IN THE SUPREME COURT OF FLORIDA

ROBERT DALE HENDERSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 63,094

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HERNANDO COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPEALLANT

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Fifth Judicial Circuit, In and For Hernando County, Florida. In the brief the parties will be referred to as they appear before this Honorable Court of Appeal.

The following symbol will be used:

"R" - Record on Appeal.

STATEMENT OF THE CASE

Appellant was charged by an indictment presented in the Circuit Court of Hernando County, Florida, with three counts of murder in the first degree. (R 1662-1663) Due to extensive pretrial publicity, an impartial jury could not be seated in Hernando County, and he was tried by a jury in Lake County, Florida, on November 16 through 20, 1982. (R 1937-1938)

Prior to trial, the trial court denied Appellant's motions to suppress statements; to prohibit the State from challenging prospective jurors for cause and from impeaching Appellant by prior convictions; to dismiss the indictment or declare that the death penalty was not a possible penalty; to declare Florida Statute 921.141 unconstitutional; for additional peremptory challenges or to declare Florida Statute 913.08(1) unconstitutional; to quash the jury venire; and to prohibit comment on the Grand Jury's indictment of Appellant. (R 1697-1701, 1704-1706, 1811-1812, 1033, 1813, 1814-1816, 1817-1818, 1819-1820, 1821-1831, 1980)

On the day of trial, Appellant's motion in limine to exclude testimony regarding other acts of misconduct for which Appellant was not on trial was granted in part. (R 1901, 1092-1093) After a deputy violated the prosecutor's instruction not to make the prohibited reference, Appellant's motion for a mistrial was denied. (R 1141-1143, 1464-1465, 1512, 1513) Likewise was Appellant's motion for mistrial denied when reference was made by a witness whom the prosecutor had failed to instruct. (R 1341-1343, 1465, 1513) The trial court also denied Appellant's motion for a mistrial made after the judge, while instructing the jury on the details of their sequestration, indicated that there would be a penalty phase following the verdict. (R 1059, 1061-1064, 1465, 1513)

The trial court denied Appellant's proposed penalty instructions, including a request to instruct that a statement introduced at the penalty phase

regarding remorse was not to be considered because it did not fall within statutory guidelines. (R 1562-1577, 1620) The trial court refused to inquire into possible juror misconduct when defense counsel and the prosecutor observed one juror return to the courtroom after penalty deliberations carrying a paperback book with, said defense counsel, his finger stuck between the pages. (R 1625-1629)

Appellant was found guilty of each count as charged, and on November 22, 1982, the jury recommended imposition of the death penalty as to each count. (R 1533-1534, 2103-2104, 2147-2149, 1533-1534, 1622-1623) The trial court sentenced Appellant to three consecutive executions by electrocution. (R 1641, 2153-2160)

Appellant's motion for a new trial was denied on December 20, 1982, and his notice of appeal was timely filed on January 14, 1983. (R 2139, 2175) The Office of the Public Defender, Fifth Judicial Circuit, was appointed to represent Appellant on appeal, and the Office of the Public Defender, Seventh Judicial Circuit, was designated to handle the appeal. (R 2179, 2186)

STATEMENT OF THE FACTS

Vernon Odum, Robert Dawson, and Frances Dickey each died within minutes of being shot once in the head and losing consciousness upon the bullet's impact. (R 1261, 1268, 1275, 1279, 1280) Their deaths might not have been discovered except that on February 6, 1982, Robert Dale Henderson made a bogus report of an automobile burglary to the Charlotte County Sheriff's Office and, when the deputy arrived, said that he wanted to give himself up for murder. (R 1188, 2307, 1120-1122, 2278) He told Charlotte County deputies that he had killed three hitchhikers in north Florida. (R 1123, 1146-1147)

On February 10th, Deputies Bakker and Hord of the Putnam County Sheriff's Office took custody of Appellant upon a warrant for a murder in Putnam County. (R 2210, 2234, 2235, 2216, 2217, 2237, 2290) They were given a document signed by Appellant declaring his desire to not discuss any criminal matters with anyone. (R 1175, 2218, 2236, 2237, 2266) During the 4½- to five-hour drive from Punta Gorda to Crescent City, the deputies and Appellant engaged in general conversation, and Deputy Hord "could tell" that Appellant had "something on his mind." (R 2267, 2268) When Deputy Bakker went into the Crescent City Police Department to call the chief of detectives, Deputy Hord asked Appellant "what he was trying to tell me." (R 2220, 2257-2260, 2266, 2267) Appellant said that there were three bodies, and he wanted them located. (R 1176, 1184, 2221, 2259, 2261) He was concerned that they be given a proper burial. (R 2221, 2226, 2227, 2245)

Appellant signed a waiver of rights form, standard except for the addition of a paragraph indicating that he wished to exercise his right to go against his attorney's advice and talk to the deputies. (R 1175, 2221, 2222, 2244, 2261, 2263) The addition had been made before the deputies left the

Sheriff's Office, just in case Appellant wanted to go against what his attorney had said and talk. (R 2221, 2222, 2243, 2261-2263)

Appellant directed the Putnam County deputies to an undeveloped subdivision about one mile inside Hernando County, where the bodies were found. (R 1181, 1182) Frances Dickey and Robert Dawson were identified from their dental records. (R 1289, 1291) Vernon Odum's last dental X-rays could not be obtained from the Mississippi State Prison, and he was identified by his tattoos. (R 1275, 1276, 1282)

On June 11th, Appellant was transported by Detective Perez of the Hernando County Sheriff's Office to the Hernando County Jail. (R 1415) Detective Perez read Appellant his rights, and showed him a picture of one of the hitchhikers. (R 2301, 2302) Appellant said, "No comment." (R 2302) Detective Perez inquired about the case, but Appellant told him he had already given statements to other detectives and the detective must have copies of those. (R 2302, 2303) When Detective Perez said he would like to have the information first hand, Appellant did not say anything. (R 2303) Later during the ride, Appellant agreed to talk. (R 2303)

In his statements to the detectives, Appellant said that he had picked up Dickey, Dawson, and Odum hitchhiking not far from Tallahassee. (R 1176, 1420-1422) They checked into a motel and Appellant gave the two men money to go buy beer. (R 1176, 1177, 1423, 1424) The men returned with a sawed-off shotgun that they said had been stolen. (R 1177) The next morning they headed south. (R 1177, 1423) Appellant told Bakker and Hord that one of the men wanted to stop to test fire the shotgun and have sex with the woman, so they pulled off Highway 44 into the subdivision. (R 1177, 1185) He told Detective Perez that they had stopped to sleep for a couple of hours. (R 1425)

Appellant heard the hitchhikers plotting to get some money, either by killing a rich man in Miami who they hoped would be seduced by either the woman or the homosexual male hitchhiker, or by kidnapping a "rich broad" in Jacksonville or Tallahassee and holding her for ransom. (R 1178, 1184, 1185, 1426, 1442, 1447, 1452) He figured that if they were capable of doing that to someone else, they were capable of doing it to him, and that he had better get them first. (R 1178, 1186, 1189) He had all the money there was among the four of them. (R 1442, 1446) He told Detective Perez that he had the woman tape the men's wrists and ankles together with adhesive tape, and then he taped her hands and feet. (R 1427-1429, 1447) He said he would have just left them there, but they were "running their mouths," so he shot the two men. (R 1429, 1430) The woman broke her tape, and began screaming at him. (R 1430) He taped her back up and, again, would have left her there alive except that she said if he was going to kill her, go ahead and kill her, and he shot her in the head. (R 1430, 1450, 1453) Appellant said he had allowed the boy friend to put on his trousers, but the woman's body was found with only a tube top around her waist. (R 1177, 1190, 1230)

Appellant said that he spent that night in a motel in New Port Richey, abandoned the truck, and lived for a couple of days in the swamps. (R 1433, 1434) A registration card from the Benchley Motel in New Port Richey reflected the same Texas truck tag number as that on a license plate found on a truck located in the woods near a creek in DeSoto County on February 4th. (R 1294-1296, 1306, 1443, 1444) A sawed-off shotgun with white tape around the barrel was found in the creek bed. (R 1308, 1309, 1314, 1316, 1326, 1357) Appellant's fingerprints were identified on a Louisiana license plate and beer bottles with the truck. (R 1362, 1385, 1386) Tape found on the shotgun and the

bodies all compared with rolls of adhesive tape found in the truck. (R 1403-1406; 1356, 1375) Papers belonging to Robert Dawson were in the truck. (R 1354-1356, 1369, 1370, 1372-1374) The bullets which killed Frances Dickey and Robert Dawson may have fired from the gun which Appellant turned over to the Charlotte County Deputy to whom he had surrendered. (R 1391-1393)

Appellant was co-operative with the law enforcement officers with whom he dealt and, in every matter which could be verified, accurate. (R 1126, 1156, 1188, 1191, 1145, 1146, 1150, 1592)

At the penalty phase of Appellant's trial, the State introduced copies of two Putnam County convictions of first-degree murder for which Appellant had been sentenced to consecutive life terms. (R 1581, 1584, 1585) His renewed motion to suppress was denied, and Detective Perez was allowed to testify that in a conversation on July 21st, Appellant had said he would "definitely not" change anything if he had his life to live over. (R 1466, 1586, 1587, 1589-1591)

A reporter testified that Appellant had told her that his father used to beat him, his siblings, and his mother, because of which the family broke up, and that when he was ten years old, his father rented him out for two dollars a day to do heavy log work. (R 1595-1597) Appellant left home early, joined the service, and did not finish school. (R 1596)

Deputy Bakker testified that Appellant told him that he had led the Putnam County deputies to the bodies so that they could be given burial. (R 1599)

POINT I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS TO SUPPRESS STATEMENTS OBTAINED IN VIOLATION OF HIS RIGHTS, AGAINST SELF-INCRIMINATION AND TO COUNSEL, AS GUARANTEED BY THE CONSTITUTIONS OF THE STATE OF FLORIDA AND OF THE UNITED STATES.

At Appellant's trial, the State was permitted to introduce over objection statements given by Appellant to Putnam County Sheriff's deputies shortly after he had turned himself in and to a Hernando County Sheriff's detective four months later. The Putnam County deputies interviewed Appellant after he had unequivocally invoked his right to counsel during questioning, and the Hernando County detective obtained a statement after Appellant had twice refused to talk.

A. PUTNAM COUNTY STATEMENT

On February 7, 1982, Appellant signed a "Notice of Defendant's Invocation of the Right to Counsel," stating that he desired to have his attorney present before and during "any questioning, interrogation, interviewing, or other conversation whatsoever" between him and any law enforcement agent. (R 1702) A copy of this declaration was presented to Deputies Bakker and Hord from Putnam County when they came to Charlotte County on February 10th to arrest Appellant upon a warrant which was attacked by the defense as defective.[1] (R 1170, 1171, 1175, 2216, 2218, 2219, 2238, 2258, 2266, 1704-1708) Deputy Bakker

1/ Although unrecorded testimony was given under oath to the issuing magistrate, the affidavit for the warrant contained no facts establishing probable cause, only conclusory language. (R 1707, 2208-2209, 2212, 2214, 2229, 2289) Article I, Section 12, of the Florida Constitution requires that a warrant for the seizure of persons be supported by affidavit, or the information obtained thereby shall not be admissible in evidence. Swartz v. State, 316 So.2d 618 (Fla. 1st DCA 1975), cert. denied 333 So.2d 465 (Fla. 1976).

had already made one trip to Charlotte County a few days before, and was told that Appellant "wasn't talking to anybody." (R 2208-2210, 2229)

Appellant's statements to the Putnam County deputies and his act of leading them to the bodies in Hernando County were inadmissible against him because the deputies violated his specific assertion of his rights and, when they readvised him of his rights in general, they did so erroneously.

Although Appellant's invocation of right to counsel specifically stated that he desired to have his attorney present during "any . . . conversation whatsoever," and the deputies claimed that they followed his declaration "to the letter," they nevertheless engaged in conversation with Appellant during their 4½- to five-hour drive to Putnam County because, as Deputy Hord said, "You don't ride mute for however many miles that was." (R 2217, 2218, 2238, 2258, 2266, 2270) Deputy Bakker "felt" that Appellant wanted to discuss "the matter" with them because he kept making "subtle statements," like "how dangerous" it was to pick up hitchhikers. (R 2219) Deputy Hord said Appellant did not mention hitchhikers' being dangerous, but Appellant did point out hitchhikers on the side of the road during their drive and said, "Hey! Look at that!" when he saw a woman hitchhiking. (R 2269) Deputy Hord's feeling that Appellant wanted to talk was based on his perceptions of Appellant's facial expressions and physical gestures. (R 2266, 2268) Although Appellant had not said anything, when the deputies stopped at the Crescent City Police Department for Deputy Bakker to use the telephone, Deputy Hord interpreted Appellant's facial expressions to say, "Here I am. I know all these things, and all you're going to do is take me to jail." (R 2260) In being asked what Appellant had done to specifically communicate a desire to talk, Deputy Hord said, "It's hard to describe an expression." (R 2260)

When Deputy Bakker left the car to make the telephone call, Deputy Hord said he turned to Appellant and asked him, "What are you trying to tell me?" (R 2259, 2260, 2267, 2268) Appellant indicated that he wanted to help the deputy "find some bodies." (R 2259, 2261)

Deputy Hord immediately contacted Deputy Bakker inside the police department because, although the deputies said they had no intention of violating Appellant's invocation, they had earlier determined that in the event that Appellant wanted to make a statement, or "information came to light," Sergeant Bakker was the officer that would deal with that. (R 2263-2264, 2220, 2221) Further, although the deputies protested that they complied with Appellant's declaration "to the letter," they also happened to carry with them, at their detective chief's instructions, a specially prepared waiver of rights form which included an extra paragraph indicating Appellant's understanding of his "Constitutional Rights to disregard the instructions of my attorney and to speak with the Officers from Putnam County, Florida." (R 2274, 1703) The alteration in the standard waiver form had been made before the deputies had left the Sheriff's Office, "just in case" Appellant wanted to go against his attorney's advice. (R 2221, 2222, 2243, 2244, 2261-2263)

Deputy Bakker readvised Appellant of his rights "in great detail," but also in error. (R 2221, 2248, 1703) He told Appellant:

> "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advise [sic] before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you

> cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer. (R 1703, 2222, 2248) (Emphasis supplied.)

This misinformation given to Appellant is remarkably similar to that communicated to the accused in Cribbs v. State, 378 So.2d 316 (Fla. 1st DCA 1980). In that case, the police chief told Cribbs that it was his understanding that "a Public Defender cannot represent you unless the court appoints him to represent you on a particular matter." The District Court held that the police chief's remarks to the effect that Cribbs could not talk to a lawyer until one had been appointed by the court vitiated the Miranda warnings previously given to him. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The Putnam County deputies' statement that they had "no way" of giving Appellant a lawyer was far more emphatic than the police chief's musing in Cribbs. In the age of the telephone and two-way radios, it is also incredible. Deputy Bakker denied that anyone suggested that they not take Appellant to the Putnam County Jail because he might come into contact with a lawyer there; but even though their subsequent travels took them through the Putnam County seat of Palatka, no effort was made to place Appellant in communication with a lawyer until after the bodies had been located in Hernando County. (R 2251, 2248)

The deputies acknowledged their awareness of various techniques for obtaining confessions, including being "friendly" but, as Deputy Bakker said, "I'm not saying I used that technique on him." (R 2240, 2265) Deputy Hord, who had found that "being friendly will get a confession," testified that a "friendly atmosphere" prevailed on the five-hour trip from Charlotte to Putnam County.

(R 2265) The deputies insisted that they did not set out to get a statement from Appellant; that just happened to be the end result. (R 2240, 2243)

The deputies' innocent protestations are belied by nearly their every act. When Deputy Hord began his questioning of Appellant, and Appellant indicated that he wanted to help find some bodies, Deputy Bakker began to talk about a "proper burial" for the victims. (R 2259, 2261, 2221, 2226, 2227, 2245) The fact that finding the bodies, not self-incrimination, was Appellant's intention is borne out by his refusing to be approached by Hernando County deputies at the scene and conversing only with his "friends" from Putnam County. (R 2226) Whether Deputy Bakker really had never heard of the "Christian burial technique" as he claimed or not, this subtle appeal to conscience is an impermisible means of overcoming a suspect's prior assertion of his right to counsel. Brewer v. Williams, 439 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); Jones v. State, 346 So.2d 629 (Fla. 2d DCA 1977). Any attempt to frustrate so unequivocal an invocation of rights as Appellant's is a violation of those rights, and renders a confession inadmissible. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The idea that Appellant "just happened" to start talking to the deputies, through no design of theirs, is disproved by the fact that they "just happened" to have a custom-made waiver of rights form with them which, if they could get him to sign it, would specifically countermand the declaration of rights which they insisted they had scrupulously honored.

Appellant's statements came at the end of a five-hour car ride during which a "friendly atmosphere" prevailed, and he and the deputies engaged in conversation. The deputies fed Appellant in St. Petersburg, bought cigarettes for him in Orlando, out of Deputy Bakker's pocket, and, after he had signed the defective waiver of rights form, Appellant was given hamburgers, cigarettes, coffee, and more comfortable shoes. (R 2246-2247)

The illegal arrest, the dishonoring of Appellant's intent not to converse with the deputies without a lawyer; the questioning of Appellant after his insistence on his rights; the "friendly atmosphere," refreshments and reference to a "proper burial" for the deceased; and the distorted version of constitutional rights which climaxed this succession--each factor compounds the taint of the former, and renders Appellant's statements against himself involuntary and violative of his rights to counsel and against self-incrimination. The admission of the statements and the tangible evidence gathered as a result of the statements was improper. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Art. I, §9, Fla. Const.; Amends. V, VI, and XIV, U.S. Const.

B. HERNANDO COUNTY STATEMENTS

On June 2, 1982, Appellant was convicted and sentenced to life terms in Putnam County upon his guilty pleas to two counts of first-degree murder. (R 2139-2143) The trial judge in this cause ordered that he be brought from the Department of Corrections to the Hernando County Jail, and on June 11, 1982, Detective Tony Perez picked Appellant up at Raiford. (R 1658-1659, 2301) The detective read Appellant his constitutional rights, showed him a picture of one of the hitchhikers, and asked him, "Do you recognize the person in this picture?" (R 2302) Appellant said "No comment," but after a few minutes the detective asked about this case. (R 2302) Appellant said, "I already told other detectives and I know about what you're investigating, and I know you have copies of my statement." (R 2302-2303) Detective Perez said that was true, but he would like to have the information firsthand. (R 2303) Again Appellant declined to talk. (R 2303) On February 11, 1982, Appellant had refused to talk to Detective Perez in the Putnam County Jail, but said he would talk to him in the presence of a Public Defender investigator. (R 2300, 2310) On February 22,

1982, still in the Putnam County Jail, Appellant had formally requested the assistance of counsel in this cause, and although Detective Perez was not aware of the fact, the Public Defender was appointed three days later. (R 584, 1656-1657)

Just before the driver stopped to make a telephone call, Appellant said, according to Detective Perez, "Give me a Pepsi and a pack of Winstons and I'll tell you about this shit." (R 2303) He then told the detective how he had killed the hitchhikers. A transcript of his taped statement was introduced over defense counsel's objection at the trial. (R 1411, 1412, 1417)

The admission of Appellant's statements to Detective Perez violated the principles of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Miranda Court made it clear that when a suspect in police custody indicates that he wishes to remain silent, further interrogation at that time must cease. Once a person has asserted that right, any statements obtained from that person are admissible only if the interrogating officer has scrupulously honored the accused's right to remain silent. Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). When Detective Perez insisted, after Appellant's two refusals to talk, that he wanted to have the information "firsthand," his persistence rendered the statements involuntary and in violation of Appellant's right to remain silent. Art. I, §9, Fla. Const.; Amends. V and XIV, U.S. Const.

Even if Appellant's statements to the Putnam County deputies had been properly obtained, and properly admitted, the introduction of his statements to Detective Perez were not merely cumulative or harmless. It was from this interview that the prosecution obtained the details of the deaths. It was primarily upon these details that the State argued that the killings were especially heinous, atrocious or cruel. The trial court's findings of fact

concerning sentence dwelt upon the circumstances of Frances Dickey's death, furnished solely by Appellant's statements to Detective Perez. (R 2158) Appellant is entitled to a new trial from which all of his illegally obtained statements to Putnam and Hernando County deputies will be excluded.

POINT II

THE TRIAL COURT ERRED BY DENYING IN PART APPELLANT'S MOTION IN LIMINE TO EXCLUDE REFERENCES TO OTHER CRIMES IN OTHER JURISDICTIONS, AND BY DENYING APPELLANT'S MOTIONS FOR A MISTRIAL WHEN SUCH EVIDENCE WAS PRESENTED.

Prior to trial, Appellant filed a motion that the state be prohibited from introducing evidence of unrelated acts of misconduct, asking for an order instructing all the witnesses to refrain from such acts, and specifically expressing the fear that inadvertent reference might be made by the State or its witnesses to irrelevant and prejudicial matters. (R 1901) The prosecutor responded that the only reference to collateral crimes that he anticipated introducing at trial was Appellant's statement to the Charlotte County deputy to whom he had turned himself in--that he wanted to give himself up for murder and that he was wanted in several states. (R 72) The prosecutor said:

> MR. McCABE: I think it's permissible. I think it's appropriate. It's the only way anything is going to make sense, any of the subsequent actions are going to make sense. (R 72, 73)

The trial court granted the motion in limine except to allow the State to elicit Deputy Moore's testimony that Appellant said he was "wanted in several states." (R 74, 1092-1093) Before the trial began, the prosecutor announced that he had instructed his witnesses on the court's ruling. (R 1093)

The trial court should have granted the motion in limine in its entirety. The argument that the evidence would not make any sense without the thoroughly irrelevant reference to crimes in other jurisdictions has no merit. Deputy Moore's testimony was that when he answered a call to a shopping center regarding an automobile burglary, Appellant motioned him over and said he wanted

to give himself up for murder. (R 1120-1122, 2278) The statement that he was "wanted in several states" bore no relevance to the fact that he was on trial for three murders in one state, the one in which he surrendered. (R 1122) It tended neither to prove nor disprove any fact material to the issues at trial, but could only tend to show bad character or propensity. §§90.401, 90.404(2)(a), Fla. Stat. (1981).

The fact that the alleged statement was made by Appellant himself does not render it admissible. The State in Rodriguez v. State, Fla. 3d DCA Case. No. 80-704 (June 28, 1983) [8 FLW 1749], elicited a response from a cellmate that the defendant, in confessing to the murder for which he was on trial, told him that he had been involved in another murder. The District Court reversed because the reference was irrelevant to the crime for which Rodriguez was on trial.

The trial court therefore erred in overruling Appellant's renewed objection to Deputy Moore's testimony regarding crimes in "several states." (R 1122) The harm was then inexcusably magnified by the State's next helpful witness, Detective Lucas of Charlotte County.

Detective Lucas' contribution to the evidence against Appellant was the interview he conducted on February 6, 1982, the day Appellant spontaneously surrendered himself. Appellant that day gave Detective Lucas a statement regarding the deaths of the three hitchhikers. (R 1146-1152) The prosecutor had said, at the hearing on the motion in limine, that he would lead his witnesses to the specific areas of their conversations with Appellant that pertained to these charges. (R 74) When Detective Lucas was asked what the occasion was for coming in contact with Appellant February 6th, however, he blurted:

> A. I was informed by personnel at my office that Mr. Henderson had been arrested for charges stemming out of a -- of a Teletype, the subject was wanted for homicide in other states. (R 1141)

It can hardly be suggested that Detective Lucas, with nine years' experience in law enforcement, did not know that his gratutious statement was blatant hearsay, and for that reason alone he would have to be suspected of deliberate impropriety. (R 2282) §90.802, Fla. Stat. (1981). His intent was proved at the bench conference on Appellant's objection and motion for a mistrial:

> THE COURT: The motion in limine response by the State was that there would be some mention of the charges in other states in the initial contact.
>
> MR. SPRINGSTEAD (Defense Counsel): Officer Moore. That was supposed to be Officer Moore. They have clearly gone beyond that.
>
> MR. McCABE: He did to beyond that, Judge. I instructed the witnesses collectively, and when I was talking to Moore, I might not have made it clear in my instruction. I don't think it's prejudicial. (Empahsis supplied.) (R 1141-1142)

The judge's instruction to the jury to disregard "any criminal acts or charges in states or jurisdictions other than Hernando County, Florida," could not suffice to remedy the harm. (R 1143) Although the prosecutor commendably made an effort to have his witnesses abide by the court's order, this behavior by a witness so interested in "helping" the State that he would deliberately violate the court's ruling is tantamount to prosecutorial overreaching; but even if it were inadvertent the harm was irreparable and a mistrial should have been

declared. United States v. Martin, 561 F.2d 135 (8th Circ. 1977); United States v. Broderick, 425 F.Supp. 93 (S. D. Fla. Miami Div. 1977).

Later in the State's case Florida Department of Law Enforcement Agent Bedore, a crime scene analyst, testified that he was summoned to DeSoto County on February 5, 1982, to process a vehicle "that had been stolen from another county." (R 1341, 1342) Defense counsel's motion for a mistrial was denied, and the jury was instructed that Appellant's three charges of first-degree murder had no connection to "auto theft or anything of that sort." (R 1342, 1343, 1465)

Not long before Agent Bedore testified, defense counsel had sought to assure that no further violations of the motion in limine ruling would take place, asking that the witnesses be instructed not to interject that it was a stolen truck. (R 1284) The prosecutor assured counsel and the court that the witnesses whom Appellant had told that it was a stolen truck had already testified, and they had been previously instructed. (R 1284) The prosecutor did not instruct Agent Bedore because he did not know that was part of his knowledge. (R 1342)

Collateral evidence that tends to suggest the commission of an independent crime is inadmissible unless such evidence is relevant to a fact in issue. Jones v. State, 194 So.2d 24 (Fla. 3d DCA 1967). If the logical effect of evidence relating to other offenses by an accused is to establish bad character or propensity to commit crimes, it is inadmissible. Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). On basic and established principles alone, therefore, the three incidents described above are objectionable and constituted grounds for a new trial. Drake v. State, 400 So.2d 1217 (Fla. 1981); Rodriguez, supra. Where defense

counsel had so vigilantly sought, by written motion, to prevent their occurrence, the violation of the relief granted under that motion is especially unfair. Appellant is entitled to a new, fair trial. Art. I §§9 and 16, Fla. Const.; Amends. V, VI, and XIV, U.S. Const.

POINT III

APPELLANT WAS DEPRIVED OF A FAIR TRIAL WHEN THE TRIAL JUDGE SUGGESTED THAT A SENTENCING PORTION OF THE TRIAL WOULD BE HELD.

After the 12 jurors were selected to try Appellant's case, they were told how they would be accommodated during the time they would be sequestered. One of the jurors asked how many days the judge would suggest they pack for, and the court responded:

> THE COURT: The indication that I received from counsel is that there may be three days of testimony, the advisory sentencing phase may be after a one day delay.
>
> Are you going to request a day to prepare for the second phase or have you considered it further since we discussed it?
>
> MR. SPRINGSTEAD (Defense counsel): If we get to that point, Your Honor, I would think that a day would be appropriate.
>
> THE COURT: Of course, if a verdict is returned in the morning or around noon, maybe we could start the next morning and not lose a whole day. (R 1060)

Upon defense counsel's request, the trial judge told the jury that the court had not intended to imply that the court had any feelings about the verdict:

> THE COURT: Ladies and gentlemen, I'd like to clarify one thing. When I was computing the total time that -- of your time that this trial might take, I in no way meant to imply I have any feelings

> whether or not we'll need to have a sentencing phase or not. That's only required if the jury determines that the Defendant is guilty of first-degree murder. If it's a lesser included offense, then that would eliminate the need for the second phase which I think--I hope we all understood it that way. Okay. (Emphasis supplied.) (R 1061-1062)

Recognizing that the instruction could not cure the error, defense counsel moved that a mistrial be declared, and was denied. (R 1063-1064) Even if the judge's instruction had admitted of the possibility that Appellant could be found not guilty, instead of mentioning only first-degree murder or a lesser included offense, it is unlikely that the harm could be repaired. The episode is very similar to the situation in Ferber v. State, 353 So.2d 1256 (Fla. 2d DCA 1978), wherein upon a question from the jury the judge told them that they had to pick one of two guilty verdict forms. Even though no objection was made, such a comment was considered fundamental error and the convictions were reversed. Like the judge in Ferber, Appellant's trial judge insisted that the implication that he would be convicted was not intended; but

> "Assuming the foregoing comment is accurately transcribed, and no one has suggested to the contrary, we are confident that the court did not mean to say what was actually said. . . . However, the fact remains that the jurors could have reasonably believed that they were being instructed to return verdicts of guilt. . . . Therefore, we cannot say that this appellant has been afforded due process, and in the interest of justice we find it necessary to set aside the judgment and remand for a new trial." Id.

Especially in the trial of a capital case, the judge's neutrality should be unquestionable. Williams v. State, 143 So.2d 484 (Fla. 1962). The judge's

comments in any trial are given great weight by the jurors and it is particularly important for the judge not to say anything which might be interpreted as being an indication of his opinion of the case. Mathis v. State, 45 Fla. 46, 34 So. 287 (1903). Even where they are unintentional, comments such as were made by Appellant's trial judge can be interpreted as an expression of his opinion of the accused's guilt and, because of that possibility, Appellant was denied his right to a fair and impartial trial. Ferber, supra; Hamilton v. State, 109 So.2d 422 (Fla. 3d DCA 1959); Art. I, §§9 and 16, Fla. Const.; Amends. V, VI, and XIV, U.S. Const.

POINT IV

THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE PARTICULARLY GRUESOME PHOTOGRAPHS OF THE DECEASED WHICH WERE IRRELEVANT AND REPETITIVE.

The bodies of Frances Belle Dickey, Vernon Odum, and Robert Dawson would not have been discovered if Appellant had not directed Putnam County deputies to their location so that they could be buried. (R 1176, 1184, 1188, 2307, 2221) They had each died almost instantly from a single, small-calibre gunshot wound to the head, but during a week of exposure to particularly severe rains and maggots, the bodies had decomposed badly. (R 1279, 1280, 1391-1393, 1217, 1267, 1271)

On the morning of February 11, 1982, Hernando County crime scene technician Ron Elliott photographed the bodies. An aerial photograph and a diagram had been admitted into evidence without objection to depict the bodies' relative locations. (R 1203, 1205; Exhibit # 7) The diagram also featured stick drawings of the bodies, indicating where white adhesive tape had been found on wrists and ankles. (R 1205, 1223, 1224; Exhibit # 8)

Defense counsel objected to three of Detective Elliott's photographs which were particularly grotesque and which duplicated other items of evidence introduced at trial. The first photograph, of Frances Belle Dickey, was obscene. Purportedly introduced to show where the tape was, on her left ankle, and the "absence of clothes," it was an unjustifiable perspective of the woman's spread legs and maggot-eaten crotch. (Exhibit # 10) The strip of adhesive tape that the prosecutor was allegedly seeking to depict was an incidental detail in the lower right quadrant of the photograph. Defense counsel offered to voice no objection to the admission of that relevant portion of the picture. (R 1228)

To that, the prosecutor responded that the picture showed "the absence of clothes," and the trial court admitted the picture, telling the jury that the picture "has probative value." (R 1229) Testimony alone could have amply established that Ms. Dickey, who Appellant said had had sex just before the three were killed, was unclothed when she died. Even if a photograph were really necessary to establish that fact, the photographer's slant in this case was not. The relevance of the location of the tape, already depicted in a drawing, and the fact that the body was nude is tenuous at best; but in any event could have been less objectionably illustrated. When a photograph is relevant it is admissible, unless what it depicts is so shocking in nature as to overcome the value of its relevancy. Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976); Williams v. State, 228 So.2d 377 (Fla. 1969).

In Alford v. State, supra, this Honorable Court ruled that the four photographs of the victim admitted at trial were allowable, but took note that the trial judge had ruled inadmissible a close-up photograph of the victim's vaginal area revealing injury to that area. Id, 307 So.2d at 440-441. The Court in Adams v. State, 412 So.2d 850 (Fla. 1982), cited the trial judge's reasoned judgment in prohibiting the introduction of "duplicitous photographs." The Alford and Adams Court were not faced with the gratuitous obscenity and pointless repetition of this photograph.

All three of the photographs to which Appellant objected shared the same main feature of depicting the nauseating effects of a human body's decomposing and being overrun with maggots. The results of nature's running its course are, absent embalming and other nice cosmetics, disgusting. But they just happened; Appellant did not purposefully and deliberately inflict maggots and rain. The only credible purpose for showing these particularly graphic

photographs of each individual was to inflame the jury. The prosecutor's weak claims of relevance cannot be accepted.

Exhibit Number 12, to which defense counsel objected, showed Robert Dawson's body clothed but crawling with maggots. (R 1232) It also portrayed his maggot-eaten head. Again, defense counsel offered to permit the State to achieve its professed purpose, of showing the tape on the left wrist, by stipulating to the admission of a cropped version of the photograph. (R 1232-1233) The suggestion was rejected and the objection overruled. (R 1233) The State thereby succeeded in showing what it had already proved, the location of the tape, and in making sure that the jury was sufficiently horrified by the appearance of the second cadaver.

The portrait of Vernon Odum's face that was admitted over defense counsel's most strenuous objection surpasses the other two as an abomination. (Exhibit # 14) A detailed closeup, the photograph illustrated that maggots perform their function of disposing of carcasses by entering the host through its orifices. The deceased's gold chain was taut in his decaying flesh, showing that the body swells after death. Besides these basic lessons in ecology and physiology, little else is shown by this thoroughly revolting exhibit.

The photographer had testified that the picture of Vernon Odum showed tattoos on the body. (R 1235) There were no tattoos, however, on the head. (Exhibit # 14) In overruling Appellant's objection, the trial court confirmed that "this was the one that had to be identified by the tattoos," and stated "for the record" that Appellant had referred during voir dire to "unappetizing" or "unpleasant" pictures. (R 1236) The court then allowed the picture to be placed in evidence "for the identification value that it may have." (R 1236)

The tattoos, the sole justification for this exhibit's admission into evidence, are slightly more prominent in the picture than were the snatches of

adhesive tape in the pictures of Frances Dickey and Robert Dawson, but again there is no excuse for not editing the picture to eliminate the particularly gruesome head. Like the other two photographs, moreover, this one was repetitive of other evidence introduced at the trial. Defense counsel stated Appellant had no objection to Exhibit Number 22, a picture of the same two tattoos taken by the medical examiner. (R 1275) The head portion of the picture had no place in the evidence, particularly if the excuse for admitting it was "for the identification value" it had--the medical examiner confirmed that identification from the dead people's facial features was impossible. (R 1267)

Defense counsel did not object to other exhibits, some of which were inflammatory but which bore some arguable relevance to the proceedings: the aerial photograph (showing the location of the bodies); the diagram (showing the location of the adhesive tape); Vernon Odum's ankles taped together; a third tattoo on Vernon Odum's abdomen; Vernon Odum's wrists taped together; or the second photograph of the two tattoos on Vernon Odum's chest. (R 1203, 1205, 1234, 1237, 1239-1240, 1275; Exhibits # 7, 8, 13, 15, 16, 22) After the second picture of the chest tattoos was introduced, the State stipulated with defense counsel that Vernon Odum's mother had identified his body from the tattoos. (R 1275, 1276, 1292) This does not, therefore, present a situation where the State may claim a righteous purpose for introducing Exhibit Number 12 by arguing that the defense could not relieve the prosecution of its burden to prove identity, by asking that it be done in a less hideous manner. Foster v. State, 369 So.2d 928 (Fla. 1979). All the facts for which the State and the trial court claimed the photographs' relevance had been established. Reddish v. State, 167 So.2d 858 (Fla. 1964).

The fact that photographs are offensive to our senses and might tend to inflame a jury is insufficient by itself to constitute reversible error.

Calloway v. State, 189 So.2d 617 (Fla. 1966); Pleas v. State, 184 So.2d 647 (Fla. 1966). But this Court has cautioned the prosecutors of this State that gruesome photographs admitted primarily to inflame the jury will result in a reversal of the conviction. Jackson v. State, 359 So.2d 1190 (Fla. 1978).

Any validity pretended by the State's feeble excuses for offering these three photographs is belied by the rest of the record and by a glance at the exhibits. We cannot read the minds of the jurors, but it is only reasonable to expect that these awful images loomed large in their consciousness as they deliberated, particularly during the penalty phase of Appellant's trial when they might have difficulty distinguishing Appellant's acts from their natural, postmortem results. Halliwell v. State, 323 So.2d 557 (Fla. 1975).

POINT V

APPELLANT WAS DEPRIVED OF HIS RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY DRAWN FROM A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY.

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 85 L.Ed. 84 (1940); Amends. VI and XIV, U.S. Const. The operation of Section 40.013 of the Florida Statutes (1981), and the particular manner in which it was implemented violated Appellant's right to an impartial jury trial.

Section 40.013(1) disqualifies anyone who is under prosecution for any crime, not just persons who have been convicted of a crime and not restored to their civil rights. This provision presumably would not disqualify an extremely large segment of society, but on the other hand it has no apparent rational basis. Thompson v. State, 300 So.2d 301 (Fla. 2d DCA 1974), held that the purpose of disqualifying a person who has a pending prosecution is to avoid the possibility that that person might vote to convict in the hope of getting more favorable treatment from the prosecution in his own case. If that is the reason for the provision, then it is just as reasonable to expect that the State Attorney's Office would try to limit eligibility by filing charges against anyone in the county who might be defense-oriented. The possibility fancied by the Thompson Court could conceivably be grounds for excusal of a potential juror for cause, but does not describe a constitutionally permissible purpose for excluding a class of people from jury eligibility.

Section 40.013(4) providing for excusal of mothers of children under age 15 who are not employed full time and attacked by Appellant's motion to

quash the Lake County venire, has been held to be unconstitutional. Alachua County Court Executive v. Anthony, 418 So.2d 264 (Fla. 1982).

Section 40.013(8), excusing persons 70 years of age or older, unconstitutionally discriminates on the basis of age, and allows an extremely significant portion of the qualified population to "opt out" of jury service and violates the accused's right to an impartial jury. Machetti v. Linahan, 679 F.2d 236 (11th Circ. 1982). That persons over the age of 70 represent a large percentage of Florida's population is demonstrated not only by common knowledge but by the fact that of the 68 excuses unauthorizedly granted by the Clerk, 26 were persons over 70. (R 588-591) Although Appellant is not a member of this class of persons, he has the right to select his jury from among them. Peters v. Kiff, 407 U.S. 4930, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972).

Appellant attacked the jury venire drawn for his trial in Lake County for these reasons, and because of the method by which summoned jurors were excused-by the Clerk, not the judge. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), held that the States are free to grant exemptions from jury service to individuals engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare. Florida has granted a statutory excuse to practicing attorneys and physicians, but only by the presiding judge in his discretion. §40.013(5), Fla. Stat. (1981). The Lake County Clerk excused a doctor, and dentist, without contacting a judge. (R 591, 592, 596) Section 40.013(5) also requires judicial approval to excuse physically infirm persons from jury duty; two such jurors were excused by the Clerk. (R 590, 592)

The Lake County Clerk followed a practice of receiving telephone calls from summoned jurors and deciding if the given excuse fell under a memorandum issued by the Circuit's administrative judge in 1981. (R 2035-2036, 587, 592)

The excuses accepted by the Clerk are not under oath. (R 593) The Clerk also "reset" 15 jurors who said they could not be in court on the particular day for which they were summoned. (R 588-591)

Although "hardship" is a constitutionally permissible basis for excusing a potential juror from service, Appellant contends that the lack of definition renders Section 40.013(6)'s "hardship, extreme inconvenience, or public necessity" vague, and that the administrative judge's delegating to the Clerk the power to define these terms was unauthorized. Taylor v. Louisiana, supra.

Appellant's Motion to Quash Jury Venire attacked the statutory provisions for excusing jurors and the method by which they were carried out in Lake County. (R 2030-2036, 1464, 1465, 585) Because the statute itself and the Clerk's unauthorized improper exercise of the trial judge's excusal power violate Appellant's right to a fair and impartial jury drawn from the community as a whole, the motion should not have been denied. (R 599) Art. I, §16, Fla. Const.; Amends. VI and XIV, U.S. Const.

POINT VI

APPELLANT WAS IMPROPERLY SENTENCED TO DEATH.

The trial court's "Findings of Fact Concerning Sentence" are a recitation of the evidence and arguments submitted by the State and by the defense, followed by the statement that the court found that three statutory aggravating circumstances had been established. (R 2157-2160) The findings do not specify what weight was given by the trial court itself to which facts presented at the sentencing phase of Appellant's trial. The "findings" merely recite the subsections of the statute relied upon. §§921.141(5)(b), (h), and (i), Fla. Stat. (1981). The sentencing order is therefore inadequate to afford meaningful review by this Court. Holmes v. State, 374 So.2d 944 (Fla. 1979). Unless the death sentences imposed in this cause are vacated, as Appellant urges they should be, this cause should be remanded to the trial court for a more detailed statement of the judge's findings of fact. Hall v. State, 381 So.2d 683 (Fla. 1978); Hoy v. State, 353 So.2d 826 (Fla. 1978).

The death sentences imposed on Robert Dale Henderson are not justified by the facts of the case. Two of the statutory aggravating circumstances found to exist are not supported by the evidence.

A. THE CAPITAL FELONIES WERE NOT ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

For the aggravating circumstance that the deaths of Frances Dickey, Robert Dawson, and Vernon Odum were especially heinous, atrocious or cruel, recites the trial court's statement, the State argued that the trial evidence showed

> ". . . (T)he binding of the three victims [sic] hands and feet with adhesive tape, (2) first shooting the two males . . . in their heads because they were joking with him once they were bound (3) then shooting the female . . . after the defendant had forced her at gun-point to bind the other two victims [sic] hand and feet with tape (4) after she had watched her two companions be executed in front of her eyes (5) after she had been able to break the tape bonds with which the defendant had rebound (6) after she had said 'if you are going to kill me, kill me now', the defendant then shot and killed her with a bullet which entered through her left eye (7) the two male victims were substantially clothed, the female was only found wearing a tube-type-top shirt that was pulled down from covering her breasts to be around her abdomen. [sic]" (R 2158)

Even assuming that the trial court's recitation of the State's presentation and argument is an indication that these facts were adopted as the court's findings, it is an insufficient basis for its finding of the aggravating circumstance of the crimes' being heinous, atrocious or cruel. §921.141(5)(h), Fla. Stat. (1981). As the court's statement also recites, both defense counsel's argument and the evidence point to the fact that all three dead people died almost instantaneously. (R 1280) Death would have occurred withing a very few minutes of the bullets' impact, and unconsciousness would have resulted immediately. None of the three suffered physically. To say that any of these killings was especially heinous, atrocious or cruel is to neglect this Court's definition of these terms:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to

> inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital 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 conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So.2d 1 (Fla. 1973); cert. denied 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

It should be pointed out that in his statement to Detective Perez, Appellant said that the dead people were arguing with him after they were bound, saying that they had only been joking when they discussed killing Appellant and taking his truck. (R 1429-1430) If the trial court accepted the statements contained in Paragraph Four of its sentencing document as facts, then the dead people's "joking" with Appellant virtually traverses the State's contention as to this circumstance. (R 2158) In neither case, of "arguing" or "joking," is there presented a scene of torture or outrageous cruelty.

The trial court repeated the State's presentation that Frances Belle Dickey watched her companions die. (R 2158) This only establishes that she was the last to go, not that her death was especially horrible. It is most certainly no justification for finding the two men's death heinous, atrocious or cruel. Even though Appellant's statement indicated that Vernon Odum and Frances Dickey were sexually involved,[1] her witnessing his demise did nothing to render his or Robert Dawson's deaths especially cruel. Riley v. State, 366 So.2d 19 (Fla. 1978) (wherein a son watched his father die instantaneously from a gunshot in the head). The fact that one of the three people was the third to die in no way

1/ Her having had intercourse with Odum immediately prior to the shootings explains her nudity. (R 1177, 1190).

establishes the first two deaths as statutorily aggravated and for this reason alone, the court's apparent reliance on this circumstance, this sentence must be vacated as to the two men's deaths because the trial court's findings give no indication of how this supposed circumstance was applied among the three counts for which Appellant was sentenced.

Even considering the fact that Frances Dickey died last, the facts supplied by Appellant's statement do not show his actions to be pitiless or unnecessarily torturous in her case. He told Detective Perez that while he shot the two men, Frances was "just standing there." (R 1430) Appellant indicated that he would have left her at the scene alive, except that she said, "No, if I was going to kill her, go ahead and kill her, so I went ahead and killed her." (R 1430) She then died instantly.

The evidence did not establish that the deaths were especially heinous, atrocious or cruel.

B. THE CAPITAL FELONIES WERE NOT COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

In Paragraph 5 of its sentencing order, the trial court repeated that the State had argued that the dead people had been bound hand and foot before being shot. (R 2158) This fact was established in the trial only by Appellant's statements, and his account of the killings also showed that, when he caused the three people to be bound, he intended to leave them there alive. (R 1429-1430) It was their arguing and "running their mouths" that caused Appellant to change his mind and shoot them. (R 1429) As for whether Appellant's actions were under a pretense of moral or legal justification, it was their plan to kill a rich person elsewhere, and possibly Appellant, that prompted him to decide to get away from them. (R 1178, 1184, 1185, 1425, 1426, 1446)

The trial court allowed the State to introduce the testimony of Detective Perez who, in an interview with Appellant in July of 1982, asked him if he would change anything if he had his life to live over. Appellant, he said, told him, "Definitely not." (R 1588-1591) Defense counsel objected to the introduction of this testimony, and moved that a mistrial be declared after the trial court overruled the objection and admitted it. (R 1588, 1591) Neither the failure of the defendant to acknowledge his guilt or to demonstrate remorse is a valid statutory aggravating circumstance. McCampbell v. State, 421 So.2d 1072 (Fla. 1982). Again, the trial court's sentencing order does not reveal the court's specific factual findings, but if it can be presumed that the court adopted the State's presentation as its findings, then a lack of remorse has no place in this recitation, and Appellant's statement to Detective Perez was improperly admitted. The sentencing order's reference to the presented mitigating circumstances is vague, but its statements that those presented by the defense are "of little if any weight," and that they are outweighed by the aggravating circumstances indicates that mitigating circumstances nevertheless were found. (R 2160) In this event, it was reversible error for the trial court to consider, and to allow the jury to consider, the alleged lack of remorse. Where there are any mitigating circumstances, no unauthorized aggravating factor may enter the equation which determines life or death. Elledge v. State, 346 So.2d 998 (Fla. 1977). In Elledge, the jury recommended the death penalty, eleven-to-one, for a man who had choked his victim to death while raping her. Since the Supreme Court had no way of knowing whether the unauthorized aggravating circumstance which was considered changed the result of the judge and jury's weighing process, and since a man's life was at stake as it is here, the Court was compelled to return the case to the trial court for a new

sentencing trial at which the impermissible factor would not be considered. Id, 346 So.2d at 1003.

The fact that Appellant bound the three people to leave them behind, and then decided to kill them, does not establish premeditation of that degree regarded as "cold" and "calculated." Jent v. State, 408 So.2d 1024 (Fla. 1981). Even had there been evidence of this factor, the unrebutted testimony that Appellant overheard the three hitchhikers plotting a murder and feared he would be done away with too shows that the homicides were committed under a pretense of moral or legal justification, and precludes the finding of this aggravating factor.

Appellant's sentences of death must be vacated and this cause remanded for imposition of life sentences because the State's claims, that the homicides were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, and were heinous, atrocious or cruel, were not established by the evidence. At the least, this cause must be remanded to the trial court for a new sentencing trial at which Appellant's alleged lack of remorse will not be presented or considered and following which the trial court will enter an order specifically stating its own findings of fact and distinguishing those facts as to each individual and which circumstances of his or her death are meant to justify the court's sentence. Art. I, §§9 and 16, Fla. Const., Amends. V, VI, and XIV, U.S. Const.

POINT VII

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form, recognizing that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statute and that detailed briefing would thus be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors. Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." The statute, further, does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, 446 U.S. 420 (1980); Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980) (England, J. concurring).

The Florida capital sentencing process at both the trial and appellate level fails to provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the Defendant with notice of the aggravating circumstances which make the offense a capital crime and upon which the State will seek the death penalty deprives the Defendant of due process of law. See Gardner v. Florida, 430 U.S. 349, 358 (1977); Argersinger v. Hamlin, 407 U.S. 25, 27-28 (1972); Amend. VI and XIV, U.S. Const.; Art. I, §§9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore a cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require the sentencing recommendation of a unanimous jury or by a substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law. Art. I, §16, Fla. Const.; Amends. V, VI, and XIV, U.S. Const.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968). The trial court in this regard erred when it failed to grant Appellant's motion to preclude challenges for cause. (R 1821-1823)

The Amendment of Section 921.141, Florida Statutes (1979) by adding aggravating factor 921.141(5)(i) (cold and calculated) renders the statute in violation of the 8th and 14th Amendments to the United States Constitution because it results in death being automatic unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

It is a denial of equal protection to allow as an aggravating circumstance the fact that the defendant committed a capital felony while on parole and legally not incarcerated, but to prohibit a finding of an aggravating circumstance in the same circumstances for a defendant on probation.

Additionally, a disturbing trend has become apparent in this Court's recent decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 414 So.2d 185 (Fla. 1982), Cert. denied, ____ U.S. ____, ____ S.Ct. ____, 74 L.Ed.2d 155 (1982) (Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra, at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 834 (1978) cert. denied, 414 U.S. 956 (1979) (emphasis added).

In view of this Court's departure from its duty to make an independent determination of whether or not a death sentence is warranted, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons expressed in Points I through V herein, Appellant respectfully requests that this Honorable Court reverse his convictions and remand this cause to the trial court for a new trial. In the alternative, and for the reasons expressed in Points VI and VII herein, Appellant requests that his sentences be vacated and this cause remanded to the trial court for imposition of life sentences, or for a new sentencing trial.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to the Honorable Jim Smith, Attorney General, at his office located at 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, and a copy mailed to: Mr. Robert Dale Henderson, Adams County Jail, 110 W. Main Street, West Union, Ohio 45693, this 2nd day of August, 1983.

Brynn Newton

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER