IN THE SUPREME COURT OF FLORIDA

CASE NO. 62,127

ALDELBERT RIVERS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT, ALDELBERT RIVERS

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Introduction

This is an appeal from a Judgment of Conviction and Sentence of Death from the Circuit Court of the Eleventh Judicial Circuit, Criminal Division.

The Appellant was the Defendant in the trial court. The Appellee was the prosecution, the State of Florida, in the lower court. The parties will be referred to as they stood in the lower court. The Record on Appeal will be referred to by the letter "R". All emphasis is added unless otherwise indicated.

Statement of the Case

The Defendant was charged by Indictment with first degree murder, robbery and possession of a firearm while engaged in a criminal offense. (R.9) The Defendant's Motion to Dismiss the Indictment was denied. (R.97a)

The Defendant filed Motions to Suppress his identification and admissions. (R. 136-7, 138-9, 140-1a, 142-3a) On February 8th and 10th, 1982, a hearing was held before the Honorable Thomas E. Scott. (R.411-618). The Motions to Suppress Identification were denied. (R. 141a, 473-4) The Motions to Suppress Admissions were granted in part and denied in part. (R.143a, 472-3)

On April 7, 1982, trial commenced before the Honorable Ellen Morphonios Gable. (R.11-21) On April 8, 1982, the trial concluded with jury verdicts of guilty on all counts. (R.230-2) The Court overturned the jury's advisory sentence of life imprisonment and imposed a sentence of death. (R.233-46)

On April 20, 1982, the Court denied the Defendant's Motion for a New Trial. (R. 1467).

On May 20, 1982, the Defendant timely filed a Notice of

Appeal. This appeal follows:

Statement of the Facts

A hearing was held on the Defendant's Motions to Suppress Identification and Admissions. The admissions sought to be suppressed consisted of statements to Officer Ohanesian and a transcribed statement to Detective Hall. (R.577-8, 145-156) The following testimony was adduced at the hearing:

Shortly after the incident at issue, Officer Ohanesian apprehended the Defendant and verbally advised the Defendant of his Miranda rights. (R.575) The Defendant's demeanor was scared. (R.577) Officer Ohanesian stated that he and another officer had a hold on each of the Defendant's arms and the also had their guns drawn. (R. 577-8)

The Defendant stated that he did not have a gun. (R.578) He stated that his buddy threw his gun "over there". Officer Ohanesian stated that the Defendant asked about the woman inside the restaurant and was concerned about her. (R. 578)

Detective Hall testified that after the Defendant's arrest, the Defendant was taken to the homicide office (R.585) where he advised the Defendant of his "Rights" (R.589) after which the Defendant gave a statement admitting his participation in the robbery and slaying. (R.595) Throughout his contact with the Defendant, Detective Hall described the Defendant as meek, depressed, and scared. (R.597, 610, 613-614)

Dr. Toomer, a psychologist qualified as an expert witness (R.425) testified that after having spent approximately 2 hours with the Defendant (R.429) and having administered various tests to the Defendant (R.440), that the Defendant, at the time of

the offense, (R.430) suffered from pathological intoxication, (R.430, 440) an underlying mental disorder (R.431) rendering the Defendant susceptible to suggestions (R.434) and which prevented the Defendant from giving a voluntary statement.(R.433)

The Court ruled that the only statement to Officer Ohanesian that could be admitted was the statement concerning the woman's condition. (R.472) The Court found that the statement given to Detective Hall was given freely and he made a knowing and intelligent waiver of his rights. (R.473)

After denying the Motions, the Court suggested that a plea to life imprisonment in this case. (R.480) The Court further stated that it believed that juries were reluctant to impose the death penalty where the death in a felony murder situation was unintended. (R.480)

On April 7, 1982, a jury trial commenced before the Honorable Ellen Morphonios Gable. Before jury selection the Court inquired of defense counsel whether the case could be pled out. (R.626)

Judge Gable admitted not knowing about the case, (R625) and was advised that the Defendant was relying upon an insanity defense. (R.626)

The Court's consideration of the question of competency, knowing the Defendant's only defense was insanity, was:

> Mr. Chavies: I don't know whether there's been an adjudication of competency with respect to Mr. Rivers, Judge. If not, I will stipulate to the reports and it can be done.
>
> The Court: All right. Determine him competent at this time. Had he ever been adjudicated insane before, if you know?
>
> Mr. Chavies: No, ma'm.

The Court: I'm in a bit of a problem as I know nothing about the case, walking into it in the middle.

Mr. Chavies: I understand. No, he has not.

The Court: Okay.

(R.627-628)

Thereupon selection of the jury commenced. During selection, the Court was concerned over the slowness of the pace at which the trial was proceeding. (R.705, 709, 714-5, 719, 740, 747, 780-1) The Court admonished the prosecutor for taking forever between questions and ordered to do it faster. (R.709) Later, she admonished defense counsel to "move". (R. 714) Further on, the State was permitted to inquire with due speed. (R. 740)

The Court then inquired of certain prospective jurors whether they would be available on Friday, which was the religious holiday of Good Friday. (R.781) At this point, the Court stated "something is going to start moving here pretty soon." (R.781) The Court then declared:

> "All right. Now hear me, no more backstriking. Tell me now any challenges you have because when we fill these seats there isn't going to be any more back-striking." (R.789)

The following testimony was adduced at trial: The first State witness, Zigmas Kaulasis stated that he had been in the China Inn Restaurant on the night of the alleged robbery. (R.836) He heard someone shout "this is a holdup," or similar words. (R.841) At this time he also heard a shot. (R.841) The shot was towards the back of the building. (R. 843) Three men were involved and two of them had guns. (R.843-4) One of the men fired a shot into the ceiling. (R.844)

After the men left, the witness stated that he had observed the waitress who had been shot. (R.847) She was in a

hallway or narrow passage area. (R.847)

Michael Hernandez identified the Defendant as having fired in the direction of the hallway. (R.860) The waitress had just come out of the cooking area. (R.861) One of the other men fired a shot into the ceiling of the restaurant. (R.863)

Michael Hernandez then testified that the waitress had just come out of the cooking area. (R.861) She said "Oh, Oh", as if she did not know what was happening. (R.861) It was at this point he saw a fast movement from the man he identified as the Defendant and heard a shot. (R.861)

Keung Chan testified that he was the cashier at the restaurant. (R.871) One of the men with a gun demanded from him the money from the register. (R.878)

Bruce Greg testified that the waitress had been waiting on tables immediately before the shooting. (R.1094) Also, he had seen her go to the back for something. (R.1094)

Officer Kessler heard shots from the restaurant while passing by. (R.901) He saw three males flee the restaurant. (R.902) He arrested Co-defendant Pressley who was hidden behind a car. (R.904-5)

Sergeant Portz arrested the Defendant in a local graveyard. (R.919) The Defendant asked the Sergeant the condition of the woman at the restaurant. (R.925)

Detective Ben Hall testified as to the inculpatory statements made by the Defendant, in which he admitted participation in the robbery and shooting the victim. (R.1002-3, 1014, 1023, 1027) The Detective stated that the Defendant did appear to be suffering from a major mental illness. (R. 1010) Defense counsel's objection to that question had been overruled. (R.1010)

On cross examination, the detective stated that the Defendant appeared sedated and depressed. (R.1037)

Roger Mittleman, an assistant medical examiner testified that the cause of death in this case was a gunshot wound to the chest. (R.1056)

Michael O'Neal identified the victim as Anita O'Neal. (R.1062)

Dr. Jethro Dumore, a psychologist testified on behalf of the Defendant. (R.1107) Dr. Dumore saw the Defendant on two occasions at the Dade County Jail. (R.1114) Dr. Dumore related items from the Defendant's psycho-social history. The Defendant was denied admission into the military service because of certain unspecified psychological difficulties. (R.1118) Based upon the examination and personal history Dr. Dumore diagnosed the Defendant as suffering a long standing major mental disorder. (R.1121) He termed it pathological intoxication and stated that it resulted from long term ingestion of toxic substances. (R.1121)

Dr. Dumore stated that in his opinion the Defendant knew wrong behavior. (R.1128) Dr. Dumore further stated that the Defendant did not have the ability to act on his knowledge. (R.1128)

Dr. Charles Mutter examined the Defendant and found him competent to stand trial and not insane at the time of the offense. (R.1192,1197). Dr. Mutter diagnosed the Defendant as sociopathic personality with drug abuse. (R.1197)

Dr. Anastasio Castillo saw the Defendant on May 1, 1981. (R.1234) This was before the incident at issue occured, which defense counsel objected to the relevancy of the doctor's testimony. (R.1235). Defense counsel stated that the jury would know that the Defendant had been charged in another case.(R.1236) A Motion for Mistrial was denied. (R.1237) Defense counsel also stated

that he did not have a copy of the doctor's report. (R.1237)

Dr. Castillo found that the Defendant had a most severe character behavior disorder; a long standing drug habit. (R.1239) He stated that this was not a major mental illness or insanity. (R.1240)

Alfreda Rivers, the Defendant's sister, testified as to his mental problems. (R.1255-6) She stated that the Defendant was using alcohol and drugs quite heavily at the time of the incident at issue. (R.1258)

Subsequent to the jury's verdict of guilty on all charges, further proceedings commenced on the determination of the penalty. The Defendant's sister, Alfreda Rivers, testified as follows:

The Defendant's mother was in South Florida State Hospital for a number of years before her death. (R.1384) The death of the Defendant's mother caused him to withdraw into a shell. (1385)

Curtell Rivers testified that the Defendant had many problems as a child; he stayed back in school, and he would lock himself in his room for days. (R.1397-8) She also stated that the Defendant used drugs and alcohol. (R.1399)

The jury returned an advisory sentence of life imprisonment. (R. 1452).

The Court overruled the jury's advisory sentence. (R.1455-1462). The Court found that the two shots fired into the ceiling constituted the aggravating factor of creating a great risk of death to many people. (R.1456) Secondly, the Court found that the murder was committed during a felony. (R.1456) Thirdly, the Court found that the victim was scared and that she was shot by the Defendant to avoid his apprehension. The Court stated that it

was not separately considering the Defendant's pecuniary motives since it was part of the conviction for murder. (R.1457) The Court also stated that it was of the opinion that the aggravating factor of a cold, calculated, permeditated murder was applicable, but declined to apply in an abundance of caution. (R.1458)

The Court found one mitigating factor; (R.1458) the Defendant had no prior felony convictions. The Court did not find that the Defendant was under the influence of extreme mental or emotional disturbance. (R.1459) The Court did not find the Defendant's participation minor, (R.1459) or that he acted under the duress or domination of another.

The Court did not find that the Defendant's ability to conform his conduct to the requirement of law was impaired. (R.1460) The Court considered no other mitigating circumstances. (R.1461)

Argument I

THE TRIAL COURT ERRED IN REFUSING TO ALLOW "BACKSTRIKING" DURING VOIRE DIRE WHEN IT HAD, IN THE SAME TRIAL, PERVIOUSLY DONE SO.

At the beginning of jury selection, the trial court allowed "backstriking" or the back-challeging of the jury voire dire. Later, during voire dire, obviously perturbed with the pace at which jury selection was progressing, (R.705, 709, 714-15, 719, 740, 747, 780-781) the Court suddenly declared:

> "All right. Now hear me, no more back-striking. Tell me now any challenges you have because when we fill these seats there isn't going to be any more back-striking." (R.789)

Rule 3.310, Florida Rules of Criminal Procedure, provides:

> "The state or defendant may challege an individual prospective juror before the juror is sworn to try the cause; except that the court may, for good cause, permit it to be made after the juror is sworn, but before any evidence is presented."

The defense relied upon the ability to backstrike in selecting the jury. The trial court, solely for purposes of speed when a man's life was "on the line", changed the rules "in the middle of the game."

Rule 3.310 allows a defendant to "backstrike" any time before a jury is sworn.

In the cases of Peels v. State, 413 So.2d 1225 (Fla. 3d DCA 1982) and Knee v. State, 294 So.2d 411 (Fla. 4th DCA 1974), convictions were reversed when a defendant was precluded from "backstriking".

The court's ruling in not allowing backstriking was not only error, it was inherently unfair as the Court changed its mind

after voire dire had already begun.

The Defendant's conviction must be reversed.

Argument II

THE TRIAL COURT ERRED IN FAILING TO HAVE A PSYCHIATRIC EXAMINATION AND ORDER A COMPETENCY HEARING BEFORE TRIAL COMMENCED.

This case was originally before Judge Scott. On the day of trial it was "farmed out" and sent to Judge Gable to try.

Judge Gable admitted not knowing about the case, (R.625) and was advised that the Defendant was relying upon an insanity defense. (R.626)

The Court's consideration of the question of competency, knowing the Defendant's only defense was insanity was:

> Mr. Chavies: I don't know whether there's been an adjudiciation of competency with respect to Mr. Rivers, Judge. If not, I will stipulate to the reports and it can be done.
>
> The Court: All right. Determine him competent at this time. Had he ever been adjudicated insane before, if you know?
>
> Mr. Chavies: No, ma'm.
>
> The Court: I'm in a bit of a problem as I know nothing about the case, walking into it in the middle.
>
> Mr. Chavies: I understand. No, he has not.
>
> The Court: Okay.
> (R. 627-28)

It is evident that the trial court never even looked at, let alone read, considered, and evaluated the psychiatric reports before adjudicating the Defendant competent, trying him, and sentencing him to death. In a life-or-death situation, as was the instant case, the court's action/inaction constituted reversible error.

While counsel realized that it is the function of the court to determine competency for trial and that a trial court

may find a defendant competent when there exist facts which point to incompetency, such a determination, crucial to the legality of a subsequent trial, can only be made after the trial court reads, considers and evaluates the doctors' reports. This was not done in the instant case even though the court knew that the Defendant was relying on an insanity defense. The failure of the trial court, knowing nothing about the case, (R.627-28) and, on notice that the Defendant had been evaluated and was raising an insanity defense, to even read and consider these reports before ruling him competent to stand trial constitutes reversible error. See, Scott v. State, 420 So.2d 595 (Fla.1982); Grant v. State, 343 So.2d 672 (Fla.2d DCA 1977); Harrell v. State, 296 So.2d 585 (Fla. 1st DCA 1974); Fowler v. State, 255 So.2d 513 (Fla. 1971)

The Defendant's convictions must be reversed.

Argument III

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ELICIT FROM A NON-EXPERT WITNESS A GENERAL OPINION AS TO THE DEFENDANT'S SANITY.

The sole defense advanced by the Defendant was that of insanity of which the State was put on notice before the trial began. (R.626)

Detective Hall had never met the Defendant prior to the incident in question. Detective Hall was neither intimately acquainted with the Defendant nor the Defendant's background. Over the objection of counsel,(R.1010) Detective Hall was permitted to testify that, in his opinion, the Defendant, at the time the Defendant allegedly made a statement to him, did not appear to be suffering from a serious mental illness.

Detective Hall was not an expert psychological witness. He had not psychological training which would qualify him to render such an opinion. His objectivity in rendering such an opinion was compromised by his direct involement in the case and the glaring fact that if the Defendant did have a major mental illness, Detective Hall should not have taken his statement, and that statement would be inadmissible as evidence at trial.

When the sanity of a defendant is in issue, a non-expert witness can not give a general opinion as to sanity. Scott v. State, 60 So.355 (Fla. 1912); Armstrong v. State, 11 So.618 (Fla.1892). Detective Hall did not know the Defendant, his background, or his previous mental condition so as to be able to render an opinion as to sanity. See, Hixson v. State, 165 So.2d 437 (Fla. 2d DCA 1964). Compare, Butler v. State, 261 So.2d 508 (Fla. 1st DCA 1972). The issue of the Defendant's sanity was a

determination that the jury had to make from the evidence presented. As the sole defense raised by the Defendant, it was the ultimate issue to be determined, and the Court erred in allowing Detective Hall to express his non-expert opinion on the subject. See, Mills v. State, 367 So.2d 1068 (Fla.2d DCA 1979); Bowles v. State, 381 So.2d 326 (Fla. 5th DCA 1980)

The Defendant's conviction must be reversed.

Argument IV

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE DEFENDANT'S STATEMENT.

The Defendant, prior to trial, moved to suppress the statement given to Detective Hall which motion was denied, and the statement came into evidence at trial. The Defendant submits that this ruling was error.

At the hearing on the Motion to Suppress, only Detective Hall, and Dr. Toomer, a psychologist, testified.

Detective Hall testified that after the Defendant's arrest, the Defendant was taken to the homicide office (R.585) where he advised the Defendant of his "Rights" (R.589) after which the Defendant gave a statment admitting his participation in the robbery and slaying. (R.595) Throughout his contact with the Defendant, Detective Hall described the Defendant as meek, depressed, and scared. (R.597, 610, 613-14)

Dr. Toomer, a psychologist qualified as an expert witness (R.425) testified that after having spent approximately 2 hours with the Defendant (R.429) and having administered various tests to the Defendant,(R.440) that the Defendant, at the time of the offense, (R.430), suffered from pathological intoxication,(R. 430, 440) an underlying mental disorder (R.431) rendering the Defendant susceptible to suggestions (R.434) and which prevented the Defendant from giving a voluntary statement.(R.433)

The State presented no expert testimony on this Motion. Dr. Toomer's conclusion that the Defendant, because of his mental illness, could not give a voluntary statement coincides with Detective Hall's observation that the Defendant, during the entire time Hall observed him, appeared meek, depressed and scared.

For a confession to be admissible, the mind of the accused must be sufficiently clear and unimpaired so that it could be said that he freely and voluntarily related his connection with the crime. Reddish v. State, 167 So.2d 858 (Fla. 1964). Mental incapacity is one circumstance which can condemn a confession. Williams v. State, 188 So.2d 320 (Fla. 3d DCA 1966).

The State bears the heavy burden of establishing, by clear and convincing evidence, that a defendant's confession was voluntarily given. State v. Graham, 240 So.2d 486 (Fla. 2d DCA 1970). The State failed to prove, by clear and convincing evidence at the Motion to Suppress, that Dr. Toomer's conclusion, corroborated by Detective Hall's observations, that the Defendant's statement was not voluntary, was incorrect. See, Hall v. State, 421 So.2d 571 (Fla. 3d DCA 1982); Tennell v. State, 348 So.2d 937 (Fla. 2d DCA 1977); T.B. v. State, 306 So.2d 183 (Fla. 2d DCA 1975).

This statement must be suppressed, the Defendant's convictions vacated, and this case remanded for a new trial.

ARGUMENT V

THE TRIAL COURT ERRED IN OVERRULING THE ADVISORY JURY'S SENTENCE OF LIFE IMPRISONMENT WHERE NO CLEAR AND CONVINCING REASON EXISTS TO DISREGARD THAT VERDICT.

In order to sustain a sentence of death following a jury recommendation of life imprisonment, the facts utilized by the court in imposing that sentence should be so clear and convincing that no reasonable person could differ. Brown v. State, 376 So.2d 616 (Fla. 1979); Tedder v. State, 322 So.2d 908 (Fla. 1975). A jury recommendation of mercy under our death penalty statute must be accorded great weight. Williams v. State, 386 So.2d 538 (Fla. 1980).

In Odom v. State, 403 So.2d 936 (Fla. 1981), this Court in emphasizing the great weight that should be given to a jury's recommendation of life imprisonment, stated:

> "The jury recommended a sentence of life imprisonment. Because it represents the Judgment of the Community as to whether the death penalty is appropriate, the jury's recommendation is entitled to great weight."

403 at 942.

Therefore, for a trial judge to overrule a jury verdict recommending life imprisonment, the facts justifying that sentence of death must be so clear that the jury can be said to have been unreasonable. Odom v. State, supra; Smith v. State, 403 So.2d 933 (Fla. 1981); Neary v. State, 384 So.2d 1276 (Fla. 1977).

The sentencing phase necessitates a careful weighing of each aggravating and mitigating factor. The State must prove each

applicable aggravating circumstance beyond a reasonable doubt. Williams v. State, supra; Alford v. State, 307 So.2d 433 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973). The death sentence does not contemplate a mere tabulation of the aggravating verses the mitigating factors to arrive at a net sum. Instead a careful weighing of those factors is required. The mere existence of aggravating circumstances does not mandate or require the imposition of the death sentence. Hargrave v. State, 366 So.2d 1 (Fla. 1978).

No clear and convincing facts exist to establish that the Jury in the sentencing phase of this case acted unreasonably in recommending life imprisonment. Reasonable men could have easily differed over the application and weighing of the aggravating and mitigating factors to be applied in this case.

The Court chose to overrule the Jury's recommendation of life imprisonment in this case on the basis of three aggravating factors. The first finding made by the Court was that the firing of the gun in a crowded restaurant presented a great risk of harm to many people.

Support for this aggravating factor is not overwhelmingly established in the record of this case. The fatal shot in this case occurred in a hallway apart from tables in the restaurant. (R.847). The record is unclear, but one more shot was apparently fired in the same hallway. (R.846).

No one from the restaurant testified that any shots were near them. The effect of one of the shots was to quite the restaurant. (R. 845).

A great risk of harm means not a mere likelihood or a high probability of harm. Kampff v. State, 371 So.2d 1007 (Fla. 1979). No showing was made that through fortuitous circumstances

that no one else was injured. The Appellant submits that this factor would only be applicable in the case of someone wantonly shooting in a crowd. A situation that did not exist in this case.

The second aggravating factor found by the Court was that the murder was committed to avoid detection or identification. The Court specifically found that the victim was scarred, she had turned to run, and that the Defendant killed her to prevent her from leaving to alert the authorities. (R.1457). No clear and convincing support for this aggravating factor is found in the record.

The victim was apparently startled by the robbery. (R.861). However, she had been returning to the kitchen after waiting on a table. (R.1094). With this conflict in the record, the Jury's recommendation is easily sustained. No clear and convincing reason compels a rejection of the Jury's recommendation.

The third aggravating factor found by the Court was that the murder was committed during the course of another felony. (R.1456). Generally, one aggravating factor is all that is necessary to justify a sentence of death. However, where the only factor is felony murder, then that factor alone is insufficient. Otherwise, every felony murder would be punishable by death. Coker v. Georgia, 433 U.S. 584 (1977).

The Jury could have easily distinguished this case from an execution style murder. See Riley v. State, 366 So.2d 1 (Fla. 1978). The Jury could have easily found that the murder in this case was unintended. Accordingly, the Jury's recommendation should be given great weight.

The Court specifically stated that the three aggravating factors outweighed the one mitigating factor found by the Court. (R.461). By this language, the Court appears to be using tabulation of factors to arrive at a net result. This is clearly improper in light of Hargrave v. State, supra.

With respect to mitigating factors, the Court erred in considering whether the Defendant had the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The Court did not find this factor applicable (R.1460). The Court acknowledged that the Defendant may have been using drugs at the time of the offense. (R.1460).

It appears that the Court may have applied the classic test for insanity or competancy to stand trial. The finding that a defendant was sane at the time of the offense is not an appropriate standard to judge statutory mitiagting factors concerning mental condition. Ferguson v. State, 417 So.2d 631 (Fla. 1982); Mines v. State, 390 So.2d 332 (Fla. 1980).

Based upon the testimony presented, the Jury could have reasonably concluded that the Defendant had been a heavy drug user. As a result of this drug usage, the Defendant may not have had the required capacity to appreciate the criminality of his conduct or to conform same to the requirements of law.

The Court found the existence of no other aspect of the Defendant's character or record as a mitigating factor.

No record support exists to show that the Jury unreasonably recommended life imprisionment. Odom v. State, supra; Smith v. State, supra; Neary v. State, supra; Brown v. State, supra; Tedder v. State, supra. Reasonable men could easily differ over the

various factors as the occluded record in the case so easily demonstrates. Brown v. State, supra; Tedder v. State, supra. Great weight must be afforded the jury's recommendation as the "Judgment of the Community". Odom v. State, supra.

Accordingly, the sentence of death must be reversed.

ARGUMENT VI

THE TRIAL COURT ERRED IN REFUSING TO DECLARE SECTION 921.141 UNCONSTITUTIONAL, BOTH ON ITS FACE AND AS APPLIED TO THIS DEFENDANT.

Prior to trial, the Defendant moved to declare Florida Statute, §921.141 unconstitutional. The Record before this Court contains no ruling on the Motion from the trial Court.

Florida Statute, §921.141 is unconstitutional on its face in that it is violative of the Eighth and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 9 and 17 of the Constitution of the State of Florida. The aggravating and mitigating circumstances as enumerated in the death penalty statute are impermissably vague and overbroad.

The first aggravating circumstance of the murder being committed under a sentence of imprisonment is overbroad since it makes no distinction between a person imprisoned for a non-violent and violent crime. The aggravating circumstance of a pervious conviction of a capital or felony involving a threat of violence is overbroad since the circumstance surrounding the felony are not considered. The aggravating circumstance of "many persons" is vague.

The aggravating circumstance of felony murder is a prohibited automatic sentence of death. Coker v. Georgia, supra. The factor of avoidance of lawful arrest or to effectuate an escape from custody is not adequately limited in its application. Any inadvertant killing in a felony murder could fall within this setting. The factor of disruption of any governmental function is vague.

The factor of a cruel, heinous, or atrocious killing has been subject to wide disparate application. Reasonable and consistent application has been impossible. The factor of a cold calculated and premeditated manner is a restatement of first degree murder other than felony murder. This factor should not be used. Otherwise it becomes a mandate for an automatic sentence of death.

The mitigating factors contained in the death penalty statute are equally vague and overbroad. The qualifying adjectives used in the statute unconstitutionally limit the mitigating factors to be applied.

The statute is therefore defective in that other mitigating factors are proscribed from consideration. The recent case of McCampbell v. State, 421 So.2d 1072 (Fla. 1982), seems to allow consideration of other mitigating factors. However, the case falls short of stating that all mitigating factors are relevant.

In Cooper V. State, 336 So.2d 1133 (Fla. 1976), this Court held that it was not free to go beyond that statutory list of mitigating factors. In Songer v. State, 419 So.2d 1044 (Fla. 1982) this Court retreated from Cooper and stated that its concern was whether the evidence of mitigation was probative. In McCampbell v. State, supra, there is no discussion of any reason why mitigating factors were considered other than those in the statute, nor is any legal basis presented for their consideration. Accordingly, if any other factors of mitigation may be presented, no clear guidelines exist for what may be considered. Therefore, that statute as interpreted remains defective.

Florida Statute, §921.141 is unconstitutional on its face in that the State of Florida is unable to justify the death penalty as the least restrictive means available to further a compelling State interest, as is required by Poe v. Wade, 410 U.S. 113 (1973) where a fundamental right, such as life, is involved. A mere theoretical justification will not satisfy the requisite burden of proof incumbent upon the State.

Florida Statute, §921.141 is unconstitutional as applied and, therefore, violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

The death penalty has been applied in a number of cases before this Court. This Court has reversed numerous cases where the death penalty has been applied. Particularly noteworthy are these examples of overturned death sentences where an advisory jury has recommended life, but the trial judge rejected that advisory sentence and imposed the death penalty. This leads to the unescapable conclusion that a pattern of arbitrary and capricious sentencing like that found in Furman v. Georgia, 408 U.S. 238 (1972), exists today.

Death sentences in Florida are imposed irregulary, unpredictably, and whimsically in cases which are no more deserving of capital punishment, under any rational standard that considers the character of the offender and the offense, than many other cases in which sentences of imprisonment are imposed. Inconsistent and arbitrary jury attitudes and sentencing verdicts, uneven and inconsistent prosecutiorial practice in seeking or not seeking death penalty, divergent sentencing polciies of trial judges, and

erratic appellate review by the Supreme Court of Florida all contribute to produce an irregular and freakish pattern of life or death sentencing results.

The aggravating factors found by the trial Court are those factors that are clearly overbroad and are those factors which are quite often subject to disproportionate application.

The facts and circumstances surrounding the murder in this case demonstrate that the application of the death penalty in this case is disproportionate to the severity of the crimes alleged and, further, deprives the Defendant of equal protection of the law. In addition to the automatic aggravating factor of felony murder, the vague factor of "great risk to many people" was applied in this case. Also, the aggravating factor of a murder to avoid identification or arrest, which was applied in this case, contains no limitation in it to avoid application where the killing was inadvertent.

Accordingly, the Appellant respectfully requests this Honorable Court to declare Florida Statute, §921.141, to be unconstitutional on its face and as applied to him.

CONCLUSION

Based upon the foregoing facts, arguments, and authorities the Defendant respectfully requests this Honorable Court to reverse his conviction and remand this cause for a New Trial or, in the alternative, to reduce his sentence to life imprisonment.

Respectfully submitted,

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By: _____
RANDOLPH Q. FERGUSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was mailed this 9 day of February, 1983 to: KELLY ANN LANTZ, Assistant Attorney General, 401 N.W. Second Avenue, Miami, Florida 33132.

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RANDOLPH Q. FERGUSON