IN THE SUPREME COURT OF FLORIDA

TOMMY S. GROOVER,

Appellant,

v. CASE NO. 63,375

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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I PRELIMINARY STATEMENT

Appellant, TOMMY S. GROOVER was the defendant in the trial court, and will be referred to as appellant. The State of Florida was the prosecuting authority, and will be referred to as the State or appellee.

The record on appeal consists of four volumes of pleadings, which will be referred to as "R", and twelve volumes of transcripts, consecutively numbered, which will be referred to as "T".

II STATEMENT OF THE CASE AND FACTS

An indictment returned February 25, 1982, charged appellant with the first degree murders of Richard Padgett and Nancy Sheppard. (R-2-4). An amended indictment returned August 26, 1982, added as a third count the first degree murder of Jody Dawn Dalton. (R-33-35).

Due to a conflict of interest by the Office of the Public Defender, attorney Richard D. Nichols was appointed to represent appellant. (R-5). Pursuant to plea negotiations, it was agreed that in exchange for his testimony against Robert "Tinker" Parker and Elaine Parker concerning the

deaths of Richard Padgett, Nancy Sheppard, and Jody Dalton, appellant would be allowed to plead guilty to the first degree murder of Richard Padgett with the binding recommendation by the State of a sentence of life imprisonment. (R-129-131). Pursuant to those negotiations, appellant, on May 17, 1982, gave the State a sworn statement concerning his participation and knowledge of the three murders. (R-128-185). Prior to his statement, appellant acknowledged his understanding that if he went to trial, his statement might be introduced into evidence. (R-133-134-136-137, 130). May 18, 1982, appellant entered his negotiated plea of guilty to the first degree charge involving Richard Padgett, which was accepted by the trial court. (T-59-67, R-23-24, 437-438). Sentencing was deferred. (T-67, 75, 85, 86).

July 9, 1982, pursuant to notice of taking deposition filed by Robert L. Parker, appellant was deposed. (R-439-684).

August 12, 1982, because of a supposed lack of cooperation by appellant (R-314-318), court-appointed counsel Richard D. Nichols was allowed to withdraw as attorney of record, and Brent Shore was appointed in his stead. (T-87-92).

August 20, 1982, appellant filed a motion to withdraw plea of guilty. (R-29). At the hearing held that date, the State indicated the plea should be withdrawn since due to appellant's supposed lack of cooperation, the State did not intend to abide by the plea agreement. (T-93-101). Appellant's motion was granted. (T-100, R-30).

Appellant sought suppression of the May 17, 1982 statement, his July 9, 1982 deposition, as well as a statement given to Officer Pavelka on the ground that the statements were coerced and were also inadmissible since made "in connection with plea negotiations." (R-49-50, T-208-210). At the commencement

of the hearing, the State announced that it did not intend to introduce either the July deposition or the statement to Officer Pavelka in its case-in-chief. (T-133-134). Appellant, who can neither read nor write and who has only a ninth grade education, testified that he gave his May 17th statement because threatened by both Mr. Nichols and Assistant State Attorney Ralph N. Greene, III that unless given, he would receive the electric chair. (T-174-180). Mr. Nichols, Mr. Greene (who also served as the prosecuting attorney in this case), and Denny Haltiwanger, an investigator with the State Attorney's Office, denied coercing appellant to give the May 17th statement. (T-152-161, 168-170, 189-191). Mr. Greene admitted that the May 17th statement was "part and parcel" of the negotiations (T-193). Following arguments of counsel, the trial court denied the motion to suppress. (T-208-221, R-117, 118-127).

Pretrial, the State served notice of its intent to offer evidence of other crimes, wrongs, or acts committed by appellant. (R-15-16, 20-21, 81-82, see also R-87). Appellant objected on the ground that such evidence was irrelevant. (T-449-451, 459-467). The trial judge ruled that the collateral crime evidence would be admissible. (T-467).

The State's theory was that Richard Padgett was killed between February 6 and 7, 1982 because of a drug debt owed to Robert "Tinker" Parker. Robert Parker, his former wife, Elaine, and appellant were each separately charged with this murder. According to the state's theory, Jody Dalton was subsequently killed because she had observed the disposal of the gun used in the Padgett homicide. Robert Parker, Elaine Parker, Joan E. Bennett, and appellant were initially charged with this homicide. According to the state, thereafter, since she had observed Richard Padgett with the Parkers and appellant, Nancy Sheppard was also killed. Robert Parker, Elaine Parker, William

(Billy) Long, and appellant were charged originally with this homicide.

The autopsy of Richard Padgett revealed that a single gunshot wound by a .22 caliber bullet was first inflicted to his head and thereafter several stab wounds were inflicted to his chest. Either the gunshot or the stab wounds would have been fatal. (T-664-669, 677). Nancy Sheppard's cause of death was gunshot wounds by .22 caliber bullets in the head and chest. Her body also exhibited seven non-fatal stab wounds. (T-672-678). It appeared that Richard Padgett had been dead four to ten hours longer than Nancy Sheppard. (T-679). The cause of death of Jody Dalton was multiple gunshot wounds of the head. (T-690-696).

Over objection, the May 17, 1982 statement of appellant was introduced at trial. (T-701-705, 711-761). In his statement, appellant indicated that February 4th or 5th, he gave drugs which belonged to Robert Parker to Richard Padgett and Morris Johnson. (T-712-714). Padgett and Johnson agreed to pay for the drugs later. (T-714). When Robert Parker learned of this, he became very angry at appellant. (T-715, 718, 721). On the morning of February 6th, Billy Long and appellant tried, unsuccessfully to locate Padgett and Johnson to collect money for the drugs. (T-718-720). That evening at the Sugar Shack lounge, appellant saw Richard Padgett, who agreed to accompany the Parkers, Billy Long, and appellant to Parker's house to make phone calls to obtain money. (T-720-722). Nancy Sheppard, Padgett's girlfriend, accompanied them to Parker's trailer. (T-722-723). After Padgett's unsuccessful attempts to get money, Billy Long drove Nancy Sheppard home while the others drove Padgett to other lounges in an effort to collect money. (T-723-728). The Parkers, Padgett, and appellant then went to Parker's junkyard where Robert Parker forced appellant to fight with Richard Padgett. (T-728-731,

734-735). Robert Parker then indicated that they would drive and drop Padgett off somewhere. (T-731). While driving, Elaine Parker kept insisting that Richard Padgett had to be killed. (T-732-733). In the vicinity of Yellow Water Road, Robert Parker, armed with a gun, threatened to kill appellant unless he killed Padgett. With a .22 Smith and Wesson pistol handed to him by Elaine Parker, appellant shot Padgett several times in the head. (T-737-739). Robert Parker then stabbed Padgett. (T-739-740). After Parker had melted down the gun at the junkyard, the Parkers and appellant went to the Out of Sight Lounge, where they met Jody Dalton who insisted on going home with appellant. (T-740). On the way to the Parkers' trailer, appellant threw the melted gun into the river. (T-740-741). After doing some more dope, the Parkers and appellant left Jody Dalton at the trailer while they went to find Joan Bennett in order to learn where Nancy Sheppard lived, who the Parkers had agreed needed to be killed. (T-742-743). After Joan Bennett showed them where Nancy Sheppard lived, the group returned to the Parker trailer, where Robert Parker discovered that in their absence, Jody Dalton had used lots of Parker's drugs. (T-744). Everyone then got into Elaine's car and drove towards Donut Lake. (T-745). Joan Bennett began beating up Jody Dalton, and then either Joan or Robert Parker shot and killed Jody. (T-746-748, 751). Robert Parker then dumped her body in the lake after he had tied cement blocks to her. (T-748-751). After dropping Joan Bennett at her house, appellant and the Parkers then drove to Billy Long's house since Robert Parker wanted Long to kill Nancy Sheppard. (T-752-753). Later, Billy Long shot Nancy Sheppard in the head with a .22 pistol. (T-754-755, 758).

Clyde Morris Johnson testified that on February 5, 1982, he, Richard Padgett and appellant shot up with drugs. (T-928-934). When Robert Parker

arrived, he became very angry at appellant for owing him money and for using his drugs. (T-934-935). Richard Padgett agreed to meet appellant at the Sugar Shack later that night to pay him back in dope. (T-935). Mr. Johnson indicated that Robert Parker had a reputation of violence. (T-937-940).

Billy Long, who had been allowed to plead guilty to the lesser charge of second degree murder in exchange for his testimony against appellant, testified that on February 6th, he and appellant went to Johnson's house where appellant indicated he wanted to find Morris Johnson or Richard Padgett to collect money owed for drugs. (T-766-769, 778-779, 852-854). That evening, Billy Long drove appellant, Richard Padgett and Nancy Sheppard from the Sugar Shack to Robert Parker's trailer to see about some money that was owed. (T-779-781). While the others, at Parker's direction, remained in the trailer, Robert Parker spoke with Richard Padgett outside. (T-782, 875). Long heard a gunshot, saw Parker place a gun back in his pant, and then, Parker and Padgett both returned to the trailer. (T-782). The group then returned to the Sugar Shack with Padgett and Sheppard in Long's car and appellant, Elaine, and Robert Parker in the Parkers' car. (T-789, 796). As Long left the bar to take Nancy Sheppard home, Padgett entered the Parker car. (T-797-798). Long testified that he did not hear appellant threaten Richard Padgett in any way and that he had never known appellant to be violent. (T-913-914).

Carl Barton, who lived adjacent to the Parker junkyard, testified during the night of February 6th, he was awakened by a disturbance outside his trailer. (T-948-952). Barton observed Robert and Elaine Parker, and appellant standing over a man (later recognized as Richard Padgett) lying on the ground, who was indicating that if left alone, he could have $100 to pay him. (T-953-956).

After Parker hollered to be let inside the trailer, Barton allowed the four to come inside. (T-957-960). As he was leaving the trailer, appellant obtained a pistol from one of the Parkers and made threatening remarks to Richard Padgett. (T-961-963).

Spencer Hance, who also lived near the Parker junkyard, related that in the early morning hours of February 7th, Robert Parker knocked on his door and asked that he dispose of a gun. (T-976-981). Robert Parker and appellant then used an arc welder to melt the gun, which was a blue steel .22 caliber revolver. (T-981-984, 986). Elaine Parker, who was seated in the car, told Hance that they had just killed somebody. (T-984-985). After the gun was melted, appellant and Parker entered Hance's house, checked each other for blood, washed off a knife in the sink, and then left. (T-987-991). Later that morning, appellant told Hance the gun had been thrown in the St. Johns River. (T-992). Hance indicated that Robert Parker carried a buck knife with him on a regular basis. (T-1008).

Joan Bennett, who had been allowed to plead guilty to the charge of accessory after the fact to murder, testified that in the early evening of February 6th, she saw Robert and Elaine Parker, Billy Long, and appellant at the Sugar Shack lounge. (T-1015-1020, 1048-1052). Robert Parker stated that he was tired of people "fucking around with his drugs" and that he was going to kill them. (T-1020). Around 2:30 a.m., Elaine Parker knocked at Bennett's trailer door and asked if she knew where Nancy Sheppard lived. (T-1023-1025). Bennett agreed to return to Elaine's trailer with Elaine, Robert Parker, and appellant to play pool. (T-1025). Jody Dalton was at the trailer when they arrived and was taking some Quaaludes belonging to Robert Parker. (T-1025-1027). Parker became angry at Jody, but appellant prevented him from hurting her. (T-1027, 1064-1065). After appellant and

Robert Parker returned from outside, appellant suggested that they all go to Donut Lake. (T-1065-1066, 1028-1029). On the way to the lake, at the instigation of Elaine Parker, Bennett and Jody Dalton became involved in a fight, but, according to Bennett, neither was seriously hurt. (T-1030-1031, 1070-1073). When they continued towards the lake, Bennett heard appellant tell Parker that "he had to waste Jody's ass" since "she knew about him throwing the piece away that he used on Richard." (T-1032). When they arrived at the lake, appellant and Jody engaged in oral sex, and then appellant, Robert Parker, and Jody exited the car. (T-1032-1033). Although she thought nothing of it, Bennett heard moans from behind the car. (T-1033-1034). Bennett then observed appellant dragging Jody, who was now naked, and kicking her. Appellant then pulled a gun from his boot and fired at least five shots at Jody. (T-1035-1037). Robert Parker and appellant then removed cement blocks and rope from the trunk, wrapped them around Jody, and both carried her body into the lake. (T-1038-1041). Over objection, Joan Bennett further testified that when they returned to the car, appellant threatened to kill her. (T-1041-1043).

Billy Long testified that around 7 a.m. February 7th, appellant, Robert Parker and Elaine Parker met him at his house asking that he go with them to Nancy Sheppard's house. (T-809-814). After Elaine went to her door, Nancy Sheppard got into the car with them. (T-814, see also T-1180-1185). After they had driven down a dirt road off Yellow Water Road, Robert Parker told Long to get out of the car. (T-815-816). After Long saw Richard Padgett lying in the ditch, Parker told Long that he had to kill Sheppard or else "you're going to lay in the ditch with him." (T-816-817). Robert Parker ordered Sheppard out of the car, and Elaine handed Long a gun stating "better

shoot her or he'll kill you too." (T-817). Because Long had previously been shot by Robert Parker and due to his violent reputation, he was afraid of Parker. (T-820-821, 881-884, 900, 906). Long then shot Sheppard twice in the back of the head and three times from the front, while Parker and appellant, who was in the car, hollered shoot her again. (T-817-819). Appellant then told Long to cut her throat. (T-819). Richard Parker then grabbed the knife and cut her throat. (T-819). After that, Parker removed a necklace and ring from her body. (T-822, 906).

Over objection (T-834-842), Long testified that after leaving the lake area, and after stopping by Joan Bennett's trailer, he, appellant and the Parkers drove to the apartment of Lewis Bradley where Hal Johns and Denise Long were staying. (T-834, 843). Robert Parker indicated, as did appellant, that Denise owed him money for drugs. (T-834, 844). Elaine pulled a pistol from her purse, which she gave to appellant. (T-845). After Robert Parker and appellant had been inside the house about five minutes, they came running out, with Lewis Bradley behind them. (T-845). Robert Parker told Long that while inside, he had to take the gun away from appellant "because he was going to kill Hal and Denise both." (T-845).

Denise Long testified that Robert Parker and appellant appeared at her door around 8 a.m. February 7th. (T-1164). Parker threatened her with a gun and demanded money. (T-1164-1165). Appellant then took the gun from Parker, pointed it at his step-brother, Hal Johns, and said "I'll shoot you, too." (T-1165). When Lewis and Barbara Bradley came out of the bedroom, appellant also pointed the gun at Lewis. (T-1166-1167). Lewis Bradley then ran outside, and appellant shouted to Parker, who now had the gun, "shoot him." (T-1168-1169).

At the close of the state's case, appellant's motion for judgment of acquittal was denied. (T-1186-1190).

Although appellant admitted he was present during the three shootings, he denied any direct involvement in them. (T-1270-1274, 1280-1292, 1295-1301, 1306) Appellant testified that he was afraid that Robert Parker might kill him since he had threatened to hang him and to shoot him several times. (T-1267, 1274, 1297-1298, 1312-1315, 1368, 1370). Appellant indicated he gave the May 17th statement because of threats made to him by Mr. Greene. (T-1305-1306). Through cross-examination by Mr. Greene, appellant maintained that Greene had threatened him on May 17th. (T-1307-1311). Over objection, (T-1329-1340), the state repeatedly attempted to impeach appellant with statements made in his July 9, 1982 deposition. (T-1319-1322, 1340, 1345-1347, 1354-1355, 1359, 1361-1362, 1364-1365).

On rebuttal, Dennie Haltiwanger testified denying that any threats were made to appellant by Mr. Greene on May 17th. (T-1394-1410).

Over objection, Lewis Bradley testified that on the morning of February 7, 1982, appellant threatened him with a gun and told Robert Parker several times to shoot him. (T-1448-1450, 1456-1458).

Appellant's renewed motion for judgment of acquittal was denied. (T-1459).

Over objection, the jury was instructed that first degree murder convictions could be returned on a felony-murder (kidnapping) theory as to Richard Padgett and a felony-murder (robbery) theory as to Nancy Sheppard. (T-1588, 1612, 1463).

The jury returned verdicts finding appellant guilty of first degree

murder as charged. (T-1614-1615, R-242-244).

At the commencement of the penalty phase, January 11, 1983, appellant was adjudicated guilty of the three counts. (T-1621). The State presented no testimony. (T-1623). Appellant's mother testified as to appellant's non-violent nature. (T-1624-1627).

The jury recommended sentences of life imprisonment for the murders of Richard Padgett and Nancy Sheppard, and a sentence of death for the murder of Jody Dalton. (T-1715-1719, R-252-254). The trial court sentenced appellant to death for the murders of Richard Padgett and Jody Dalton and to life imprisonment for the murder of Nancy Sheppard. (T-1747-1754, R-266-300, 431-432).

Notice of appeal was timely filed. (R-303). The Public Defender for the Second Judicial Circuit was designated to handle the appeal.

ISSUE I

THE TRIAL COURT REVERSIBLY ERRED IN ALLOWING TESTIMONY CONCERNING COLLATERAL OFFENSES TO BE INTRODUCED AT APPELLANT'S TRIAL WHERE THE COLLATERAL OFFENSES WERE NOT RELEVANT TO THE CRIMES CHARGED, AND, EVEN TO THE EXTENT RELEVANT, WHERE SUCH TESTIMONY IMPROPERLY BECAME A FEATURE OF APPELLANT'S TRIAL, THEREBY DENYING HIM THE SIXTH AMENDMENT RIGHT TO A FAIR TRIAL AS WELL AS HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

The general rule set forth in Williams v. State, 110 So.2d 654 (Fla.), cert. denied 361 U. S. 847 (1959), (Williams I), as codified in Section 90.404 (2), Florida Statutes (1981), is that similar fact evidence is admissible if relevant to a fact in issue even though it also points to the commission of a separate crime. Such evidence is inadmissible, however, if its sole relevancy is to establish bad character on the part of the accused or to show his propensity to commit crime. The rationale for this rule is that:

> [T]he guilt or innocence of the accused should be established by the evidence relevant to the alleged offense being tried, not because the jury may believe the defendant to be a person of bad character or because he committed a similar offense.

United States v. Taglione, 546 F.2d 194, at 199 (5th Cir. 1977). See also, Michelson v. United States, 335 U.S. 459 (1948); Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981). Further, even if evidence of other crimes meets the relevancy test, considerations of due process and the right to a fair trial preclude the introduction of such evidence from becoming a feature, rather than an incident, of the trial. Willams v. State, 117 So.2d 473 (Fla. 1960)(Williams II). See also, §90.403, Fla. Stat. (1981).

At appellant's trial, over objection (T-459-467, 835-842, 1042-1043, 1444-1447, 1456-1458), extensive evidence was introduced pertaining to collateral crimes committed either by appellant or his alleged co-conspirator, Robert Parker, which, appellant contends, does not fit within the rule of admissibility set forth in Williams I. This evidence consisted of testimony that in 1980, Robert Parker had committed an aggravated assault by shooting Billy Long (R-87, T-820-821), that on February 6, 1982, appellant threatened to kill Joan Bennett (T-1041, 1043, 1045, 1087); and that on February 7, 1982, appellant committed aggravated assaults upon Hal Johns, Lewis Bradley, and Denise Long while attempting to collect from them money owed for drugs (R-15, T-845-846, 1164-1167, 1178, 1449-1450, 1455). Because such evidence served only to show bad character or propensity to crime, appellant submits the erroneous admission of this evidence entitles him to a new trial. See, Straight v. State, 397 So.2d 903 (Fla. 1981). Further, appellant contends a new trial is mandated because even assuming that the foregoing evidence was properly introduced, this evidence, coupled with evidence relating to appellant's drug dealings with Richard Padgett and others prior to the

murders (which concededly may have been relevant to motive)(R-20, T-766-782, 798, 929-936, 943-945, 1020, 1022-1023, 1027, see also T-712-722, 1509-1510), so transcended its relevancy as to become a prohibited assault upon the character and propensities of appellant, contrary to the dictates of Williams II.

Case law firmly establishes that the introduction of testimony related to collateral crimes committed by Robert Parker was erroneous since such testimony was not relevant to the charges against appellant. Hirsch v. State, 279 So.2d 866 (Fla. 1973); Whitted v. State, 362 So.2d 668 (Fla. 1978); Banks v. State, 400 So.2d 188 (Fla. 1st DCA 1981); Armstrong v. State, 377 So.2d 205 (Fla. 2d DCA 1979); Kellum v. State, 104 So.2d 99 (Fla. 3d DCA 1958); Beneby v. State, 354 So.2d 98 (Fla. 4th DCA 1978), cert. denied 359 So.2d 1220 (Fla. 1978); Buckhann v. State, 356 So.2d 1327 (Fla. 4th DCA 1978). Reliance upon the Williams rule to support the admissibility of such testimony is wholly misplaced since the testimony does not involve "other crimes committed by a defendant." In holding that reversible error was committed by allowing the introduction of evidence relating to a collateral crime committed by a third person, this Court has noted:

> The testimony sought to be elicited in the petitioner's trial dealt,... with an alleged criminal act committed not by petitioner but rather by a third party .... The determination of the admissibility of the testimony in dispute must be resolved by a consideration of basic fundamental rules of evidence.
>
> It is interesting to note that even under the Williams rule evidence which is relevant is inadmissible if its sole purpose is to "show the propensity of the accused to commit the instant crime charged." If the aforementioned objectionable testimony did not directly involve the petitioner and if it had no tendency to demonstrate the commission of a collateral

> (related) crime what purpose then could such evidence serve except to suggest a tendency, inclination, ergo propensity of the petitioner to have committed the crime for which he was charged? See Williams v. State, supra; see also Anthony v. State, 246 So.2d 600 (Fla.App. 1971).

Hirsch v. State, supra at 869. Accord, Whitted v. State, supra at 672-673. The erroneous introduction of collateral crimes committed by a third party is highly prejudicial since it improperly infers criminal conduct on the part of a third party, and this highly prejudicial effect is particularly heightened when the possible "spill-over" effect is considered. E.g., Fulton v. State, 335 So.2d 280 (Fla. 1976); Banks v. State, supra; Armstrong v. State, supra. Here, as in the foregoing cases, the admission of testimoney concerning the collateral crime committed by Robert Parker was clearly erroneous. This testimony could serve only to prejudice the jury against appellant, and therefore the erroneous admission of this testimony requires reversal.

Likewise, appellant submits Joan Bennett's testimony concerning threats made to her by appellant was not properly admitted as Williams rule testimony since it was irrelevant to any fact at issue. Fasenmeyer v. State, 383 So.2d 706 (Fla. 1st DCA 1980). But see, Goodman v. State, 418 So.2d 308 (Fla. 1st DCA 1982). Even assuming testimony as to threats were relevant, nevertheless Joan Bennett's testimony as to this collateral crime was inadmissible. Dinkens v. State, 291 So.2d 122 (Fla. 2d DCA 1974) is directly on point. There, to establish the defendant's guilt of the crime charged, the state introduced the testimony of an accomplice, James Williams, Jr. In addition to testifying as to the defendant's perpetration of the crime charged [the Berrier robbery], James Williams, Jr., also testified as to the defendant's

involvement in two collateral crimes [one being a robbery at a Drive-In Theatre]. Although acknowledging that the modus operandi of the collateral crime may have been sufficiently similar so as to be relevant to identity, the Second District held that the admission of the collateral crime was reversible error because there was no independent evidence of the defendant's involvement in the collateral crime. The Court noted:

> The difficulty we see in this testimony is that it was given by the same person who testified that Dinkens was involved in the Berrier robbery.
>
> Generally, the relevance of showing a modus operandi is that if a particular person is identified as having committed a crime similar in peculiar methods of operation to the one for which he is presently charged, his identification involving the other crime bolsters the identification with respect to the crime for which he is on trial. This presupposes an independent identification in each occurrance. In this case, the only evidence of the Drive-In Theatre robbery was the testimony of James Williams, Jr., who also testified concerning Dinkens' involvement in the Berrier robbery. Williams' testimony implicating Dinkens in the crime for which he was charged was not bolstered or aided in any material way by his testimony that Dinkens participated in the Drive-In Theatre robbery. But, there was no such independent evidence here. As presented on this record, the only purpose this testimony appears to have served was to illustrate Dinkens' bad character and his propensity to commit robbery.

[Emphasis supplied]. Id. at 125.

Similarly, here there was no independent evidence establishing appellant's involvement in the collateral crime, which is a necessary predicate for admission of collateral crime testimony. See, Norris v. State, 158 So.2d 803 (Fla. 1st DCA 1964), cert. discharged 168 So.2d 541 (Fla. 1964); Dibble v. State, 347 So.2d 1096 (Fla. 2d DCA 1977); Long v. State,

407 So.2d 1018 (Fla. 2d DCA 1981); Chapman v. State, 417 So.2d 1028 (Fla. 3d DCA 1982). Here, as in Dinkens, Joan Bennett, the accomplice, testified as to appellant's involvement in the murder of Jodi Dalton and as to his involvement in the collateral crime, i.e. the threats. Either the jury believed Bennett or they did not. Since independent evidence from another witness implicating appellant in the collateral crime was not presented, under the rationale of Dinkens, Bennett's testimony as to threats made by appellant was inadmissible since it served only to illustrate his bad character.

Further, appellant contends testimony as to aggravated assaults committed by appellant after the murders was not properly admitted. The state asserted such evidence was relevant to appellant's state of mind or intent. However, as in Zeigler v. State, 404 So.2d 861 (Fla. 1st DCA 1981), pet. for review denied, 412 So.2d 471 (Fla. 1982), this theory of admissibility is not apropos. There, the defendant was charged with the second degree murder of Diane Williams. At trial, the state introduced evidence that several months later, the defendant also shot and killed his girlfriend, Sheila Smith. In rejecting the state's contention that the later murder was relevant to the defendant's state of mind in shooting Williams, the First District noted:

> In the instant case, the similarities between the two shootings, that both victims were black women and both were shot with a handgun, were completely superficial. The differences were numerous and significant. Under the circumstances, with no significant similarities to render the evidence logically probative of any fact in issue, the collateral crime evidence was simply not relevant for any purpose other than to show criminal propensity, and it was inadmissible for this purpose.

Id. at 863. See also, Green v. State, 228 So.2d 397 (Fla. 2d DCA 1969)

(McNulty, J., specially concurring). Here, as well, the collateral crime simply showed propensity and thus was inadmissible.

Assuming the relevancy of the foregoing collateral crimes, appellant submits this evidence coupled with the extensive evidence of appellant's drug dealings improperly became a feature of his trial. The disproportionate use of other crime evidence destroys the fundamental right to a fair trial since:

> Such procedure devolves from the development of facts pertinent to the main issue of guilt or innocence into an assault on the character of the defendant whose character is insulated from attack unless he introduces the subject.

Williams II supra at 475-476. Numerous cases have reversed criminal convictions involving similar fact evidence where its probative value was slight or its effect unduly prejudicial. Reyes v. State, 253 So.2d 907 (Fla. 1st DCA 1971); Denson v. State, 264 So.2d 442 (Fla. 1st DCA 1972); Banks v. State, 298 So.2d 543 (Fla. 1st DCA 1974); Green v. State, 228 So.2d 397 (Fla. 2d DCA 1969); Davis v. State, 276 So.2d 846 (Fla. 2d DCA 1973), aff'd State v. Davis, 290 So.2d 30 (Fla. 1974); Mattera v. State, 409 So.2d 257 (Fla. 4th DCA 1982).

A cursory review of the record herein reflects that the major thrust of the state's introduction of the collateral crime evidence was to highlight appellant's character, portraying him as a dangerous drug dealer.[1] Although motive was not seriously disputed, extensive evidence was presented to show appellant's drug usage, his sales of drugs, and his efforts

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[1]The state's efforts to emphasize appellant's bad character extended to its presentation of evidence that at the time of the crimes, in contrast to the time of trial, appellant had long bushy hair, which, of course, was totally irrelevant since identity was never in question. (T-831-832, 990, 1035, 1168, 1536).

to collect drug debts.[2] The state's repetitive presentation of such evidence turned the trial into a "sideshow focusing on the character, general reputation and propensity of [appellant] to engage in criminal activity."[3] Reyes v. State, supra at 907. This disproportionate use of collateral crime evidence denied appellant his right to a fair trial on the issue of guilt or innocence as well as prejudicing him on the question of life or death. Williams II, supra. Appellant is therefore entitled to a new trial.

ISSUE II

APPELLANT WAS DEPRIVED HIS RIGHT TO A FAIR TRIAL GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE REPEATED INFLAMMATORY, EMOTIONAL AND THOROUGHLY IMPROPER ARGUMENTS MADE BY THE PROSECUTOR.

During closing arguments at both the guilt and penalty phase of the trial, the prosecutor repeatedly made blatantly illegitimate comments and inflammatory prejudicial appeals to the jury. The virtual catalogue of prosecutorial improprieties was so egregious that appellant's trial was rendered fundamentally unfair. Hance v. Zant, 696 F.2d 940 (11th Cir. 1983); Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978); Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978); Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975); United States ex rel. Haynes v. McKendrick, 481 F.2d 152 (2d Cir. 1973).

Courts of this state have repeatedly denounced the prosecutorial use

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[2] The theme of the horror of drugs was reiterated throughout the state's closing arguments, (E.g., T-1509-1510, 1635, 1638, 1647) and in the Court's sentencing order. (R-281).

[3] The state even insisted upon poisoning the jury with a "last shot" by its presentation of the cumulative rebuttal testimony of Lewis Bradley, concerning the aggravated assaults after the murders. See, Reyes v. State, supra, Donaldson v. State, 369 So.2d 691 (Fla. 1st DCA 1979).

of "offensive epithets to defendants" or "vituperative characterizations of them." Johnson v. State, 88 Fla. 461, 464, 102 So.549 (1924). See, Young v. State, 141 Fla. 529, 195 So.569 (1939) (prosecutor referred to defendant as a "harlot" and "drunkard"); Brown v. State, 284 So.2d 453 (Fla. 3rd DCA 1973) (prosecutor argued defendant was "a desperate crook," a "little thief"); Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976) (defendant characterized as "dope peddler"); Groebner v. State, 342 So.2d 94 (Fla. 3rd DCA 1977) (statement that accused, who had previously been convicted, was "[a] leopard [who] never changes his spots"); Glantz v. State, 343 So.2d 88 (Fla. 3rd DCA 1977) (defendant described as a "fence"); Porter v. State, 347 So.2d 449 (Fla. 3rd DCA 1977) (defendant labeled a "pusher"); Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979) (references to "pushers" and the "slime" in which they live); Glassman v. State, 377 So.2d 208 (Fla. 3rd DCA 1979) (defendant, a physician, referred to as "Donald Duck-quack, quack"); Green v. State, 427 So.2d 1036 (Fla. 3rd DCA 1983) (defendant typified as "dragon lady"). The prosecutors' epithets here were much more odious than those employed in the foregoing decisions. Throughout the closing arguments, appellant was repeatedly labeled as a rapacious animal:

> [T]here are sharks in this world, predators... And he's one of them.
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> * * *
>
> [T]he frenzy, a frenzy of killing and of blood much like the frenzy of sharks attacking a wounded and bleeding animal. And he was one of them, Tommy S. Groover. (T-1510, see also T-1516)
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> * * *
>
> Here's ... Tommy, you know, the sharks in this thing. (T-1514)

* * *

He's a savage. (T-1518)

* * *

It was just these sharks, they were there.

* * *

Sometimes you have to make deals with sinners to catch devils. And that's what he is. (T-1520)

* * *

[It's] like having three big rats in the room and you have a pistol with two bullets; what are you going to do, let them all go free? No, you are going to try to shoot two of them. Well, that's exactly what you are going to do. (T-1521)

* * *

[T]hat pack of wolves...vicious. (T-1532)

* * *

Mr. Greene only said one thing through the whole trial that I disagreed with: he called Tommy Groover an animal and animals don't do that to their own species; it is below animalistic con-ition, it's below that. It's worse than that because animals don't act that way to their own...

He's not an animal, he's worse. He's worse than an animal. (T-1655)

These vituperative characterizations of appellant by the prosecution far exceed permissible bounds of conduct.

The prosecutorial improprieties were not, however, limited to the foregoing. Repeatedly, the prosecutor violated the Code of Professional Responsibility, Canon 7, EC 7-24 and DR-7-106 by expressing his personal opinion concerning the credibility of the witnesses. (T-1520, 1522, 1523, 1524, 1526, 1527, 1528, 1530, 1543, 1547, 1549). Unquestionably, such arguments are improper. E.g., Tyson v. State, 87 Fla. 392, 100 So.254 (1924); Thompson v. State, 318 So.2d 549 (Fla. 4th DCA 1975); Reed v. State, supra; Dukes v. State, 356 So.2d 873 (Fla. 4th DCA 1978); Buckhann v. State, supra;

Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982); Harris v. State, 414 So.2d 557 (Fla. 3rd DCA 1982).

Further, the prosecutor made repeated appeals to the sympathy of the jury. (T-1511, "pathetic young girl"; 1513, "Nancy Sheppard... young girl on her birthday"; 1550, "Nancy Sheppard, 17 years old, birthday"; 1635-1636, "This little girl. ... A human being, pitiful, sad."; 1643-1644, "Nancy Sheppard, a child, just barely one day older than 16 years old, a child. ... Barely 17 years old, 16-year-old child, 17-year-old child in her own bed with her own mom"; 1646, "poor child"; 1654, "poor little Nancy Sheppard"; 1659, "Richard Padgett, he had a right to live...; and Jody Dalton, poor little Jody Dalton; and this child, this child, she had a right to live"; 1660, "You have to go think about the rights of Nancy Sheppard to live, 17 -- barely 17-year-old Nancy Sheppard, her right to live. The sanctity of her life, the dignity of her life.") Such appeals to the emotions and sympathies of the jury are clearly prohibited. Singer v. State, 109 So.2d 7 (Fla. 1959); Breniser v. State, 267 So.2d 23 (Fla. 4th DCA 1972); Knight v. State, 316 So.2d 576 (Fla. 1st DCA 1975); Harper v. State, 411 So.2d 235 (Fla. 3rd DCA 1982); Edwards v. State, 428 So.2d 357 (Fla. 3rd DCA 1983).

The prosecutor's improper argument also included his assertions that even if appellant were merely an aider and abettor, coercion or duress would be no defense. (T-1538-1541). This argument constituted a clear misstatement of law since coercion or duress may be a defense to homicide, where, as here, the state is proceeding partially on a felony murder theory. See, Wright v. State, 402 So.2d 493, 498 n.8 (Fla. 3rd DCA 1981); Jackson v. State, 558 S.W. 2d 816 (Mo. App. 1978); People v. Merhige, 212 Mich. 601, 180 N.W. 418 (1920). Misstatements of law by prosecutors are clearly prejudicial. Pait v. State, 112 So.2d 380 (Fla. 1959); Meade v. State, 431

So.2d 1031 (Fla. 4th DCA 1983). Additionally, the prosecutor made grossly improper remarks concerning the role of defense counsel and his efforts to "do the best he can with a bad situation." (T-1658, 1551-1552). See, Adams v. State, 192 So.2d 762 (Fla. 1966); Cochran v. State, 280 So.2d 42 (Fla. 1st DCA 1973); Reed v. State, supra; Simpson v. State, 352 So.2d 125 (Fla. 1st DCA 1977); Peterson v. State, supra; Melton v. State, 402 So.2d 30 (Fla. 1st DCA 1981); Jackson v. State, 421 So.2d 15 (Fla. 3rd DCA 1982).

The prosecutorial improprieties perhaps reached their apogee in the urgings to the jury to convict and recommend death for its symbolic value only. This theme commenced with the prosecutor's argument:

> This case stands as a symbol of the horror that's destroying large segments of our country today, our young people. That's what it stands for: Drugs. (T-1509)

It culminated in the prosecutor's exhortation for a unanimous death recommendation, viz:

> We talked about the dignity of life and sanctity of life and you talked about the right to live. But you've got to think about the rights of other people to live, of innocent people that aren't going around killing people. You have got to think about the rights of Nancy Sheppard to live, 17 -- barely 17-year-old Nancy Sheppard, her right to live. The sanctity of her life, the dignity of her life. And you cheapen Nancy Sheppard's life and lives of decent people if you can't take his life for taking their lives. That's when you cheapen life, when the outlaws can go around taking it and you don't command the exact punishment that it deserves for taking the innocent life. That's what the death penalty is all about, it's protecting the dignity of life of innocent and decent and innocent people. That's what the death penalty is about. You protect the integrity of life when you take a life for violating and committing murder.
>
> Ladies and gentlemen, I thank you again, but this is the time to tell Richard Padgett and

> say, I am sorry, but to you, Tommy Groover, this is the time to tell Tommy Groover and Tommy Groovers of the world that they are not going to do this to our society. This is the time to draw the line. (T-1660-1661)

This inflammatory, emotional appeal to jury, deliberately designed to enlist the jurors in the war against crime and which went far beyond the scope of the issues being tried, was as improper and prejudicial as the arguments condemned in Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968); Russell v. State, 233 So.2d 154 (Fla. 4th DCA 1970); Simmons v. Wainwright, 271 So.2d 464 (Fla. 1st DCA 1973); Porter v. State, supra; Sims v. State, 371 So.2d 211 (Fla. 3rd DCA 1979); McMillian v. State, 409 So.2d 197 (Fla. 3rd DCA 1982); Harris v. State, supra; if not more so. See also, Hance v. Zant, supra.

The prosecutor's arguments here were so thoroughly prejudicial that the fundamental fairness of the proceedings were destroyed. Therefore, even though no objection was made below, reversal is required. Pait v. State, supra; Peterson v. State, supra; Meade v. State, supra; Hance v. Zant, supra. As has been noted:

> [W]hen an improper remark to the jury can be said to be so prejudicial to the rights of an accused that neither rebuke nor retraction could eradicate its evil influence, then it may be considered as ground for reversal despite the absence of an objection below, or even in the presence of a rebuke by the trial judge.

Pait v. State, supra at 385; Peterson v. State, supra at 1234; Meade v. State, supra at 1032. Since the inflammatory arguments here denied appellant his right to a fair trial, a new trial is constitutionally mandated.

ISSUE III

APPELLANT WAS DENIED HIS RIGHTS TO A FAIR TRIAL BY JURY AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE PROSECUTOR'S IMPROPER ASSERTION OF FACTS, OBVIOUSLY WITHIN HIS OWN PERSONAL KNOWLEDGE, THROUGH CROSS-EXAMINATION OF APPELLANT, THEREBY EFFECTIVELY MAKING HIMSELF A MATERIAL WITNESS IN THE TRIAL.

Although a prosecuting attorney is not incompetent to be a witness, "the practice of acting as prosecutor and witness is not to be approved, and should not be indulged in, except under most extraordinary circumstances."[4] Robinson v. United States, 32 F.2d 505, at 510 (8th Cir. 1928). Accord, United States v. Torres, 503 F.2d 1120 (2nd Cir. 1974); Shargaa v. State, 102 So.2d 809 (Fla. 1958); Waldrop v. State, 424 So.2d 1345 (Ala. Cr.App. 1982); People v. Guerrero, 47 Cal.App. 3d 441, 120 Cal.Rptr. 732 (1975); People v. Spencer, 512 P.2d 260 (Colo. 1973); People v. Thomas, 38 Ill.App. 3d 685, 348 N.E. 2d 282 (1976); Adams v. State, 30 So.2d 593 (Miss. 1947); State v. Hayes, 473 S.W. 2d 688 (Mo. 1971); State v. McCuistion, 88 N.M. 94, 537 P.2d 702 (1975). This prohibition stems from the recognition that the jury may be improperly influenced in its fact-finding function since the average juror will ordinarily give evidence presented by the prosecutor, a public official in whom the public has reposed confidence, greater weight than that of an ordinary witness. Shargaa v. State, supra; State v. Hayes, supra; Frank v. State, 150 Neb. 745, 35 N.W. 2d 816 (1949). Cf. Turner v. Louisiana, 379 U.S. 466 (1965) (deputy sheriffs in charge of jury improperly became witnesses at trial).

Reversals of criminal convictions have resulted where the prosecuting attorney has served the dual role of advocate and witness. Waldrop v.

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[4] This rule has also found expression in the Code of Professional Responsibility, DR-5-101(B) and DR-5-102(A).

State, supra; People v. Spencer, supra; State v. Hayes, supra; State v. McCuistion, supra. The critical issue at trial in State v. Hayes was the voluntariness of the Hayes' confession. The prosecuting attorney had negotiated with Hayes to obtain his confession. At trial, Hayes denied that the statements in his confession were true, and claimed he had untruthfully admitted guilt to get out of the Nevada penitentiary. The prosecuting attorney, who actively participated in the trial by conducting voir dire examination, making opening statement, examining and cross-examining most of the witnesses, and making opening and closing argument to the jury, testified in detail concerning the negotiations which led to the signing of the confession. In argument, the prosecutor commented on his own testimony. The Missouri Supreme Court held the prosecuting attorney's participation as both prosecutor and witness denied Hayes a fair trial by an impartial jury. The court noted that this dual role was particularily prejudicial since the only real factual issue to be decided by the jury concerned the confession, which required the jury to determine the issue of the credibility of Hayes as opposed to the prosecutor.

Similarly, in Waldrop v. State, supra, the defendant's murder convictions were reversed because the district attorney was not only the prosecutor but also the state's main witness. There, the district attorney testified to a confession and written statement made by the defendant following his arrest. Further, in closing argument the prosecutor argued his own credibility to the jury. The court concluded that allowing the district attorney to continue to prosecute the case and argue to the jury following his testimony seriously imperiled the fact finding process of a trial by jury. The court noted that this practice had the effect of allowing the prosecutor to improperly express his opinion that the

defendant was guilty of the crime charged. See, Berger v. United States, 295 U.S. 78 (1935); United States v. Gonzalez Vargas, 558 F.2d 631 (1st Cir. 1977); United States v. Benson, 487 F.2d 978 (3rd Cir. 1973); Hall v. United States, 419 F.2d 582 (5th Cir. 1969); United States v. Leon, 534 F.2d 667 (6th Cir. 1976); United States v. Splain, 545 F.2d 1131 (8th Cir. 1976); Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975); and Devine v. United States, 403 F.2d 93 (10th Cir. 1968), cert. denied, 394 U.S. 1003 (1969) (condemning assertions by a prosecutor, based upon personal knowledge, expressing opinion concerning the guilt of the accused). The court further recognized that due to the power and prestige the prosecutor exerts in the prosecution of a criminal case such practice raised the grave possibility that the jury was improperly influenced, thereby depriving the defendant of his right to trial by an impartial jury. See, Turner v. Louisiana, supra.

The critical issue for the jury's determination here was the weight to be given appellant's confession. See Palmes v. State, 397 So.2d 648 (Fla. 1981). Appellant testified that his confession was untrue, but had been made due to pressures and threats exerted by Chief Assistant State Attorney Ralph Greene. (T-1305-1306). Mr. Greene had negotiated with appellant and had obtained his confession, with Greene asking the questions and appellant making the answers. (R-128-185). The jury obviously knew therefore that Mr. Greene, the chief prosecutor in this case, had personal knowledge of whether he did or did not make threats to appellant. While Mr. Greene did not actually take the witness stand and testify under oath, his cross-examination of appellant, as well as his closing argument to the jury, was of such a nature that it really constituted evidence in the case. Through his questioning, Greene clearly imparted to the jury his contention that no threats were made to appellant. (T-1307-1310). Thus, Greene effectively assumed the role of a witness in the case. The

prejudicial effect of this testimony was exacerbated by Greene's closing argument where he vouched that Investigator Haltwanger's testimony that Mr. Greene did not talk with appellant alone was "the truth." (T-1543). As in Waldrop, Spencer, Hayes, and McCuistion, the credibility of appellant was pitted against that of the prosecutor, Mr. Greene. As in the foregoing cases, the testimony related to the critical factual issue to be determined by the jury. Contrast, Shargaa v. State, supra, and O'Callaghan v. State, 429 So.2d 691 (Fla. 1983) (where prosecutor's testimony concerned collateral matter which was not critical to the issues actually tried, and thus did not cause defendant substantial harm). The lack of objection to the prosecutor's misconduct does not preclude reversal since the actions here totally deprived appellant of his fundamental right to a fair trial by an impartial jury. O'Callaghan v. State, 429 So.2d 691, 697-698 (Fla. 1983) (McDonald, J., dissenting):

> [T]he actions of the prosecutor precluded a fair trial and the jury's impartial consideration of the facts. Lawyers cannot present testimony or submit facts to the jury via open courtroom comments or statements to the jury in argument. In this case the prosecutor transgressed this rule and violated fair presentation on two occasions. First, he disputed a factual statement of the defendant by saying, "That's a lie," while cross-examining him. ... [W]hen a transgression is this substantial, a new trial should be granted, with or without an objection. If improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence a new trial should be awarded regardless of the want of objection or exception. Carlile v. State, 129 Fla. 860, 176 So.862 (1937).

[Emphasis supplied]. See also, Dukes v. State, supra; Peterson v. State, supra. Cf. Rhone v. State, 93 So.2d 80 (Fla. 1957) (whether or not the practice of allowing bailiff to also serve as witness will constitute reversible error depends upon facts and circumstances of case, even though no objection made to the testimony). Because the testimony here concerned

the critical issue being tried, appellant is entitled to a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS MADE MAY 17, 1982 AND JULY 9, 1982.

Appellant's May 17, 1982 statement was introduced against him in the state's case-in-chief. (T-701-761). A deposition of appellant taken July 9, 1982 was utilized by the state to impeach appellant's testimony. (T-1329-1340). Both statements had been the subject of appellant's motion to suppress filed pre-trial. Appellant submits the denial of his motion to suppress was erroneous, and that the introduction of these statements necessitate a new trial.

A) The statements were involuntary as a matter of law since obtained by direct or implied promises of leniency.

It is well-established that the due process clause of the Fourteenth Amendment to the United States Constitution prohibits the states from using a coerced confession of an accused against him. Brown v. Mississippi, 297 U.S. 278 (1936). To be admissible, a confession must be "free and voluntary; that is [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence ...." Bram v. United States, 168 U.S. 532, 542-543 (1897). Accord, e.g., Frazier v. State, 107 So.2d 16 (Fla. 1958); Brewer v. State, 386 So.2d 232 (Fla. 1980); M.D.B. v. State, 311 So.2d 401 (Fla. 4th DCA 1975); Fillinger v. State, 349 So.2d 714 (Fla. 2d DCA 1977); Foreman v. State, 400 So.2d 1047 (Fla. 1st DCA 1981); Henthorne v. State, 409 So.2d 1081 (Fla. 2d DCA 1982). Appellant submits that his statements were the direct result of the promises made by the state in the plea bargain, and that accordingly they were involuntary as a matter of law. Therefore, the introduction of appellant's May 17th statement in the

state's case-in-chief was violative of due process as was the state's use of appellant's deposition to impeach him. Mincey v. Arizona, 437 U.S. 385 (1978).

Directly on point is People v. Jones, 331 N.W.2d 406 (Mich. 1982), cert. denied 103 S.Ct. 1775 (1983). The defendant, Jones, was advised that if he would give a statement implicating himself in the murder case in which he was a suspect and if he would testify against the others involved, other charges against him would be dropped and he would be allowed to plead guilty to manslaughter. After this agreement was reached, Jones was readvised of his Miranda[5] rights and he voluntarily waived his right to counsel. Jones then gave a statement in which he fully implicated himself, as well as others, in the robbery and murder. Thereafter, Jones refused to carry out the plea bargain. At Jones' trial, over objection, his confession was admitted into evidence. The Michigan Supreme Court held that Jones' confession was improperly introduced, and that the erroneous admission of the confession constituted reversible error.[6]

Justice Kavanagh noted the general principle that confessions induced by promises of leniency are inadmissible. In concluding that Jones' confession was so induced, Kavanagh reasoned:

> In the instant case, the confession was made as part of an agreement. In return for a statement implicating himself in the Hockstad murder and testimony against the others included, Jones would be permitted to plead guilty to manslaughter for the Hockstad murder, and the unrelated federal and state gun charges would be dropped. There is

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[5] Miranda v. Arizona, 384 U.S. 436 (1966)

[6] The Court was equally divided on the reasoning of this holding: the opinion of Justice Kavanagh finds the confession involuntary while the opinion of Justice Ryan concludes the confession was inadmissible since made "in connection with" a plea or offer to plea.

> no question but that Jones' confession was 'obtained by' the prosecutor's promise.

Id. at 408. Further, it was noted that neither the giving of Miranda warnings nor the advice of counsel negated the inducements of the plea bargain. Id. at 409.

A similar result was reached in Gunsby v. Wainwright, 449 F.Supp. 1041 (M.D. Fla. 1978), aff'd. 596 F.2d 654 (5th Cir. 1979), cert. denied 444 U.S. 946 (1979). The court held that the petitioner's sworn statement and his deposition taken following a plea agreement with the state was inadmissible since involuntary. There, petitioner engaged in plea negotiations with the state which culminated in an agreement that he would plead guilty and would receive not more than seven and one-half years imprisonment. An express condition of the agreement was that petitioner testify against his co-defendants. After petitioner had changed his plea to one of guilty and pursuant to the plea agreement, a sworn statement of petitioner was taken by the prosecutor. Thereafter, pursuant to a subpoena from a co-defendant, petitioner's deposition was taken. Subsequently, the plea bargain was revoked since petitioner's testimony at the trial of one of his co-defendants deviated from his prior statement and his exculpatory testimony resulted in the co-defendant's acquittal.

In affirming the district court's determination that petitioner's sworn statement was involuntary, the Fifth Circuit noted:

> In Hutto v. Ross, 429 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976), the Supreme Court rejected a per se rule of inadmissibility where a confession is made as a result of a plea bargain. In that case the plea bargain did not call for a confession. Against the advice of his attorney, Hutto made a statement in which he incriminated himself, even though it was made clear to him that the terms of the plea bargain would continue to be available to him without such a statement. The plea bargain

> was later withdrawn and the confession introduced at Hutto's trial. The Court held that the confession was not the result of any direct or implied promise and was voluntarily given. Conversely, a confession given as the result of a direct or implied promise would be legally involuntary.
>
> Here, Gunsby made the statement to the prosecutor as a result of the promises made by the State in the plea bargain. That the original statement was part of the plea bargain is demonstrated by the fact that the State obtained nullification of the plea bargain on the ground that Gunsby's testimony at a codefendant's trial was inconsistent with that statement. The district court's conclusion that the statement was legally involuntary and inadmissible at Gunsby's state trial was thus compelled under Hutto.

Id, 596 F.2d at 655-656. The Court also agreed that petitioner's deposition was not voluntary, noting:

> [P]etitioner ... believed that he was compelled to testify in order to keep the plea bargain. At no time was he advised, as in Hutto, that he need not testify in order to retain the benefits of the plea bargain should the court refuse to nullify it, or that the State would not use his refusal to testify as additional ground for the motion to set aside the plea bargain.

Id. at 658.

Support for the conclusion that the statements involved here were involuntary is also found in Hutto v. Ross, 429 U.S. 28 (1976). There, following a plea bargain with the state, the defendant gave a sworn statement confessing to the crime charged. The confession was not, however, an express precondition of the plea bargain. The Supreme Court held that the confession was not per se inadmissible because it was made subsequent to an agreed upon plea bargain that did not call for such a confession. The Court noted:

> The existence of the bargain may well have entered into respondent's decision to give a statement, but counsel made it clear to respondent that he could enforce the terms of the plea bargain whether or not he confessed. The confession thus does not appear to have been the result of "any direct or

> implied promises" or any coercion on the part of the prosecution, and was not involuntary.

Id. at 30. The Court's opinion suggests that a confession given as the result of a direct or implied promise would be involuntary, and thus, that where a confession is directly linked to a plea bargain, in the sense of a quid pro quo, the confession is involuntary and must be excluded.

Here, appellant's confession and his subsequent testimony against his accomplices were both express preconditions of the plea bargain, the quid pro quo of the bargain. Both statements were clearly induced by the prosecutor's express promises of leniency. Although appellant was attended by counsel and waived his Miranda rights prior to his May 17th statement, neither of these factors negate the inducements of the plea bargain. People v. Jones, supra. As in Gunsby, appellant's deposition testimony was part of his promise to testify and compelled by the subpoena. Prior to this testimony, appellant was not apprised of his Fifth Amendment rights or the self-incriminating implications of his statements.[7] Nor did he waive his Sixth Amendment right to counsel.[8] Since appellant's testimony was involuntary, the introduction of his statements in the state's case-in-chief and the use of his deposition for impeachment purposes were violative of his Fifth, Sixth, and Fourteenth Amendment rights. Appellant is therefore entitled to a new trial.

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[7] It is clear that although appellant had pleaded guilty at the time of his deposition, since he had not yet been sentenced, his privilege against self-incrimination still endured. Meehan v. State, 397 So.2d 1214 (Fla. 2d DCA 1981).

[8] See, e.g., Brewer v. Williams, 430 U.S. 387 (1977); Estelle v. Smith, 451 U.S. 454 (1981); Anderson v. State, 420 So.2d 574 (Fla. 1982).

B) The statements were made "in connection with" appellant's offer to plead guilty and his plea of guilty, and therefore were privileged under Section 90.410, Florida Statutes (1981) and Rule 3.172(h), Florida Rules of Criminal Procedure.

Florida law precludes the introduction into evidence of statements made in connection with an offer to plead guilty or a plea of guilty.[9] See, Anderson v. State, supra. Appellant submits his statements were made "in connection with" his offer to plead guilty and his plea, and thus were inadmissible.

As previously noted, the case of People v. Jones, supra is factually similar to the present case. MRE 410 is virtually identical to Section 90.410, providing:

> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or

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[9] Section 90.410 provides:

> Evidence of a plea of guilty, later withdrawn, a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered in a prosecution under chapter 837.

[Emphasis Supplied]. Rule 3.172(h) also sets forth that:

> Except as otherwise provided in this Rule, evidence of an offer or a plea of guilty or nolo contendere, later withdrawn, or of statements made in connection therewith, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

[Emphasis Supplied].

> nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement.

A unanimous court held that Jones' confessional statement, being plea-related, was one made "in connection with" an offer to plead guilty, and thus could not be used against him.

Also analogous is State v. Jackson, 325 N.W.2d 819 (Minn. 1982). Pursuant to plea negotiations, Jackson entered a plea of guilty to the charge of burglary. Subject to a presentence investigation report, Jackson's plea was accepted. In the report, Jackson gave his account of what had happened. Subsequently, Jackson was allowed to withdraw his guilty plea and later proceeded to trial. At trial, the substance of the statements Jackson made to the probation officer in the presentence investigation report was introduced to impeach his claim that he was too intoxicated to recall what had happened. The Minnesota Supreme Court held that the admission of Jackson's statement to the presentence investigation officer was violative of Minnesota Rule of Evidence 410.[10]

The state argued that "statements made in connection with" referred only to statements made in court or in discussions with the prosecutor in the plea bargaining process. The Minnesota court flatly rejected this assertion noting that the out-of-court statements were integrally a part of

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[10] Minn. R. Evid. 410 provides:

> Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil, criminal, or administrative action, case, or proceeding whether offered for or against the person who made the plea or offer.

[Emphasis supplied].

the plea proceeding. Further, the court noted that the statements were made pursuant to a presentence investigation in which Jackson was expected to cooperate. Thus, the court concluded that:

> the presentence investigation statements are "statements made in connection with the plea later withdrawn, as that phrase is used in Rule 410. This seems to us the plain import of the language of the rule.

Id. at 822. See also, People v. Morris, 79 Ill. App. 3d 318, 398 N.E.2d 38 (1980).

Similarly, in United States v. Albano, 414 F.Supp. 67 (S.D. N.Y. 1976), the court held that a letter written to the trial judge by the defendant following his plea of guilty could not be utilized at his trial after his plea had been withdrawn. The court indicated the letter was a statement "made in connection with, and relevant to" his plea, Id. at 69 n.1, noting that it was made shortly after his plea, incidental to it, and in contemplation of the sentence to be imposed as a result of the plea.

Likewise, appellant submits his sworn statement and deposition testimony must be considered statements "made in connection with" his plea. Appellant's statements were integrally related to the plea proceedings. Appellant's sentence was contingent upon his giving these statements. Appellant's statements must be considered incidental to his plea, and thus ones "in connection" with his plea. Therefore, appellant's statements could not be utilized in any manner at trial. United States v. Lawson, 683 F.2d 688 (2d Cir. 1982) (statements made in plea negotiations may not be used for impeachment purposes). Accord, Mann v. State, 605 P.2d 209 (Nev. 1980); State v. Jackson, supra.

In denying appellant's motion to suppress, the trial judge relied heavily upon the reasoning of United States v. Stirling, 571 F.2d 708 (2d Cir. 1978) and United States v. Davis, 617 F.2d 677 (D.C. Cir. 1980). (R-

118-127) A major underpinning of those decisions is the notion that a defendant should not be allowed to breach his bargain with impunity. Stirling, supra at 732; Davis, supra at 685-686. This rationale, however, totally eviscerates the safeguards of the rule. The policy of the rules is not to punish promise-breakers. See, United States v. Robinson, 582 F.2d 1356 (5th Cir. 1978) (Morgan, J., specially concurring). As noted in United States v. Grant, 622 F.2d 308, 315 (8th Cir. 1980):

> If statements made by an accused person during plea bargain negotiations are admissible if that person decides to change the plea after the plea bargain is struck, then Fed.R.Crim.P. 11(e)(6) and Fed.R.Evid. 410 would be so circumscribed in their applicable scope that the rules would be rendered effectively meaningless.

Further, contrary to the fears expressed by the court in Stirling and Davis, exclusion of statements made in connection with plea bargaining is not somehow unfair to the state. "[T]he government's inability to introduce the statements made in a bargaining session does not place it in a worse position than it would occupy if an accused chose not to engage in plea bargaining at all." United States v. Herman, 544 F.2d 791, 797 (5th Cir. 1977); People v. Jones, supra. Rather, the state must simply fulfill its obligation of independently assembling and proving its case against the defendant.

Appellant contends therefore that he is entitled to a new trial where his plea-related statements are not utilized against him.

ISSUE V

THE TRIAL COURT ERRED BY REJECTING THE JURY'S SENTENCING RECOMMENDATION OF LIFE IMPRISONMENT FOR THE MURDER OF RICHARD PADGETT AND BY IMPOSING A SENTENCE OF DEATH UPON APPELLANT WHICH IMPOSITION, IF SUSTAINED AND CARRIED OUT, WILL UNCONSTITUTIONALLY DEPRIVE APPELLANT OF HIS LIFE.

A) Fundamental Constitutional Objections

When a trial judge rejects a jury recommendation of life, several constitutional rights are violated by the subsequent imposition of a sentence of death. Transgressed are the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 9, 16, 17 and 22 of Article I of the Constitution of the State of Florida. See, Bullington v. Missouri, 451 U.S. 430 (1981). In recognition of this Court's repeated rejection of these constitutional challenges to the propriety of a life-override, appellant, while maintaining his position as to the unconstitutionality of such practice, acknowledges the futility of further briefing in this issue, but does not waive these constitutional challenges to his non-jury recommended sentence of death.

B) Reasonable persons could differ as to the propriety of the death sentence on the facts of this case.

It is well established that a jury recommendation of life imprisonment is entitled to great weight and that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Appellant submits this standard was not met here, and that accordingly his death sentence for the murder of Richard Padgett must be reduced to one of life imprisonment without possibility of parole for twenty-five years.

In terms of statutory aggravating circumstances, the trial judge found four: (1) that appellant was previously convicted of another capital felony, Section 921.141(5)(b), Florida Statutes (R-289); (2) that the capital felony was committed while appellant was engaged, or was an accomplice, in the commission of a kidnapping, Section 921.141(5)(d), Florida Statutes (R-291-292); (3) the capital felony was especially heinous, atrocious or cruel, Section 921.141(5)(h), Florida Statutes (R-293-295); and (4) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, Section 921.141(5)(i), Florida Statutes (R-295-297). The trial court found none of the statutory mitigating circumstances listed in Section 921.141(6), Florida Statutes applicable. (R-282-288).

Assuming arguendo that the four statutory aggravating circumstances were properly found by the trial judge,[11] this finding does not demonstrate that the jury's recommendation was correctly overridden. Even in the absence of any mitigation and in the face of valid aggravation, a jury life recommendation is entitled to such great weight that it can require a reversal of a sentence of death. Williams v. State, 386 So.2d 538 (Fla. 1980); Welty v. State, 402 So.2d 1159 (Fla. 1981); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Richardson v. State, __So.2d__ (Fla. 1983) Case No. 61,924. Here, although the trial court found no mitigating factors, a review of the

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[11] Appellant submits the finding of a prior violent felony based upon the same criminal episode as the capital felony was improper. See infra, Issue VI (a). Additionally, appellant asserts that a death sentence for a felony murder cannot be supported by an aggravating circumstance which takes into account the same underlying felony in which the murder was committed. See, State v. Cherry, 257 S.E.2d 551 (N.C. 1979); Keller v. State, 380 So.2d 926 1980). Further, appellant submits the murder can not be described as "cold, calculated, and premeditated without any pretense of moral or legal justification." See, McCray v. State, 416 So.2d 804 (Fla. 1982); Cannady v. State, 427 So.2d 723 (Fla. 1983).

record reflects numerous mitigating factors upon which the jury's recommendation could reasonably have been based.

From the evidence presented, the jury could have believed appellant's confession that he shot Richard Padgett due to the threats by Robert Parker to kill him if he did not (T-732-738), and yet still convicted him of first degree murder. See, Cawthon v. State, 382 So.2d 796 (Fla. 1st DCA 1980). The jury could thus have found the existence of the statutory mitigating circumstance enumerated in Section 921.141(6)(e), which it could reasonably conclude outweighed any aggravating circumstances which existed. See, Neary v. State, 384 So.2d 881 (Fla. 1980); Stokes v. State, 403 So.2d 377 (Fla. 1981). The jury's recommendation could also have been based upon his youthful age (23). See, Cannady v. State, supra. Likewise, there was evidence introduced relative to nonstatutory mitigating factors which could have influenced the jury to return a life recommendation. (Testimony was introduced that appellant was a loving person, that he had often tried to help others, including one occasion when he rescued his sleeping sister and her family from a burning mobile home, and that appellant was never known to be violent.) (T-1624-1627). See, McCampbell v. State, supra; Washington v. State, 432 So.2d 44 (Fla. 1983); Welty v. State, supra. Under these circumstances, the jury's recommendation of life must be considered reasonable, and appellant's death sentence for the murder of Richard Padgett should be vacated.

ISSUE VI

APPELLANT IS ENTITLED TO A NEW PENALTY HEARING WHERE THE JURY IS PROPERLY INSTRUCTED ON THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

A) The trial court erred in instructing the jury that the aggravating circumstance set forth in Section 921.141(5)(b), Florida Statutes could be found based upon a simultaneous conviction for a capital felony.

At the state's request, and over appellant's objection, the trial court

instructed the jury that the aggravating circumstance of prior conviction of another capital offense could be found on the basis of appellant's simultaneous conviction of a capital felony. (R-245, 247, T-1689-1691, 1693-1694, 1701-1705, 1706-1707). While appellant recognizes that this Court has held that a conviction for an offense which occurred contemporaneously with the capital felony may be used in aggravation, Elledge v. State, 346 So.2d 998 (Fla. 1977); Lucas v. State, 376 So.2d 1149 (Fla. 1979); King v. State, 390 So.2d 315 (Fla. 1980), appellant submits a reexamination of these decisions is required.

In State v. Stewart, 197 Neb. 497, 250 N.W. 2d 849 (1977) the defendant committed a homicide, then he attempted to kill another by burning a van and shooting the occupant. He was convicted at the same trial of first degree murder and of shooting the second victim with the intent to kill, wound or maim. The shooting of the second victim was used by the trial court as an aggravating circumstance under Section 29-2523(1)(a), Neb. R. R. S. which provides: "The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person." The court noted that the Nebraska statute is very similar to Section 921.141 (5)(b), Florida Statutes (1979) and construed the Nebraska statute to apply "only to criminal activity conducted prior to the events out of which the charge of murder arose". 250 N.W.2d at 863. The court reached the same result in State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977), and State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977), cert. den. in both 434 U.S. 912, 98 S.Ct. 313, 54 L.Ed.2d 198 (1977).

Likewise, in State v. Goodman, 298 N.C. 31, 257 S.E.2d 569 (1979) the North Carolina Supreme Court construed the aggravating circumstance provided in N.C.G.S. 15 A-2000(e)(3): "Defendant had been previously convicted of a felony involving the use or threat of violence to the person." Goodman had

been convicted at the same trial of armed robbery and kidnapping of the victim whom he also murdered. The court found the statute applied only to criminal activity which occurred prior to the events out of which the murder arose. To do otherwise would be to improperly double this aggravating circumstance with that of felony murder, as provided in N.C.G.S. 15 A-2000(e)(5).

Appellant submits that the better view expressed by the Supreme Courts of North Carolina and Nebraska should be adopted by this Court. This interpretation is consistent with that found in the A.L.I. Model Penal Code, §210.6 (1980), which notes that this aggravating circumstance is intended to deal with a defendant's past behavior. Considering simultaneous offenses in aggravation does not serve as an indicator or measure of a defendant's past behavior, but rather only emphasizes the circumstances of the present offense. For that reason, appellant contends simultaneous convictions should not be utilized in aggravation, and that accordingly he is entitled to a new penalty hearing where the jury is properly instructed in this regard.

B) The trial court erred in failing to instruct the jury on all the aggravating circumstances set forth in Section 921.141, Florida Statutes.

This Court has held that the trial court must instruct upon all aggravating circumstances regardless of the evidence produced at trial. Straight v. Wainwright, 422 So.2d 827, 830 (Fla. 1982); Cooper v. State, 336 So.2d 1133 (Fla. 1976). In Cooper the Court stated:

> If the advisory function were to be so limited initially because the jury could only consider those mitigating and aggravating circumstances which the the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted.

Id., at 1939-1940.

Here, the trial judge instructed the jury regarding aggravating circumstances as follows:

> the aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> [1] You may consider the conviction of a capital felony, even though occuring simultaneously with the conviction of another capital felony may be considered by you as an aggravating circumstance as to the other capital felony. The phrase previously convicted refers to previous to this day and previous to this advisory sentence proceeding.
>
> [2] You may also consider the crime for which the defendant is to be sentenced was committed while he was engaged in or was an accomplice in the commission or the attempt to commit the crime of robbery and/or kidnapping. [3] Also you may consider as an aggravating circumstance that the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody, or [4] that the crime for which the defendant is to be sentenced was for financial gain. [5] And that the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel. [6] And that the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(T-1706-1707)

By so instructing the jury, the trial judge misled the jury into believing that every possible aggravating circumstance recognized in Florida law was applicable to appellant, when in actuality only six of the nine statutory aggravating circumstances had arguable application. This distortion of the sentencing process renders appellant's death sentence violative of the Eighth and Fourteenth Amendments.

C) The trial court erred in failing to instruct the jury on the definition of the aggravating circumstances set forth in Sections 921.141(5)(h) and (i).

As previously noted, the jury was instructed that aggravating circumstances could be found if the crime was "especially wicked, evil, atrocious or cruel" or if the crime was committed "in a cold, calculated and premeditated manner without any pretense of moral or legal justification." Appellant contends that these instructions failed to adequately channel the jury's discretion by "'clear and objective standards' that provide 'specific and detailed guidance'", Godfrey v. Georgia, 446 U.S. 420, 428 (1980), thereby rendering his penalty phase constitutionally deficient. Cf. Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982).

In State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), this Court defined the terms heinous, atrocious or cruel as follows:

> 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.

In Cooper v. State, 336 So.2d 1133 (Fla. 1976), the court recognized the necessity for a proper instruction defining the terms "especially heinous, atrocious or cruel." Likewise, this Court has recognized that the aggravating circumstance of cold, calculated and premeditated does not automatically apply upon the finding of a premeditated murder. See, Jent v. State, 408 So.2d 1024 (Fla. 1981); Combs v. State, 403 So.2d 418 (Fla. 1981). However, the instructions given here totally failed to limit the jury's discretion in finding these aggravating circumstances.

Because the jury was given inadequate guidance in its determination of the penalty issue, the death recommendation is unconstitutionally tainted and a new sentencing trial is required.

ISSUE VII

THE DEATH SENTENCE IMPOSED UPON APPELLANT FOR THE MURDER OF JODY DALTON IS UNCONSTITUTIONAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE MITIGATING CIRCUMSTANCES EXISTED WHICH THE TRIAL COURT IMPROPERLY FAILED TO CONSIDER.

In Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982), the Supreme Court held:

> Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence .... The sentencer ... may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

An examination of the trial court's sentencing order reveals that the judge improperly limited his consideration to the statutorily enumerated mitigating circumstances contrary to the dictates of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, supra. (R-273-299). The trial judge, in his order, merely made findings megating each of the statutory mitigating circumstances, but totally failed to acknowledge the existence of nonstatutory mitigating circumstances, which the record undoubtedly supported. The trial judge, by limiting himself to the statutorily enumerated mitigating circumstances, not only violated the Eighth and Fourteenth Amendments, but also failed to consider numerous circumstances which militate against the imposition of the death penalty.

As previously noted, the record demonstrates the existence of numerous nonstatutory mitigating circumstances. Testimony showed that appellant had

never previously been known to be violent. It was shown that on November 8, 1978, appellant had risked his own life to rescue his sister and her children from their burning home. (T-1731-1732). Abundant evidence was presented as to appellant's alcohol and drug abuse, which supports a finding of mental mitigation. Since ample evidence existed which would have justified imposition of a life sentence, and since the record reveals that the trial judge did not consider this evidence, appellant's death sentence must be vacated. Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983); Moody v. State, 418 So.2d 989 (Fla. 1982).

ISSUE VIII

THE SENTENCES OF DEATH CAN NOT BE SUSTAINED WITHOUT VIOLATING APPELLANT'S RIGHTS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

It is now well-settled that since the penalty of death is so qualitatively different from any other sentence, this difference "calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, supra at 604. Accord, Woodson v. North Carolina, 428 U.S. 280, 303-305 (1976); Gardner v. Florida, 430 U.S. 349 (1977); Beck v. Alabama, 447 U.S. 625 (1980). Appellant submits his death sentences have been imposed under circumstances incompatible with the Eighth and Fourteenth Amendments, and in spite of facts which may call for a less severe penalty.

A major contention at appellant's trial, and more particularily at the penalty phase, was that he acted under duress or the domination of Robert Parker. In rejecting this statutory mitigating circumstance, the trial judge expressed his disbelief of appellant's testimony to this effect (R-285). In the subsequent trial of Robert Parker (Case No. 63,700, transcripts and records of which will be referred to as "PT" or "PR"), testimony by persons other than appellant was presented verifying the fact that Robert Parker had

threatened to kill appellant. Michael Green testified that on February 5, 1982, he was present when Robert Parker threatened to hang appellant by a rope's noose which was hanging from a nearby tree if he did not give him money. Green also indicated that appellant was terrified of Parker. (PT-1177-1179). Billy Long also testified that appellant had advised him of Parker's threat to kill him (appellant). (PT-1244). Additionally, Joan Bennett testified that she was more afraid of Parker since he "seemed to be in charge." (PT-1529, 1591-1594). In his findings of fact justifying imposition of the death penalty against Robert Parker, the trial judge (the same judge who had rejected appellant's earlier testimony about threats made by Robert Parker) found:

> The day before the homicidal events began, Parker placed a rope over a tree limb and told Groover he would hang him if he did not pay the drug debt.
>
> The day of the homicides Parker again threatened to kill Groover if he did not get the money.
>
> * * *
>
> [T]he homicidal events started when defendant [Parker] made threats of death to enforce payment of drug debts.
>
> * * *
>
> Defendant threatened to kill Groover if he did not get drug money.
>
> Defendant [Parker] threatened and intimidated others but was himself never threatened.
>
> * * *
>
> This defendant is the person who had guns and was armed most of the time and he is the person who repeatedly threatened to kill Groover.

(PR-476-508)

Thus, the critical factual predicate supporting appellant's claim of duress or domination has been explicitly accepted by the same trial judge. The trial judge's sentencing findings in appellant's case vis-a-vis Robert Parker's are factually inconsistent. Appellant was either threatened by Parker or he was not. In appellant's case, the trial judge found that no threats were made. Yet, in Parker's case, the trial judge found that repeated threats to kill appellant were made by Parker.

Under these unique circumstances,[12] appellant contends his death sentences can not be sustained. At a minimum, appellant submits the trial judge is obliged to reevaluate the sentences imposed upon appellant in light of his specific findings that repeated threats to kill appellant were made by Parker. These findings mandate reconsideration of the applicability of the mitigating circumstances set forth in Sections 921.141(6)(b), (d), and (e). Further, this evidence requires a finding of the applicability of these mitigating circumstances. See Foster v. Strickland, supra, at 1349 n.12. To uphold appellant's sentences under these circumstances would make a mockery of the requirement that the sentence of death be imposed only upon reliable facts. Appellant requests therefore that his death sentences be vacated and the cause remanded for further consideration of the appropriate sentences to be imposed herein.

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[12] Appellant expressly does not waive any claims he may have involving newly discovered evidence or ineffectiveness of counsel due to the fact that the evidence as to threats made against him was not presented before the sentencing jury. These matters would necessitate additional factual findings not developed in this record and thus are not cognizable here. See State v. Barber, 301 So.2d 7 (Fla. 1974).

CONCLUSION

For the reasons set forth in Issues I, II, III, and IV, appellant requests that his convictions be reversed and that the cause be remanded for a new trial. For the reasons set forth in Issue VI, appellant requests a reversal of his sentences and a remand for a new penalty hearing. For the reasons set forth in Issues V, VII, and VIII, appellant requests reversal of his death sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Barbara Butler, Assistant Attorney General, Duval County Courthouse, Jacksonville, Florida 32202 and a copy to appellant, Mr. Tommy A. Groover, #088266, Florida State Prison, Post Office Box 747, Starke, Florida 32091 on this 6th day of September, 1983.

Glenna Joyce Reeves
GLENNA JOYCE REEVES