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SUPREME COURT  
STATE OF FLORIDA

DAVID WALTER TROEDEL,  
Appellant,  
vs.  
STATE OF FLORIDA,  
Appellee.

Appeal No. 82-140  
Collier County

APPEAL FROM THE CIRCUIT COURT OF  
THE TWENTIETH JUDICIAL CIRCUIT,  
IN AND FOR COLLIER COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT,  
DAVID WALTER TROEDEL

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STATEMENT OF THE CASE

A Collier County Grand Jury returned an indictment on June 30, 1981, charging Appellant, DAVID WALTER TROEDEL, with two counts of first degree murder, one count of robbery and two counts of burglary. (A 4-6)<sup>1</sup> Counts I and II charged the murders of Chris John Musick and Robert Schreckengost, respectively; Count III charged a robbery of the same two victims; Count IV charged a burglary of a dwelling with an assault on the above-named victims; and Count V charged a burglary of the same dwelling while armed with a firearm. (A 4-6) Both Hawkins and Appellant TROEDEL pleaded not guilty and proceeded to separate jury trials. (R 8, 125-126)<sup>2</sup> Appellant TROEDEL was tried second, with his trial beginning February 16, 1982.

At the trial one witness for the State, Sergeant Jack Gant, an investigative officer, testified that he provided the factual exhibits necessary for the performance of a neutron activation test on the Appellant (R-1294) This, exhibit which was a cotton swab doused in a chemical, involved mixing chemicals for the

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<sup>1</sup>As indicated hereinafter for reference the letter "A" signifies the Appeal Record followed by the page number of that record.

<sup>2</sup>The letter R represents the Trial Record and the following numeral indicated the number found at the upper right corner of the trial transcript.

purpose of determining the presence or absence of antimony and barium. As further elaborated at trial these two substances were discharged upon on the firing of the .25 caliber pistol (R-1544) which was determined to be the murder weapon. (R-1570). The results of the test in this case showed substantial quantities of antimony and barium on Appellant TROEDEL's hands. (R-1548) The States witness, John P. Riley, an FBI element expert, testified that based upon these test results he was of the opinion that Appellant DAVID TROEDEL fired the .25 caliber pistol.

The jury found Appellant TROEDEL guilty of all five counts charged in the indictment. (A63-69). On the two counts of first degree murder the jury returned specific verdicts of first degree pre-meditated murder. With respect to the robbery charge, the jury returned a verdict of guilty and also found that the Appellant possessed a firearm during its commission. (A 67). The jury further found as to Counts IV and V that a burglary was committed by Appellant TROEDEL, and that an assault was made upon a person and that Appellant TROEDEL had in his possession a firearm. (A 68-69)

At the conclusion of the penalty phase of the trial, the jury recommended the imposition of the death penalty upon Appellant DAVID WALTER TROEDEL (A 70-71, R-1965) At the request of Appellant TROEDEL, a presentence investigation was ordered. On March 17, 1982, Judge Brousseau adjudged Appellant TROEDEL guilty on all five Counts and sentenced him to Death on each Murder conviction (A 76-81), thirty years for the robbery (A-78), and thirty years for the burglary of Count IV (A-79). The trial

court imposed no sentence for the burglary charged in Count V.  
(A-80)

In the findings of fact to support the death sentences, Judge Brousseau found and recited the following aggravating circumstances: (1) The capital felony was committed while the Appellant was engaged, or was an accomplice, in the commission, or in the attempt to commit, a robbery and burglary. This was also found by the jury (A-83). (2) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (A-84). (3) The capital felony was committed for pecuniary gain (A-84). (4) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws (A-84). (5) The capital felony was especially heinous, atrocious, or cruel; the victim Robert Schreckengost did not meet a swift or relatively painless death (A-84). (6) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, due to the fact that Co-defendant David Hawkins had earlier in the evening stated that he wanted to go to Golden Gate and "blow away a couple of dudes".

The Trial Judge found no merit and specifically rejected the statutorily prescribed mitigating circumstances namely: (1) no significant history or prior criminal activity (2) the Appellant being under extreme mental or emotional disturbance, (3) victim participation, (4) level of actual participation of Appellant TROEDEL, (5) the Appellants young age of 22 years. (A 85-86)

Appellant, David Walter TROEDEL, filed his notice of appeal to this Court on April 12, 1982. (A-82)

STATEMENT OF THE FACTS

The location of the occurrence of this criminal incident was at 1430 29th Street Southwest in a community subdivision development known as Golden Gate Estates in Collier County, Florida. Twenty-ninth Street Southwest runs North and South and at its southernmost direction deadends at a canal (R-955). At the northern end, the street runs into White Boulevard, which is its only access road. (R-955)

At the time that the incident occurred, there were only a few houses on 29th Street SW. On the East side of the street is the home of Harry and Laura Schreckengost, and situated further North is the location of the home of Dr. Bellay. The area between the Schreckengost home and the Bellay home is totally wooded. Directly across the street from the wooded area on the West side of 29th Street Southwest is the home of James Decker, who lives with his wife and son, Matthew. (R-998). The Decker residence is about 100 yards from the street. Likewise the Schreckengost home is about 100 yards from the street. (R-999). Matthew Decker's bedroom at the SE corner of his house provides a view of the limerock road which these houses face. (R-994)

On June 12th, at approximately 12:10 a.m., Matthew Decker was in his bedroom studying for a speech test when the noise of a vehicle proceeding down the road captured his attention (R-994). Because of the remoteness of the area and the usual sparcity of traffic, Matthew continued his observation of the truck until he saw it stop about midway between the Schreckengost home and the



Decker home. (R-1000) After the vehicle stopped the motor continued to run (R-1000). Matthew watched for a few minutes and then he got dressed and walked to the location of the truck (R-1002). After finding no occupants in or around the truck he went back to his house. He woke his father, Jim Decker, who was an investigator for the State Attorney, and they got in their car and drove to the truck. (R-1006). The truck, which was a large, green, flatbed, had now changed positions from when first observed by and had assumed a posture perpendicular to the road, and partially on the roads shoulder. (R-1007) The two of them drove past the truck, turned around in the Schreckengost driveway, and returned to the truck while shining the headlights on it (R-1108). James Decker got out and observed the truck, made a license check, and called for a uniformed officer by way of his portable radio (R-1023). James did not observe anyone at this time in the vicinity. (R-1023).

James drove Matthew home, and then made a trip up and down the street. Upon approaching White Boulevard, he encountered the requested uniformed officer, Deputy Sammie Jacobs. (R-1026). When he arrived, Deputy Jacobs observed an individual, who was later identified as David Hawkins, at the front of the truck (R-1069). He also observed a second individual, who was later identified as the Appellant DAVID WALTER TROEDEL at the drivers side of the truck leaning inside (R-1070). In response to a series of questions demanding an accounting for their presence on 29th Street Southwest Hawkins stated that he was there hunting for a job site. (R-1071) Decker was present during most of the

conversation. (R-1072) The Deputy instructed both individuals away from the truck and proceeded to examine the inside where he observed 2 handguns lying on the front seat of the truck.

(R-1072) He removed the two guns, which he identified as a .25 caliber automatic and a .22 automatic (R-1072). The .25 caliber was loaded with a clip. Jacobs removed the clip and extracted the rounds from the chamber. (R-1073) The .22 caliber contained no ammunition in its chambers or clip (R-1073). Jacobs then showed the guns to the two individuals and inquired as to their ownership. Appellant responded that he owned the .25 caliber and Co-Defendant Hawkins said that he had borrowed the .22 caliber gun from an unidentified friend (R-1073) Deputy Jacobs asked Hawkins and Appellant exactly where they had been, and Hawkins pointed to the Schreckengost house and responded that they had gone to that house seeking assistance for the stalled truck (R-1073, 1074).

At this time James Decker decided to go to Schreckengost home to see if everything was all right (R-1036) He observed that the front door was standing open at about a 45° angle. Thereupon he returned to where Jacobs and the two individuals were standing. (R-1037) Deputy Jacobs detained the subjects, read them their Miranda rights and proceeded to pat them down (R-1080) The pat down uncovered foreign paper money from Hawkins, in addition to a cellophane sealed coin (R-1081). These items were returned to the subjects pockets and the subjects, Hawkins and Appellant TROEDEL, were placed in the back of Jacobs' patrol car (R-1082). Later, an inventory search of the truck incident to

the arrest uncovered a .22 caliber revolver, which contained four spent rounds and two live rounds. (R-1166)

James Decker proceeded back to the Schreckengost house. He called into the house seeking a response, but receiving none, entered and began a casual observance (R-1039) Decker started to walk through the house and did not notice anything unusual until he reached the master bedroom, which he found ransacked and extremely out of normal order (R-1040). In the master bathroom, he found the Schrenckengosts two sons, Robert Schreckengost and Chris Musick, lying on the floor. (R-1040) Decker believed the Musick boy to be dead, but the Schreckengost boy was breathing laborously, and thought alive (R-1041). He then went outside to his car and radioed to Jacobs and the Sheriffs Department, telling them of his findings (R-1041). Immediately thereafter he began taking photographs of the scene with the camera normally kept in his car. (R-1042)

An autopsy examination of one of the deceased, Chris Musick, was performed later the morning of June 13, 1981, by Dr. Irving Goodof. (R-1376) It was determined that Chris Musick received two bullet wounds to the head, one in the cheek, the other about 2 inches above the right eye. (R-1377) The doctor also found and extracted two bullets from the skull of Chris Musick (R-1391) The cause of the death was determined to be from either one gunshot wound to the forehead or the combination of both gunshot wounds (R-1396, 1397)

On the next day, June 13, 1981, an autopsy was performed on Robert Schreckengost and several wounds were discovered

throughout his body (R-1398) The body had a bullet wound to the top of the head just beneath the scalp, which did not penetrate the skull (R-1398), a bullet wound over the left eye (R-1398) a bullet wound on the outer back of the right thigh (R-1399) a bullet wound on the inner aspect of the left thigh (R-1399) and a shallow wound on the left fifth finger. (R-1399) The cause of death was determined to be a gunshot wound to the head. (R-1416).

Several exhibits and items of evidence were collected both from the Harry Schreckengost home and the surrounding grounds that same morning. The first investigator at the scene was Investigator Harold Young who arrived at approximately 1:55 a.m., on June 12, 1981. (R-1092). He primarily watched the house to make sure the condition as it then existed remained undisturbed. (R-1094) Investigator Young was joined by Lieutenant Jack Gant, who is the supervisor of the men who work the crime scenes (R-1110). They examined the house and the surrounding areas close to the house. Investigator Gant's search of the adjacent wooded area uncovered three long guns, a pillowcase, and jewelry (R-1173). Additionally Sergeant Gant discovered two pairs of rubber gloves and a knife in a holster (R-1192, 1200). The holster was detailed with the impression of the initials of "D.T." (R-1199). The .22 caliber automatic, the three long guns, the jewelry and pillowcase all belonged to the Schreckengosts. (R-1323, 1324, 1360).

Following their arrests, Appellant TROEDEL and his Co-Defendant Hawkins were placed in the patrol car where they remained for several minutes (R-1082). Deputy Sheriff James H.

Gunderson arrived and removed Appellant TROEDEL from the patrol car and drove him to the Collier County Sheriffs Department, at which time he removed the personal property from the person of Appellant DAVID TROEDEL (R-1306). The personal items were turned over to Sergeant Gant (R-1307). Later that morning, Sergeant Gant performed the preliminary steps for a neutron activation test on Appellant TROEDEL and his Co-Defendant, Hawkins. The neutron activation test is used to determine the presence of the substance of antimony and barium (R-1240). The substance taken in Sergeant Gant's preliminary tests were then sent to the FBI laboratory for testing and result purposes (R-1242) The results showed that Appellant TROEDEL had 400% more antimony on his hands, than did Co-Defendant Hawkins (R-1548) Sergeant Gant admitted that he did not follow recognized procedures for administering these preliminary steps prior to testing (R-1294) A neutron activation test was subsequently performed by John Riley of the FBI, on the .25 caliber and .22 caliber revolver pistols. (R-1539) His tests revealed that the .25 emitted both the substances, antimony and barium, while the .22 revolver gave off very small amounts of each substance which were not accurately traceable. (R-1542) FBI Special Agent Robert Siebert conceded that the natural emission of these two substances from a firearm would be significantly disrupted from the .25 pistol being enclosed by a pillow (R-1599). The pillow itself would capture huge amounts of these substances. (R-1599). A person could collect these elements on his hands by touching the gun or being in close proximity to where the guns are fired. (R-1555, 1556).

Several projectiles which had been fired from both the .22 caliber revolver and the .25 caliber automatic were discovered at the scene and in the bodies of Chris Musick and Robert Schreckengost. One .25 Caliber bullet and one .22 caliber bullet were found in Chris Musick's head (R-1388) The .25 caliber bullet was positively identified as being expelled from the .25 caliber pistol that was owned by Appellant TROEDEL. (R-1570) The .22 caliber bullet was too mutilated and fragmented to be positively traced to any particular gun. (R-1580).

A bullet recovered from Robert Schreckengost head was identified as a .25 caliber fragment originating from the same .25 caliber pistol belonging to Appellant TROEDEL. (R-1570) Of the two other bullets recovered from Robert Schreckengost body, one was a .25 caliber fragment, the other a .22 caliber bullet. Four empty .25 caliber casings were found in the master bathroom area and were matched to the previously identified .25 caliber pistol (R-1575).

Further investigation of the master bedroom uncovered a feather pillow containing one large blackened hole on one side and three (3) smaller holes on the other side (R-1136). The FBI tests showed that gunpowder was present on the pillow (R-1590). Feathers which were similar in composition to those of the pillow were found in the bathroom (R-1514) and on the pants which were worn by Chris Musick (R-1515), and on the .25 caliber pistol (R-1516).

Appellant TROEDEL testified at trial and offered that he had known of his Co-Defendant David Hawkins through TROEDEL's

employment at Jay's 76 where he had been employed for for about six months before June 11, 1981. Appellant TROEDEL, however, did not know Hawkins well (R-1651). On the day of the shooting, David Hawkins was driving down Davis Boulevard, when he recognized Appellant TROEDEL walking. He stopped to give him a ride (R-1654) Hawkins asked Appellant TROEDEL if he could go with him and Mike Tillman to the Good Times Lounge that night (R-1655). Hawkins dropped Appellant TROEDEL off at home and then returned to the house about 8:30 so he could go out with Appellant TROEDEL and Mike Tillman (R-1656). While the three men were sitting in the lounge, Hawkins asked Michael Tillman if he had a gun (R-1611) Upon Tillman's response that he owned a shotgun, Hawkins countered with "that would be too loud". (R-1611) Hawkins then offered that he "wanted to go out in Golden Gate and blow away a couple of dudes" (R-1612) Appellant TROEDEL did not hear Hawkins make either of these statements (R-1660). After the three had decided to leave, Hawkins offered Appellant TROEDEL a ride home because it would be more convenient for him as opposed to Tillman (R-1661). Hawkins then decided that he wanted to ride out to the Golden Gate area to see his girlfriend (R-1661). Appellant TROEDEL agreed to ride there with him (R-1661). Hawkins then switched from his car to his employer's truck and continued on (R-1662). Upon their arrival in Golden Gate, Hawkins told Appellant TROEDEL that his girlfriend was not home but that he wanted to talk to someone else before he took Appellant TROEDEL home (R-1663). They then stopped at the Schreckengost house but were told that the person whom Hawkins

wished to see was asleep, so they left without anything further (R-1665). As they began to leave in the truck it stalled and became fixed in the sand on the side of the road and would not start. (R-1665). Hawkins advised that they would have to go back to the Schreckengost house and get assistance (R-1665) While walking to the house Hawkins stopped to relieve himself. He told Appellant TROEDEL that he would catch up with him (R-1666). Appellant TROEDEL knocked on the door and when the door opened Hawkins came from behind and with a drawn .25 caliber handgun and ordered everyone inside (R-1666). Hawkins proceeded to the bedroom where a person was sleeping and woke him up demanding money (R-1667). When told that no money was available, Hawkins collected the guns from the adjacent closet and ordered everyone into the master bedroom where some money was said to be found (R-1668). Appellant TROEDEL further testified at trial that Hawkins followed everyone into the master bedroom while wielding the drawn gun, and had Appellant TROEDEL fearing for his own safety (R-1669). While in the master bedroom, one boy turned as if he was going to run, but was then shot in the leg by Hawkins (R-1670). The two boys, Robert Schreckengost and Chris Musick, moved into the bathroom with Hawkins stalking them and while inside the bathroom area, Hawkins grabbed a pillow and fired several shots into the bathroom (R-1671) Appellant TROEDEL was shocked and afraid and obeyed Hawkins orders. Appellant TROEDEL did not know either of the victims, Robert Schreckengost or Chris Musick (R-1671-1673) Hawkins gave Appellant TROEDEL some items



and they proceeded to the truck where they encountered Officer Sammie Jacobs (R-1674).

ISSUE 1

THE TRIAL COURT ERRED IN ADMITTING THE RESULTS OF  
A NEUTRON ACTIVATION ANALYSIS TEST SINCE THE TEST  
AS ADMINISTERED WAS IMPROPER AND LACKS TRUSTWORTHINESS.

A procedure for neutron activation analysis purposes was performed by Sheriff Investigator Jack Gant on the Appellant, DAVID WALTER TROEDEL, within a few hours after he was arrested. (R-1240) Although the actual neutron activation test itself was performed in the FBI labs, the subjective elements of that test were obtained from officer Gant. Gant's role in this test was the capturing of chemicals and substances from the hands of Appellant TROEDEL. This was accomplished by his rubbing all along the hands and fingers of Appellant TROEDEL with a cotton swab which had been annointed with an unknown chemical solution. (R-1241) At trial Investigator Gant admitted that he uses his own concoction of chemicals, despite the fact that he has access to the recommended solution which comes pre-mixed in a neutron activation kit. (R-1294) These swabs were then sent to the FBI lab where neutron activation tests were performed, the results of which introduced into evidence at trial.

The admissibility of the results of the neutron activation test must rely on long standing principles of law which are designed to guarantee reliable results and accurate indications of trustworthiness. The early case of Frye V. U.S. 293 Fed. 1013

(Dec. 1923) exemplars this principle and states, "to admit a scientific principle or discovery the thing from which the deduction is to be made must be sufficiently established to have gained general acceptance in the particular field". Also, in his treatise on evidence, Jones states, "where evidence is based solely on scientific tests, it is essential that the reliability thereof shall be recognized and accepted by scientists, or that they shall have passed. . . from the stage of experimentation and uncertainty to that of reasonable demonstrability." (Jones on Evidence, 2d ed. §15.9) And, in Florida, these views are consummated by the Supreme Court in Yolman V. State 388 So. 2d 1038 (Fla. 1980) whereby that court declares, "As with other scientific evidence, the appellant has the right to attack the reliability of the scientific tests or equipment and the competence of the operator". In the Yolman decision, the accuracy of motor vehicle speed testing equipment was at issue, and the Supreme Court of Florida, while upholding the use of the results of that particular test nonetheless recognized that the reliability feature of all scientific tests is always in issue and subject to close examination.

The common fabric which must be woven into this case is the universal concurrence that all steps of the scientific tests must be accounted for and recognized as being totally reliable, or in the alternative as being generally acceptable by the scientific community. The record in this case fails to show the trustworthiness of the materials and apparatus used in the test which directly affects its value and weight as evidence. In the

case of State V. Smith 362 NE 2d 1239 (Ohio 1976) the court stated that "before a test may be admitted, it must be shown that the test was based on generally accepted scientific principles, that the APPARATUS and MATERIALS were acceptable, and that persons conducting the tests were qualified to do so." This Ohio case involved the administering of a scientific test, known as a Harrison-Gilroy Gunpowder Residue Test, which is designed to measure the presence of lead, antimony and barium on a person's hands. That Court disallowed the presentment of the results of that test in evidence because the police officer who administered the test used a new theory and a new apparatus in conducting the test. The Court disallowed the results even though the police officer had 13 years of experience and was properly qualified to administer the test. Further the Appellate Judge ruled that the officers modified test had not been proved as acceptable in the Scientific community. The Ohio Appellate Court ruled that this was fundamental and reversible error. Clearly the procedures followed in this case against Appellant TROEDEL lack the requisite qualifications for acceptability because the solution used to extract substances from Appellant TROEDEL's hands was not proven to be an acceptable mixture and has not been otherwise shown to be accurate for the purposes intended. Another jurisdiction has applied this principle into law in a similar case involving the detection of gunshot residue. People V. Palmer 80 Cal. App. 3d 239 (1977) holds "the proponent of the evidence must demonstrate that the correct scientific procedures were used in a particular case".

From the record, the only thing we know is that in Investigator Gant's testimony he mentions that his solution contains 5% nitric acid. (R-1241) He also attests to the cleanliness of his bottle containing the solution. Otherwise, a proper foundation was never laid which would demonstrate that his solution as devised is capable of ascertaining accurate results, especially when that solution is not the same solution normally used by the actual test controllers when they performed all steps of neutron Activation analysis, in their controlled labs. Even though TROEDEL did not make a specific objection at trial, he contends that the use of these results constitutes fundamental and prejudicial error.

To supplement Appellant's assertion that the neutron activation test is improper, authority demands that when 2 tests are performed, they must be so performed under similar conditions. Esquivel V. Texas 101 S. CT. 408 (TX 1980) held as inadmissible a trace metal detection test when an experiment was not performed under similar conditions as were performed initially at the hospital. Applying this principal to the facts of the instant case on appeal, it is apparent that two tests were performed on the Neutron Activation machine by Jack Riley. One test was on the swabs submitted from Gant, and another test was on substances extracted from Riley's own hands by his own extraction procedures. At the time Riley performed an extraction procedure of his own hands, he used a removing solution different from the solution used by Gant on Appellant TROEDEL. This difference is sufficient to conclude that the test was not performed under

similar conditions, and should be inadmissible. The testimony regarding the conclusion from that test obviously was the primary factor resulting in Appellant's conviction and sentence.

Assuming, arguendo, that the test was properly administered, the existence of the surrounding circumstances should bear on the accuracy of the neutron activation. The trial record shows that Appellant TROEDEL worked at a gas station during the day. In his normal duties he came into physical contact with a greater number of substances than the average person. Barium and Antimony are found in products used in the daily course of events and not only in weapons. (R-1541) While at the Schreckengost home the .25 caliber automatic was fired into a pillow which conclusively disrupted the normal emissions of antimony and barium, the tell-tale substances. (R-1599) After arrest Appellant TROEDEL was placed in jail. He had his hands on cell bars, benches, in his pockets, and countless other objects before he was tested by Investigator Gant. Gant then used his own solution for extraction. Taken individually any one of the factors could cause an inaccurate finding in the Neutron Activation testing. The results of the neutron activation test being used at trial was the obvious reason that Appellant TROEDEL was found to be the trigger man in the commission of this crime. The finding of this conclusion was clearly an error as the evidence tends to show the opposite, rather that TROEDEL was not the trigger man. The allowed use of the results of the neutron activation test at trial was a fundamental error and violative of Appellant's right

to due process, and should not have been used to implicate and convict the Appellant.

ISSUE 2

THE TRIAL COURT ERRED IN THE SENTENCING OF THE APPELLANT TROEDEL TO DEATH SINCE THE CRITERIA FOR IMPOSING THE DEATH SENTENCE, THE AGGRAVATING AND MITIGATION CIRCUMSTANCES, WERE IMPROPERLY USED AND WEIGHED.

Even though an advisory sentence of death has been recommended by the jury, the Trial Judge remains responsible for imposing the actual sentence. §921.141 Fla. Statutes (Supp. 1979). As required by the statute, the Court must consider the aggravating circumstances and then apply any mitigating circumstances which may operate to relieve the Death sentence. (§921.141 Fla. Statutes (Supp. 1979) While considering these circumstances the judge is directed to make a reasoned and controlled judgment, which excludes any calculated system involving the adding and subtracting of these circumstances to reach conclusions. State V. Dixon 283 So. 2d 10 (Fla. 1973). That case involved the imposition of the death sentence to an offender who was found guilty of involuntary sexual battery of a child under 11 years of age. The Trial Court found that the crime was "especially heinous, atrocious, or cruel" and had sufficient facts to support that finding. Upon a careful and reasoned evaluation the Court must find that the statutorily defined aggravating circumstances exist so as to justify the death penalty and that currently there



are insufficient mitigating circumstances. Spinkellink V. Wainwright 578 F. 2d 753 (5th Cir. 1978) Lucas V. State 417 So. 2d 250 (Fla. 1982).

Upon passing a sentence of death § 921.141 (3) Florida Statutes requires that each aggravating and mitigating circumstance be supplemented with specific findings of fact which must be set forth in writing to support each finding of a circumstance. The trial court did find specific facts which would support the aggravating circumstances, but the supporting facts themselves are improper conclusions and, as such, are insufficient to support the listed statutory aggravating circumstances. The aggravating circumstances as found are stated:

The Capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; earlier in the evening of the crime the co-defendant HAWKINS had stated that he wanted to go out to Golden Gate and "blow away a couple of dudes", in DAVID TROEDEL's presence. A pillow and pillowcase was found with bullet holes through it, with feathers on both bodies of the victims as well as scattered in the large pool of blood in the bathroom. One pair of rubber gloves was found together with the empty wrapping in which they had been packed. All of the facts indicate the Defendant was the "trigger man" in this "execution style" murder.

The Court expressly found or concluded that Appellant TROEDEL was the "trigger man" in the murder. The supporting facts above do not tend to support the conclusion that Appellant TROEDEL pulled the trigger. Rather, the findings above point more directly at Co-Defendant Hawkins. Appellant TROEDEL testified at trial that he never heard the statements made by Co-Defendant HAWKINS regarding guns or that HAWKINS wanted to "blow away a couple of dudes". (R-1660)

The Court also mentions physical evidence found at the crime scene but that evidence listed above was not connected up to Appellant TROEDEL in any way at trial.

The trial court improperly presumed these facts against the clear weight of the evidence and they are insufficient to support the aggravating circumstance of "homicide committed in a cold, calculated, and premeditated manner without. . .justification". Aggravating circumstances must be found to exist before a death sentence may be imposed. Purdy V. State 343 So. 2d 4 (Fla. 1977) The Appellant contends that this finding of an aggravating factor was a fundamental error, as the alleged fact that Appellant TROEDEL was the trigger man was not proven and did not exist as a fact to support this aggravating factor.

The Florida cases, including Jent V. State 408 So. 2d 1024 (Fla. 1982), State V. Dixon 283 So. 2d 1 (Fla. 1973) direct that all aggravating circumstances used in the death sentencing process must pass the highest standard of proof; that being the proof of such aggravating circumstances beyond a reasonable doubt. Clearly the proof in Appellant TROEDEL's case at trial fails to bound this crest.

The trial court also rejected the application of certain mitigating circumstances which should have been recognized and used in the sentencing phase of Appellant TROEDEL. The evidence at trial, if carefully and properly considered, clearly indicated that Appellant TROEDEL was suffering from extreme duress and under the substantial domination of another person. This is a statutory mitigating factor which must be considered and weighed

in the sentencing process. Fla. Statute § 921.141 (3). Authority in Florida has strongly suggested and commanded that certain factors which are reasonably related to a valid mitigating circumstance should be accepted in the sentencing procedure. Emmund V. State 399 So. 2d 1362 (Fla. 1980), Jacobs V. State 396 So. 2d 1113 (Fla. 1981). The Court did not appear from the record to consider the fact that Appellant TROEDEL did not know the victims, neither did he drive to the house, nor exhibit any voice or direction in the entire scheme of events that evening as shown by the evidence. These factors strongly indicate that Appellant TROEDEL was in a subservient role to Hawkins, and that he was under Hawkins influence and intimidation at all times. Even at the point of first contact with Officer Samuel Jacobs, it was Hawkins who did all the talking and made all the alibi's, while Appellant TROEDEL quietly stood in the background, probably still stunned at the events that had taken place. These factors should have received proper consideration and weight to find that this mitigating circumstance (i.e. that TROEDEL was suffering from the substantial domination of HAWKINS) did in fact exist, and as such should be considered in TROEDEL's favor before a sentence of death is imposed.

When all of the mitigating and aggravating circumstances have been brought before the Trial Judge, the determination as to the sentence must be carefully considered. During this time preceding a final decision the Trial Judge must continue to follow the instructions as dictated from substantive law. Miller V. State 373 So. 2d 882 (Fla. 1979) directs him to "strictly

follow the sentencing statute and be guided and channeled by an examination of specific factors so that arbitrariness and capriousness are eliminated". Further when the Trial Judge examines the specific facts supporting both aggravation and mitigation his judgment must be a "reasoned judgment" as required by Huckaby V. State 343 So. 2d 17 (Fla. 1979). State V. Dixon 283 So. 2d 1 (Fla. 1973). Because of insufficient examination of crucial, necessary and specific factors, the appellant contents that it is very improbable that a reasoned judgment could be reached by the Trial Court. Consequently, the imposition of the absolute proclamation of death is fundamental and reversible error.

ISSUE 3

THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE  
ON APPELLANT TROEDEL SINCE THE PENALTY CONSTITUTES  
CRUEL AND UNUSUAL PUNISHMENT WHICH VIOLATES THE  
EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED  
STATES CONSTITUTION

The evidence at trial fails to establish that Appellant, TROEDEL was the trigger man in the commission of the murders of Chris Musick and Robert Schreckengost. The trial Judge's finding to the contrary was clearly an error as the Arguments in Issues 1 and 2 above demonstrate.

Taking these facts into consideration, it is submitted that it was improper for the Trial Judge to sentence Appellant TROEDEL to death. In the recent case of Enmund V. State of Florida \_\_\_\_\_ U.S. \_\_\_\_\_ 31 Cr. L 3149 (1982) the United States Supreme Court held that a Defendant who does not take a life, attempt to take a life or intend that life be taken during the course of the underlying felony cannot constitutionally be given the death sentence. The rationale for the Enmund holding is founded on solid principles, namely that a disproportionate punishment as related to the gravity of the crime, must be paramount and if harm is caused unintentionally, as is the case of Appellant TROEDEL, it must be punished differently than the same crime committed intentionally.

Reiterating the testimony at trial, it is conclusively

established that Co-Defendant Hawkins had made statements earlier that same evening, no longer than four hours before the murders, that he was looking for a gun to "blow away a couple of dudes in Golden Gate." Appellant TROEDEL denied hearing any of these statements in his testimony at trial.

He further testified that Co-Defendant Hawkins had suggested that the two of them ride out to the Golden Gate area for the purpose of going to Hawkins girlfriend's house. TROEDEL agreed to accompany him. After discovering that his girlfriend was not at home, Hawkins suggested that they drive to another home in that area in order to see someone else whom Hawkins knew. At this time TROEDEL was still accompanying Hawkins. Appellant TROEDEL did not know that Hawkins had made the statement about killing someone in that area and was not riding with Hawkins in that area for the purpose or intention of killing anyone.

At the sentencing phase of the Trial, several witnesses testified on TROEDEL's behalf that he was a follower. The testimony indicated that TROEDEL was shy and would usually go along with another's suggestion for the purpose of having something to do.

The witnesses also testified that TROEDEL was not a violent person.

Appellant TROEDEL was obviously the follower in this situation and did not intend or attempt to take the life of another and therefore should not receive the death sentence under the authority of Enmund.

Even if the court were to conclude that the Enmund rationale

is inapplicable to the facts of the instance case, it is submitted the imposition of the death penalty violates Appellant TROEDEL's constitutional right against cruel and unusual punishment.

CONCLUSION

The Appellant, DAVID WALTER TROEDEL, asks this Court to reverse his convictions and sentences and remand with instructions that (1) a new trial be awarded to Appellant TROEDEL upon the arguments present in Issue I because of the improper use of the results of the Neutron Activation scientific test and (2) the death sentence be vacated and Appellant TROEDEL be resentenced in accordance with the arguments presented in Issues 2 and 3.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Appellant's Brief has been served by first-class mail, postage prepaid, on the Office of the Attorney General, State of Florida, Park Trammell Building, 1313 Tampa Street, Tampa, Florida 33602, this 7th day of January, 1983.

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