

SUPREME COURT
 STATE OF FLORIDA

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

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Appeal No. 82-140
 Collier County

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

REPLY BRIEF OF APPELLANT,
 DAVID WALTER TROEDEL

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FILED

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SID J. WHITE
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Collier County Clerk

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ARGUMENT

ISSUE I

PERMITTING THE USE OF THE RESULTS OF THE NEUTRON ACTIVATION TEST AT THE TRIAL OF DAVID WALTER TROEDEL CONSTITUTES FUNDAMENTAL ERROR AND IS SUBJECT TO A REVIEW BY THE SUPREME COURT.

Appellant, David Walter Troedel, respectfully submits that the results of the neutron activation test should not have been used against him in his trial in the Circuit Court. Appellant agrees with the Appellees proposition, and general rule, that most issues cannot be raised for the first time on appeal, if there was an opportunity to make specific objection and test that issue in the trial court. [Castor V. State 365 So. 2d 701 (Fla. 1978), Crespo V. State 379 So. 2d 1971 (Fla. 4th DCA 1980) and other cases cited in Appellees brief]

However, there is an equally well recognized rule of law that provides "nothing shall preclude a court from taking notice of fundamental errors effecting substantial rights, even though such errors were not brought to the attention of the trial judge." Fla. Statutes §90.104. Further, "fundamental error constitutes a well recognized exception to the general rule that questions not raised to the trial court will not be considered on appeal. An appellate court may, in the interests of justice, take notice of fundamental errors apparent in the record on appeal, or exception in the court below." Pitman V. Roberts 122 So. 2d 333 (Fla. 2d DCA, 1960) This case commendably promotes the judicial awareness of the imperfections of our legal systems, and the compelling desires to temper these imperfections with equitable determinations of fairness and the pursuit of what is right and

just. Due process demands nothing less and Fuller V. State 406 So. 2d 1212 (Fla. 1981), emphasizes the role of constitutional due process when errors are not recognized at trial and states that, "the appellate court will not review issues raised on appeal which have never been raised by the trial court EXCEPT where error is so fundamental to amount to a denial of due process." Clearly when an error is determined to be fundamental, and effecting due process and justice, that error may be brought to the attention of the court at any time. Pitman supra., Warmble V. State 393 So. 2d 1164 (Fla. 1981).

The facts which were presented at trial and recounted in appellants initial brief, have compelled the Appellant to attack the admissibility of certain evidence. (i.e. the results of neutron activation testing). This evidence has been used in the sentencing process to justify the imposition of the death sentence on Appellant, David Walter Troedel. Without the use of this evidence, the current law in the United States forbids that the death sentence be given to Appellant. The United States Supreme Court's decision in Enmund V. Florida, overruled the Florida precedents with regard to persons who did not actually kill or intend to kill. Specifically the Enmund court held that it is unconstitutional for a person to be given the death penalty when that person "does not take a life, attempt to take a life or intend that a life be taken in the course of a felony."

If there is in fact an error in the admission of the neutron activation test, then there would be no proof that the Appellant, David Walter Troedel was the trigger man. If Appellant

cannot be aligned as a trigger man, the Appellant would question the constitutionality of the death sentence in his case in view of Enmund.

The case of White V. State 403 So. 2d 331, (Fla. 1981) certification pending does not mandate a different result. The White case sustain's the imposition of the death penalty for an accessory to a murder in a felony-murder situation if the defendant is present at the scene of the homicide. The Appellant submits that the decision of the United States Supreme Court in the Enmund case is the controlling law in the State of Florida despite the apparent contrary holding of this court in White.

These factual determinations affect the very life of Appellant, David Walter Troedel. The question regarding the accuracy of the test appears to be the conclusive factor as to whether the Appellant is to live or die. Appellee would argue that this is not a fundamental error, but appellant cannot imagine a more drastic, prejudicial, or fundamental error that would play so strong a role in the right to life of Appellant, David Walter Troedel. While there is no precise definition of what constitutes "fundamental error," several cases have set forth well-reasoned criteria. In Sanford V. Rubin 237 So. 2d 1934 (Fla. 1970), the court stated

Fundamental error which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action. The Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly.

Appellant, David Walter Troedel contends that the admission of the results of the neutron activation tests goes

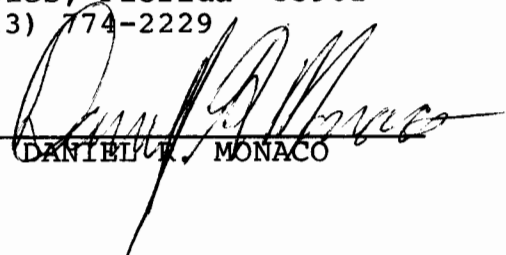
directly to the merits of this cause of action and the foundation of this case. The Appellant submits to this court that a reconsideration of these points on appeal is desirable and necessary to insure the proper due process of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Appellant's Reply 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 20th day of April, 1983.

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