IN THE FLORIDA SUPREME COURT

KENNETH WAYNE HARDWICK, :

Appellant, :

vs. : Case No. 63,500

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

KARLA J. STAKER
ASSISTANT PUBLIC DEFENDER

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830-3798
(813)533-0931 or 533-1184

COUNSEL FOR APPELLANT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd) PAGE NO.

STATEMENT OF THE CASE

On November 17, 1981, a Highlands County grand jury returned a four count indictment charging KENNETH WAYNE HARDWICK with first degree murder,[1] sexual battery using force likely to cause serious personal injury,[2] robbery[3] and burglary with an assault.[4] (R3-6) Before trial Hardwick rejected the State's offer of life imprisonment in exchange for his plea of guilty to the murder charge. (R183-184)

Jury trial was held February 22-24, 1983. (R385-979) Hardwick's motion for judgment of acquittal on the robbery charge, made at the end of the State's case and duly renewed, was denied. (R834-837,945) Over objection, the prosecutor made a misleading closing argument regarding the mathematical probabilities that Hardwick was the person who committed the crimes. (R940-941) The jury found Hardwick guilty as charged. (R103-106)

Before the penalty phase, Hardwick unsuccessfully moved to have Florida's death penalty statute and standard jury instructions for penalty phase crimes declared unconstitutional or, alternatively, to strike from the statute and instructions the limiting words used to define mitigating circumstances.

---

[1] §782.04(1), Florida Statutes (1979).

[2] §794.011(3), Florida Statutes (1979).

[3] §812.13, Florida Statutes (1979).

[4] §810.02, Florida Statutes (1979).

(R125-126) And, Hardwick's proposed jury instruction number 5 and proposed jury instruction number 11 were denied. (R991,994, 998)

An advisory sentencing hearing was held February 25, 1983. (R1003) No additional evidence was presented. (R1003-1012) After receiving instructions on only the aggravating circumstances supported by the evidence (R1044-1045), the jury recommended the death penalty by a vote of eight to four. (R133,1052)

At a sentencing hearing also held February 25, Hardwick received the death penalty for the murder conviction. (R1056-1057) He received life sentences for the sexual battery and burglary and a fifteen year sentence for the robbery, all to run concurrently with each other but consecutive to the death penalty. (R1057-1058)

Also on February 25, the trial judge filed written findings in support of the death sentence. (R134-139)(A1-6) He found five aggravating circumstances: previous conviction of a violent felony; felony murder; homicide committed for pecuniary gain; heinous, atrocious or cruel; and homicide committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R134-136)(A1-3) He found no mitigating circumstances. (R136-138)(A3-5)

Hardwick timely appeals. (R150)

STATEMENT OF THE FACTS

Mrs. Henshall was a seventy two year old widow living in Sebring. (R473) She was last seen alive at 10:00 p.m. on December 24, 1980, when she left her sister's home to drive the four or five blocks to her own home. (R474-476) Around 8:00 p.m. on December 25 her granddaughter, Mrs. Edwards, arrived at Mrs. Henshall's house. (R489) Mrs. Henshall's car which was usually parked in a garage behind the house was not there. (R483,489) The house was dark and the back screen door was unlocked. (R489) Mrs. Edwards unlocked the back door and entered the house. (R491) Mrs. Henshall's bed was in a made condition, the electric blanket was on but there was blood on the side of the bed. (R492) The police department was notified. (R943)

Upon their arrival, police officers found Mrs. Henshall's body dressed in a nightgown lying in her bed. (R533-534,565) The covers were pulled up to her neck and a pillow was over her face. (R533) The screen door to the front porch was unlatched and the screen near the latch had been pushed in or bent. (R535-536,547) The door leading from the front porch into the house was locked and bore no sign of forced entry. (R535,547) However, there were fresh pry marks in the wood under the two double-hung windows opening onto the porch from the house. (R537,547-548) The glass of one of these windows was broken and the latch unlatched. (R537-538,564) There was also a tear in the back screen door but no sign of forced

entry to the back door leading into the house. (R535-536) The police determined that in addition to her car, Mrs. Henshall's purse and contents and several necklaces were missing. (R494-495)

A pathologist later determined that death had been caused by manual strangulation and/or smothering. (R622,634) He determined that a cord, wire or the like had not been used. (R634) There were semi-circular cuts consistent with fingernail marks on the front of Mrs. Henshall's neck. (R620-621) There were also nonfatal bruises beside the left eye and cheek, caused by one or more blows. (R620,622-623) There was also a nonfatal abrasion on the side of her neck. (R620,622) It had a chain-like pattern and had likely been caused by a necklace being yanked from her neck. (R621-622) Spermatosa was present in the vagina, indicating intercourse within twelve to twenty four hours of death. (R624) There was no trauma to the genital area. (R636)

Hardwick, an itinerant house painter (R514,599,822), had painted Mrs. Henshall's bedroom, living room and dining room before the incident. (R496-497) The evidence was conflicting, however, as to when the painting was done. (R479, 496-497,601-602) According to Mrs. Henshall's sister it was about a week before the December 24 incident. (R479) According to Mrs. Edwards it was before Thanksgiving. (R496-497) According to Otto Neaves, a painter known as "Redbird," it was in September, October or November. (R601-602) During his employment by Mrs. Henshall, witnesses had seen Hardwick

riding with Mrs. Henshall in her car but had not seen him driving the car. (R513-514,643-645)

Upon finishing Mrs. Henshall's house, Hardwick had begun painting Mrs. Edwards' house. (R499) Mrs. Edwards testified that he worked on her house off and on until "right after" Thanksgiving when he quit coming to her house. (R500)

Redbird testified that in December of 1980 Hardwick stayed with him at his trailer. (R598-599) Hardwick did not have a car. (R600) On December 24 they visited Herschel Elam, a friend who lived in Belview. (R602) Very late in the afternoon they returned to Sebring. (R602-603) Although he could not remember if it was their first stop, he and Hardwick went to the Triangle Bar for a beer. (R603) Then they went to the Yogi Bar. (R605) There, Redbird told Hardwick that he could not stay at his trailer that night because he had a date. (R605) When Redbird left the bar around 7:30 p.m. Hardwick was still there. (R606) Although he expected Hardwick to return to the trailer the next day or so, he did not see Hardwick after that. (R607) Further, he testified that on the 23rd or 24th he had given Hardwick $30, probably for work Hardwick had done for him. (R604) Also, he said that Herschel Elam had loaned Hardwick $20. (R604-605) He volunteered that Hardwick was a good worker. (R609)

Terry Balfour, then bartender at the Yogi Bar, testified that Hardwick and Redbird arrived at the Yogi Bar about 4:00 or 4:30 p.m. on December 24. (R517,519) They drank three or four beers for which Redbird paid. (R519) While they

were there Hardwick unsuccessfully tried to borrow money from Redbird. (R520) They left, and about 5:00 or 5:30 p.m. Hardwick came back in alone. (R520) He drank two beers which he paid for with change. (R520) When Balfour would not loan him money for another beer Hardwick left through the front entrance saying he was going to find someone from whom he could borrow money. (R520-521) About 9:30 p.m. Hardwick came back in through the back door where the main parking lot was. (R521-522) Hardwick drank two beers which he paid for with bills taken from a wad of money. (R523-524) He was shaking and appeared nervous. (R524) He stayed five or ten minutes and then left through the rear door. (R525) At 10:00 or 10:30 p.m. Balfour went to the Rendevouz Lounge. (R526) Hardwick was there and still appeared nervous. (R526) Balfour did not know how long Hardwick stayed at the Rendevouz. (R526)

Cathy Musick Brosambly, Hardwick's former girlfriend who at the time of trial resided in Indiana Women's Prison for several forgery convictions, testified for the State. (R675-676,697) She stated that sometime after 9:00 p.m. on December 24 Hardwick called her at her home in Indiana. (R676-678) He sounded drunk or high. (R679) He said that he was calling from a bus station in Florida; that he thought he had killed someone; and that he needed for her to say that he had been at her house for about a week. (R678-679) He asked her if he could come to her house and stay. (R678)

Ms. Brosambly said that she next saw Hardwick in January of 1981 when he was in jail in Indiana. (R679-680)

During her visits with Hardwick he admitted the strangling and sexual battery but said he was sorry about it and that he had not intended for it to happen. (R682-683,685) He said the incident occurred because he had been drunk and high, had gotten mad at Mrs. Henshall and had lost his temper. (R685) He explained that he was supposed to have worked the morning of December 24 but instead went drinking with a friend. (R683) That night he, accompanied by a man named Mike, went to Mrs. Henshall's door to borrow money. (R683,696) When she refused to loan him any more money and threatened to call the police he got mad, argued with her, hit her and decided to do away with her. (R683-684) He tied her up with two electrical cords, one around her hands and one around her neck, and raped her, putting a pillow over her head to quiet her. (R683-684) Afterward Mike became scared so to make it look like a robbery they "messed up the house a little bit" and took her car, purse and some jewelry. (R684) Mike was supposed to do something with the car and purse and they were supposed to split the money. (R684) The jewelry was pawned. (R685) Hardwick went to the bus station to go home. (R684) He got a bus as far as the money would take him. (R684) When he got to Atlanta he called his mother and she wired him a bus ticket for Chicago. (R686) He mentioned having been in Jacksonville but did not give any details. (R686)

On cross-examination of Ms. Brosambly, defense counsel brought out that Hardwick had not said anything about breaking into the house (R696-697); that although Hardwick supposedly

had confessed to her in January of 1981 she waited until May of 1982 to relate the information to the authorities (R703-705); and that a man named Bob Ritchie who had been in jail in Indiana with Hardwick had visited her twice after he got out of jail. (R694-695) She also admitted that she and Hardwick were no longer on good terms due to a conflict as to whose family should have custody of their child. (R699)

A serology expert testified that Hardwick has Type A blood and is a secretor. (R747) Mrs. Henshall also had Type A blood, secretor status unknown. (R747) Fourty percent of the population has Type A blood and eighty percent of the population is made up of secretors. (R745-746)

The serology expert found two human blood stains on the bottom sheet of Mrs. Henshall's bed. (R748-749) One contained Type A blood, the other was unsuitable for conclusive grouping. (R748-749) She also found a semen stain containing Type A blood group. (R749,751) The semen stain could have been left by a Type A secretor. (R751) However, if Mrs. Henshall was a secretor her vaginal fluid could have mixed with the semen stain causing it to contain evidence of the Type A blood group. (R755-756) Although the expert also found human blood on the top sheet, pillow cases from Mrs. Henshall's bed, and in Mrs. Henshall's fingernail scrapings, she was unable to group it. (R753)

An expert in hair analysis obtained hair samples from the bottom sheet. (R798) There were limb and body hairs and three caucasian pubic hairs unlike Mrs. Henshall's. (R798)

Two of the pubic hairs exhibited the same microscopic characteristics as Hardwick's, indicating that he was a possible, but not definite, source. (R799-800)

An expert in fingerprint identification found Hardwick's latent handprint on the bottom sheet but could not determine when it was placed there. (R767,774-775) This was the only print on the bottom sheet sufficient for identification. (R782) He found no latent prints on the pillow cases or top sheet. (R786)

On January 31, 1981, Mrs. Henshall's abandoned car was discovered in Jacksonville about eight blocks from the Greyhound Bus terminal. (R658,711) Her purse and jewelry were not in the car. (R715) The ashtrays contained several brands of cigarettes, including Salems. (R657-658) Hardwick's latent fingerprint was found on the heater control knob located to the left of the steering wheel. (R716,734)

The defense recalled Redbird during its case. (R810) He testified that he helped Hardwick paint Mrs. Henshall's bedroom; that there was a bed in the room; and that it was their usual procedure to move all the furniture to the center of a room before painting. (R810-811) He also stated that Hardwick had very few possessions at his trailer when he left. (R810) Further, he said he did not recall Hardwick trying to borrow money from him at the Yogi Bar the night of the incident. (R811) The prosecutor elicited testimony that at the time in question Hardwick sometimes smoked Salem cigarettes. (R812)

Luther Thomas, then owner of the Yogi Bar, testified that on the night in question the Yogi Bar had a keg of beer from which each customer could get four mugs of free beer. (R855,857) At 8:00 or 8:30 p.m. he saw Hardwick at the Rendevouz Lounge. (R856) Hardwick left the Rendevouz saying that he was going home to Chicago. (R856)

Sally Wilks, owner of the Rendevouz Lounge, testified that Hardwick arrived at the Rendevouz around 10:00 p.m. (R815) and left between 10:30 and 10:45 p.m. (R816-817) While in the bar he bought two beers, paying for one with a dollar bill and paying for the other with coins. (R815-816) She did not see a large amount of money on him. (R816) He did not seem nervous or act unusual (R816-817) although he did call her attention to the fact that previously he had been barred from the Rendevouz. (R820)

Mike Grady, a friend of Hardwick's, and Mike's sister, Mary Stringer, testified that on the night in question Mike was at a family reunion in Orlando. (R822,825)

Detective Kent of the Sebring Police Department (R648) testified that he spoke to Ms. Brosambly three times in late January and early February of 1981. (R827-829) On none of those occasions did she tell him that Hardwick had called her December 24, 1980, or that Hardwick had made admissions to her in January of 1981. (R827-829) She did not tell him any of those things until May of 1982. (R829)

Michael Pettigow, a friend of Hardwick and Ms. Brosambly, testified that Ms. Brosambly told him she was

going to lie about Hardwick and have him sent away because he was having her baby taken away from her. (R859-860)

Robert Patterson, who had been Hardwick's cellmate in Indiana, testified that inmates received visitors at the cells. (R865-866) Although he overheard some of Hardwick's conversations with Ms. Brosambly, he never heard Hardwick discuss the murder. (R868) A man named Bob Ritchie was in the cell next to theirs. (R868) Hardwick let Ritchie read various official documents containing details of the murder and when Ritchie got out of jail he took the documents with him. (R869) Ritchie did not like Hardwick. (R868)

ARGUMENT

ISSUE I.

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR'S ARGUMENT TO THE JURY REGARDING THE MATHEMATICAL PROBABILITIES THAT HARDWICK WAS THE PERSON WHO COMMITTED THE CRIMES.

A serology expert found Type A blood and a semen stain containing Type A blood group on Mrs. Henshall's bottom sheet. (R748-749,751) She testified that Hardwick is a Type A secretor and that Mrs. Henshall had Type A blood with secretor status unknown. (R747) Further, she testified that 40% of the population has Type A blood and that 80% of the population is made up of secretors. (R745-746)

In rebuttal closing argument, over objection, the prosecutor used these percentages to show that by the application of the law of mathematical probabilities Hardwick was the perpetrator. (R940-941):

> [Prosecutor]: ...You start out with forty percent of the population in the country having Type A blood, so you can say, "Okay, maybe forty percent of the population could have committed the crime." But of that forty percent only eighty percent of it are secretors. So now you are down to thirty-two percent of the population, and thirty-two percent of the population could have committed the crime; that includes males and females. So you have to knock out all your females. That brings it down further, I don't know what percentage we are talking about now, but it certainly is not up to thirty-two percent or forty percent. So when you knock out all the females being suspect in the case, then you have to look at what of that thirty-two or forty percent live in Sebring. That's in the whole United States. What percentage lives in Sebring?

> That's going to knock it down further. Then you say what percentage of those people knew--
>
> MR. SHEARER [Defense Counsel]: I am going to object to this line of argument as far as starting with forty percent and saying what percentage is in Sebring. I think it's a totally misconstrued and misleading type of argument.
>
> THE COURT: I note your objection but I am going to overrule it.
>
> MR. SHEARER: You start with the world and then you say the United States and then you come down to Sebring?
>
> MR. PICKARD: Okay, start with the world.
>
> THE COURT: You have explained your point. Go ahead.
>
> MR. PICKARD: How many of these people knew Mrs. Henshall? How many had ever been in her house? How many of this same group of people with Type A secretor blood also had the pubic hairs the same as Mr. Hardwick? That's got to eliminate most of them, because as Mr. Burwitz says, it's very rare even two people have the same pubic hair. So your perpetrator is not just a member of the forty-percent group that has Type A blood, it has also got to be a person who is a Type A secretor, who has pubic hair similar to Mr. Hardwick in all microscopic comparisons, who was in Sebring that night, who knew Mrs. Henshall, who had been in her home before and had fingerprints the same as Mr. Hardwick.
>
> People, excuse the language, there is not but one person in the world that fits that description, and that's Kenneth Hardwick.

The prosecutor's use of mathematical probabilities became gravely misguided and misleading when, after stating that 32% of the United States' population had Type A secretor blood, he went on to state that the percentage of people in Sebring's population would be much less. His argument became even more

misleading after defense counsel's objection. Then, he suggested that 32% of the world population had Type A secretor blood, therefore, the percentage of people in the United States' population would be less than 32% and that, in turn, the percentage of people in Sebring with that blood type would be even less. There was no evidence to support his theory that Type A secretors in Sebring would be less than the 32% found in the general population.

After drastically narrowing down the percentage of people who could have committed the crime, the prosecutor continued by stating that the perpetrator had to have been a person "who has pubic hair similar to Mr. Hardwick in all microscopic comparisons, who was in Sebring that night, who knew Mrs. Henshall, who had been in her home before and had fingerprints the same as Mr. Hardwick." (R941) He summed up by saying that Hardwick was the only person in the world fitting that description. (R941) Thus, he suggested that mathematics showed Hardwick to be the perpetrator. (R942) In reality, the mathematics only showed what percentage of the "population" could have committed the crimes.

A similar situation was presented in United States v. Massey, 594 F.2d 676 (8th Cir.1979). There, an expert testified that three hair samples found in a ski mask believed to have been worn by a bank robber were similar to hair samples taken from Massey. The expert further stated that he had examined samples in some 2000 cases and on only two occasions had he been unable to distinguish between the hairs of two individuals.

In closing argument, the prosecutor converted the 2 in 2000 to a percentage of 99.44 percent, and stated that the hair sample alone was enough to prove Massey's guilt beyond a reasonable doubt. Because the prosecutor confused the probability of concurrence of the identifying marks with the probability of mistaken identification of the bank robber the Court of Appeals found fundamental error and reversed the conviction. See also People v. Collins, 438 P.2d 33 (Cal.1968); Annotation, Admissibility, in Criminal Case, of Statistical or Mathematical Evidence Offered for Purpose of Showing Probabilities, 36 ALR3d 1194.

The principal issue in Hardwick's trial was whether he was the perpetrator of the crimes. Because the prosecutor applied improper and misleading mathematical techniques to show him to be the perpetrator, Hardwick was prejudiced and this Court should reverse his convictions.

ISSUE II.

THE TRIAL COURT ERRED IN DENYING HARDWICK'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE ROBBERY CHARGE SINCE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT A CONVICTION.

At the conclusion of the State's case, the defense unsuccessfully moved for a judgment of acquittal on the robbery charge on the ground that the State had failed to prove that the taking of Mrs. Henshall's property was accompanied by force, violence or putting in fear. (R834-837) The motion was duly renewed at the conclusion of all the evidence. (R945)

An essential element of robbery is the use of force, violence or putting in fear in taking the property of another. Section 812.13(1), Florida Statutes (1979); McCloud v. State, 335 So.2d 257,258 (Fla.1976). It is well-settled that where, as here, the only evidence of a crime is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. See Jaramillo v. State, 417 So.2d 257 (Fla.1982); McArthur v. State, 351 So.2d 972,976 n.12 (Fla.1977). Here, Hardwick's version of the incident given to Ms. Brosambly provided a reasonable hypothesis of innocence to the robbery charge.

The State's circumstantial evidence showed that on the evening of December 24, Hardwick left the Yogi Bar telling the bartender that he was going to find someone who would loan him money. (R521) The next evening Mrs. Henshall's body was found.

(R489,532-533) A bruise on her neck indicated that a necklace had been yanked from her neck. (R620-622) Her car, purse and its contents, and jewelry were missing. (R494-495) Her house showed evidence of forced entry. (R535-538)

According to Ms. Brosambly, Hardwick said that he, accompanied by a man named Mike, went to Mrs. Henshall's house to borrow money. (R683,696) When she refused to loan him money and threatened to call the police, he lost his temper and killed her. (R683-684) Then, Mike became scared so they "messed up the house" to make it look like a robbery. (R684)

Under this version, there was no robbery since force or intimidation was neither used in the physical taking of the property, in retaining the property after it was taken nor in attempting to escape. The taking, as well as intent to take, was formed after the killing.

This hypothesis was reasonable. Since Hardwick had had an employment relationship with Mrs. Henshall it would have been natural for him to go to her when he wanted to borrow money. After the killing it would have been reasonable to try to throw suspicion elsewhere. Tearing the screens and breaking and tampering with the windows would have made it look like a stranger had broken into the house.

The State having failed to exclude every reasonable hypothesis of innocence, the conviction and sentence for robbery was improper.

ISSUE III.

THE TRIAL COURT ERRED IN ADJUDICATING GUILT AND IMPOSING SENTENCE FOR BOTH FELONY MURDER AND ITS UNDERLYING FELONY SINCE DOUBLE JEOPARDY BARS MULTIPLE CONVICTIONS AND SENTENCES FOR LESSER INCLUDED OFFENSES.

The double jeopardy clause of the Fifth Amendment to the United States Constitution prohibits multiple convictions and sentences for lesser included offenses. Bell v. State, Case No. 62,002 (Fla.June 9, 1983)[8 FLW 199]. The underlying felony in a felony murder is necessarily an offense included within the latter. State v. Hegstrom, 401 So.2d 1343 (Fla. 1981).

Here, the State advised in its statement of particulars that it would be proceeding under both premeditated and felony murder theories. (R47) Nonetheless, this was a felony murder case as premeditation was not shown.

Premeditation can be shown by circumstantial evidence. Spinkellink v. State, 313 So.2d 666 (Fla.1975), cert.denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). The premeditation required for first degree murder is more than simply an intent to commit homicide. Littles v. State, 384 So.2d 744 (Fla.1st DCA 1980).

> Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection....It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned. [Cites omitted.]

Sireci v. State, 399 So.2d 964,967 (Fla.1981), cert.denied, __U.S.__, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). Matters bearing on the question of premeditation include past difficulties between the parties, the type of weapon used, the manner in which the homicide was committed, the nature of the wounds and the presence or absence of provocation. Id.

Setting aside for the moment Ms. Brosambly's testimony, the State's evidence of these matters was insufficient to show premeditation. The evidence showed no prior difficulties between Hardwick and Mrs. Henshall. Apparently they had had a satisfactory employment relationship since, in addition to hiring Hardwick to paint her house, Mrs. Henshall was instrumental in securing two other painting jobs for Hardwick. (R497,642-643) There was no evidence of a weapon or even burglary tools having been taken to the house. (R535-538,547) There is nothing inherent in manual strangulation to show premeditation. Cf. Hall v. State, 403 So.2d 1319 (Fla.1981) (single gunshot through side of victim's bulletproof vest insufficient to prove premeditation); Tien Wang v. State, 426 So.2d 1004 (Fla.3d DCA 1983)(chasing and repeatedly stabbing victim was as consistent with hypothesis of heat of passion killing as with hypothesis of premeditation). In fact, the nature of the wounds, including the bruises on the face (R620), are more indicative of a frenzied attack than of a premeditated plan to kill.

Ms. Brosambly's testimony did not support premeditation but, rather, negated it. According to Ms. Brosambly,

Hardwick said he only went to Mrs. Henshall's house to borrow money (R683), that he did not intend to kill Mrs. Henshall but that he got angry and lost his temper when she threatened to call the police. (R683-685)

In summary, the evidence did not exclude the hypothesis that the killing was a spur-of-the-moment act.[5/] Since one of the felonies was indispensable to the murder conviction, Hardwick's conviction and sentence for all of the felonies violated his protection against double jeopardy contained in the United States and Florida Constitutions. Amend. V, XIV, U.S. Const.; Art. I, §9, Fla.Const. One of the underlying convictions and sentences should be set aside.

5/ It is worthy of note that premeditation was not even suggested to the jury during the State's guilt phase closing argument. (R877-899,937-944)

ISSUE IV.

THE TRIAL COURT ERRED IN FINDING SECTION 921.141, FLORIDA STATUTES (1979), AND THE STANDARD PENALTY PHASE JURY INSTRUCTIONS CONSTITUTIONAL SINCE THEY USE LIMITING WORDS WHICH RESTRICT THE SENTENCERS' CONSIDERATION OF MITIGATING EVIDENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Before the penalty phase, the defense filed a motion to declare Florida's death penalty statute and Florida's standard jury instructions for penalty phase crimes unconstitutional or, alternatively, to strike from the statute and instructions the limiting words used to define mitigating circumstances. (R125-126) The motion was denied after argument (R981-983), and the court gave the standard jury instructions which track the offending statutory language. (R1046)

It is unconstitutional to restrict the sentencing body's consideration of mitigating evidence. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, __U.S.__, __S.Ct.__, 71 L.Ed.2d 1 (1982); Songer v. State, 365 So.2d 696 (Fla.1978)(on rehearing), cert.den., 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). The mitigating circumstances listed in Florida's death penalty statute use modifying words such as "extreme," "significant," "relative" and "substantial." Section 921.141(6)(a)(g), Florida Statutes. These modifiers place a threshold on consideration of certain types of evidence. They have the effect of improperly instructing the jury to disregard all the mitigating evidence if the threshold defined by the limiting word is not met.

This error is not cured by the Standard Jury Instruction read after the list of mitigating circumstances which provides for consideration of

> Any other aspect of the defendant's character or record, and any other circumstance of the offense. (R1046)

Nor is the error cured by the giving of a special instruction, as was given in this case, that

> The mitigating circumstances which you may consider are unlimited, and you may consider any evidence presented at trial or the sentencing proceeding in mitigation of the Defendant's sentence. (R1047)

The probable inference to the jury is that the open ended consideration of evidence applies to matters not covered in the specific list of mitigating circumstances which preceded the above instructions.

With a jury vote only two short of a life recommendation (R1052), it cannot be said that the improper instructions in this case were harmless beyond a reasonable doubt. The trial court should have declared the statute unconstitutional, severed the offending modifying words and changed the jury instructions. Hardwick's death sentence based upon a jury recommendation tainted by such an unconstitutional instruction cannot stand.

ISSUE V.

THE TRIAL COURT ERRED IN GIVING JURY INSTRUCTIONS ON ONLY THOSE AGGRAVATING CIRCUMSTANCES WHICH WERE SUPPORTED BY THE EVIDENCE.

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 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 (R1044-1045):

> Ladies and gentlemen, the aggravating circumstances that you must, you may consider are limited to any of the following that are established by the evidence:
>
> 1. The Defendant has been previously convicted of another capital offense or a felony involving the use of violence to some person.
>
> * * *
>
> 2. The crime for which the Defendant is to be sentenced was committed while he was engaged in the crime of robbery, sexual battery or burglary.
>
> 3. The crime for which the Defendant is to be sentenced was committed for financial gain.

* * *

> 4. The crime for which the Defendant is to be sentenced was especially wicked, evil, heinous, atrocious or cruel.
>
> * * *
>
> 5. The crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner, without any pretence of moral or legal justification.

In instructing on only the aggravating circumstances supported by the evidence, the trial judge mislead the jury into believing that each and every possible aggravating circumstance recognized in Florida law applied to Hardwick. In reality, only five of the nine statutory aggravating circumstances had arguable application. This jury taint renders Hardwick's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

ISSUE VI.

THE TRIAL COURT ERRED BY REFUSING TO GIVE HARDWICK'S REQUESTED JURY INSTRUCTIONS CONCERNING THE JURY'S RECOMMENDATION ON THE PENALTY TO BE IMPOSED WHERE SUCH INSTRUCTIONS CORRECTLY STATED THE LAW TO BE APPLIED AND WERE NOT COVERED BY THE INSTRUCTIONS GIVEN.

Defense counsel requested the trial court to give the following jury instructions:

> ADVISORY SENTENCING PHASE - JURY INSTRUCTION NO. 5
>
> Ladies and gentlemen of the jury, I charge you that you need not find any mitigating circumstance in order to return a sentence of life imprisonment. A life sentence may be returned regardless of the evidence. (R113,993)
>
> ADVISORY SENTENCING PHASE - JURY INSTRUCTION NO.11
>
> The aggravating circumstance that the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification does not apply to every premeditated murder. The fact that you previously convicted the defendant of a premeditated murder does not automatically mean that this aggravating circumstance applies. There must be some additional evidence beyond the evidence required to prove the murder was premeditated to establish that such premeditation was cold, calculated and without any pretense of moral or legal justification. (R119,997-998)

The court refused to give the instructions. (R991,994,998)

Hardwick's proposed instruction number five, that a life recommendation could be returned even if no mitigating circumstances were found, was a correct statement of the law. Section 921.141, Florida Statutes, was enacted to insure that

the death penalty would not be imposed in an arbitrary and capricious manner. State v. Dixon, 283 So.2d 1 (Fla.1973), cert.den., 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The statute's goal as far as a jury's sentence recommendation is concerned is that a death sentence not be recommended unless the aggravating circumstances outweigh the mitigating ones. There is no requirement that the jury must recommend a death sentence under any circumstances since the statute guards against improper imposition of a death sentence, not life imprisonment. Id. A life recommendation and the imposition of a life sentence where there are aggravating circumstances and no mitigating ones is entirely proper under the statute. Williams v. State, 386 So.2d 538 (Fla.1980).

Hardwick's requested instruction number 11 defining cold, calculated and premeditated was not only a correct statement of the law, see Jent v. State, 408 So.2d 1024 (Fla.1981); Combs v. State, 403 So.2d 418 (Fla.1981), but was essential to an understanding of the circumstance. The standard jury instructions which were given wholly failed to give any definition of the circumstance. (R1045)

The trial court had a duty to properly instruct the jury on the law to be applied. Bennett v. State, 350 So.2d 556,557 (Fla.1st DCA 1977); Tamayo v. State, 237 So.2d 251,253 (Fla.3d DCA 1970). The trial court's denial of the requested instructions left the jury with incomplete instructions on the law. Consequently, the jury's death recommendation was tainted.

Hardwick's death sentence which is based in part upon this tainted recommendation is unconstitutional. Amends. VI, VIII, XIV, U.S. Const.

ISSUE VII.

THE TRIAL COURT ERRED IN SENTENCING HARDWICK TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED INAPPLICABLE AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 921.141, Florida Statutes (1979), was improperly applied in this case. These misapplications reinject into the sentencing process the arbitrariness and capriciousness condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Florida's statute was designed to cure such ills. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla.1973), cert.den., 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). However, a sentence imposed under the statute in an incorrect manner violates the Eighth and Fourteenth Amendments just as much as one imposed before the current law was enacted. Specific misapplications of Section 921.141, Florida Statutes, regarding aggravating and mitigating circumstances, are treated separately in the remainder of this argument.

A.

The Trial Court Erred In Finding As An Aggravating Circumstance That Hardwick Had Been Previously Convicted Of A Felony Involving Violence.

Section 921.141(5)(b), Florida Statutes (1979), provides for an aggravating circumstance if

> The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The trial judge found this circumstance based upon the jury's guilty verdicts for sexual battery and robbery as charged in Counts II and III of the indictment. (R134)(A1)

Finding this aggravating circumstance was improper for several reasons. First, as robbery was not proved at trial (see Issue II), it should not have been considered in sentencing. Perhaps the judge could have relied solely upon the existence of a sexual battery to support the aggravating circumstance, but he did not. Consequently, there is no way to determine if the circumstance would have been found without the robbery. And, certainly, there is no way to determine the weight given to the circumstance because the robbery was included. Second, the finding was improper because the sexual battery and robbery were tried contemporaneously with the homicide as part of a single criminal transaction. And third, Hardwick was not "convicted" via an adjudication of guilt prior to being adjudged guilty of the murder and sentenced to death. (R977-1058)

Hardwick is aware that this Court has held that a violent felony tried in the same trial as the capital felony can qualify as a "previous" violent felony for purposes of this aggravating circumstance. King v. State, 390 So.2d 315 (Fla. 1980). Additionally, Hardwick is aware of McCrae v. State, 395 So.2d 1145,1153-1154 (Fla.1980), where this Court held

that a prior finding of guilt satisfies the "conviction" requirement for the circumstance. However, Hardwick contends that the holdings of these cases do not comport with legislative intent or due process standards and asks this Court to reconsider them.

B.

The Trial Court Erred In Finding As An Aggravating Circumstance That The Murder Was Committed During Certain Felonies Since The Same Felonies Were The Underlying Felonies For The Murder Conviction.

Hardwick was convicted on a felony murder theory since premeditation was not shown. (See Issue II) The trial judge used the underlying felonies to find the aggravating circumstance provided for in Section 921.141(5)(d), Florida Statutes (1979), murder committed during a felony. (R135)(A2)

Using underlying felonies to aggravate the capital felony is improper for several reasons. First, it is against legislative intent. The underlying felony in a felony murder is a necessarily included offense of the latter. State v. Hegstrom, 401 So.2d 1343 (Fla.1981). Subsection (4) of Section 775.021, Florida Statutes, was enacted after Florida's 1972 death penalty statute.6/ It expresses a clear legislative intent that lesser included offenses not be used to enhance punishment when the defendant has been sentenced on the greater offense. The aggravating circumstance felony murder has the

---

6/ Section (4) was added to Section 775.021 in 1976.

effect of enhancing punishment or at least of increasing the likelihood of enhanced punishment since it increases the likelihood of a defendant receiving the death penalty rather than a life sentence.

Second, using underlying felonies to aggravate the capital felony violates due process of law by arbitrarily establishing a presumption that death is the appropriate sentence in a felony murder. See State v. Dixon, 283 So.2d 1 (Fla.1973), cert.den., 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Third, it violates equal protection of the laws since a defendant convicted of first degree premeditated murder, even though considered more culpable than many convicted of felony murder, see Enmund v. Florida, __U.S.__, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), does not begin the sentencing process with an automatic aggravating circumstance.[7/] Fourth, it is incongruous with the capital sentencing scheme's purpose of evaluating the individual defendant's character and moral responsibility in order to set murders warranting the death penalty apart from the usual first degree murders. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); State v. Dixon, supra.

7/ The aggravating circumstance cold, calculated and premeditated without any pretense of moral or legal justification does not automatically apply to every premeditated murder since it requires evidence beyond mere premeditation. Jent v. State, 408 So.2d 1024 (Fla.1981).

In State v. Cherry, 257 S.E.2d 551 (N.C.1979), the Supreme Court of North Carolina held that an aggravating circumstance very similar to the Florida provision in question could not be applied to support a death sentence in a felony murder situation. That Court characterized the aggravating circumstance as a flaw in the statutory sentencing scheme.

Hardwick acknowledges Menendez v. State, 419 So.2d 312 (Fla.1982) and White v. State, 403 So.2d 331 (Fla.1981), wherein this Court rejected some of the arguments advanced here. However, he still maintains that using felony murder to aggravate the capital felony was against legislative intent and violated his rights to due process and equal protection of law. Amend. V and XIV, U.S. Const.; Art. I, §§2 and 9, Fla. Const. He urges this Court to reconsider its previous position, particularly in light of the continuing impact of Enmund v. Florida.

C.

The Trial Court Erred In Finding As An Aggravating Circumstance That The Homicide Was Committed For Pecuniary Gain.

It is well-settled that aggravating circumstances must be proved beyond a reasonable doubt before being considered in sentencing. State v. Dixon, 283 So.2d 1,9 (Fla.1973), cert. den., 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The aggravating circumstance murder for pecuniary gain must not only be proved beyond a reasonable doubt, but "[s]uch proof cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other

than the existence of the aggravating circumstance." Simmons v. State, 419 So.2d 316 (Fla.1982).

Here, the trial judge found that the murder was for pecuniary gain based on evidence that the murder occurred during a robbery and burglary. (R135)(A2) The finding was improper, however, since the State's circumstantial evidence did not exclude the reasonable hypothesis, provided by Ms. Brosambly's testimony, that the taking of property, as well as the intent to take, occurred after the killing. (See Issue II) Under that hypothesis, there was no robbery. Although there was a burglary committed by remaining in a structure with intent to commit an offense therein, see Section 810.02(1), Florida Statutes (1979), the burglary could not support the finding that the murder was for pecuniary gain.

Applying the circumstantial evidence to the facts of this case, there was insufficient evidence to prove a pecuniary motive for the murder beyond a reasonable doubt.

D.

The Trial Court Erred In Finding As An Aggravating Circumstance That The Murder Was Cold, Calculated And Premeditated Without Any Pretense Of Legal Or Moral Justification.

Aggravating circumstances must be proved beyond a reasonable doubt. State v. Dixon, 283 So.2d 1,9 (Fla.1973), cert.den., 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The aggravating factor cold, calculated and premeditated without any pretense of justification requires proof of a greater level of premeditation than the level needed to convict of

first degree murder. Jent v. State, 408 So.2d 1024,1032 (Fla.1981). It also requires proof beyond a reasonable doubt that the murder was cold, calculated and without any pretense of moral or legal justification. Id. This factor is usually found in murders characterized as executions, see, Smith v. State, 424 So.2d 726 (Fla.1982); Combs v. State, 403 So.2d 418 (Fla.1981), cert.den., __U.S.__, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982); Magill v. State, 386 So.2d 1188 (Fla.1980), cert. den., 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359, or, in murders planned in advance, such as contract murders. See Hill v. State, 422 So.2d 816 (Fla.1982)(defendant made the decision to rape and murder victim substantially before the time he picked her up).

Here, the trial judge found that the murder was cold, calculated and premeditated. (R136)(A3) In support, he found that the motive for the murder was to prevent Mrs. Henshall from calling the police and from testifying. (R136)(A3) Also, he found that the murder occurred after Hardwick had been inside the house "some period of time." (R136)(A3)

These findings are not only insufficient bases upon which to find this aggravating factor, but are sheer speculation. Ms. Brosambly's testimony provided the only direct evidence of the murder. According to her, Hardwick said he did not intend for the murder to happen but because he was intoxicated on drugs and alcohol he lost him temper when Mrs. Henshall threatened to call the police. (R685) Essentially, her testimony was that Hardwick killed out of anger and a sense of betrayal, rather than to prevent Mrs. Henshall from calling the police.

There was no evidence of a premeditated murder (See Issue III), much less a murder qualifying for the circumstance cold, calculated and premeditated.

E.

The Trial Court Erred In Not Finding As Mitigating Factors That The Murder Was Committed While Hardwick Was Under The Influence Of Extreme Mental Or Emotional Disturbance And/Or That Hardwick's Capacity To Appreciate The Criminality Of His Conduct Or To Conform His Conduct To The Requirements Of Law Was Substantially Impaired.

In rejecting the mitigating circumstance extreme mental or emotional disturbance[8] the trial judge wrote (R136)(A3):

> * * * There is no evidence tending to show that the defendant was under the influence of drugs or suffered from any mental or emotional disturbance at or about the time of the offenses. There is some testimony that the defendant had been drinking at a bar prior to the commission of these acts but there is also sufficient evidence that he was seen immediately after the commission of these acts again drinking in a bar and seemed to be alert and attentive to what was going on around him and was able to make conversation, walking in a normal manner, etc. Therefore, there is no indication that he was so intoxicated that he was under any type of extreme mental or emotional disturbance.

In rejecting the mitigating circumstance impaired capacity[9] the judge wrote (R137)(A4):

---

[8] §921.141(6)(b), Florida Statutes (1979).

[9] §921.141(6)(f), Florida Statutes (1979).

> * * * The defendant in this case was able to appreciate the criminality of his conduct by his actions. It is clear that he took the motor vehicle of the victim and was able to drive the same after the commission of these acts. There is no indication as mentioned above that he was so under the influence of any alcoholic beverages to the extent that he was substantially impaired. Witnesses having seen him after the commission of the crime described him as being nervous but attentive and being able to talk, walk and think.

These factual bases were insufficient.

First, it is clear that the judge failed to consider Hardwick's mental condition in mitigation largely because he interpreted the evidence as showing that Hardwick appeared normal after the murder. This was improper since the evidence was so conflicting that it is unclear when the murder occurred and thus unclear when Hardwick's post-murder actions began. Moreover, Jones v. State, 332 So.2d 615 (Fla.1976), instructs that the mere fact that a defendant appeared normal before and after the murder is not enough upon which to reject the statutory mitigating circumstances relating to mental condition.

In Jones the female victim was raped and stabbed to death sometime between 6:00 p.m. Friday and 11:45 a.m. Saturday. Jones had watched television on Friday night prior to the murder, at which time he was sober and spoke coherently. The following day he was sitting with his landlady on her front porch when the police arrived. He had the presence of mind to immediately leave the porch, borrow money and leave the state with his personal effects. Notwithstanding Jones' normal appearance before and after the murder, this Court held that

the trial court erred in not finding mental mitigating circumstances based upon evidence that Jones suffered a paranoid psychosis and consumed large quantities of wine daily.

Second, in giving undue emphasis to Hardwick's post-murder actions the judge unjustifiably minimized evidence that Hardwick was under the influence of alcohol at the time of the murder, erroneously found that there was no evidence Hardwick was on drugs at the time and completely overlooked evidence that Hardwick acted out of rage. The evidence established that on December 24 Hardwick drank most, if not all, of the day. Ms. Brosambly testified that Hardwick told her he was supposed to work the morning of December 24 but, instead, went drinking with a friend. (R683) Redbird testified that after spending the day at Herschel Elam's house, he and Hardwick went to the Triangle Bar for a beer and then went to the Yogi Bar. (R602-603) According to the testimony of other witnesses, Hardwick alternated between the Yogi Bar and the Rendevouz Lounge all evening, drinking beer at both. (R517-529,815-816,856) When Hardwick called Ms. Brosambly sometime after 9:00 p.m. on the 24th he sounded "drunk or high." (R678-679)

The most significant testimony regarding Hardwick's mental state at the time of the killing, however, came from Ms. Brosambly. Regarding why the incident occurred, Hardwick told her "...that he was drunk and he was high and [Mrs. Henshall] had made him mad and that he didn't intend for it to happen but he was just mad and when he gets mad he loses control of his temper." (R685) Hardwick's admissions to Ms.

Brosambly indicate that his consumption of drugs and alcohol reduced his capabilities to contain his impulses of violence and rage. The lack of detail in his account of the crimes to Ms. Brosambly supports the contention that he suffered from mental impairment at the time in question. The statutory mental mitigating circumstances should have been found.

ISSUE VIII.

THE TRIAL COURT ERRED IN IMPROPERLY DOUBLING STATUTORY AGGRAVATING CIRCUMSTANCES, RENDERING HARDWICK'S DEATH SENTENCE UNCONSTITUTIONAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court has repeatedly held that where the same aspect of a capital crime gives rise to two or more aggravating circumstances, only one circumstance can be found and considered in sentencing. See Clark v. State, 379 So.2d 97 (Fla.1979); Provence v. State, 337 So.2d 783 (Fla.1976), cert. den., 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Here, the trial court found three aggravating circumstances based on evidence of three crimes committed contemporaneously with the murder. (R134-135)(A1-2) It matched the aggravating circumstances with the crimes as follows:

> Previous conviction of violent felony - sexual battery, robbery
>
> Felony murder - sexual battery, burglary, robbery
>
> Murder for pecuniary gain - burglary, robbery

Thus, the sexual battery and burglary were each given double consideration and the robbery was given triple consideration.

Although the trial judge could have matched each of these aggravating circumstances with only one contemporaneous crime without overlap, the fact remains that he did not do so. Consequently, there is no way to determine if each of the circumstances would have been found without the improper double and triple consideration of the crimes. And, certainly, there

is no way to determine the weight given to each of the circumstances. Hardwick's death sentence therefore violates the Eighth and Fourteenth Amendments and must be reversed.

CONCLUSION

Hardwick asks this Court to reverse his case for a new trial for the reasons expressed in Issue I. He asks for reversal of his judgment and sentence for robbery (Count III) with directions to enter a judgment for theft for the reasons presented in Issue II. He asks for reversal of his judgment and sentence for one of the felonies underlying his felony murder conviction for the reasons presented in Issue III. Finally, for the reasons and authorities presented in Issues IV through VIII, Hardwick asks that his death sentence be reduced to life imprisonment or that it be remanded for new sentencing proceedings before a new jury.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: Karla J. Staker
KARLA J. STAKER
Assistant Public Defender

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830-3798
(813)533-0931 or 533-1184

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 26th day of July, 1983.

Karla J. Staker

KARLA J. STAKER

KJS:js