions §15.12 at 466-467 (3d ed.). This instruction also creates only a permissive presumption or inference because it allows the jury to: (1) determine whether the defendant voluntarily made a statement; (2) find whether it shows innocence; (3) conclude for itself whether the statement is false; (4) consider it as circumstantial evidence; (5) determine whether it tends to prove guilt, but it does not require a finding of guilt; (6) weigh for itself whether it points to guilt; (7) attach whatever significance to the statement which it deserves; (8) perform this function completely within its province as a jury; and (9) remember that the defendant has no burden to prove his innocence.

Likewise, instructions concerning flight or concealment of the defendant after a crime are constitutional if couched in terms of a permissive presumption or inference, which fully permit the jury to engage in its fact-finding function without interference from the trial court. See, e.g., Blackwell v. State, 79 Fla. 709, 86 So. 224 (1920). As the Supreme Court stated so long ago in Hickory v. United States, 160 U.S. 408, 416-417 (1896);

> It is undoubted that acts of concealment by an accused are competent to go to the jury as tending to establish guilt, yet they are not to be considered as alone conclusive, or as creating a legal presumption

> of guilt. They are mere circumstances to be considered and weighed in connection with other proof with that caution and circumspection which their inconclusiveness when standing alone requires.

Not only does the instant instruction create an unconstitutional presumption, but it also is an improper comment on the evidence. The trial court instructed the jury that he had found the statements to be inconsistent and exculpatory, and therefore the appellant must have "a consciousness of guilt and unlawful intent", and so he must be guilty of first degree murder.

The prohibition against judicial comment upon the evidence is a principle ingrained in Florida law. Lester v. State, 37 Fla. 382, 20 So. 232 (1896); Raulerson v. State, 102 So.2d 281 (Fla. 1958). It insures the exclusiveness and the independence of the jury as a fact-finder, and insulates that body from a trial judge's influence, a force readily persuasive by virtue of his dominant position. Wood v. State, 31 Fla. 221, 12 So. 539 (1893); Leavine v. State, 109 Fla. 447, 147 So. 897 (1933); Seward v. State, 59 So.2d 529 (Fla. 1952).

A trial judge is prohibited from giving instructions which purport to analyze the evidence or summarize the facts of the case. Raulerson v. State, supra; Esposito v. State, 243 So.2d 451 (Fla. 2d DCA 1971); Parise v. State, 320 So.2d 444 (Fla. 3d DCA 1975). Any instruction that assumes the existence of a fact necessarily invades the jury's province. Hisler v. State, 52 Fla. 30, 42 So. 692 (1906); West v. State, 53 Fla. 77, 43 So. 445 (1907); Stokes v. State, 54 Fla. 109, 44 So. 759 (1907); Dwyer v. State, 93 Fla. 777, 112 So. 62 (1927); McBrayer v. State, 112 Fla. 415, 150 So. 736 (1933). Indeed, this Court has not hesitated to condemn instructions that assumed facts which were uncontested and fully supported

by the evidence. Green v. State, 43 Fla. 556, 30 So. 656 (1901).

It is well settled that a comment by the court upon the evidence is reversible error because the figure of the trial judge in the eyes of the jury is so important that any appraisal by the judge of the testimony is prejudicial. In Raulerson v. State, supra, the trial judge stated in front of the jury that the state had shown a conspiracy between the defendant and others to commit a crime. This Court reversed for a new trial. Likewise, the trial court's declaration of the existence of a conspiracy was found reversible error in Flicker v. State, 374 So. 2d 1141 (Fla. 5th DCA 1979). Likewise, a comment that a gun was found at the scene of the crime was reversible error in Beckham v. State, 209 So.2d 687 (Fla. 2d DCA 1968) and a comment upon the veracity of a state witness was prejudicial error in Robinson v. State, 161 So.2d 578 (Fla. 3d DCA 1964).

Because the faulty jury instruction was both an unconstitutional presumption and an improper comment on the evidence, appellant is entitled to a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN CHARGING THE JURY THAT BURGLARY AND ROBBERY ARE PRIOR VIOLENT FELONIES.

Pursuant to Section 921.141(5)(b), Florida Statutes (1981), the state presented evidence that appellant had been convicted in 1977 of burglary of a dwelling and robbery, by introducing copies of the prior judgments and sentences (R 1078-1080). Appellant's counsel objected during the charge conference on the jury being instructed on this aggravating circumstance because robbery and burglary are not violent. The state argued that they were and made reference to Section 776.08, Florida Statutes (1981), which defines "forcible felonies" as they relate to self-defense and to justifiable force by a police officer in making an arrest. The state's argument is incredible, because the Legislature's use of the words "forcible felony" in creating Ch.74-383, §13, Laws of Florida, in 1974, has nothing whatsoever to do with "felony involving the use or threat of violence to the person" as it existed at that time as an aggravating circumstance.

Appellant is aware that this Court in Simmons v. State, ___ So.2d ___(Fla.S.Ct. Case No. 58,183, opinion filed August 26, 1982) held that unarmed robbery is a violent felony under the death penalty statute. But here the jury was charged that both robbery and burglary of a dwelling were violent felonies (R 350; 1156). Burglary of a dwelling is not a prior violent felony, as held by this Court recently in Mann v. State, ___ So.2d ___ (Fla.S.Ct. Case No. 60,569, opinion filed September 2, 1982). Because the jury was told that both robbery and burglary were violent felonies, and because it did not return a specific verdict on

what aggravating circumstances were found, we cannot know that the jury did not find burglary to support this aggravating circumstance.

The net effect of the trial court's erroneous instructions on this aggravating circumstance was to violate the due process clause of the Fourteenth Amendment. In Sandstrom v. Montana, 442 U.S. 510 (1979), the defendant was charged with a homicide which had as an essential element thereof that it be purposely or knowingly committed. The trial court instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The Supreme Court held that this instruction conflicted with the presumption of innocence and whether it was viewed as a rebuttable or a conclusive presumption, the erroneous instruction improperly shifted the burden to the defendant to prove lack of intent, in violation of the due process clause.

The importance of Sandstrom v. Montana, as applied to the instant case, is in the test of constitutional error employed. The Court spoke in terms of whether a reasonable juror could have given effect to the improper presumption; the Court could not ignore the possibility that the jury did so; and the jurors could have concluded that the defendant intended to commit the homicide. This is the test whenever the jury returns a general verdict. In the instant case, the jury's recommendation of death was a general one, in that it did not list the aggravating circumstances which it found. So it must be assumed that the jury could have determined that a prior violent felony existed because of the burglary only; that possibility cannot be ignored. The rationale for this appellate inquiry is that when a case is submitted to the jury upon alternative theories, the unconstitutionality of one of these

theories requires that the conviction be set aside. Sandstrom v. Montana, supra; Stromberg v. California, 283 U.S. 359 (1931). As the Court stated in Gregg v. Georgia, 428 U.S. 153, 192-193 (1976)(citations and footnote omitted):

> The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law.
>
> . . .
>
> When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

Appellant is also aware that in Simmons, supra, this Court held that it is proper for the trial court to inform the jury that certain felonies are violent as a matter of law. To permit the trial court to reach the conclusion required of that instruction and announce it to the jury allows an impermissible comment on the evidence by the trial judge. Raulerson v. State, 102 So.2d 281 (Fla. 1958); Parise v. State, 320 So.2d 444 (Fla. 3d DCA 1975).

Judicial comments on the evidence have such a demonstrable effect on the jury's deliberation that the comment should not be allowed because they denied the defendant his constitutional right to a fair trial. In this instance, the jury should have been required to determine on its own and from the evidence presented to them, whether the robbery for which appellant was previously convicted involved the use or threat of violence. Moreover, the court's instruction that burglary is also a violent felony was patently erroneous in light of Mann, supra. The trial court effectively

directed the jury to find the aggravating circumstance in question, a prior felony conviction involving the use or threat of violence to the person. Because the evidence regarding the prior crime of robbery was the only proper proof offered by the state in the penalty phase (see Issue V, infra) it is not inconceivable that this aggravating circumstance was the only one found by the jury in support of its death recommendation. By giving the instruction, the trial court denied appellant's state and federal contitutional rights to due process and a fair sentencing hearing before an impartial jury.

ISSUE V

THE TRIAL COURT ERRED IN ALLOWING DETECTIVE NEWMAN TO TESTIFY DURING THE PENALTY PHASE THAT APPELLANT STATED AT THE BOOK-IN DESK THAT HE WAS ON PAROLE AND IN CHARGING THE JURY ON THIS AGGRAVATING CIRCUMSTANCE.

Appellant moved to suppress all statements appellant had made to the police (R 180-181, ¶6). He renewed his motion when Detective Newman testified during the penalty phase that appellant had stated when booked into the Clay County jail that he was on parole, when Newman asked appellant what his status was with the Department of Corrections or the Parole Commission. Appellant's objection was overruled, and the jury heard that appellant admitted that he was on parole (R 1087-1088).

Of course, the state was seeking to establish the aggravating circumstance of "under sentence of imprisonment", as defined by Section 921.141 (5)(a), Florida Statutes (1981), and as construed by this Court in Lewis v. State, 398 So.2d 432 (Fla. 1981), and other cases, which hold

that parole status is equivalent to a sentence of imprisonment. The jury heard this improper evidence and was also charged on this aggravating circumstance (R 1166).

This admission was not properly received in evidence because, quite simply, there is nothing in the record to suggest that Detective Newman advised appellant of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) at the book-in desk when he asked appellant the question.

Perhaps the trial court found appellant's admission to be a spontaneous utterance, not in response to interrogation. This view is incorrect, in light of Rhode Island v. Innis, 446 U.S. 291 (1980). There the Supreme Court held that Miranda warnings are required where a person in custody is subject to interrogation in any form which is reasonably likely to elicit an incriminating response. The Court further held that in determining whether the officer's comment is likely to elicit a response, the focus is upon the perception of the defendant rather than the intent of the questioner. In the instant case, Newman's question about appellant's status is precisely the type of comment which is the functional equivalent of interrogation, likely to elicit a response.

In Harryman v. Estelle, 616 F.2d 870 (5th Cir. 1980), cert.den. 449 U.S. 860 (1980), the police,conducting a routine pat-down of the defendant without Miranda warnings,found a condom containing white powder and asked,"What is this?". The court held that the defendant's response was not validly obtained because Miranda warnings had not been given. Harryman was a pre-Innis decision; its rationale was based

solely upon Miranda, but its vitality is increased in light of Innis.

Similarly, in United States v. Moody, 649 F.2d 124 (2d Cir. 1981), a female customs officer stopped a female international airline passenger in a New York airport and conducted a pat-down search. The officer felt a bulge in the defendant's girdle and asked her to produce the object. When the defendant pulled out a plastic bag, the officer asked what it contained and the defendant replied, "It is heroin." The court, relying upon Innis, held that the admission was invalidly obtained without Miranda warnings.

Likewise, in People v. Jordon, 413 N.E. 2d 195 (Ill. 3d DCA 1980), the defendant was arrested for DWI and while awaiting a breath test at the police station, the officer saw suspected marijuana at the defendant's feet. The officer asked the defendant where it came from, and the defendant said from his boots. The court held that the admission was improperly obtained.

In a case very similar to the instant one, Murray v. State, 273 S.E. 2d 219 (Ga.Ct.App. 1980) the defendant and his wife were arrested for possession of marijuana at their joint residence. At the book-in desk, the officer was conversing with the defendant in general about marijuana, and the defendant said, "At least you didn't get my private stash." The state used that admission at trial to show the defendant's guilty knowledge of the presence of marijuana at the residence. The court applied Innis and found, although there was just an informal conversation about drugs, it was functionally equivalent to interrogation.

It is well-settled that the right against self-incrimination as contained in the Fifth Amendment, United States Constitution, is fully

applicable to a defendant's admission which is sought to be used against him in the penalty phase of a capital case. Estelle v. Smith, 451 U.S. 454 (1981). Appellant's statement was the only evidence before the jury regarding this aggravating circumstance. Because we cannot know that the jury did not find it in recommending death, the penalty phase was constitutionally infirm. See the discussion of Sandstrom v. Montana, in Issue IV, above. This Court must order a new penalty phase before a new jury.

ISSUE VI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THREE AGGRAVATING CIRCUMSTANCES FOR WHICH THERE WAS NO RELIABLE EVIDENCE.

The trial court instructed the jury on the aggravating circumstances of avoiding lawful arrest; heinous, atrocious and cruel; and cold, calculated and premeditated (Section 921.141 (5)(e),(h),and(i), Florida Statutes (1981)),all over appellant's timely objection that there was no competent evidence to support them (R 351-353; 1133-1139; 1166). The trial court also found these three aggravating circumstances in imposing the death sentence (R 427; 444-445). There was no reliable evidence to support these three aggravating circumstances,because they were supported only by appellant's admissions to Randy Thomas and to Detective Newman, which the trial court had previously found to be inconsistent as a matter of law. See Issue III, supra. Aggravating circumstances must be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). These, being unreliable, were not. Thus, both the jury instructions and the findings are erroneous; this Court

must vacate the death sentence and remand for the imposition of a life sentence; or, at the least, remand for a new sentencing proceeding before a new jury.

In Woodson v. North Carolina, 428 U.S. 280 (1976), the Supreme Court held that the prohibition in the Eighth Amendment, United States Constitution, regarding cruel and unusual punishment, is not violated by a death sentence if the sentence is imposed upon reliable factors. The Court again addressed reliability in terms of the due process clause of the Fourteenth Amendment, United States Constitution, in Gardner v. Florida, 430 U.S. 349 (1977), where the Supreme Court held that the undisclosed matters in a presentence investigation cannot be used to support a death sentence because their reliability has not be tested by the right to rebut or explain them.

The evidence regarding admissions made by appellant to Randy Thomas is unreliable because it is inconsistent with appellant's later exculpatory and inculpatory statements to the police. The evidence of avoiding arrest is unreliable because appellant first told Thomas he had killed a man (R 881), but then said he had killed a girl because "she said she was going to send me back" (R 882). Thomas took the statement to mean that she was somehow going to send appellant back to jail and so he killed her to prevent his arrest. There is nothing in appellant's statements to Thomas to show that appellant killed her to prevent his arrest for an outstanding warrant from Broward County, as the trial court found (R 427). As this Court held in Riley v. State, 366 So.2d 19, 22 (Fla. 1978): "[P]roof of the requisite intent to avoid arrest and detection must be very strong." See also Menendez v. State,

368 So.2d 1278 (Fla. 1979), appeal after remand, ___ So.2d ___ (Fla. S.Ct. Case No. 49, 294, opinion filed August 26, 1982)(slip opinion at 5, especially note 2).

The trial court derived that statement from appellant's confession on August 27, which said that appellant strangled the girl in Georgia (R 979), and which was wholly inconsistent with his prior statements to Thomas or to the police. Because the trial court had previously found appellant's statements to be so inconsistent as a matter of law as to justify a special jury instruction, they were inherently unreliable. The same is true with regard to the findings of heinous, atrocious and cruel, and cold, calculated and premeditated, which are again based solely upon appellant's statement to Thomas (R 892-893) and his August 27, confession to Newman.

Thus, there was no reliable evidence to support these three findings. To use this unreliable evidence to support a death sentence is a violation of both the Eighth and Fourteenth Amendments, United States Constitution. The death sentence must be vacated.

ISSUE VII

THE TRIAL COURT IMPROPERLY DOUBLED THE AGGRAVATING CIRCUMSTANCES OF HEINOUS, ATROCIOUS, AND CRUEL, AND COLD, CALCULATED AND PREMEDITATED.

The trial court's findings regarding these two aggravating circumstances are identical, in that appellant allegedly attempted to manually strangle the victim twice, and succeeded a third time by ligature strangulation (R 427; 445). They were improperly doubled and can be considered, if at all, as only one aggravating circumstance. Although

the court found no mitigation, the doubling cannot be harmless error because the trial court improperly limited itself to statutory mitigation. See Issue VIII, infra.

Where these two factors are found, they cannot be separately sustained unless "the trial court's findings contained distinct proof as to each factor." Hill v. State, ___ So.2d ___ (Fla. S.Ct. Case No. 60,144, opinion filed July 15, 1982)(slip opinion at 5). Here the same proof, if proof at all, was found for both. One must be stricken.

ISSUE VIII

THE LOWER COURT ERRED IN FAILING TO CONSIDER ANY NON-STATUTORY MITIGATING CIRCUMSTANCES.

The transcript and sentencing order of the lower court expressly state that only statutory mitigating circumstances have been considered (R 426; 444). Of course, mitigating circumstances must be open-ended in order for the statute and death sentence to be constitutional. Lockett v. Ohio, 438 U.S. 586 (1978); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981). This Court has properly construed our statute to allow consideration of any and all mitigating circumstances. Jacobs v. State, 396 So.2d 713 (Fla. 1981).

Recently the Supreme Court has explained what the requirements of Lockett v. Ohio are, where it held that:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . 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.

438 U.S. at 604 (emphasis in original). In Eddings v. Oklahoma, ___ U.S. ___, 71 L.Ed.2d 1 (1982), the sentencing court had failed to consider the defendant's family history in imposing a death sentence:

> The trial judge stated that 'in following the law' he could not consider 'the fact of this young man's violent background.' App.189. There is no dispute that by 'violent background' the trial judge was referring to the mitigating evidence of Eddings' family history. From this statement it is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact, rather he found that as a matter of law he was unable to even consider the evidence.

71 L.Ed.2d at 9-10 (footnote omitted; emphasis in original). The reviewing state court also precluded itself from considering this evidence. The Supreme Court held:

> We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in Lockett. Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeal on review, may determine the way to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.[10]
>
> . . .
>
> 10. We note that the Oklahoma death penalty statute permits the defendant to present evidence 'as to any mitigating circumstance.' Okla.Stat.,Tit.21,§701.10. Lockett requires the sentencer to listen.

71 L.Ed.2d at 10-11 (footnote 9 omitted).

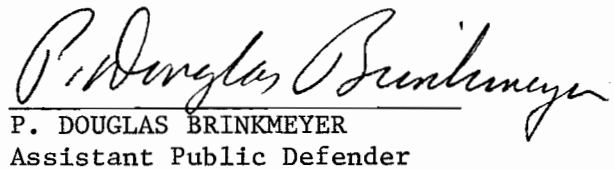
By its own words, the trial court failed to listen to any favorable evidence presented by the defense witnesses at the penalty phase. It went to appellant's character and was relevant under the cases cited

above. This is not a case where mitigating evidence was considered by the trial judge and rejected. It is a case, just like Eddings, where the evidence was totally excluded from consideration. See also Moody v. State, ___ So.2d ___ (Fla. S.Ct. Case No. 52, 907, opinion filed July 15, 1982). This Court must vacate the death sentence and remand for the trial court to reweigh this mitigation against whatever proper aggravating circumstances remain.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, as to Issues I, II, and III, appellant requests that the judgment and sentence be vacated and the cause be remanded for a new trial. As to Issues IV, V, and VI, appellant requests that the sentence be vacated and the cause be remanded for a new penalty phase by a new jury. As to Issues VII and VIII, appellant requests that the sentence be reconsidered by the trial judge.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Ms. Barbara Ann Butler, Assistant Attorney General, Duval County Courthouse, Suite 513, Jacksonville, Florida 32202, and to Mr. Daniel Karr Johnson, #A-062588, Post Office Box 747, Starke, Florida, 32091 on this 30 day of September, 1982.

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