IN THE SUPREME COURT OF FLORIDA

DANIEL LEE DOYLE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO.: 62,212

BRIEF OF APPELLANT

Appeal from the Circuit
Court, 17th Judicial
Circuit, in and for
Broward County, Florida
Judge Leroy H. Moe

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TABLE OF CONTENTS

TABLE OF CITATIONS

Case Authorities Continued: Page

Case Authorities Continued: Page

Case Authorities Continued: Page

Case Authorites Continued: Page

Case Authorities Continued: Page

Other Authorities:

PRELIMINARY STATEMENT

The Appellant, DANIEL LEE DOYLE, was the Defendant in the trial court of the Circuit Court of the Seventeenth Judicial Circuit, the Honorable Leroy H. Moe presiding; Appellee, State of Florida, was the Plaintiff in the trial court. They will be referred to in this Brief as the "Appellant" and "Appellee" or "State".

STATEMENT OF THE CASE

Appellant, DANIEL LEE DOYLE, was arrested on the instant charges and was indicted by the Broward County Grand Jury for one count of First Degree Murder of Pamela Kipp and one count of Sexual Battery upon Pamela Kipp with force likely to cause serious personal injury. On February 25, 1982, a lengthy evidentiary hearing was held on Defendant's pretrial motions including Motion to Suppress Statements, Motion to Suppress Evidence seized from search and seizure, and Motion to Dismiss the Indictment based upon the destruction of evidence. The Motion to Suppress articles was denied (Tr. Vol. II, P. 282), the Motion to Dismiss was denied (Tr. Vol. II, P. 289), and the Motion to Suppress Statements was denied (Tr. Vol. II, P. 294). Thereafter, on March 29, 1982, after some hesitation by defense counsel in answering ready for trial (Tr. Vol. III, P. 304), the trial in the instant matter began, and the Defendant was found guilty as charged of First Degree Murder and of Sexual Battery with force likely to cause serious personal injury (Tr. Vol. VIII, P. 1302).

The jury was returned and heard evidence for the advisory portion of the capital trial and the jury returned an advisory sentence recommending death by an eight to four

vote (Tr. Vol. IX, P. 1395). Thereafter, the Defendant was adjudicated guilty on both counts (Tr. Vol. IX, P. 1400), and a presentence investigation was ordered. On May 13, 1982, the Defendant was present in court for sentencing, and Leroy H. Moe sentenced the Defendant to death in the electric chair (Tr. Vol. IX, P. 1413). The instant appeal followed.

STATEMENT OF THE FACTS

The Defendant, DANIEL LEE DOYLE, lived on the same street and was a neighbor of the Kipp family, including Pamela Kipp, the victim in this case, in Miramar, Broward County, Florida. On September 5, 1981, the Defendant was seen doing yard work in the Kipp's yard which including clipping branches and hedges (Tr. Vol. V, P. 678), and, in fact, Appellant's truck was seen full of bushes about 3:30 P.M. on September 5, 1981 (Tr. Vol. V, P. 714). On that same day, the victim, Pamela Kipp, was seen jogging in the area between 4:00 and 5:00 in the afternoon (Tr. Vol. V, P. 705). The Appellant's truck was seen parked in the area of 130 Street and Miramar Parkway at approximately 5:00 P.M. (Tr. Vol. V, P. 718) which was the same area in which the victim was seen to be jogging (Tr. Vol. V, P. 717). Later that same afternoon, David Familgietti helped to pull Appellant's truck out of the mud where it was stuck in a field in the area of 132 Street and Miramar Parkway (Tr. Vol. VI, P. 892). The friends and family of Pamela Kipp noticed that she was gone and at 7:45 that same evening, September 5, 1981, the victim's sister, Barbara Kipp, learned that the victim was neither at home nor at work nor at any of her friends houses (Tr. Vol. VI, P. 817).

After further checking, a missing persons call was reported to Sergeant Cerniglia of the Miramar Police Department (Tr. Vol. V, P. 787) and a large scale search by volunteers, friends, relations, and the Appellant took place. While the victim's ring was found on the night of September 5, 1981, during the search (Tr. Vol. VI, P. 923), the body of Pamela Kipp was not discovered until approximately 8:00 A.M. on the next day, Sunday, September 6, 1981, in the area of the field near 132 Street and Miramar Parkway (Tr. Vol. V, P. 696). Also found in the vicinity of the nude body of Pamela Kipp was a beige carpet and fresh tree clippings as well as ruts in the mud where a vehicle had been stuck (Tr. Vol. V, P. 791). The victim's dog was also found in the area with its leash tied to a tree.

Before the discovery of the body of Pamela Kipp, the Appellant was in fact questioned by Miramar Police officers as being the last person to see Pamela Kipp (Tr. Vol VII, P. 1005). Upon questioning, Appellant accompanied police officers to a place in the area behind the area mailboxes to show where he had dumped the clippings from the Kipp yard work earlier on September 5, 1981 (Tr. Vol. VII, P. 1007-1008). It was noticed at that time by police officers that the clippings were some

what dried out and did not look fresh (Tr. Vol. VII, P. 1010). After taking the police officers to the area, Appellant assisted in the search for Pamela Kipp until a point where he went to get boots and never came back to continue the search (Tr. Vol. VI, P. 874-875). Upon being requested to do so, Appellant accompanied by his girlfriend Karen Wentnik responded to the Miramar Police Department where Defendant was given his constitutional rights and gave a tape recorded statement (Tr. Vol. VII, P. 1015). After the tape recorded statement by Appellant, the Appellant was informed of discrepancies in the statement by Miramar Police officers including the fact that the front-end loader which the Defendant claimed he saw on the day before the murder, September 4, 1981, was in fact not present until the day of the murder, September 5, 1981 (Tr. Vol. V, P. 757, Vol. VII, P. 1042). The Appellant was also informed that the clippings which he showed the police officers looked older than they should have (Tr. Vol. V, P. 1043). Appellant then made a non-recorded inculpatory statement to the police officers (Tr. Vol. VII, P. 1043) with such statement being repeated and changed somewhat in subsequent tape-recorded statements made while the Appellant was in the Broward County Jail. While admitting having sex with the victim and killing

the victim, the Appellant explained the fact that he was intoxicated at the time and in fact had blacked out and in fact had no recollection of details of the incident (Tr. Vol. VII, P. 1123-1124).

The victim, Pamela Kipp, was found to have been killed by strangulation and to have had sex while she was still alive (Tr. Vol. VI, P. 971), however, there was no sperm or semen present (Tr. Vol. VI, P. 978) nor were there tears in the vagina or bruises on the external genitalia (Tr. Vol. VI, P. 978). Attempts to lift fingerprints from the body of the victim were negative (Tr. Vol. V, P. 796) and there were no footprints nor tire marks casted photographed or prepared (Tr. Vol. VI, P. 919).

Other facts will be cited throughout the Brief as appropriate.

POINT I

THE COURT ERRED IN FAILING TO DISMISS THE INDICTMENTS DUE TO THE LOSS OR DESTRUCTION OF TAPE-RECORDED STATEMENTS OF THE APPELLANT

During the preparation of the Appellant's defense, the Appellant's trial lawyer inadvertently discovered the non-disclosed fact that there were tape-recorded statements made by the Appellant to a hypnotist, Martin Segal, in the course of the investigation in the instant case. On November 5, 1981, during a pretrial hearing, it was agreed by the Assistant State Attorney that such taped statements should be totally accessible to the defense and available for copying.

On February 25, 1982, an evidentiary hearing was held before the trial court on various motions including the Appellant's motion to dismiss due to the destruction of favorable evidence (Tr. Vol. I, P. 19-20). During the course of such evidentiary hearing, it was elicited that the Appellant was questioned on numerous occasions by the Miramar Police Department and gave numerous and often contradictory statements regarding his participation or not in the alleged murders: on September 6, 1981, oral statements given to Detective Buzzo by Appellant at the scene denying any involvement (Tr. Vol. I, P. 28-30);

subsequent tape-recorded statement on September 6, 1981, in which Appellant denied involvement in the incident yet gave considerable detail as to his activities of the day of the murder (Tr. Vol. I, P. 38-50); a subsequent oral "corrected" statement given by Appellant on September 6, 1981, after being confronted with discrepancies by Detective Buzzo, in which Appellant implicated himself in the murder by assisting and witnessing an unknown white male in the rape and murder of the victim, Pamela Kipp (Tr. Vol. I, P. 57-58); an oral, non-taped statement on September 8, 1981, in the form of a confession to the killing of Pamela Kipp and implications in the killing of Monica Ruddick (Tr. Vol. I, P. 134-141); a tape-recorded statement in the form of a confession on September 8, 1981, giving details regarding Pamela Kipp (Tr. Vol. I, P. 144-169); taped statement on September 11, 1981, in the form of a confession giving details regarding the Pamela Kipp incident (separated from the tape regarding the Monica Ruddick incident) (Tr. Vol. I, P. 170-173); and a tape-recorded statement on September 15, 1981, while the Appellant was under hypnosis wherein the Appellant supposedly confessed to the Pamela Kipp murder and retracted his confession regarding Monica Ruddick (Tr. Vol. I, P. 175-176).

The session under hypnosis on September 15, 1981, was tape recorded and due to that tape recording, the hypnotist, Mr. Segal, made no notes of what transpired at the session (Tr. Vol. I, P. 109), although Officer Bellrose did take notes (Tr. Vol. I, P. 187). It was Mr. Segal's testimony that, upon being hypnotized, the Appellant initially admitted to both the Kipp murder and the Ruddick murder, and upon further questioning, then retracted his confession to the Ruddick murder by saying that he simply confessed because Appellant felt that someone should pay for that particular murder (Tr. Vol. I, P. 113). It was the further testimony of Mr. Segal that Appellant refused to answer some questions and these questions were recalled to be all regarding "the second murder" which was the murder that the Appellant denied upon hypnosis (Tr. Vol. I, P. 114-117). Mr. Segal was allowed to testify that the Appellant had a good rapport with Mr. Segal, that the Appellant understood communications, and that the Appellant understood his constitutional rights, and that the Appellant had sufficient intellectual level for hypnosis to be effective (Tr. Vol. I, P. 114-119). These tape recordings and all of the notes of Officer Bellrose taken at the time of such tape-recorded statements were misplaced or lost (Tr. Vol. I, P. 187).

Detective Bellrose made no police report setting forth the substance of said tape-recorded statements until approximately three to four months after the statements were given (Tr. Vol. I, P. 187), and, in fact, Detective Bellrose never mentioned the hypnosis session where the Appellant allegedly made statements at any point in his police reports prior to his supplemental report made three to four months afterwards (Tr. Vol. I, P. 188).

The due process concepts set forth in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) was clarified by the Supreme Court in Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562; 33 L.ed.2d 706 (1972), where the following three criteria for measuring Brady violations for non-production of favorable evidence were set forth:

> a. Suppression by the prosecution after a request by the defense;
> b. The evidence's favorable character for the defense;
> c. The materiality of the evidence.
> P. 794.

While the Appellant does not suggest that the failure to produce the taped statements calls for an automatic reversal of a conviction, See State v. Sobel, 363 So.2d 324 (Fla. 1978), the Appellant does contend that the failure to produce such taped statements is a serious due process violation, which, after applying the balancing

approach as adopted in Sobel, supra, at P. 327, requires reversal.

In applying the three-prong test set forth in Moore v. Illinois, supra, P. 794, it becomes clear that the facts in the instant case support a due process violation and mandate a reversal of the instant conviction. Without the taped statements and without the notes made at the time of the statements, Appellant is left at the mercy of the memories of Martin Segal and Detective Bellrose (a major investigator in the case) regarding the lack of confusion as to which confession was recanted, regarding the existence of any partial recantations of the other confession, and regarding the existence of new or inconsistent factors when considered in relationship to the numerous prior statements made by Appellant. The favorable character of these tape-recorded statements also becomes apparent when the evolution of the earlier statements is taken into account. As was pointed out earlier, Appellant made numerous statements and each statement was an entity within itself with new and usually different information than the prior. It certainly becomes apparent that this statement which is not available to the Appellant would have great importance to the Appellant in not only testing the reliability of prior statements by the Appellant, but

as an impeachment source of oral statements, and, more importantly, as being a solid indicator of the Appellant's psychological makeup, his mental stability, his grasp of the situation, his ability to communicate, etc., which directly goes to the acceptability of this and prior statements presented to the jury and goes to Appellant's ability to understand and waive his "Miranda rights".

The Assistant State Attorney involved made no attempt to sustain the State's burden of showing a lack of prejudice to the Appellant for the lack of the tape, See Sobel, supra; Krantz v. State, 405 So.2d 211 (1981); but instead concentrated on convincing the court that the destruction was negligent and not intentional (Tr. Vol. II, P. 288). The court, in denying the motion to dismiss for a loss of the evidence, erroneously placed this burden of proving prejudice upon the Appellant.

When dealing with due process and materiality of the suppressed or lost evidence involved, it has been held that the test is to be applied generously to the defendant when there is substantial room for doubt as to what effect disclosure of the evidence might have had upon the outcome of the trial. See Budman v. State, 362 So.2d 122 (Fla. 3rd D.C.A. 1978); Levin v. Clark, 408 F.2d 1209 (U.S.D.C. 1967). Consequently, based on the beneficial nature of

the missing recordings and the materiality of said recordings, coupled with the failure of the State to prove the lack of prejudice to the Appllant, due process requires that the conviction and sentence in the instant matter be reversed for the failure to produce tape-recorded statements of the Appellant.

POINT II

THE TRIAL COURT ERRED IN ADMITTING VARIOUS STATEMENTS OF THE APPELLANT INTO EVIDENCE BEFORE THE JURY

A.

The warings given Appellant regarding his constitutional rights under the Fifth Amendment were inadequate.

During the course of the investigation into the slaying of Pamela Kipp, Detective Buzzo and Detective Guess and Detective Bellrose had occasion to question Appellant, interrogate the Appellant, and eventually elicit statements submitted at the trial of Appellant. At no time was an attorney present with Appellant at any of the interrogation sessions (Tr. Vol. I, P. 179). Nonetheless, due to the fact that Appellant was allegedly given his "Miranda rights" (Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966)), the detectives chose to continue their investigation and interrogate the Appellant without the presence of Appellant's attorney. After the eliciting of the first oral statement, the Appellant was effectively in custody with the investigation focusing upon him due to the discrepancies in the evidence and the statement (Tr. Vol. I, P. 72; Tr. Vol. I, P. 102).

It is well established law in this country that in any case involving interrogation by law enforcement officers, certain specified warnings must be given to a person in

custody before questioning can occur, and certain specified procedures during the course of any such interrogation must be followed. Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321 (1975) P. 324. Such warnings must inform the person in custody that he "has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney either retained or appointed". Miranda, supra, P. 1612. Notwithstanding the voluntary nature of such resultant statement, no statements made by the person interrogated can be admitted into evidence over his objection without the defendant being first advised of such rights. See Michigan v. Mosely, supra, P. 325; Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974) P. 2363.

While it was testified at the motion to suppress, the Appellant was given his "Miranda rights" before being interrogated at the various times, it is equally clear that these rights were insufficient to advise the Appellant of his Fifth Amendment privileges during the three statements given by the Appellant: the statement of September 6, 1981; the statement of September 8, 1981; and the statement of September 11, 1981. Although on September 8, 1981, Detective Bellrose correctly and adequately apprised the Appellant of his constitutional rights and his privileges regarding those rights:

> If you decide to answer questions now without an attorney present, you will still have the right to stop answering at any time until you talk to an attorney. Do you understand? (Tr. Vol. I, P. 131).

However, on the tape-recorded statements given by the Appellant, the constitutional rights as given by Detective Buzzo and Detective Bellrose were inadequate in that they did not include the Defendant's right to terminate interrogation at any time (Tr. Vol. I, P. 38-40; Tr. Vol. I, P. 145-146).

In interpreting the warnings mandated by Miranda v. Arizona, supra, the Supreme Court has held that:

> A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the court in that case to adopt "fully effective means...to notify the person of his right to silience and to assure that the exercise of the right will be scrupulously honored... 384 U.S., at 479, 86 S.Ct., at 1630. The critical safeguard identified in the passage at issue is a person's "right to cut off questioning" Id. at 474, 86 S.Ct. at 1627.

Through the exercise of this option to terminate questioning, he can control the time at which questioning occurs, the subjects discussed and the duration of the interrogation. P. 326. See also, Shriner v. State, 386 So.2d 525 (Fla. 1980) P. 529.

As the right to cut off questioning has been held to be the critical safeguard protected under Miranda, it is logical to require the notification of the soon to be interrogated subject that he does in fact enjoy the right to limit questioning if he so desires. Under the facts of the instant case, the shortcoming is blatant due to the Appellant's diminished capacity and mental ability (Tr. Vol. II, P. 207, 213, 225, 266, 272), and due to the inconsistencies of the resultant confusion of the Appellant being advised at one point that he had the right to stop questioning at any time (Tr. Vol. I, P. 131), and being advised on at least two other occasions of a purported battery of rights which did not include the right to terminate questioning. Due to the inadequacy of the warnings regarding his Fifth Amendment rights given to the Appellant, statements made by the Appellant must be suppressed, notwithstanding the question of voluntariness. Michigan v. Mosely, supra, P. 325.

B.

The evidence elicited at the motion to suppress and at the trial was insufficient to demonstrate a knowing and intelligent waiver of Appellant's constitutional rights under the Fifth Amendment.

Notwithstanding the inadequacy of the warnings regarding Appellant's Miranda rights before interrogation, the trial

court erred in admitting statements by Appellant due to the fact that there was inadequate evidence to support a finding that such Miranda rights were knowingly and intelligently waived by the Appellant, and that the resultant statements were freely and voluntarily given.

> If the interrogation continues without the presence of an attorney, and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to a retained or appointed lawyer. Escobedo v. Illinois, 378 U.S. 478, 490 n. 14, 84 S.Ct. 1758, 1764; 12 L.ed.2d 977. This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1018; 83 L.ed. 1461 (1938), and we reassert these standards as applied to incustody interrogation. Tague v. Illinois, U.S. , 100 S.Ct. 652 (1980) P. 653.

Although Detective Buzzo testified at the motion to suppress that Appellant understood his constitutional rights (Tr. Vol. I, P. 34, P. 64), Martin Segal testified that in his opinion there was no doubt that Appellant understood his rights (Tr. Vol. I, P. 114-115), it was testified by Doctor Robert Wylan, Director of Psychological Services for the Broward County Schools, that Appellant

was in handicapped classes categorized as border-line retarded (Tr. Vol. II, P. 207); Karen Doyle, the Appellant's sister-in-law, testified that though Appellant might understand his constitutional rights, she was not sure, that there was a possibility that Appellant would not understand such rights (Tr. Vol. II, P. 212-213); clinical psychologist, Doctor Seth Kreiger, testified that the Appellant was of border-line intellectual endowment with an I.Q. level between 70 and 80, and that when these factors were considered in conjunction with the detrimental effects of stress on the Appellant's logical thinking ability and functional intelligence, Doctor Kreiger could not be sure that the Appellant knew the ramifications of an attorney (Tr. Vol. II, P. 232); Karen Wentnick testified that the Appellant was slow (Tr. Vol. II, P. 266); and psychiatrist, Doctor Arnold Eichert, testified that the Appellant was suffering from organic brain problems and in fact had brain damage (Tr. Vol. II, P. 272).

While it is conceded that mental weakness alone will not automatically render a confession voluntary and admissible, Ross v. State, 384 So.2d 1269 (Fla. 1980) P. 1272, mental weakness is in fact a factor to be considered in

determining the voluntariness of a confession, and logically is a factor in determining the knowing and intelligent nature of the waiver of constitutional rights.

Ross contested the voluntariess of this statements, as he was of border-line intelligence with an I.Q. of 66 according to a doctor that testified. The critical difference in the instant case and Ross, supra, was that the doctor that testified (presumably the only doctor) testified that Ross had the ability to understand Miranda warnings. P. 1272. Most importantly, Ross testified at the trial of the matter, reconfirmed his confession when he took the stand and testified that he stomped the victim in the head and demonstrated to the jury exactly how he stomped her. P. 1273.

In the case of Fields v. State, 402 So.2d 46 (Fla. 1st D.C.A. 1981), order denying suppression was reversed where a court-appointed psychologist testified that Fields had reduced mental ability with brain damage and attention span problems and that Fields would have trouble understanding his Miranda rights as they were read to him, although Fields was repeatedly advised of his Miranda rights and stated that he understood those rights.

In Hall v. State, ___So.2d___; F.L.W. Vol. 7, No. 39, 10/15/82, P. 21-25, the conviction was reversed where Hall was a juvenile with an I.Q. of 55 classified as severely retarded by a school psychologist who further testified that Hall could not understand the constitutional rights waiver form even if it were read to him.

Similarly in Tennell v. State, 348 So.2d 937 (Fla. 2nd D.C.A. 1977), Tennell gave a confession while 14 years old. The record established that Tennell was of below-average intelligence, had a low reading ability, and difficulty understanding normal speech, and the conviction was reversed.

Consequently, the record in the case at bar, clearly indicates that there were insufficient facts to support the State's burden of proof by preponderance of evidence of the Appellant's knowing and intelligent waiver of his Miranda rights. Wherefore, these statements made by the Appellant must be suppressed and the conviction and sentence reversed.

C.

Appellant's request for an attorney to be present during questioning was not honored as his interrogation was not terminated until an attorney was present.

In the recent United States Supreme Court case of Edwards v. Arizona, ___U.S.___, 101 S.Ct. 1880 (1981), the Court in clear language put to rest any amibiguities regarding the possibility of further interrogation once a suspect has indicated a desire for counsel:

> We now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused...having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communications, exchanges or conversations with the police. P. 1884-1885.

Regarding the Appellant's right to an attorney at his first statement, the following dialogue appears in the record:

> Question: Do you wish to have an attorney present at this time?
>
> Answer: Well, he's out of town right at the moment.
>
> Question: Well, do you wish to have an attorney here though, you know, while I talk to you now?
>
> Answer: If, you know, we'll talk about that later. I can, yes. (Tr. Vol. I, P. 39-40).

Instead of ceasing the interrogation at this time, the detective chose to ignore this invocation of the Appellant's right to counsel by continuing the interrogation:

> Question: So, what I am saying is, you're willing to talk to me now; right, without your attorney?
>
> Answer: Yes
> (Tr. Vol. I, P. 40).

It was related at the motion to suppress that George Evans, an attorney, was in fact the Appellant's attorney and was out of town (Tr. Vol. I, P. 77-78), that Appellant's family had called him on the weekend in question (Tr. Vol. I, P. 79), and that Appellant asked Karen Doyle to contact attorney Evans (Tr. Vol. II, P. 211. Further, Appellant had tried to call the attorney before going to the police department (where the statements in question were given) and, in fact, the Appellant thought he should not go to the police department without his attorney (Tr. Vol. II, P. 248, 254). Finally, under cross-examination, Detective Bellrose candidly testified that he was the one that arrested the Appellant and that at no time during that day did he take any measures to put the Appellant in touch with his attorney or with the Public Defender's Office (Tr. Vol. I, P. 179), and Detective Buzzo who gave him the rights previously cited, in fact, knew the Appellant

had an attorney but the attorney was out of town (Tr. Vol. I, P. 72).

In DelDuca v. State, ___So.2d___; F.L.W. Vol. 7, No. 40, 10/22/82, P. 222, DelDuca was arrested and taken to jail at which time his attorney requested that no one question him without his being present. Some five hours later, an officer visited DelDuca in jail, informed him of his Miranda rights, obtained an apparent waiver and secured an inculpatory statement from DelDuca. In reversing the conviction, the Second District Court of Appeals held that DelDuca clearly invoked his right to have counsel present during custodial interrogation, and that under Edwards, supra, valid waiver of that right cannot be established by showing only that the accused responded to police initiated interrogation after being readvised of his Miranda rights. Similarly, in Silling v. State, 414 So.2d 1182 (Fla. 1st D.C.A. 1982), citing Edwards, supra, the Court reversed the conviction finding the statements to be inadmissable because when Silling invoked her right to counsel that right was not voluntarily, knowingly, and intelligently waived as counsel was not afforded nor did Silling initiate further communications which resulted in the statement.

In Jennings v. State, ___So.2d___; F.L.W. Vol. 7, No. 15, 4/16/82, P. 181, this Court dealt with a situation

similar to that of the case at bar. In that after being advised of his right to counsel, Jennings indicated that he wanted an attorney, at which time the investigator continued to explain Jennings' right indicating his hope of continuing the questioning. Jennings agreed to talk if given a recess and after five minutes made an inculpatory statement without an attorney. This Court found, after considering the totality of the circumstances, that the prelude to the interrogation concerning the crime concluded with an unequivocal agreement to proceed without counsel. Of course, of critical importance when comparing Jennings to the instant case is the fact that there was no testimony or indication that Jennings in any way had a diminished capacity for understanding, a low emotional and mental level, and certainly there was no expert testimony by psychologists and psychiatrists.

It is quite logical to assume that once Appellant invoked his right to counsel and requested an attorney and had that request ignored by his interrogators, that his further "waivers" of his right to counsel were simply a continuing course of conduct wherein Appellant's low intellectual level was manipulated and exploited for further improper interrogation.

In that Appellant's statements should have been suppressed and should not have gone before the jury, Appellant's conviction and sentence must be reversed without consideration of the harmless error rule. It can certainly not be said beyond a reasonable doubt that it was harmless error for the statements to come before the jury, See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967); Bennett v. State, 316 So.2d 41 (Fla. 1975); as there was no direct evidence of the Appellant's guilt without the consideration of the statements given by Appellant.

POINT III

THE COURT ERRED IN FAILING TO GRANT A NEW TRIAL DUE TO PREJUDICIAL COMMENTS BY THE TRIAL COURT.

During the course of the trial, the trial court on two separate occasions made comments in the presence of the jury which were highly prejudicial to Appellant's right to a fair trial. At one point in the early stages of voir dire, the court made the comment that, "I can tell you with a great degree of certainty that the State has more evidence than simply a confession, than simply a statement or whatever" (Tr. Vol. IV, P. 537); and later during a heated exchange between trial counsel and witness Fernandez, when Fernandez sarcastically asked the defense counsel, "Is that understood" (Tr. Vol. V, P. 726), trial counsel's motion to admonish the witness and to strike such comments and arguments by the witness were met by the court's politely thanking Mr. Fernandez for coming (Tr. Vol. V, P. 727). Both of these comments were objected to and mistrials were requested (Tr. Vol. III, P. 539; Vol. V, P. 728-729).

It is certainly clear that:

> That the utmost care should be used by the trial judges, and especially in criminal prosecutions, not to make any expression that is capable of being interpreted by the jury as an indication of what the judge thinks of the prisoner. Seward v. State, 59 So.2d 529 (Fla. 1952) P. 531.

This is particularly true in a capital case where everything including errors are magnified due to the stakes involved:

> The judge's neutrality should be such that even the defendant will feel that his trial was fair. In the trial of a capital case, the judge's attitude or demeanor may speak louder than his words, in fact, it may speak so loud that the jury cannot hear what he says. Williams v. State, 143 So.2d 484 (Fla. 1962) P. 488.

In light of the instruction to the jury regarding the jury's determination of the voluntariness of any statements and their duty to disregard any statements if not freely and voluntarily made (Tr. Vol. X, P. 1502) and the basic lack of any other evidence of the Defendant's guilt other than the various vague circumstances, the trial court's indication that the State certainly had other evidence beyond confession is critical. Innocuous evidence or circumstances which may have been totally ignored or disregarded take on an added light when the court's words are recalled in the jury's deliberation. Similarly, the court's politeness and seeming approval of the same witness that was in a heated argument with defense counsel on cross-examination certainly tends to undermine that cross-examination and bolster the witness's credibility before the jury. Certainly the remarks toward Fernandez could be viewed

as an intimation of the trial court's opinion as to the weight, character or credibility of the testimony adduced. See Leavine v. State, 147 So. 897 (Fla. 1933). Finally, in Coley v. State, 185 So.2d 472 (Fla. 1966), this Court held that:

> We think then in a case of this kind the only safe rule appears to be that unless this court can determine from the record that the conduct or improper remarks of the prosecutor did not prejudice the accused, the judgment must be reversed. P. 476.

Wherefore, due to the cumulative prejudicial effect to the Appellant of the court's comments to the jury, the judgment and sentence in the instant matter must be reversed.

POINT IV

THE TRIAL COURT ERRED IN NOT GRANTING A NEW TRIAL FOR JUROR MISCONDUCT

During the course of the trial in the instant matter, two separate incidences of juror misconduct occured which when taken together would properly be grounds for new trial in the instant matter due to their cumulative effect: During a break in the trial, a juror approached the trial attorney for the Appellant and said, "Good luck, you're going to need it" (Tr. Vol. VIII, P. 1182), and during the course of the trial, two members of the jury were observed in a local restaurant and lounge and were heard to say that the Appellant was obviously guilty and that one could tell just by looking at him (Tr. Vol. X, P. 1544). From these comments it is certainly clear that the verdict and sentence in the instant appeal do not square with right and justice and that there is reasonable ground to conclude that the jury acted through prejudice or other unlawful cause. See Florida Publishing Company v. Copeland, 89 So.2d 18 (Fla. 1956) P. 20.

It is fundamental that every Defendant is entitled to be tried by a fair and impartial jury, See Marrero v. State, 344 So.2d 883 (Fla. 2nd D.C.A. 1977); Kelly v. State, 371 So.2d 162 (Fla. 1st D.C.A. 1979), and that our system of

law has continuously endeavored to prevent even the possibility of unfairness. In Re: Murchison, 349 U.S. 133, 75 S.Ct. 623 (1955). In conclusion, this and any other case tried in our judicial system is to be induced only by evidence and argument in open court and not by any outside influence, Patterson v. Colorado, 205 U.S. 454, 27 S.Ct. 556 (1907). Since these cumulative errors should not be held harmless if there is a reasonable possibility that they might have contributed to the conviction in the instant matter, a new trial is mandated in the instant matter. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967); Bennett v. State, 316 So.2d 41 (Fla. 1975).

POINT V

THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE ON THE APPELLANT

The review of a death sentence by this Court has two discreet facets:

> First, we determine if the jury and the judge acted with procedurial rectitude in applying Section 921.141 in our case law...the second aspect of our review process is to insure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and the jury have acted with procedurial regularity, we compare the case under review with all the past capital cases to determine whether or not the punishment is too great. Profitt v. Florida, 428 U.S. 242 (1976); See State v. Dixon, 283 So.2d 1 (Fla. 1973) cert. denied 416 U.S. 943 (1974). In those cases were we found death to be comparitively inappropriate, we have reduced the sentence to life in prison. See Malloy v. State, 382 So.2d. 1190 (Fla. 1979); Adams v. State, ___ So.2d ___ ; F.L.W. Vol. 7, No. 6, P. 75, 2/12/82, at P. 77.

According to these two discreet functions of this Court in reviewing the instant death penalty, it becomes clear that not only was the court's sentencing flawed procedurally (reliance upon improper aggravating circumstances and failure to consider a mitigating circumstance) but the sentence was also disproportionate to other death sentences

which have been approved statewide, based upon the facts and circumstances of the case as a whole and the mitigation of the Appellant's diminished mental and emotional capacity.

A.

At the time of the sentencing, the trial court found that there were three aggravating circumstances present: murder committed during or after sexual battery; murder committed to avoid or prevent a lawful arrest or effecting an escape; and particularly heinous, atrocious, or cruel. See (Tr. Vol. X, P. 1575-1580). Of these aggravating circumstances, only the circumstance of a murder committed during or after sexual battery was properly considered in favor of the death penalty. The evidence of the other two aggravating circumstances was insufficient to prove them beyond a reasonable doubt. It is well established that aggravating circumstances of Florida Statute 921.144(g) must be proven beyond a reasonable doubt before being considered by the judge or the jury. State v. Dixon, 283 So. 2d 1 (Fla. 1973). When reviewing the sufficiency of evidence regarding aggravating circumstances supporting the death penalty, this court in Quince v. State, ___So.2d___; F.L.W. Vol. 7, No. 10, 3/12/82, P. 122, set forth the appropriate test:

> Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating and mitigating circumstances. P. 122.

Regarding the aggravating circumstance of murder being committed for the purpose of avoiding or preventing a lawful arrest, it is clear from the court's findings in support of such aggravating circumstance that the facts set forth do not support this aggravating circumstance beyond a reasonable doubt. There were no factors set forth by the court to show that there was an attempt to escape detection or arrest which led directly to the commission of the murder in question. Although there is no question about the fact that Appellant knew the victim and was in fact related to the victim, this fact in and of itself is insufficient to support the aggravating circumstance. The court relied upon the fact that Appellant took the body and attempted to hide it in a marsh area so that nobody would find her, and that he assisted searchers that were looking for the victims body by leading them away from the area where the body in fact was, as well as later denying any involvement in the victim's disappearance (Tr. Vol. X, P. 1576). Certainly, the bulk of the factors relied upon by the trial court were dealing with disposal of the body in

question and not the motivation for the killing. Clearly, once the victim dies, the murder is completed. See Blair v. State, 406 So.2d 1103 (Fla. 1982) P. 1108. In Riley v. State, 366 So.2d 19 (Fla. 1978), this Court disapproved of finding of the aggravating circumstance of avoiding detection holding that:

> The mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement officer. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases. P. 22.

In the instant matter, all that the court has to rely on is the proof of the death itself. The hiding of the body was certainly not well planned nor elaborate, see Blair, supra; Halliwell v. State, 323 So.2d 557 (Fla. 1975), nor was the denial of his involvement to the police out of the ordinary.

Regarding the court's reliance upon the earlier plea of guilty and being placed on probation as justificiation for finding of avoiding detection or arrest, this factor is speculation at best on the part of the trial court and does not substantiate this aggravating circumstance. Following Riley, supra, this Court in Mendez v. State, 368 So.2d 1270, (Fla. 1979), held that:

> An intent to avoid arrest is not present at least when the victim

> is not a law enforcement officer unless it is clearly shown that the dominant or only motive for the murder was the elimination of a witness. P. 1282.

In Smith v. State, ___So.2d___; F.L.W. Vol. 7, No. 42, 11/5/82, P. 487, the victim was robbed while working as a clerk in a convenience store, kidnapped, and raped by all three defendants involved, then taken into the woods and executed with three shots to the head. These factors, missing in the instant appeal, are also embelished by the fact that there were two separate conversations between the defendants after the commission of the robbery, rape, and kidnap, regarding killing the victim so that she could not testify. To the contrary, in the instant matter, the testimony of Appellant indicates that, as opposed to the commission of the sexual battery and then a calculated effort to eliminate the witness and/or avoid a sentence on a former case the murder was committed, the statement of Appellant played to the jury indicates that while the victim was helping Appellant free his truck from the mud, the Appellant was accidently struck on the hand with a board which caused him to blackout and to start the sexual battery upon the victim. When the victim hit Appellant four times and pulled Appellant's hair, Appellant reacted in the drunken condition that he was in and strangled the

victim with her T-shirt (Tr. Vol. I, P. 157-159). These facts do not reflect the dominant motive of the murder as being the elimination of witnesses. Similarly, in White v. State, 403 So.2d 331 (Fla. 1981), this Court disapproved the aggravating circumstance of avoiding arrest dispite the fact of a contract murder/execution while bound and gagged in a home while the home was robbed and ransacked holding that although the aggravating circumstance could validly be applied when the victim was not a law enforcement officer, the dominant motive for the murder must be the elimination of the witnesses. Due to the lack of evidence beyond a reasonable doubt sustaining this strong motive in the instant matter, together with the mere speculation with the Defendant's reaction to his earlier probationary plea, the aggravating circumstance of murder for the purpose of avoiding or preventing arrest was improperly found and improperly considered.

The aggravating circumstance of the murder being especially heinous, atrocious, and cruel also cannot be supported by the evidence and was improperly considered by the trial court as an aggravating circumstance. It has long been the law in the State of Florida that, when dealing with the aggravating circumstance of heinous, atrocious, and cruel:

> What is intended to be included are those type of crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the consciousless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So.2d 1 (Fla. 1973) P. 9.

In his actual conclusions supporting the aggravating circumstance of heinous, atrocious, and cruel, the trial court relied upon the fact that the victim was strangled with her T-shirt and that the victim was alive at least several minutes during the strangulation before death occurred as well as having bruises on her head showing a beating before strangulation. Further, the court relied upon the fact that the victim was alive during the sexual battery and the fact that the Appellant has shown no remorse for the killing (Tr. Vol. X, P. 1577). When this court spoke of the consideration of the magnitude of the criminal conduct and the hours of torture inflicted, etc., See White v. State, 403 So.2d 331 (Fla. 1981), it is clear that the court would consider a situation such as that found in Bolender v. State, ___So.2d___; F.L.W. Vol. 7, No. 42, 11/5/82, P. 490, wherein Bolender and two co-defendants captured the four victims during an alleged drug deal, robbed them, and bound them, and subjected them to hours of beatings, torture, and physical abuse (including burning the victims

with a hot knife and shooting one of the victims in the leg) in order to learn the location of drugs. The victims were then shot and stabbed numerous times, put into a car while some were still alive and the car set afire. In Bolender, supra, there is sufficient magnitude of the crime and sufficient torturous activity to justify the finding of the aggravating circumstance of heinous, atrocious, or cruel.

In Adams v. State, 341 So.2d 765 (Fla. 1977), during a robbery at the victim's home, the victim was beaten with a metal fire poker past the point of submission and until her body was grossly mangled. The victim was found injured and incoherent and died the next day. Again, the magnitude of the torturous activity toward the victim in Adams is certainly sufficient for any heinous activity and the fact that the victim lingered before death for a day was certainly more of a justification than the instant allegation by the trial court that the victim was probably alive for minutes while being strangled.

Regarding the trial court's reliance upon the fact that the victim was alive during the sexual battery and had some bruises on her head (noting that there was no testimony whatsoever regarding tears, lacerations, or mutilation of the victim regarding the sexual battery),

this Court should consider Thompson v. State, 389 So.2d 1197 (Fla. 1980), wherein during the course of the sexual battery and murder, the victim was beaten with a chain and billy club, struck with a chair leg, and burned with a cigarette lighter in the area of her vagina. The chair leg was forced into the vagina of the victim, it was twisted inside and struck with the hand to force it up into the vaginal area. The billy club was forced into the vagina of the victim so that it ripped the entire portion of the vagina, tearing the wall, causing such extreme pain, that the shock contributed in great part to the death of the victim as stated by the medical examiner's testimony. The beating of the victim resulted in 80% of the victim's body being covered with deep bruises, cuts, perforations, in addition to some of her front teeth being broken by blows from the defendant. P. 200. Similarly, in Gardner v. State, 313 So.2d 675 (Fla. 1975), the victim had at least 100 bruises upon her head, eyes, nose, both breasts and various parts of her body, large patches of healthy hair were pulled from her head, abrasions to the head as a result of the hair being grabbed and her head pushed against the wall and floor, massive hemorrhage of scalp, small hemorrhage under the covering of the brain, and contusions of the nose, massive hemorrhage to the pubic

area, including the inner surface of the thigh and the labia of the vulva, large tears inside the vagina from the outside entrance all the way to the back as far as it could go, caused by a broomstick, bat, or bottle, large larcerations or tears of the entire right side of the liver, and the peritoneal cavity or bone located in the pubic area, and the lower part of the body was broken up into small pieces by blunt injuries such as being stomped on. P. 676. In both Thompson and Gardner, it is clear that the murder in the course of the sexual battery to the respective victims qualified as being heinous, atrocious, and cruel to support the aggravating circumstance. By comparison, the instant facts do not sustain a finding of torturous activity toward the victim nor do they sustain a period of suffering of any during by the victim. See also, Stewart v. State, ___So.2d___; F.L.W. Vol. 7, No. 33, 9/3/82, P. 375; Gent v. State, 408 So.2d 1024 (Fla. 1981)

Finally, regarding the trial court's reliance upon the fact that the Appellant showed no remorse it should be kept in mind that the Appellant did not testify at trial nor at sentencing hearing and this fact is simply as assumption by omission made by the trial court. Also, this reliance by the trial court seems to be an artificial buttressing of the factual basis for the finding of heinous, atrocious,

and cruel, in that, unlike Sullivan v. State, 303 So.2d 632 (Fla. 1974), wherein Sullivan affirmatively stated, "I don't feel no different" when refering to the murder, or Hargrave v. State, 366 So.2d 1 (Fla. 1978), wherein the defendant stated, "I have killed before. It wouldn't bother me to kill again.", there was no affirmative statement by the instant Appellant which could be taken as a factor in the "equation of whether or not the crime was especially heinous, atrocious, or cruel". See Sireci v. State, 399 So.2d 964 (Fla. 1981).

When the Court considers the factual matters used to support the trial court's finding of heinous, atrocious, and cruel, it is clear that these factors do not substantiate this aggravating circumstance beyond a reasonable doubt.

B.

Under the second facet of this Court's review of the death sentence in the instant matter, the facts and circumstances of the instant case do not warrant the death sentence when the instant matter is reviewed to insure the relative portionality of death sentences which have been approved statewide. See Adams, supra, P. 77. Regarding a statewide comparison of cases in which the death sentence has been reversed, this Court should consider McKennon v.

State, 403 So.2d 389 (Fla. 1981) where the death sentence was reversed although McKennon returned to his job and killed his boss by beating her head against the wall and floor, strangling her, sliting her throat, breaking 10 ribs and eventually stabbing her to death; Chambers v. State, 339 So.2d 204 (Fla. 1976), where the death sentence was reversed in a situation where the Defendant in the course of a series of arguments and physical fights leading to an ultimate argument at which time the victim was so severely beaten that she died five days later as a result of cerebral and brain stem contusions. The victim was bruised all over the head and legs, had a gash under the left ear, and her face was unrecognizable as well as receiving several internal injuries; Neary v. State, 384 So.2d 881 (Fla. 1980), death sentence reversed although Neary and a co-defendant burglarized the home of a 66 year-old neighbor, committed robbery and rape of the neighbor, and eventually strangled the victim, all leading to a full confession; Tedder v. State, 322 So.2d 908 (Fla. 1975) where the death sentence was reversed although the Defendant chased his mother-in-law, the victim, throughout the house, eventually shooting the victim in the presence of her daughter and then would not let the daughter care for her allowing the victim to lanquish

and die. See also, Swan v. State, 322 So.2d 485 (Fla. 1975); Phippen v. State, 389 So.2d 991 (Fla. 1980); Welty v. State, 402 So.2d 1159 (Fla. 1981); and Brown v. State, 367 So.2d 616 (Fla. 1979).

This Court should also consider a sampling of state-wide cases in which the death sentence was found to be appropriate in comparison to the instant case. In Francois v. State, 407 So.2d 85 (Fla. 1982), the death sentence was affirmed where the defendant and co-defendants broke into a home, tied up eight people and shot all eight people execution style, with six of those persons dying; Ferguson v. State, ___So.2d___; F.L.W. Vol. 7, No. 29, 7/23/82, P. 729, death sentence was affirmed where Ferguson and co-defendants went into a house posing as F.P.&L. workers, bound and blindfolded eight people and executed six after robbing the people; Zeigler v. State, 402 So.2d 365 (Fla. 1982), death sentence affirmed wherein four victims were executed inlcuding the in-laws of the defendant for the insurance money involved; Smith v. State, 407 So.2d 894 (Fla. 1982), where the death sentence was affirmed where the mother and her 12 year-old daughter were choked and then stabbed numerous times with their throats being slit and the chests of both victims being cut open for a viewing of the hearts. See also, Palmes v. State, 397 So.2d 648

(Fla. 1981); Steinhorst v. State, ___So.2d___; F.L.W. Vol. 7, No. 10, 3/12/82, P. 115; LeDuc v. State, 365 So.2d 149 (Fla. 1978); Booker v. State, 397 So.2d 910 (Fla. 1981); Rutledge v. State, 374 So.2d 975 (Fla. 1979); Adams v. State, ___So.2d; F.L.W. Vol. 7, No. 6, 2/12/82, P. 75; Goode v. State, 365 So.2d 381 (Fla. 1978); Buford v. State, 403 So.2d 943 (Fla. 1981).

Without in any way attempting to minimize the grave nature of the instant case, it becomes clear upon comparison with other death sentence cases throughout the State, that the instant case is not one of such a nature that sustains the position of the ultimate penalty. In order to maintain constitutional integrity and consistency, the death sentence in the instant matter must be reversed.

C.

Notwithstanding the trial court's improper consideration of aggravating circumstances not proven beyond a reasonable doubt, the death sentence was wrongly imposed on Appellant due to the court's failure to consider various mitigating circumstances, particularly dealing with the Appellant's mental and emotional abilities, his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Appellant acting under

extreme duress, or the murder being committed while the Appellant was under the influence of extreme mental or emotional disturbance (Tr. Vol. X, P. 1578-1759).

In the State's evidence in chief, being the tape-recorded statement of the Appellant, the testimony revealed that the Appellant had been drinking all day and was drunk at the time of the murder of Pamela Kipp (Tr. Vol. I, P. 158-159), that he was out on drugs, cocaine, marijuana, and amphetamines, and that Appellant at the time of the incident blacked out due to the drugs, intoxication, and terrible pain, and that Appellant's head was "screwed up" based upon his mental and emotional state (Tr. Vol. I, P. 148-159). While this apparent voluntary intoxication alone may not be sufficient for mitigating circumstance or consideration in the review of the death sentence, the intoxication must be considered in conjunction with the black outs that the Appellant was experiencing. More importantly, these factors must be considered along with the basic emotional and mental problems that Appellant exhibited.

There was unrebutted testimony before the Court by Doctor Robert Wylan, the Director of Psychological Services for Broward County Schools, that Appellant was in handi-capped classes and was considered border-line retarded

(Tr. Vol. II, P. 207). Similarly, Doctor Seth Kreiger, a clinical psychologist testified that Appellant had border-line intellectual endowments and an I.Q. level between 70 and 80 (Tr. Vol. II, P. 225-227), that the Appellant had problems with chronology, time sequence, etc., and that the Appellant suffered from detrimental effects of stress in logical thinking ability and functional intelligence, where Appellant became more disorganized with slower thinking under stress situations (Tr. Vol. II, P. 230-234). Doctor Arnold Eichert, a psychiatrist, testified that Appellant was suffering from organic brain problem defects and that Appellant actually has brain damage which interfered with his use of any inherent intelligence (Tr. Vol. II, P. 264, 270, 272). Similarly, at the sentencing phase, Doctor Eichert again testified on behalf of the State, and the uncontradicted testimony was that not only does the Appellant have organic brain problems (Tr. Vol. VIII, P. 1326), but that the Appellant has emotional problems (Tr. Vol. VIII, P. 1330). Also at the sentencing, Doctor Kreiger again testified, and, as mentioned by Doctor Eichert, testified regarding the effect on the Appellant of his brother being killed in a hunting accident in November of 1980. Doctor Kreiger testified that the effect on Appellant of the

death was quite severe and that after the death, Appellant starting to use intoxicants to an extreme degree, spent a lot of time high on one thing or another, had periods of flashback or memories of what happened to the brother, became more and more despondent, irritable, quick to anger, and very unstable emotionally, giving him even less self control (Tr. Vol. VIII, P. 1337-1338). Regarding Appellant's self control, his control of his temper and of his conduct, Doctor Kreiger testified that Appellant has always had some impairment of these controls because of Appellant's suffering from dyslexia, which has always limited his verbal abilities and caused him to be frequently frustrated and more physical (Tr. Vol. VIII, P. 1338). Finally, Doctor John McClure, clinical psychologist testified at the sentencing phase that not only was Appellant considered to be border-line retarded, but the Appellant had a severe personality disorder which, though less than psychosis, was more serious than neurosis (Tr. Vol. VIII, P. 1345). Doctor McClure further testified that Appellant not only lacked the ability to control his mood and impluses, but in many cases Appellant lacked the intellectual capacity to understand how he should conform to, and that this problem was a chronic, life-long problem stretching

back to at least age seven (Tr. Vol. VIII, P. 1346). Also, Doctor McClure testified that the death of a close relative, such as Appellant's brother, is an extreme psycho-social stresser which can produce psychotic symptoms in someone suffering from a personality disorder as Appellant was. Further, Doctor McClure testified that the manner in which someone who is unstable to begin with will react to such an extreme stresser is unpredictable other than there will be a reaction of some sort (Tr. Vol. VIII, P. 1346-1347). Further, corroboration of these opinions was furnished by the Appellant's mother, Goldie Doyle, with her testimony that the Appellant's brother died in his arms and that death changed the Appellant dramatically (Tr. Vol. VIII, P. 1356).

In Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982), United States Supreme Court dealt with mitigating factor in the Oklahoma death statute which was similar to the Florida provision, in that evidence may be presented as to any mitigating circumstances. After being convicted of first degree murder for the shotgun killing of a police officer, Eddings presented evidence in mitigation dealing with his unhappy childhood and including a State's psychologist's testimony of Eddings' anti-social personality. P. 872. In affirming the trial court's sentence of death,

the Oklahoma Supreme Court found that there was no doubt that Eddings had a personality disorder, that Eddings knew the difference between right and wrong which was the test of criminal responsibility in Oklahoma, and that although the family history of Eddings was useful, it did not excuse his behavior. P. 873-874. In reversing the death sentence and remanding the case, the Supreme Court held that:

> It is not disputed that he was a juvenile with serious emotional problems and had been raised in a neglectful, sometimes even violent, family background... Just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background, and mental and emotional development of a youthful defendant be duly considered in sentencing. P. 877.

This consideration by the sentencing court is in accordance with the rule expounded in Gregg v. Georgia, 28 U.S. 153, 96 S.Ct. 2909 (1976) P. 2936, that "justice ...requires...that there be taken into account the circumstances of the offense together with the character and propensities of the offender". Eddings, supra, P. 875. Certainly, in the instant case, the Appellant presented considerable uncontradicted expert testimony regarding Appellant's emotional problems instability, low intellectual

level, etc., and the court's failure to consider these matters as mitigation in imposition of the death sentence was error.

In the case of Jones v. State, 332 So.2d 615 (Fla. 1976), the Court reversed a sentence of death finding that Jones had a "paranoid psychosis which was undenied and unrefutted, the degree of which no one can fully know". P. 1619. Finding that such illness contributed to Jones' strange behavior, although it is not fully known to what degree, the death sentence was reversed. The Jones' rationale was followed and cited in Burch v. State, 343 So.2d 831 (Fla. 1977), where a death sentence was reversed where the evidence established that at the time of the offense, Burch was mentally disturbed and his capacity to conform his conduct to the requirements of law were substantially impaired, notwithstanding the fact that a defense of not guilty by reason of insanity was found to be not available to Burch. P. 834. In the later case of Mines v. State, 380 So.2d 332 (Fla. 1980), this Court found unrefutted medical testimony in the record reflecting that Mines had a mental condition diagnosed as schizophrenia, paranoid-type. Holding that the finding of sanity of Mines did not eliminate consideration of the statutory mitigating factors concerning mental condition (under the influence

of extreme mental or emotional disturbance and the capacity to appreciate criminality of conduct or conform conduct to the requirements of law substantially impaired).

> The evidence clearly establishes that the appellant had a substantial condition at the time of the offense...The trial court erred in not considering the mitigating circumstances of extreme mental or emotional disturbance...and the substantial impairment of the capacity of the defendant to appreciate the criminality of his conduct...P. 337.

In the instant matter, the record was repleat with testimony, both expert and civilian regarding the Appellant's diminished capacity, low intellectual level, emotional instability, etc. Yet, even when these factors were combined with the Appellant's extreme intoxication, drug use, and black outs, the trial court summarily dismissed the mitigating factors as being inapplicable. Similarly, in Mann v. State, ___So.2d___; F.L.W. Vol. 7, No. 34, 9/10/82, P. 395, a psychiatrist testified that Mann's mental condition was of such a nature that he was under the influence of extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired. These opinions were

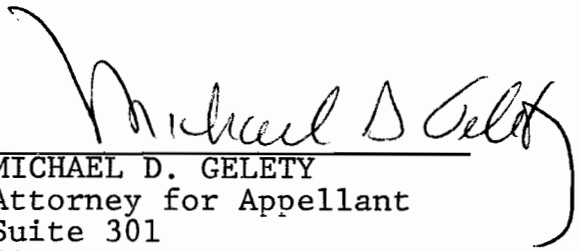
neither rebutted nor contradicted by the witness. As in the instant matter, the trial court made reference to such testimony in an ambiguous manner. The death sentence was reversed for the court's further consideration of such testimony and for a clearer statement of his ruling. P. 396. It should be also be noted that in the instant matter, the court found no mitigating factor under the Appellant's diminished capacity, holding in part that, "This Court found him competent to stand trial". (Tr. Vol. X, P. 1579). This misconception as to the applicability of psychiatric testimony to mitigating circumstances seems identical to that in Ferguson v. State, ___So.2d___; F.L.W. Vol. 7, No. 29, 7/23/82, P. 329, where the trial judge misconceived the standards to be applied in assessing the existence of mitigating circumstances discussed, drawing the conclusion that the trial judge in Ferguson applied the test for insanity. P. 329. See also, Chambers v. State, 339 So.2d 204 (Fla. 1976), wherein the Court considered all circumstances of the case including Chambers being under the influence of illegal drugs at the time of the incident in reversing a death sentence.

Wherefore, based upon the emotional problems and intellectual shortcoming of the Appellant and the related testimony, it is clear that the death sentence must be reversed in the instant matter as the appropriate mitigating factors were not considered by the trial court in the imposition of the death sentence.

CONCLUSION

Due to the improper admission of both tape-recorded oral statements of the Appellant before the jury, prejudicial comments by the trial court, and juror misconduct, the instant matter must be reversed and remanded for new trial. Also, due to the improper consideration of aggravating circumstances, the failure to consider mitigating circumstances and the inappropriateness of the death sentence, the sentence in the instant matter must be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of the Appellant, DANIEL LEE DOYLE, Case No. 62,212, was furnished to RUSSELL BOHN, Esq., Assistant Attorney General, Attorney General's Office, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 12th day of Nov, 1982.

Michael D. Gelety

MICHAEL D. GELETY