IN THE SUPREME COURT OF FLORIDA

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JOHN MILLS,JR.

Appellant,

vs.

CASE NO. 63,092

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR WAKULLA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

JOHN MILLS, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

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

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

II STATEMENT OF THE CASE

By indictment filed May 19,1982, appellant was charged with the premeditated first degree murder of Les Lawhon by a shotgun firearm. Additionally, he was charged with Burglary, Grand Theft, Kidnapping, possession of a firearm by a convicted felon and arson in the second degree (R 1-3). The Public Defender of the Second Judicial Circuit had previously been appointed to represent appellant but withdrew due to a conflict, and private counsel Roosevelt Randolph of Tallahassee, Florida, was appointed on May 24, 1982 (R 5). On June 9, 1982, counsel filed a demand for discovery and the State responded with its first answer on June 22, 1982 (R 15-16). Additional amended answers to discovery were subsequently filed by the State.

Counsel filed a Motion For Statement Of Particulars (R 24-28), a Motion For Mental Examination (R 36-37), a Motion To Dismiss The Indictment (R 80-81), a Motion For Change Of Venue, (R 85-88), a Motion To Sever, etc. The court ordered a severance of the possession of a firearm charge which became case no. 82-137 (R 141). These motions were all disposed of at hearings held on September 10, September 29, October 15, and October 26, 1982. The State filed six (6) Motions in Liminie on December 1, 1982. Those motions were disposed of during the trial.

The cause proceeded to jury trial on November

29,-December 4, 1982 before an all-white jury, on all charges except a possession of a firearm charge. At the conclusion thereof appellant was found guilty as charged (R 2007-2009). Penalty phase proceeding were held on December 4, 1982 and at the conclusion thereof, the jury returned a death recommendation (R 2341). Appellant entered a plea of no contest to the possession of a firearm charge on January 4, 1983. Counsel filed a motion for new trial (R 255-257) which was denied by the court (R 264). The court adjudicated appellant guilty and imposed the death sentence (R 273-274).

On January 13, 1983, a timely notice of appeal was filed (R 309). On January 31, 1983, attorney Roosevelt Randolph was allowed to withdraw (R 315) and the Public Defender's Office of the Second Judicial Circuit was reappointed to represent appellant. On July 11, 1982, after jurisdiction of this court was relinguished to the trial court for purposes of appointing an appellate counsel, attorney Roosevelt Randolph was reappointed.

III STATEMENT OF THE FACTS

(A) GUILT PHASE

Appellant renewed his motion for a change of venue shortly before the court called the roll of the jurors (R 341). At that time appellant place into evidence without objection of the state a article which appeared in the Tallahassee Democrat called "Man linked to Lawhon case toTestify Against Partner." The court denied the renewed court for general questioning (R 773).

The state called as its first witness Shirley Lawhon, wife of the victim. She stated that when she left her home in Medart, Florida to go to work about 1:15 p.m. on March 5, 1982, her husband, victim Les Lawhon was lying on the couch in their trailer. At approximately 5:00 p.m. the sheriff's office called and informed her that her trailer had been burned and her husband was missing. She went through the trailer and found that property was missing including a black and white television set, four (4) guns, stereo equipment, jewelry, clocks etc... (R 1126-1131).

William Payne of Medart, Florida, a neighbor of the Lawhons, noted that somewhere between 4:30 and 5:00 p.m. on March 5, 1982 he observed the Lawhon trailer burning. The sheriff's department arrived about 20 or 25 minutes later. (R 1138-1142).

Larry Masser, a deputy sheriff of the Wakulla County

Sheriff's Department stated he was dispatched to the Lawhon trailer at 4:35 p.m., March 5, 1982. Most of the trailer was completely burned down with only the rear of mobile home still standing. He checked the trailer, but did not find a occupant. Later that evening he and other officers attempted to secure the area by placing a tape around the trailer area. The State Fire Marshall's Office and FDLE were called to do an analysis of the area. On cross-examination deputy Masser admitted that there was several hours before the crime scene was sealed off, with many people standing around (R1142-1147).

Nayola Darby, a crime labortory analyst with the FDLE was dispatched to Wakulla County to process the crime scene of trailer of Les Lawhon. Ms. Darby identified five (5) photographs of the burned trailer (state's composit exhibit no. 1). She also collected a doorknob from the trailer and turned it over to the firearms section. She found no shoeprints or tireprints of any evidentiary value (R 1147-1154).

Thomas Franklin Easterling, investigator with the State Fire Marshall's Office, after being qualified as an expert stated that upon his examination of the Lawhon trailer burning of March 5, 1982, he determined that the fire originated somewhere in the livingroom. The fire originated off floor level and they were able to eliminate all accidentaltype causes. Therefore he concluded the fire was set by applying an open flame to a combustible product (R

1155.-1171).

Michael Tyrone Fredrick, who was also charged in the indictment was called to testify. He stated he had been convicted of a felony, three (3) times and was awaiting sentencing on eight (8) other felonies. The charge of First Degree Murder was reduced to Second Degree Murder with no other agreement, as to any particular sentence. Fredrick met appellant in 1976 and saw him again in the Wakulla County jail in February, 1982. They became friends in jail and Fawndretta Galimore, appellant's girlfriend bonded him out of jail upon appellant's request on February 22, 1982. He promised to repay the bond when he started work. Appellant was released from the Wakulla County jail several days later. Appellant and Ms. Galimore came by his trailer upon being released and inquired about a dog that he promised appellant if he could not repay the money. Appellant was driving an orange Dodge truck. He later drove this same vehicle with a white camper on it. He gave appellant a .12 gauge single shot shotgun on that day with the marking "TB" carved on the but of the gun. He saw appellant practically every day after his release from jail. He states he later gave Mill's some money that he had borrowed to pay on the bond (R 11711194).

On March 5, 1982 Michael Federick began his day by using some cocaine. He picked up his girlfriend May Francis Moore and went back to his trailer and stayed there most of the morning. Later that morning appellant came to the trailer and asked did I want to make any money. They left his

trailer and proceeded to appellant's mothers home in Buckhorn, Florida. They both got into the camper truck and appellant retreived the .12 guage shotgun that Frederick had given him earlier and placed it in the truck. Appellant was driving and Frederick was the passenger. They then went to a Junior Food Store in Sopchoppy. They began riding and appellant brought up the fact that a hit needed to be made (i.e. a burglary). Appellant then suggested ripping off some crackers. They stopped at a house on Surf road, but someone was home so they left. They proceeded to the Lake Ellen area eventually winding up at the Lawhon trailer. Appellant got out of the truck and knocked. Les Lawhon came to the door and let him in. Appellant came back to the door a few minutes later and told him to come on in. He came in and appellant pretended to use the phone. Appellant then grabbed a knife from the table and placed it around Lawhon's neck who was seated with his back to appellant. Frederick then went outside to see if anyone was watching. Appellant then brought Lawhon out of the trailer with the knife and a .12 guage shotgun he had retrieved from the house and placed him in the truck. Federick then drove the truck to an area near Shell Point Resort" at appellant's instruction (R 11941216).

Frederick stopped the truck in a wooded area and told Lawhon to get out. Appellant placed Lawhon on his knees and then tied Lawhon's hands behind his back with a belt. Appellant then took a tire tool from the truck and hit Lawhon on the back part of his head. Lawhon fell forward. Appellant

said "Let's go" but Lawhon jumped up and ran out in a bunch of bushes. Appellant ran after Lawhon with the gun he had taken from Lawhon's residence into the bushes. He heard two (2) shots and Appellant returned without Lawhon. The brown shirt that he was wearing had blood in the stomach area. He took the shirt off and threw it out on the way back to the Lawhon trailer. They then went back to Lawhon's trailer and cleaned it out of all the property which included a lady's class ring, an antique clock, weapons, jewelry, television set's, stereo equipment etc. They were not wearing gloves so appellant wiped the door knobs off with a towel. Frederick says he did not see any fire when they left the place. Frederick was taken back to the area of his home at Hudson Height Trailer Park and appellant let him out. He did not see appellant after the night of the murder (R 1216-1246).

Frederick later took the lady's class ring he had stolen from the Lawhon's and sold it to the Jewelry box in Tallahassee. He then stated he lied to the police upon his arrest about the sale of the ring. After his arrest in May he took the officers to the area where Lawhon was killed (R On cross-examination, Frederick admitted telling at least ten (10) different lies as to the origin of the ring and other property that came from the Lawhon's residence. He further admitted that he had discussed making a hit on a Mr. Jewel Hudson in late February,1982, another Wakulla resident. He admitted carrying a firearm in his back pocket during this time but denied telling Greg Rosier that he wanted to make a

hit on Les Lawhon (R 1254-1311). Frederick was later recalled by the State and testified he had been convicted of a crime four (4) times and that he told his roommate that when he wanted to make a hit on Mr. Jewel Hudson, he was talking about burglarizing (R 1327).

Jim Skipper, FDLE agent stated he assisted local Wakulla sheriff's deputies on May 8, 1982 in searching the area that Michael Federick had indicated for the body of Les Lawhon. They located the skeletal remains (R 1320-1326).

Nayola Ruth Darby, crime scene analyst stated on May 8, 1982 she searched the crime scene that the remains of Les Lawhon were located and took measurements and photographs of the scene. She also located clothing, a wallet and wadding from a shotgun shell. She further seized latent fingerprints from appellants dodge truck and turned them over to Doug Barrow of FDLE for examination. Vacum Sweepings, a red sweater and a tire iron from the truck were also seized and turned over to other members of the lab for analysis. On cross-examination she stated that she located a bandana at the crime scene (R 1330-1368).

Robert C. Dailey anthropologist at Florida State University and consultant with FDLE examined the skeletal remains of Les Lawhon. The cause of death was a gunshot wound to the head and neck. He stated he found no evidence of a blow to the head by a blunt instrument (R1368-1396). Dr. Mooney a local dentist in Crawfordville identified the remains of Les Lawhon found at the crime scene as the person

he already had dental records dating back to 1978 (R 1396-1401).

David Harvey, Sheriff of Wakulla County stated after developing information from Michael Frederick as to the whereabouts of the missing property, he searched the residences of Blonzie Mills, mother of Appellant and discovered a .12 gauge shotgun and a white truck camper shell. He then arrested Fawndretta Galimore of Tallahassee and searched her residence finding television sets, clocks, silverware and other equipment that came from the Lawhon place (R1401-1416). Charles Landman, deputy sheriff of Wakulla County said he recovered the .12 gauge stolen shotgun form the residence of Blonzie Mills and turned it over to the crime lab. He also retrieved a recorder from Ms. Gailmore. All property items which were recovered were kept in his custody. He did not recover a .12 guage shotgun with the label "TB" on the stock (R 1416-1431). Deputy Roxie Vause of the Wakulla County Sheriff's Department found some spended .30.30 casings and retrieved them from the Lawhon trailer. He found no .12 guage shotgun (R 1431-1445).

Alvis Horne,identification-technician of the Tallahassee Police Department photographed and collected property from Fawndretta Galimore's residence, which was later identified as stolen property from the Lawhon trailer. He did not locate a .12 gauge shotgun with the label "TB" on the stock (R 1445-1453).

Shirley Lawhon, wife of the victim was recalled. She

identified all of the recovered property as having belonged to she and her husband (R 1454-1460). Rev. Glenn Lawhon father of the victim, was called and testified over the objection of appellant as to the identification of stereo equipment recovered in the Galimore residence as being that belonging to the victim (R 1461-1470).

James Laten, microanalyst at the FDLE stated he compared fibers from the victim's clothes found at the crime scene where skeletal remains were located with vacuum sweepings from appellant's truck and found no fibers like the clothes (R 1475-1476). Linda Hinsley, microanalyst with the FDLE examined, compared and classified hair samples in the investigation of the Les Lawhon case. She examined hair that was seized from the scene where the the body was recovered and a blue bandana found at the scene, both of which were characteristic of caucasion head hair. The hair from the bandana was a light brown hair. She examined the vacuum sweepings from the the truck and did not find any hair like that found at the same. Upon examination of the crime scene one colorless, caucasion head hair was located. Ther was no colorless hair present in the hair recovered from the scene (R 1476-1488). Douglas Barrow, crime laboratory analyst, specializing in latent prints stated he examined the doorknob from the Lawhon trailer and found no latent prints. He dusted the stolen property from the Lawhon residence and did not identify the latent print of appellant. The alleged murder weapon a .12 guage shotgun (state exhibit no. 25) was

not submitted bylaw enforcement to Mr. Barrow for examination for latent prints (R 1488-1509). Dorethea Munger, crime laboratory analyst in serology examined a .12 gauge shotgun (from crime scene), tire irons (from truck), and a shirt (from road) for the presence of blood. She found no blood on the shotgun or tire irons. She found an indication of blood on the shirt which could have been animal blood (R 1509-1523). Don Champagne, firearms examiner with the FDLE, stated he examined the doorknob from the Lawhon trailer and found no evidence of a forced entry. The pellets found in the mandible were fired from a 410 or a .12 gauge shotgun. He could not tell from his examination the gauge of the shotgun that killed Les Lawhon (R 1526-1536). Mary Ann Sanders stated she lived approximately one half of a mile from the Les Lawhon trailer. She recalled a pumpkin orange Dodge pickup with a camper turn around in her driveway with two black males at approximately 2:30 or 3:00 o'clock. On cross examination, she admitted that she had stated upon an earlier deposition that there were three people in the truck, one of which could have been white (R 1537-1548).

James Whitaker, Deputy Sheriff, Wakulla County stated he located at Michael Fredrick's direction a shirt (state exhibit no. 5) about .3 of a mile from the Lawhon trailer. (R 1548-1555).

Fawdrette Galimore, girlfriend of Appellant, was called to testify. She stated she lived in Sopchoppy, Florida with Appellant for a while. She met Michael Fredrick while he was

in jail with Appellant and arranged his bail bond. She and Appellant went by Fredrick's trailer several times to inquire about the bond money. On the day Lawhon's disappearance came on TV, she and Appellant went to Fredrick's trailer that morning. They then went to the convalescent home so that Fredrick could secure permission to give Appellant some dobermans that he had promised. All three then went to Tallahassee and then came back to Fredrick's trailer. The three of them then went to the Mills residence in Buckhorn around 1:00 p.m. Appellant and Fredrick talked outside her presence and then left in the truck. Approximately three hours later Appellant and Fredrick returned. Appellant returned a gun from the house and then left again. Appellant returned in about three hours at approximately 6:00, without Fredrick. When he returned, he had a truck load of property which was placed in the shed. Approximately one week later when Appellant was arrested at the courthouse he informed her to remove the property from the shed and house. She removed the property to her home in Tallahassee. She stated that after she removed the property, she spoke to Michael Fredrick who informed her that the property was supposed to have taken care of the $175.00 debt. Eventually, the sheriff's office removed the property. She further stated that Appellant later wrote her and told her not to be afraid of caucasians. She indicated she had never seen the shirt identified by Fredrick as having been worn by the Appellant. Appellant informed her that the property in the shed had been given to

him in satisfaction of the bond money (R 1555-1614).

Major Hines a resident of Buckhorn, Florida, stated he had a conversation with Appellant before his arrest at Appellant's mother's house. Appellant alleged stated "Let's do some burglaries." On cross-examination Major Hines stated the conversation took place in June or July, 1982 (months after appellant was incarcerated) (R 1614-1623). Willie B. Timmons resident of Wakulla County and uncle to Michael Frederick, stated he loaned Fredericks some money and let him off in front of the Mill's residence. He could not recall the date (R 1623-1634). Willie Mae Gavin, mother of Micheal Fredericks, stated she didn't work March 5, 1982. Appellant, Ms. Galimore and her son came by another day and borrowed some money from her. She stated she had never seen her son wear a shirt like state exhibit no. 5 and she has not seen it. She admitted Frederick did not live with her and most of his clothes had been at his own home (R 1634-1645). Blonzie Mills, appellants mother stated appellant and Ms. Galimore lived in her house in Sopchoppy. Appellant may have known Les Lawhon through Pigott's Cash and Carry. She assumed appellant knew Les Lawhon (R1645-1650). Ronald Wilson roommate of Michael Frederick stated that he knew both appellant and Federick. Appellant was a leader and Frederick a follower according to Mr. Wilson. He stated that Frederick had clothes in several locations and thus could have had the shirt (state exhibit no. 5) without his knowledge. He further stated he didn't go out with Frederick so he really

didn't know what kind of personality Frederick had on the street (R 1650-1656). Earnestine Webster testified she had seen appellant and Frederick together several times (R1656-1660).

Al Gandy of the State Attorney's Office, who had sat in the courtroom the entire case over appellant's objection was called to testify. Gandy interviewed appellant along with Ray Federick special agent of the Florida Department of Law Enforcement on May 9, 1982-one day after the remains of Les Lawhon were located. The statement was not recorded although he had a recorder. Appellant told him he had no knowledge of a burglary in Wakulla County and had no knowledge of any of the property from the Lawhon burglary. He denied telling Ms. Galimore to get rid of the property. He further denied knowledge of a Mike Federick or of owning a Dodge pickup truck. On cross-examination Mr. Gandy stated he only had a half a page of notes and he highlighted the interview. He admitted that he did not have a word by word account of what took place. The conversation lasted over thirty (30) minutes but he only wrote down 15 lines. He further did not tell appellant he was investigating a murder. He admitted having some prior problem with appellant since he had previously arrested him (R 1660-1680).

David Harvey, Sheriff of Wakulla County was recalled and stated his records showed appellant and Frederick were lodged in the same cell from February 10, through February 22, 982 (R 1680-1684). Christine Oneal of Medart, Florida was called

and stated that she had never seen Michael Federick wear a shirt listed like state exhibit no. 5. She stated on cross-examination that on occasion she, Frederick, Greg Rosier and her sister went out together (R 1684-1686).

The State rested it's case in chief. Appellant moved for a directed verdict of acquittal which was denied (R 1698).

The Defense called as its first witness Appellant John Mills, Jr. He stated he moved tohis family home in Buckhorn with Ms. Galimore in December, 1981. His late father owned a great deal of property in the community which is tied up in a civil suit. He met Michael Frederick in the Wakulla County jail in February 1982. An arrangement was made through Ms. Galimore to get Frederick out on bond. Federick agreed to pay him $200.00 the day he got out of jail. Upon appellant's release from jail he went to Frederick's trailer several times inquiring of the money. He rode Frederick around because Frederick did not have any transportation but knew several people he might be able to borrow the money from so he could repay appellant. Frederick agreed that if he could not get the money he would repay him with dogs (Dobermans from his mother) and other property. They usually traveled in his mother truck and on occasion he allowed Frederick to drive the truck by himself.

On March 5, 1982, Frederick came by appellant's mother's house in Buckhorn at about 1:30 of 2:00 p.m. appellant and his family painted his house that morning. Appellant

inquired about the $200.00 and Frederick suggested that we would like to use the truck.

Appellant informed Frederick that he (appellant) needed to go to Sopchoppy if he wanted to use his truck. They rode to the Junior Food Store where Appellant purchase some honey and returned to the house. Appellant went back to the house and placed the honey in the kitchen. Appellant then went to Kilgore road (which is about a mile from his house) and got out of the truck. Appellant needed to check out timber planted on forty (40) acres that his disceased father owned. It was a misty day. It took Federick approximately two to three hours to return with the truck. Appellant waited near the side of the road until Frederick returned with the truck loaded with property. It was the same property that was later discovered as belonging to the Lawhon family. Although the property was worth more than $200.00, Appellant stated that he was charging a dollar on a dollar interest to Frederick for the money that Frederick had not repaid. Thus Frederick left him with all the property which he stored in his shed at his house. Frederick never told him where the property came from and he did not ask. When he was arrested at the courthouse on a related matter he told Fawndretta to remove the stuff from the house because his mother's house had been recently burglarized. Later he asked Fawndretta had

she remove the property and she indicated that she had. Frederick gave him the property in satisfaction of a debt. He stated he did not tell Mr. Gandy the truth about the property when he interviewed him or his knowledge of Frederick because of previous quarrels he had with Mr. Gandy when he was arrested before. In his letter to Ms. Galimore in which he said "tell them you had a receipt for the stuff" he was referring to the receipt for bonding Michael Frederick out of jail. Appellant says he never saw nor owned a shirt like exhibit no. 5. He stated he did not burglarize or commit arson on the Lawhon trailer. Further he did not kidnap or murder Les Lawhon (R 1700-1765).

Jessie Ranson, brother of appellant stated that they started painting their mother's house and cafe around the beginning of March 1982. He did not recall the exact day. He stated that appellant and Ms, Galimore participated in painting. They started painting around 9:00 a.m. and stopped around 1:00 p.m. (R 1765-1771).

Ms. Tina Partin of Tallahassee, Florida testified that Michael Frederick had given her some property which had been turned in to the Wakulla Sheriff's Department. Michael Frederick had given Ms. Debra Mock, another White sixteen year old female, some rings and other gold items which the police never recovered. Ms. Mock is approximately five (5) feet tall with bleach blond hair. She indicated that Ms. Mock wore bandanas. Ms. Parten was shown the bandana found

at the scene of the body (state exhibit no. 17) and stated this bandana looked similar to the one that Debra Mock had worn (R 1771-1777).

Greg Rosier of Crawfordville testified that Mike Frederick told him somewhere in November 1981 that he needed to go make a hit on a Mr. Lawhon. He had a pistol in his back pocket at the time. He says that he has seen Mike Frederick and Debra Mock in a place called Shadeville, which is in Wakulla County. After viewing the bandana found at the murder scene (state exhibit no. 17) he stated that it looked similar to the one Tina Parton wore. In March 1982 he had another conversation with Michael Frederick. Frederick said he was in some trouble and if he goes to jail he was going to take someone else with him. He saw Frederick at the Swannee Swifty store in appellant's truck without appellant. On cross-examination Rosier admitted he may be confused on the exact date but does recall the conversation he had with Frederick (R1778-1810).

Ronald Wilson, Fredrick's former roommate was recalled by Appellant. Fredrick told him in January 1982 that he wanted to make a hit on Jewel Hudson. He assumed Fredrick meant to rob (R 1810-1814). Appellant's renewal of his motions for acquittal were denied (R 1814).

The State called several rebuttal witnesses. Steven Pigott, owner of Pigott's Cash and Carry stated that Les Lawhon worked at his place from June 9, 1973-August 12, 1977 (R 1818-1819). Reverend Glen Lawhon was recalled and stated

he did not sell insurance to a Greg Rosier, nor did he tell him that his son Les worked at Pigott's Cash and Carry (R 1820-1822). Linda Hinsley, hair analyst with FDLE, was recalled and stated the hair she examined from the bandana (exhibit 12) was brown to light brown. Since she had a single strand to test, there is a possibility that the detergent like a bleach could have been there and not shown up (R 1823-1825). Sheriff Harvey was recalled as the State's last witness and stated an article appearing in a news release may have mentioned that Les Lawhon worked a Pigott's Cash and Carry (R 1826-1829). All appellant motions were renewed and denied by the court (R 1829).

B. PENALTY PHASE

The State called Angus MacDowell of the Florida Parole and Probation Commission. Appellant has been under parole supevision through him since December 1, 1981. Appellant was on parole for conviction of four counts of burglary of a dwelling without a firearm, having been sentenced to a term of imprisonment on August 18, 1976. Appellant was twenty-six (26) years old on March 5, 1982 (R 2271-2273).

Appellant called Doctor Na'im Akbar a clinical psychologist. He examined appellant and talked with family members to determine if an emotional or mental disorder existed. He performed various test which included an intelligence test. Appellant has an I.Q. of 78 which is

somewhere between the retarded level and low average level of intelligence. Appellant displays a deficiency in making good sound rational judgments. Appellant does not have a complete understanding of his religious beliefs and developed a jailhouse version of Islam. Appellant thus has difficulty understanding people and the world around him. He feels that appellant has the kind of mental makeup which would be conducive to a person that could be rehabilitated (R 2273-2302).

During a charge conference, appellant's counsel objected by the use of a motion in Liminie (R 187-188) to the jury being instructed on several aggravating circumstances because there was no evidence to support them (R 2249-2270).

Before the jury, the prosecutor argued that he had proven five aggravating circumstances and there was no mitigation (R 2303-2324). Appellant's counsel disagreed (R 2324-2334). The jury was instructed (R 2334-2339). After forty (40) minutres of deliberations, the jury returned its death recommendation (R 2341-2345).

At sentencing, the court found no mitigating circumstances as set forth in the statute. The court found aggravating circumstances under 921.141(5)(a)(d)(f)(h) and (i) present (R 268-272). This appeal follows.

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT MILLS' MOTION FOR A CHANGE OF VENUE

A. THE TRIAL COURT ERRED IN REFUSING TO TAX COST FOR A PUBLIC OPINION SURVEY NEEDED TO AIDE APPELLANT MILLS IN PRESENTING HIS MOTION FOR CHANGE OF VENUE

The United States Supreme Court in Irvin v. Dowd, 366 US 717, 6 LED 2d 751, 81 S.Ct. 1639 (1961) ruled that:

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. Irvin at 755

The right to an impartial jury is of particular importance when the defendant's life is at stake, as is the case in the cause now before the court. This same reasoning was followed by the Florida Supreme Court in Manning v. State, 378 So.2d 274 (Fla. 1980).

In Manning,Supra as in the case subjudice, the crime took place in or near a small community with a black defendant and a white victim. In addition in the instant case, the case was given considerable of adverse publicity not only by the local media but also by the media of neighboring counties as well. There were several articles in the Tallahassee Democrat as well as in the Wakulla County News, the local newspaper. The extent of the publicity given the case made an impartial trial free of preconceived prejudicial opinion and influences impossible. Further, the victim Les Lawhon was the son of a well known, highly respected white minister in Wakulla County. Mr. Glen Lawhon

had been the minister of the largest church in the area with a very large congregation. Under such circumstances the defendant should be granted a change of venue pursuant to FRCr.P. 3.240(a) which reads as follows:

> Rule 3.240. Change of Venue
> (a) The state or the defendant may move for a change in venue on the ground that a fair and impartial trial cannot be had in the county where the case is pending for any reason other than the interest and prejudice of the trial judge.

The Second District Court of Appeal in Kelley v. State, 212 So.2d 27 (2nd DCA 1968) set out a test to be used in determining when a change of venue is required. This court ruled that mere knowledge by the citizens of a community of a crime or incident is not in and of itself enough to require a change in venue.

> The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case soley upon the evidence presented in the courtroom. Kelley, Supra at 28

This test was adopted by the U.S. Supreme Court in Murphy v. Florida, 421 U.S. 794,95 S. Ct. 2031,44 L.Ed.2d 589 (1975), McCaskill v. State, 344 So.2d 1276 (Fla. 1977).

The burden is on the Defendant to prove the need for a change of venue. Thus the courts have realized that this burden should not be [compounded] as a result of the defendant's lack of funds. In Griffin v. Illinois, 351 U.S. 12 (1956), the United States Supreme Court ruled that:

> In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance hears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

The principle set out in Griffin,Supra was adopted by the state of Florida. Florida Statute §925.036(1) which deals with compensation for attorneys appointed by the courts persuant to §925.035 expressly authorizes the courts to tax cost for preparation of a trial by indigent defendants. Florida Statute § 925.036(1) states in part:

> ...In addition such attorney shall be reimbursed for expense reasonably incurred...

The State of Florida grants an accused the right to put forth a defense, especially in a capital case. It would be a constitutional error to refuse to allow a defendant to present as complete and adequate a defense as a more prosperous defendant soley because of his inability to pay the cost for preparing his case for trail. See Bodie v. Connecticut, 401 U.S. 371 (1971); Tate v. Short, 401 U.S. 395 (1971)

In light of the test set out in Kelly and Murphy, more than just mere knowledge of the crime committed, the appellant Mills saw the need to employ Professor Paul Alan Beck, the director of the Research Center at Florida State University to conduct a public opinion survey. The appellant Mills felt that with this survey he could better demonstrate the extent to which the citizens of Wakulla County had been prejudiced by the adverse media coverage and the influence

exercised by the victim's family (R 2361).

On September 28, 1983 the appellant Mills filed a Motion To Tax Cost for a public opinion survey. During the hearing held on the motion , the State Attorney objected to allowing cost for the survey on the basis of the cost to the county and the results of the survey may not be admissible (R 2365-2368). The opposing counsel gave no basis for his objection to the survey other than stating that they had been previously found inadmissable in a Florida case (R 2368). The case counsel referred to at the hearing is Irvin v. State, 66 So.2d 288 (Fla. 1953).

In this 1953 case the Florida Supreme Court ruled that the Public opinion survey done with the scientific knowledge at that time was not admissable because they were unsure of its reliability. Counsel for the Appellant offered to submit a memorandum on the issue at the hearing. In subsequent cases within recent years in Wakulla County, however, the Honorable Judge Cooksey allowed the results of a public opinion survey done by the same Department at Florida State University to be admitted into evidence. See State v. Johnny Copeland, Victor Hall, Frank Smith, Jr., ___ So.2d___ (Fla. Cir. Ct. Case No. 78-66). The Florida Courts also allowed information from the public opinion survey in the Ted Bundy's case now pending before this court to be admitted into evidence.

In addition, a United States District Court in New York in a case citing Irvin v. State, supra, allowed information from public opinion surveys to be admitted into evidence as an exception to the hearsay rule. See Zippo Manufacturing

Co. v. Rogers, 216 F Supp. 670 (S.D.N.Y. 1963). In a recent case, the United States District Court for the Middle District of Florida, Tampa Division , citing Zippo, allowed the results of a public opinion survey to be admitted into evidence. Debra P. v. Turlington, 564 F. Supp. 177 (U.S.D.C., MD Fla. 1981). The Court ruled that the information could be admitted as the basis of expert opinions presented during the trial.

The judge denied the Motion To Tax Cost and Stated:

> And as far as the opinion poll being able to grant any defendant to present a defense, I don't think it's going to help present in any defense. I'm sure it's strictly used fo the purpose of venue motion only (R 2370).

The appellant Mills disagrees with this reasoning. Trying the Defendant before an impartial jury is a very important step in presenting a defense. Therefore when a change of venue is needed to protect the defendant's right to an impartial jury it should be granted. This is particularly true in a case like the instant one where the defendant's life is at stake. Since the defendant has the burden of proving that a change of venue is needed, he should be given ample resources to do so. It is the appellant's contention that in taxing cost for purposes of insuring that a defendant receives an adequate defense, it is best to err by allowing too much money than not enough. Apparently, however, the Prosecution in this case does not agree with this contention.

During the hearing the presecution stated:

> Certainly, the courts have always said that poverty -- not always said, but certainly since the middle of the Twentieth Century, the courts have said that poverty should not stand in the way of a defendant receiving a fair and impartial trial.
> But that's not to say that an indigent defendant has the right to spend as much money as whoever that millionaire ou in Texas seems to spend every time he gets charged with murder, three, four, five million dollars, or whatever ridiculous thing happens to work to get him off.
> That doesn't mean that just because a person charged with a crime, he has the right to spend money on anything (R 2364-2365).

Furthermore, the Court seemed concerned with not being able to control the taking of the public opinion survey. The court was also concerned with the possible contamination of the community by the poll takers (R 2370-2371). These concerns are unfounded. The aim of professional survey takers is to get reliable accurate data. They are, therefore, very careful about making sure they do not influence their subjects in any way.

The record clearly shows that the individual jury selection process did not cure the problem. Under the circumstances, the Court should have granted the appellant Mills' motion to tax cost.

> B. THE TRIAL COURT ERRED IN DENYING THE APPELLANT MILLS' MOTION FOR CHANGE OF VENUE IN THAT THE EVIDENCE PRESENTED DURING THE OCTOBER 26, 1983 HEARING AND DURING THE TRIAL CLEARLY INDICATED A NEED FOR A CHANGE OF VENUE.

The appellant Mills filed a Motion For Change of Venue on October 13, 1982 (R 85-88). A hearing was held on October

26, 1983. During the hearing the appellant presented testimony and evidence that clearly indicated a need for change of venue.

The appellant Mills' first witness was Mr. Jerry Goodman circulation manager and district manager for the Tallahassee Democrat. Mr. Goodman testified that the Tallahassee Democrat carried eight (8) seperate articles concerning the Lawhon disappearnace over about a ten week period (R 2073-2080). He also testified that the Tallahassee Democrat had a large circulation in Wakulla County (R 2082).

The Appellant's second witness was William Phillips editor of the Wakulla News. Mr. Phillips testified that the Wakulla News carried at least five (5) articles concerning the Lawhon disappearence. One of the articles was dated as late as October 14, 1982. In the front page article printed on May 13, 1982 the Appellant Mills, his co-defendant Fredericks, and Fawndretta Galimore were listed as suspects who were under arrest. The article also included a passage concerning the recovery of a .12 guage shotgun found in appellant Mills' home that was believed to have been taken from the Lawhon home. The article also mentioned that the co-defendant Frederick led sheriff's officers to Lawhon's body. Another article on October 14, 1982, gave details of the co-defendant Frederick's plea . Mr. Phillips also testified that the Wakulla News has a circulation of approximately three thousand (3,000) papers.

The appellant Mills' third witness was Mr. Clyde David Williams, Jr. a resident of Wakulla County. Mr. Williams testified that he was approached by the two white men who suggested that they get their guns, go to the jail and do away with the appellant and the co-defendant (R 2102). He also testified that he has on several occasions heard local residents express their belief that the appellant and co-defendant were guilty; some even suggesting that they should get a lynch mob and hang them (R 2102-2107). Mr. Williams also testified that he did not believe that they could get a fair, impartial trial in Wakulla County (R 2106). The Court denied the Appellant Mill's Motion for Change of Venue at the hearing.

The appellant Mills renewed his Motion For Change of Venue on November 29, 1982 (R 341) at the beginning of his jury trial Appellant Mills entered into evidence another article published by the Tallahassee Democtrat on November 28, 1982, the eve of the trial. The article mentioned the appellant Mills' prior incarceration on a parole violation. Furthermore, the article was titled "Man Linked to Lawhon Case To Testify Against Partner." This title strongly implied that the appellant Mills was involved in the murder by referring to him as the co-defendants partner.

In the case subjudice, each group of prospective jurors were questioned by attorneys in the trial court. The voir dire transcript shows that the majority of the prospective

jurors had heard a great deal about the case, mostly in the Tallahassee Democrat and Wakulla News, and had a very good recollection of the case. A number of jurors were excused due to a prior knowledge of the cause. Sixteen (16) jurors were excused by the State by preemptory challenge. The appellant used all sixteen (16) of his peremptory challenges with very few exceptions.

The prospective jurors could not state that they could unreservedly render a impartial verdict.

The voir dire of the jury selected reveals that the majority had prior knowledge of the case before being called for jury duty. It is obvious from the record that the defense was not satisfied with the jury selected. This was supported by the fact that the appellant Mills exhausted all of his premptory challenges and requested more. It is also supported by the fact that he renewed his Motion for Change of Venue (R 1012). This request was denied by the trial court. Thus an all white jury was impaneled to hear the case.

As the events of the trial unfolded, it became very clear that the Motion for Change of Venue should have been granted.

At one point during the trial, the judge made a statement about possible violence and asked that the audience move to the back of the courtroom and not right behind the appellant (R 1403). In addition, during a recess outside the courtroom, Reverend Glen Lawhon,father of the victim, made threatening gestures at the Appellant. At that time he was not even a witness in the case (R 1644). Furthermore, the

Appellant's attorney needed a police escort out of town.

> A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result.

See Manning v. State, 378 So.2d 274 (Fla. 1980). In the case at bar each prospective juror had knowledge of exparte statements against the appellant. In addition the victim was the son of a very influential white minister. Furthermore,the testimony during the hearing on the motion clearly showed extreme prejudice against the Appellant in the community. Moreover all of these facts coupled with the fact that the incident occurred in a small rural community indicate a need for a change of venue.

The trial court's denial of Appellant's motion for change of venue was not harmless error. The error was substantial and very prejudicial to Appellant and thus constitutes reversible error.

POINT II

THE COURT ERRED IN FAILING TO EXCUSE JUROR JOHN C. BYRNE FOR CAUSE

Appellant utilized his last peremptory challenge to remove Juror Byrne from the panel (R 1009-1010). A request for additional peremptory challenges was then denied. (R 1011). The record reveals extensive questioning of Juror Byrne (R 691-700,1009-1010).

The initial determination of a juror's competence for cause rest within the discretion of the trial court. Such discretion however is not unlimited. Singer v. State, 109 So. 2d 7,22 (Fla. 1959). In the instant case, juror Byrne ultimately stated he could lay aside any knowledge he had about the case or parties; any bias or prejudice he may have had and render a verdict solely on the evidence. That however is not determinative in a capital case. In Singer, Supra, a murder case the court said:

> A juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence, if it appears from other evidence that he is not possessed of a state of mind which will enable him to do so.

The court used the term "other evidence" in determining whether the juror was competent. Appellant's attorney requested a special hearing on juror Byrne to get some sworn testimony that in his heated argument with Appellant's brother-in-law he had stated prior to jury selection "Let's get a rope and hang him (Mills)." There appears to be no authority for supplementing the record on a prospective juror as Appellant's attorney had suggested, but perhaps the Singer court left the door open for such evidence by

use of the term "other evidence." Regardless of the "other evidence" outside of the record request made by Appellant; Byrne's comments on the record suggest that the court out of abundance of caution should have excused him for cause. Juror Byrne was (1) a relative of the Lawhon family (2) admitted his close association with the victim unitl he left his employment at Pigott's (3) admitted that personal feelings about Appellant and his family would "not really" prevent him from being fair and impartial and (4) admitted the conversation with Appellant's brother-in-law took place but gave a cautious limted version of the facts of such conversation. Appellant had to utilize his last peremptory challenge to excuse juore Byrne. In Leon v. State, 396 S0. 2d 203 (Fla. 3rd DCA 1981) the court said:

> we find the general rule to be that it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause since it has the effect of abridging the right to exercise peremptory challenges. Swain v. Alabama, 380 U.S. 202, 85 S.CT. 824, 13 L.ED.2d 759 (1965); Stroud v. United States, 251 U.S. 15, 40 S.CT. 50, 64 L.ED. 103 (1919).

There was a reasonable doubt as to the impartiality of Mr. Byrne and thus the failure to excuse him constitutes reversible error. In discussing juror Shaw in a similar situation in Singer, Supra at 24, the court said:

> There is such a reasonable doubt as to the impartiality of Mr. Shaw and his being able to render a verdict on the evidence and law given at the trial free of influence of his opinions and prejudices that we feel he should have been excused from the jury when challenged for cause by the defense. In view of the fact that the defendant used all of his peremptory challenges, denial of the challenge for cause directed to Mr. Shaw was reversible error.

Appellant should receive a new trial.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A MISTRIAL BASED ON THE PROSECUTOINS IMPROPER CROSS-EXAMINATION CONCERNING APPELLANT'S PRIOR CONVICTIONS

Appellant filed a pretrial motion to prohibit impeachment of defendant by prior criminal convictions (R 92-94). The trial court denied this motion (R146). During the course of the guilt phase of the trial, appellant took the stand in his own behalf. Upon examination of his attorney he was asked:

Q. Mr. Mills, have you ever been convicted of a felony?

A. yes, sir.

Q. How many times?

A. Four. (R 1701)

These were truthful responses as the prosecution knew. The very first question on cross examination by the prosecution was:

Q. Mr. Mills, these convictions you referred to, were they for felonies?

A. yes, sir.

Q. How many?

A. Four. (R 1726)

Appellant's attorney timely objected and the court overrulled the objection (R 1726).

The rule in Florida has long been established that a defendant who testifies on his own behalf may be asked on

cross-examination whether he has ever been convicted of a crime and, if so how many times. Unless the defendant's answers untruthfully, the prosecution's inquiry along this line must stop. Fulton v. State, 335 So.2d 280 (Fla.1976); McArthur v. Cook, 99 So.2d 565 (Fla. 1957); Mead v. State, 86 So.2d 773 (Fla. 1956); Whitehead v. State, 279 So. 2d 99 (Fla. 2d DCA 1973); Leonard v. State, 386 So.2d 51 (Fla. 2d DCA 1980). In a capital case, the type of cross-examination done in the instant case is reprehensible. Appellant did not open the door for further inquiry. Repetition of the question was only to establish criminal propensity. In Wilt v. State, 410 So.2d 924,925 (Fla.3rd DCA 1982) the court said:

> While the fact that a defendant has previously been convicted of a crime is relevant to his credibility, once that admission has been obtained,further questioning must be viewed as an attempt to attack character. For nearly one hundred years, it has been the law in Florida that unless a defendant has placed his character in issue, such an attack deprives him of a fair trial and constitutes reversible error. Lewis v. State, 377 So.2d 640 (Fla. 1980); Young v. State, 141 Fla. 529, 195 So. 569 (1939); Mann v. State, 22 Fla. 6000 (1886); Fla. Evid. Code,§ 90.610, F.S. (1979).

Cross-examination may not be further pressed merely to show the likelihood that defendant committed the crime with which he is charged because he had been convicted of other crimes of like character. Smith v. State, 177 So.222 (1937). On the other hand, cross-examination must be carefully conducted test by over emphasis of the prior conviction it unduly

prejudices the jury with a suggestion that defendant has a propensity to commit criminal acts. U.S. v. Blair, 470 F,2d 331 (1972). The prosecution explored this prejudice by his examination in the instant case.

A review of the entire record reveals that proof of guilt was not overwhelming. There was no physical evidence at the crime scene where the body was located or at the Lawhon trailer to suggest that appellant had been there. Appellant explained his possession of the stolen property as an exchange for money that the co-defendant Frederick owed him for a bond. Co-defendant Frederick was the only direct evidence linking appellant to the murder. For some reason the alleged murder weapon was never examined by the crime lab. Because of the bandana (state exhibit no. 5) there is evidence that someone other than appellant had been to the crime scene. It was on felon's word as opposed to another. Unfortunately for appellant the jury believed Frederick. Thus the harmless error rule of Cunningham v. State, 239 So.2d 21 (Fla. 1st. DCA 1970) does not apply. Appellant was deprived of a fair trial and the prosecution's action warrant's a new trial.

POINT IV

THE COURT ABUSED IT'S DISCRETION BY ALLOWING THE TESTIMONY OF REVEREND GLEN LAWHON, THE VICTIM'S FATHER CONCERNING IDENTIFICATION OF PROPERTY.

During the course of the trial, the Court allowed the victim's father Reverand Glen Lawhon to testify over appellant's objection (R 1461-1470). The Prosecution alleges that the purpose for the testimony was for identification of property taken from Les Lawhon's residence. It is clear from the record, however, that the underlying purpose for the testimony was to envoke the sympathy of the jury. The prosecutor frames his questions in a way which allowed Glen Lawhon to interject a great deal of information showing the close relationship between he and his son (R 1461-1470). This information was in no way relevant to any issue, in the case.

Even if part of Glen Lawhon's testimony was relevant, its probative value was by far outweighed by the danger of unfair prejudice. Florida Evidence Code §90.403 requires exclusion of relevant evidence if the danger of prejudice outweighs its probative value.

> 90.403 Exclusion on grounds of prejudice or confusion
>
> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible. F.S. §90.403.

See Frafer v. State, 403 So.2d 355 (Fla. 1981). The record in the case at issue here shows that the probative value of the evidence outweighed by its danger of unfair prejudice.

The testimony of Glen Lawhon even if relevant was inadmissible because it was merely cummulative. The property in question during his testimony had previously been identified as belonging to Les Lawhon. The appellant had already stipulated to the ownership of the property (R 1465). The ownership of the property was never really at issue in the case. In Neering v. Johnson, 390 So.2d 742 (4th DCA 1980), the Fourth District Court of Appeal reversed the ruling in a case because the lower court allowed testimony concerning an issue which had already been stipulated by the parties.

Furthermore, the Florida Supreme Court in Welty v. State, 402 So.2d 1159 (Fla. 1981) followed a well settled rule that family members of the deceased victim should never be allowed to give identification testimony when a nonrelated witness is available to do so. See Lewis v. State, 377 So.2d 640 (Fla. 1979); Rowe v. State, 120 Fla. 649, 163 So.22 (1933); Ashmore v. State, 214 So.2d 67 (Fla. 1st DCA 1968)

> The basis for this rule is to assure the Defendant as dispassionate a trial as possible and to prevent interjection of matters not germane to the issue of guilt Welty at 1162.

Even though the case at issue here does not concern the identification of the victim's body, the principle behind the rule is still applicable. The father's testimony was clearly

structured in a way that would invoke sympathy from the jury. The type of questioning used allowed the father to interject matters into his testimony that were not relevant to any issue in the trial. Furthermore, since the ownership of the property had been stipulated there was no need to put Glen Lawhon on the stand.

The court in Welty, Supra also ruled that in some instances the testimony of a victims relative is harmless error. This is not true in the case at issue. Most of the jurors knew Glen Lawhon and his standing in the community. The testimony of Glen Lawhon in a community in which he is the pastor of the largest white church in the county where sympathy already was high would not constitute harmless error. The error is reversible. Thus appellant should receive a new trial.

POINT V

THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPH B OF STATE'S COMPOSITE EXHIBIT NO. 9 INTO EVIDENCE.

During the course of the trial, Appellant Mills objected to admitting photograph B of State's composite exhibit no. 9 into evidence. This color photograph was comprised of the skull and bones from the remains of the victim Les Lawhon. The Appellant acknowledges the fact that Florida Courts allow the admission of photographs into evidence if they are relevant to the case. The Appellant Mills also acknowledges the fact that even if the photographs are gruesome and inflame the jury they are still admissable if they are relevant. See Straight v. State, 397 So. 2d 903 (Fla. 1981); Adams v. State, 412 So. 2d 850 (Fla. 1982).

The Appellant Mills contends however that this photograph in not relevant to the case at issue here. The issue in the case was not whether or not the remains were those of Les Lawhon or whether or not he was murdered or how he was murdered. These facts were not contested by the Appellant Mills at the trial. The only issue is the case in question was whether or not there was evidence to show that the Appellant Mills was at any time at the scene of the crime. Nothing in the photograph revealed any evidence to show that he was at the scene.

In addition, the color photograph was merely cummulative evidence. F.S. §90.403 requires the exclusion of cummulative evidence despite its relevance.

> Relevant evidence is inadmissable if its probative value is substantially outweighed

> by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cummulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissable.

the prosecution had several expert witnesses, doctors and policemen , who did testify about the crime scene, identity of the victim and manner of death. There were also other photographs of the crime scene of which Appellant did not object (composite no. 9) which adequately described the scene. The Prosecution was also going to attempt to introduce a scale drawing of the crime scene into evidence. This testimony and the introduction of the scale drawing of the scene makes it unnessary to admit this photograph. This is particularly true in an emotionally packed capital case. The photograph added nothing to the case. The trial judge even stated:

> As an aid to them (the jury and witnesses), I'll let it in. I don't see where it is going to add anything (R 1319).

The identity of the victim and manner of death had been shown by abundant evidence from other sources. The photograph had no independent relevance. It was simply cummulative. See Dyken v. State, 89 So. 2d 866 (Fla. 1956). In Dyken, a photograph was found inadmissable because the location of the wound had been conceded and amply proved by other evidence. This photograph did not include any of the crime scene. It was also taken too far in time and space from the crime. Despite the fact that the photograph here contained the crime scene and was taken shortly after the body was discovered the rational in Dyken still applies. As stated

previously, the photograph showed no new evidence at the crime scene that would have been helpful during the trial or add anything to it.

Furthermore, the identity of the victim and manner of death, which are the only possible issues that the photograph had any relevance to were not at issue in this case.

The trial court erred by allowing the photograph to be admitted into evidence. The photograph was used only to prejudice the jury.

POINT VI

THE TRIAL COURT ERRED IN RETAINING JURISDICTION OVER ONE-HALF OF APPEL LANT'S SENTENCE.

Florida Statute §947.16(3) gave the Court jurisdiction over one-third of a defendant's sentence. On April 20, 1983, the Florida legislature amended this statute increasing the retention period from one-third to one-half. The effective date for the statute read as follows:

> This act shall take effect upon becoming a law and shall apply only to those persons sentenced after the effective date of this act. Ch. 82-171 §9, Laws of Fla.

In a special session the Florida Legislature added another section to the statute which read as follows:

> This section as amended by Ch. 82-171, Laws of Florida, shall apply only to those persons convicted on or after the effective date of Ch. 82-171; and this section as in effect before being amended by Ch. 82-171 shall apply to any person convicted before the effective date of Ch. 82-171. Ch. 82-401,§2, Laws of FLorida.

This passage is currently subsection 5 of Florida Statute §947.16.

Case law construing Florida Statute §947.16(3) before the amendment, uniformly held that the retention period set out in the statute could not be applied to a case in which the crimes were committed before the effective date of the statute. See Williams v. State 414 So.2d 509 (Fla. 1982); Prince v. State, 398 So.2d 976 (Fla. 1st DCA 1981) and State

v. Williams, 397 So.2d 663 (Fla. 1981).

It seems clear that the Legislature waas attempting to get around this body of case law. However, if this law is applied in the manner prescribed in Florida Statute §947.16(5), this would violate the prohibition against ex post facto laws in Article I §9 and 10 of the Florida Constitution and Article I §9 and 10 of the United States Constitution.

Appellee may argue that subsection 5 is not ex post facto but simply retroactive legislation. The enactment of retroactive legislation is not prohibited by either constitution. This contention, however, is without merit.

The United States Supreme Court in Dobbert. v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed. 2d 344 (1977), explained the difference between expost facto legislation and retroactive legislation. The Court ruled that changes in procedure are retroactive and do not fail under the prohibition. However, changes in substantive law are expost facto and are unconstitutional.

It is clear that the change in the statute was substantive and not merely procedural. The change in the statute allowed the judge more control over the sentence. This extra control would allow the judge to increase the appellant Mill's mandatory time before he is eligible for parole.

Thus the court erred in applying the amended statute to the appellant's case since the crime was committed before the enactment of the amended statute.

POINT VII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN ITS WRITTEN FINDINGS THAT TWO AGGRAVATING CIRCUMSTANCES UNDER F.S. §921.141 (5)(h) AND (i) ARE APPLICABLE BEYOND A REASONABLE DOUBT

A. Applicability of F.S. 921.141 (5)(h) Heiuous, Atrocious or cruel.

The trial court in its finding of fact determined that this capital felony was especially heinous atrocious or cruel (R 209). The legal standard for this aggravating circumstance is conscienceless, pitiless or an unnecessiarily tortious crime accompanied by additional acts that set it apart from the norm of capital felonies. State v. Dixon,283 So.2d 1 (Fla. 1973). The entire factual basis recited by the Court outlining facts that Les Lawhon was subjected to agony over the prospect that death was soon to occur in its findings of fact (R 269-270) are based on co-defendants Frederick's statement. This reviewing court should look at these facts with care and skeptism in light of the fact that this same co-defendant admitted during cross-examination that he had earlier planned a hit on another white man and the alledged murder weapon was never examined by the police authorities to see whose fingerprints were on the trigger of the shotgun. It is highly possible although the jury chose to believe otherwise, that co-defendant Frederick embellished the whole story to save himself from the electric chair. Viewed in a light most favorable to the State there is no

support in the evidence that appellant planned the murder of Les Lawhon. The murder weapon was apparently taken from the Lawhon trailer. Harris v. State, ___ So. 2d ___ (Fla. Sup. Ct. Case No. 61,343, opinioned filed September 8, 1983). Death was also instantaneous according to the State's medical testimony. It is shear speculation for the trial court to speculate and label as a fact which the prosecution was bound to prove beyond a reasonable doubt that Les Lawhon must have suffered extreme mental pain and suffering.

In Riley v. State, 366 So.2d 19 (Fla. 1978), appellant Riley robbed a business establishment. There he threatened three (3) people with pistols, forced them to lie on the floor bound, gagged, and then shot in the head the father (victim), killing him instantly while the son watched his father's execution. There the court find that the killing was no heinous and atrocious within the meaning of section 921.141 (5)(h). In Kampff v. State, 371 So.2d 1007,1010 (Fla. 1979), the trial court find defendant Kampff planned his crime in advance, fired five (5) pistol blasts from a .38 caliber pistol, at least one of which struck the victim in her head. This court held that the trial court erred in finding that the murder was especially heinous, atrocious or cruel. See also McCray v. State, 416 So.2d 804,807 (Fla. 1982). There are insufficient additional acts to thus set this case apart from the norm of capital felonies. The trial court erred in so finding.

POINT VIII

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

The trial court relied upon the facts stated in the findings for the aggravating circumstances of heinous, strocious and cruel to support the finding of cold, calculated, premeditated (R 270). There were no distinct court findings which would justify the finding of cold, calculated and premeditated which were stated or proved beyond a reasonable doubt which was seperate and apart. Thus, we were improperly doubled and can be considered, if at all, as only one aggravating circumstance. Although the court found no mitigation, the doubling cannot be harmless error. See Point VII, infra.

Where these two factors are found, they cannot be seperately sustained unless "the trial court's findings contained distinct proof as to each factor". Hill v. State, 422 So.2d 816 (Fla. 1982). Here the same proof, if proof at all, was found for both. One must be stricken.

POINT IX

THE TRIAL COURT ERRED IN NOT FINDING THAT MITIGATING CIRCUMSTANCES UNDER 921.141 WERE APPLICABLE.
A. Applicability of F.S. 921.141 (6)(a) significant Criminal History.

The trial court find that appellant had a significant history of prior criminal activity because of four (4)

B. Applicability of F.S. 921.141 (5)(i) Cold, Calculated

The trial court cited no additional facts than what it had already considered under F.S. 921.141 (5)(h) in support of the finding that this murder was committed in a cold, calculated and premeditated manner (R 270). This aggravating circumstance applies to crimes exhibiting heightened premeditation beyond that required for a conviction at trial on ordinary first degree murder, and beyond that required for finding present in the crime any of the other aggravated factors. Jent v. State, 408 So.2d 1024 (Fla. 1981).

In Mann v. State,420 So.2d 578 (Fla. 1982) a ten year old girl was abducted while bicycling to school. She was found the next day with her skull fractured, having been stabbed and cut several times. The court find that the trial court had improperly found the homicide to have been committed in a cold, calculated premeditated manner. The record in the instant case does not reveal facts to show a "heightened premeditation beyond that required for a conviction at trial of first degree murder." Further the absence of facts recited by the trial judge in its findings (R 270) warrants a finding that this aggravated circumstance has not been shown beyond a reasonable doubt.

convictions for burglary (R 270). Thus, reasoned the trial court, appellant could not claim his past criminal history as a mitigating factor. The court gave no other facts in support of its finding (R 271). Appellant is aware of this courts previous holding that it is within the trial court's province to decide whether a mitigating circumstance is proven and the weight to be given it. Smith v. State, 407 So.2d 894 (Fla. 1981). The Critical word within the statute upon which an average person would deem critical is "significant." The court failed to take into account that the defendant was charged and convicted of four (4) counts of burglary at the same time. State witness, Agnus MacKowell testifying in the penalty phase states that the defendant was convicted of these burglaries on August 18, 1976. Further these burglaries did not include a firearm (R 2272). Appellant had just turned twenty (20) years old at the time of these offenses which should be considered as one offense. Although this court does not reweigh evidence of a trial court it should be stated that in the absence of an objective standard as to what is "significant" and facts in the record to support it, appellant should be given the benefit of the doubt. The number of mitigating circumstances are too important to a man whose life is on the line to do otherwise.

B. Applicability of F.S. 921.141 (6)(g) Age of Defendant.

Apparently there is no per se rule pinpointing a particular age as an automatic factor in mitigation. In Peck v. State, 395 So.2d 492,498 (Fla. 1980) the court said:

The propriety of a finding with respect to the circumstances depends upon the evidence adduced at trial and at the sentencing hearing.

Appellant was twenty-six (26) years old at the time of the crime (R271). The only other fact that the court mentioned is that appellant had already served time in state prison. Should this factor alone be controlling on this mitigating circumstance? Defendants' from minority groups, often get into some kind of trouble at an early age, yet rebound to become outstanding citizens. What is noteworthy is that his imprisonment resulted from four (4) counts of burglary without the use of a weapon. The factual situation of the instant case are not as heinous, atrocious and cruel as those in Hoy v. State, 353 So.2d 826 (Fla.1978). The court still upheld the trial court's allowance of the appellant's age as a mitigating circumstance. Therefore, Appellants age should have been a mitigating factor.

C. Applicability of a Non-Enumerated Mitigating circumstance - Testimony of Dr. Na'im Akbar.

Appellant received an instruction from the court reguarding non-enumerated mitigating circumstances. There appellant was allowed to present testimony through Dr. Na'im Akbar during the penalty phase concerning appellant's mental condition and prognosis for rehabilitation (R 2273-2302). The trial court however, find no evidence of any mitigation from this testimony (R 271). Testimony of ones mental condition not amounting to insanity or extreme mental or

emotional disturbance has been given and received in other death cases. In Mikenas v. State, 407 So.2s 892, 893 (Fla. 1981) the court stated that such information could be considered, but it's consideration was jeopardized because Mr. Mikenas had ample opportunity to present the evidence in the original sentencing proceeding but did not do it. In the instant case, Appellant's intelligence level was shown to be between the retarded level and low average level of intelligence (R2276). Further although he has problems understanding society and his role in it, his personality makeup is such that he can be rehabilitated in the future (R 2282-2284). The trial court should have find a non-enumerated mitigating circumstance in this instance.

CONCLUSION

Because of the aforementioned reasons urged in Points I through IX, Appellant's conviction herein should be overturned and a new trial ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Brief has been furnished by U.S. Mail to the Honorable Jim Smith, Attorney General, Department of Legal Affairs, the Capitol, Tallahassee, FL 32301, this 14th day of November, 1982.

ROOSEVELT RANDOLPH