IN THE SUPREME COURT IN AND
FOR THE STATE OF FLORIDA

LLOYD DUEST, etc.,)
Appellant,)
vs.)
STATE OF FLORIDA,)
Appellee.)

CASE NO. 63,678

APPELLANT'S BRIEF

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ABBREVIATIONS USED

R - RECORD

AA - APPELLANT'S APPENDIX

AB - APPELLANT'S BRIEF

STATEMENT OF THE CASE

On May 12, 1982 the Broward County Grand Jury returned an indictment charging that on February 15, 1982 Lloyd Duest a/k/a Robert Brigida (hereinafter referred to a Duest) committed 1st Degree Murder of one John Pope Jr. in violation of F.S. 784.03 (R-1701)(AA-1); Duest was arraigned in the Broward Circuit Court on May 14, 1982 and "stood mute", whereupon the Court entered "not guilty" plea in the Defendant's behalf. (R-1702)(AA-2).

Counsel for Duest then files the following motions and notices:

1. Demand For Discovery (R-1709)(AA-3)--
   Answered by State: (R-1711)(AA-5-7)
   (R-1714)(AA-9)
   (R-1715)(AA-10)
   (R-1718)(AA-11)
   (R-1719)(AA-12)
   (R-1757)(AA-45)
   (R-1758)(AA-46)

2. Motion For Statement of Particulars (R-1710)(AA-4)
   Answered by State: (R-1713)(AA-8)

3. Motion To Dismiss (R-1720)(AA-13)
   Denied 11/4/82

4. Motion For Statement of Aggravating Circumstances (R-1722)(AA-15)
   Denied 11/4/82

5. Motion To Dismiss (R-1725)(AA-18)
   Denied 11/4/82

6. Motion To Preclude Sentencing under F.S. 921.141 and 775.082 (1)

7.	Motion To Dismiss Indictment or To Declare Death not a Possible Penalty	(R-1733)(A-25) Denied 11/4/82
8.	Motion For Individual Voir Dire etc.	(R-1735)(AA-27) Denied 11/4/82
9.	Demand For Discovery Relative To Sentencing	(R-1737)(AA-29) Granted 11/4/82)
10.	Motion To Dismiss	(R-1739)(AA-31) Denied 11/4/82
11.	Motion To Dismiss	(R-1747)(AA-38) Denied 11/4/82
12.	Notice of Alibi State Rebuttal	(R-1717)(AA-39) (R-1750)(AA-40)
13.	Motion in Limine	(R-1751)(AA-41)
14.	Motion to Strike Alias	(R-1753)(AA-43)
15.	Motion To Withdraw/For Mistrial	(R-1758)(AA-47)

Jury Trial was held commencing March 7, 1983 through March 19. The Jury found Defendant Guilty of Murder in the First Degree on March 18, 1983 (R-1792)(AA-49) and Judgment of Guilt rendered thereon (R-1793)(AA-50). On March 19, 1983 the sentencing bifurcated phase of the trial took place and on that date a majority of the Jury, by a vote of 7 to 5 recommended the death penalty for Defendant (R-1802)(AA-53). A hearing was held thereon (R-1642) (AA-55) and the Court summarily denied all eleven (11) Defense Motions (R-1643)(AA-56).

Sentencing hearing was held by the Court on April 24, 1983. The Court found that Pursuant to F.S. 921.141 (3) as to Aggravating Circumstances 4 applied:

B. "Previous conviction of a felony involving the use or threat of violence to some person".

D/F. (combined) Engaged in committing or attempting to commit a Robbery" ...."committed for Pecuniary Gain".

H. "Especially heinous atrocions and cruel".

I. "Cold calculated and premeditated".

5 Aggravating Circumstances did not apply:

A. "Committed while under Sentence of Imprisonment".

C. "Knowingly created a great risk of death to many persons".

E. "Committed for purpose of avoiding or preventing a lawful arrest or effecting an escape".

G. "To disrupt or hinder the lawful exercise of any government function or the enforcement of laws".

The Court found that none of the 7 Statutory Mitigating Circumstances may be applied to the case (R-1696)(AA-57) accordingly Pursuant to F.S. 775.082 (1) the Court pronounced the Death Sentence on the Defendant (R-1697) (R-1833)(AA-58)(AA-59). From this Judgment and Sentence timely notice of appeal was filed with this Court on May 11, 1983 (R-1837)(AA-63) Statement of Judicial Acts to be reviewed (R-1838)(AA-64).

STATEMENT OF FACTS

Michael Francis Demizio testified that he met a "Guy" by the name of "Danny" on a bus bound to Florida from New York (R-642); he identified that person as the Defendant (R-647), who told him steals from gay people (R-648). After they arrived in Fort Lauderdale they met a man named "John" who gave them a place to stay at 607 Northeast 7th Avenue. (R-653). The Defendant was wearing a gray jogging suit (R-662) and that on Tuesday (R-665) the Defendant drove up in a brown Camaro with rags on the steering wheel and shifter and a box of jewelry on the floor (R-665). The Defendant left and came back walking about 45 minutes later and then left the premises (R-668). The witness identified the Defendant as the person he knew as "Danny" in open court (R-684). The witness further testified that he had an antique knife his parents had given him (R-674). The last time he saw the knife was Saturday evening (R-712) in the apartment.

Joanne Wioncek who lived at the Alfa Apartments in February of 1982 (R-929), testified that during the weekend of February 13th, Danny and Mike were visitors (R-930). On Monday about 3 o'clock in the afternoon (R-939 Danny arrived in a car with a gentleman, went into the closet, closed the door then turned around and walked out (R-940), with the gentleman whom she identified as the victim from State Exhibit #16. (R-942). At 4:30 or 5:00 o'clock Monday "Danny" came back to her apartment in a gold Camaro. (R-944), "he got his things and just left" (R-947). The Witness identified Defendant as "Danny" (R-948).

Robert L. Harris testified that he knew the deceased had arranged to take a mutual friend to the Fort Lauderdale Hollywood Airport on the afternoon of February 15, 1982 (R-544), that when he described the deceased (John) to the Bartender at Lefty's by telephone, he learned that the deceased had departed from Lefty's "with another person" (R-548). That Lefty's is "almost totally a gay bar". (R-549).

Neil O'Donnell, Bar Manager and Bartender at Lefty's Bar on the day of the crime (R-567), came into the bar, although not on duty and saw John Pope there about 2:30-3:00 in the afternoon; Mr. Pope met a man dressed in a jogging suit who left the bar with the deceased (R-576), The witness later identified a photograph of the Defendant (R-580), identified "Danny" as number four in a line-up held subsequently at BSO (R-583), and identified the Defendant in open court (R-586).

David William Shifflett, a roommate who lived with the deceased, testified that he came home to their residence about 6:30 P.M. on the day of the crime and found the deceased's 1980-81 gold Camaro not in the driveway, the front door unlocked, (R-484), lights on, stereo on loud, and a sliding glass door opened, his personal jewelry box on a table in the living room (R-485), bathroom door and light on in the deceased's bathroom (R-491). His friend Vicki Green was with him at the time and they went next door to call the Police.

Victoria Louise Green came to the deceased's residence about 8:00 P.M., confirmed Mr. Shifflett's testimony about unlocked doors, jewelry box and missing automobile (R-522); when they found the blood on the bed, they ran out of the house to a neighbors and called Police (R-533). The witness identified the deceased's missing automobile as a "gold, brownish gold Camaro" (R-535).

Deputy Edward Hellman, a Broward County Deputy Sheriff, was on duty on February 15, 1982 when he received a call to 6928 N. W. 34th Avenue, Fort Lauderdale. At the scene he found a nude white male on the bathroom floor in a pool of blood with several stab wounds (R-442). He determined the victim was John Edward Pope, Jr., about 63 years of age (R-444). He was accompanied by Deputy Halow. They turned the crime scene over to Detective Lauria and Robes who tried to take fingerprint impressions, most of which (4 out of 5) were unsuitable for identification, no testimony was offered regarding the 5th print (R-471).

Robert Henry Parr of the Broward Sheriff's office (BSO) attached to the Forensic Services Division took photographs of the scene (R-451), dusted for fingerprints (R-468).

George T. Duncan, a Forensic Serologist for the Broward County Sheriff's Department Crime Laboratory, (R-862), was qualified as an expert in Forensic Serology (R-863), analyzed blood

samples taken from 6928 Northwest 34th Avenue (R-863) from pillow cases, bed sheets, wash cloth, shoes and David Shiffletts shirt and pants by luminol testing which indicates the possibility of the presence of blood (R-871). None of David's apparel (shoes, shirt or pants) showed traces of blood (R-865). The bed sheets and pillow cases were positive for blood (R-870) as to the washcloth which gave a positive reaction to the luminol test (R-870.

Ronald Robert Keith Wright, Chief Medical Examiner of Broward County was qualified as an expert in Forensic Pathology (R-902) testified that Mr. Pope "died of multiple stab wounds" (R-905) by a sharp instrument. . defined as "including pocket knives, butcher knives, paring knives .... " (R-907); "he, (the victim) was in full rigor mortis, meaning that he had completely stiffened up after death" (R-912), at the time of examination about 9:30 in the evening.. (R-913). The witness testified the victim had been dead at least 4 hours (R-913).

John F. Bowers, Jr., a bartender at Lefty's 1 Lounge (R-603) identified the victim as having been in the bar the Monday afternoon from a photograph shown him later (R-608) who had a beer with a man in a jogging suit, but the witness could not positively identify person number two (the Defendant) in the line-up as the Defendant (R-621).

Donna Roeschke testified she lived in Apartment C at 607 Northeast 7th Avenue. She met a man who introduced himself as

"Danny" who wore a jogging suit and showed her a dagger shoved down in the waistband of his pants (R-735) around Sunday Valentine's Day (R-733). The witness later identified "Danny" as number four in a line-up in April, 1982 (R-743)

Tammy Jean Duncan testified she met Danny (R-807) in Fort Lauderdale in February, 1982 (R-806) on a Sunday, was in the same room with him at the Alpha Apartments (R-811), when he was wearing a gray sweatsuit and he had a tattoo and a scar (R-852). On Monday "Danny" told the witness he was going to a gay bar and roll a fag (R-813). "Danny" left and returned with an older man (R-814) in a gold Camaro, they stayed a few minutes and left; Danny later returned alone between four and five (R-815); the witness identified the Defendant as "Danny" (R-820).

Witness Dawn DeLuca testified that in February of 1982 she lived at 607 Northeast 7th Avenue, Fort Lauderdale (R-769. She further testified she met a man named "Danny" wearing a gray jogging suit, (R-771), with scars on his stomach (R-772) when he came to her apartment to thank her boy friend for helping him to clean up glass broken the night before during a party. (R-771). The last time she saw him he got out of a gold Camaro. This was on a Monday afternoon (R-773). This witness identified number four in a photograph of a line-up at BSO as Danny (R-776), and in open court (R-791).

Laura Sayles the Day Manager of the Downunder Restaurant (R-924) testified that Mike Demezio was an employee of the restaurant with the dates of his employment (R-925) from 2/15/82 (R-926) until June 10, 1982 (R-927)

Paul Perez-Cubas, a patrolman for the City of Fort Lauderdale Police Department, testified that during April of 1982 (R-835) he was dispatched to the Marlin Beach Hotel (R-836). He questioned a subject who identified himself as Robert Brigida (R-838) and the witness identified the Defendant as that person (R-839). Upon learning that the subject was to be held for questioning he transported the Defendant to the Broward County Courthouse where he turned him over to Detective Feltgen.

John William Feltgen, a homocide detective with the Broward Sheriff's office (R-874) interviewed the Defendant about 9 o'clock PM on April 18, 1982 (R-875).

Rene Robes, a detective with BSO testified he conducted a line-up in which the Defendant was placed on April 30, 1982 (R-986). In the line-up the suspect was in position number four, the Defendant was picked by Neil O'Donnell (R-990), Donna Platt Roeschke (R-991) and Mike Demezio (R-992); that the victim's motor vehicle was recovered from a parking lot at the Galleria Mall, Fort Lauderdale (R-995).

In defense to the charge by way of an alibi the Defendant presented witnesses who testified:

Nancy Duest (mother of the Defendant) (R-1192) last saw her son on Saturday February 13, in Watertown, Massachusetts (R-1195). However, she did not know his whereabouts for the following two days (R-1200).

The Defendant's father, Richard Paul Duest, testified he last saw his son on April 5, 1982 (R-1232) when the father took his son to the Trailways Bus Station in Boston. The last time father saw son prior to the departure was on February 15th, 1982, when the witness was cleaning his van (in Watertown) and the Defendant delivered to him a yellow sales slip from Suburban Auto Parts (R-1235).

Debra Duest (R-1018) (sister of the Defendant); Paul Richard Duest (R-1078) (brother of the Defendant) Frank Duest (Uncle of Defendant (R-1095); Mark Duest (R-1115) (Uncle of the Defendant); Matthew C. Turner (R-1863) a friend; Diane Turner (R-1887) (also a friend of Defendant); Eddie LaVache (R-1914) (Debbie Duest's boyfriend), and Nancy Kerrigan (R-1992) (Defendant's sister) all testified they saw the Defendant in Watertown, Massachusetts on the 14th and/or 15th of February (1982);(Debra Duest) (R-1022); (Paul Richard Duest) (R-1074); (Frank Duest)(R-1096);(Mark Duest)(R-1116,17); (Nancy Duest, the Defendant's mother testified she saw him in Watertown on Saturday

February 13th. (R-1195); Matthew C. Turner testified he saw "Lloyd" (the Defendant) on Valentines Day (February 14, 1982); this testimony was supported by his wife Diane Turner (R-1887); Eddie Lavache saw the Defendant on February 14th (R-1917) and 15th, 1982. (R-1918).

Witness Stephen Fralick, owner of an Auto Parts Store in Bellmount, Mass. testified he sold an automobile fan belt to Defendant on February 15, 1982 (R-1954).

In Rebuttal, William Richard Long identified the Defendant as someone he had seen in Lefty's Lounge on February 14, 1982 and on April 18th, 1982 at the Marlin Beach Hotel (R-1303) when the witness took the Defendant to his home with him (R-1309). The next time the witness saw the Defendant was on April 18, 1982 and he then called the Fort Lauderdale Police (R-1316). He identified the Defendant in open court (R-1318).

ARGUMENT

POINT I

THE COURT ERRED IN ALLOWING STATES WITNESSES RICHARD LONG AND EDWARD HEFFELMAN TO TESTIFY OVER OBJECTION BY APPELLANT'S COUNSEL.

Edward Heffelman had been contacted by the Fort Lauderdale Police February 18th (1982) shown a photograph of Appellant, gave Detective Lauria a name of the subject matter (R-1144), however the name of the prospective witness - while known to the State - was never included in any of the States Answers to Demand for Discovery (R-1711 & 1712), (R-1714), (R-1715), (R-1718), (R-1719), (R-1757) or (R-1758). Appellants Counsel objected strongly to the courts permitting the witness to testify (R-1146),(R-1153), however the witness was allowed to testify (R-1279) to the prejudice of the Appellant. The Prosecutor represented to the court that he (the Prosecutor) did not know the name of the witness until about the time the trial commenced (R-1148). In an attempt to avoid the consequences of failing to list this particular witness on the State's Answers to Discovery the Prosecutor elected not to use the witness in the case-in-chief, but brought the witness in as a rebuttal witness.

The State had a continuing duty to disclose. FLA. R. Crim.P. 3.220 (f). Evidently the Prosecutor did advise the Defense Counsel "within minutes" of learning it himself, of the witnesses identity.

The point is the investigating officer (Lauria) knew the identity of the witness and did not disclose it to the State, in violation of the Rights of Due Process in the Appellant. Compounding the problem was that Defense Counsel took Detective Lauria's deposition (not included in the record) however, no information was offered as to the potential witness, nor was the identity or possibility of a potential witness included in the Police reports. Whether the Prosecutor or the investigating officer withheld evidence of the identity of a witness is not relevant. What is relevant is that by withholding evidence possibly favorable to the accused on the guilt issue, Due Process was denied. BRADY v. MARYLAND, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.215 (1963).

The same reasoning applies to the witness WILLIAM RICHARD LONG who testified as a States Rebuttal Witness (R-1301). It appears that Officer Perez-Cubas of the Fort Lauderdale Police Department knew Mr. Long's name - and in order to protect the witnesses identity - at the witnesses request, wrote on his report that he received his information from a confidential informant, however, the officer had the potential witnesses name and relayed it to the BSO (R-1163) even though there was some problem getting the witnesses correct name, Counsel objected to testimony from Mr. Long as being prejudicial to the Appellant (R-1168) because the State did

not provide the defense with any name for the witness until during the trial. (R-1169). This was also to the prejudice of Appellant. The investigating officers knew the true name of the witness as well as his address, but the State provided the wrong name (RICHARD LAUN - address presently unknown) to Defense Counsel (R-1757)(AA-45) when the officers knew the correct name.

POINT II

WERE THE APPELLANT'S SIXTH AMENDMENT RIGHT TO HAVE "THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE" ABROGATED BY COMMENTS MADE BY THE PROSECUTOR REGARDING DEFENSE COUNSEL DURING THE TRIAL? (R-763)(AA-66-69)

Appellant takes the position that the Court erred in its refusal to grant Motion for Mistrial (R-765) after Prosecutors comments about Defense Counsel.

On redirect examination of Donna Roeschke, the Prosecutor made a disparaging remark about Defense Counsel, who in turn Moved to Strike, which Motion was sustained by the Court. (R-764). Defense Counsel moved for a mistrial, which was denied by the Court (R-765). That while the Court cautioned the Prosecutor (outside the hearing of the Jury)(R-764) no cautionary instruction was given. In CARLILE v. STATE 129 FLA 860, 176 So862 (1937) this Court ordered new trial holding that prosecutorial comments precluded a fair trial for the Defendant. In this case Counsel gratuitously insulted Defense Counsel and while not a a remark made during Summation as in SIMPSON v. STATE 352 So.2d 125 (FLA 4 DCA 125(5). The test for preservation of Appellant's right to present this error was cited by this Court in CARLILE. The improper remark was not of such severity that it would require reversal without an objection. However, the improper remark warranted a rebuke or retraction for the Jury so that the sinister influence of the aspersion on Defense Counsel's ability could

be overcome. The Prosecutor's comment was similar to that that condemned by the Third District Court in JACKSON v. STATE 421 So.2d 15 (FLA 3DCA 1982) wherein the Court held where the Trial Court had neither rebuked the Prosecutor or instructed the Jury to disregard the comments, the Defendants fundamental right to a fair trial could be upheld only by ordering a new trial.

On the Motion for Mistrial this Court said in WILSON v. STATE 436 So.2d 908 (FLA 1983) citing SALVADORE v. STATE 366 So2d 745 (FLA.1978), Cert. Denied 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed. 2d 115 (1979), that the ruling on a Motion for Mistrial is within the sound discretion of the Court, and such Motion should only be granted in cases of absolute legal necessity. FLOWERS v. STATE 351 So.2d 764 (FLA. 3DCA 1977). However, the Court committed error and abused its discretion by neither rebuking the Prosecutor or giving a curative instruction. This had the effect of violating Appellant's Sixth Amendment right to have effective counsel for his defense.

POINT III

HAVE THE DUE PROCESS RIGHTS OF THE APPELLATE BEEN INFRINGED BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT "DID THEN AND THERE UNLAWFULLY AND FELONIOUSLY AND FROM A PRE-MEDITATED DESIGN TO EFFECT THE DEATH OF ... JOHN POPE, JR."... (AA-1)(R 1701) AS CHARGED IN THE INDICTMENT, WHERE THE COURT ALSO CHARGED THE JURY REGARDING FELONY MURDER (R-1768)(AA-48) WHEN DEFENDANT WAS CHARGED WITH PREMEDITATED MURDER.

The Court charged the Jury with the standard charge:

> "Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the Defendant. The premeditated intent to kill must be formed before the killing. (R-1767)(R-1510)

What then was the evidence submitted to the Jury upon which they relied in order to find DUEST guilty of first degree murder? Michael Francis Demizio testified that during the bus trip from New York City to Fort Lauderdale DUEST told him that he steals from gay people by taking them back to their apartments, "beats them up and then he steals from them". While showing a propensity to rob a certain type of person this admission by the Appellant is insufficient evidence upon which to base a finding of premeditation in the slaying of JOHN POPE, JR. What other evidence is there in the entire record to sustain such a finding? The proof in this case was wholly circumstantial in that there were no known actual eyewitnesses to the crime. This Appellant was not charged with felony murder under the part of Florida Statute 782.04 for a killing "when committed by a person engaged in the perpetration of, or an attempt to perpetrate

any .... Robbery ...." The Appellant was charged under the first sentence of F.S. 782.04 (1)(a) for "the unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed ...." (AA-1)(R-1701).

The Medical Examiner testified that the decedent died of multiple stab wounds (R-905). Demizio testified that his parents had given him an old antique knife (R-674), which was stolen sometime between Saturday and Monday from his suitcase in the closet of the apartment (R-675) where he and DUEST were staying with John Scaficchio (607 Northeast 7th Avenue, Fort Lauderdale)(R-653). Joan Wioncek testified Danny came into her apartment with a gentleman, (R-939) went into the closet, closed the door behind him, came out and walked out (R-940). Presumably the Appellant stole Demizio's knife and subsequently used it to kill Pope, but significantly no murder weapon was found. What was found was a "knife in Defendant's possession on April 18, 1982" as listed on State's Amended Answer to Demand for Discovery filed August 26, 1982 (AA-10)(R-1715). The record is not clear whether or not this knife belonged to Demizio, but assuming it was the property of Demizio was it possible it was not the murder weapon. Dr. Wright testified the stab wounds could have been caused by any sharp instrument "including pocket knives, and probably excluding bayonettes, however", or that a dagger with a six or seven inch blade would be quite consistent with these (wounds)(R-907). Donna Roeschke testified that at one point the Appellant "showed me

a dagger he had shoved down his waistband in his pants .. with no sheath .. long, thin; about seven inches long (R-735) (the blade)", and the dagger was "old, worn" (R-736). The witness identified "Danny" (the Appellant) who she met on Sunday, Valentines Day (R-733)(R-761) February 14, 1982. There is little doubt from the testimony of the witnesses that DUEST may have stolen Demizio's dagger, and it can be reasonably inferred that DUEST intended to rob JOHN POPE, JR. However, there is no other evidence in the record that DUEST planned to kill the victim and that he had a premeditated intent to do so.

The Verdict of Guilt of premeditated murder was not supported by substantial competent evidence. Moreover, Deputy Hellman of the BSO was unable to make any useful fingerprint comparisons placing Appellant in the Pope residence (R-471). Tammy Duncan testified that "Danny" stated he was "going to a gay bar and roll a fag" (R-813). No evidence was ever presented by the State to prove the Appellant had the necessary intent to kill the deceased. Accordingly, the Court erred when Trial Counsel moved the Court for Judgment of Acquittal of the first degree murder charge (R-1851), denied (R-1856), renewed (R-1204) and again denied (R-1295).

The Court said in WILLIAMS v. STATE 437 So.2d 133(1)(FLA 1983):

> (1) The proper role that this Court plays in capital cases has been enunciated in TIBBS v. STATE 397 So.2d 1120 (FLA.1981), aff'd, 457 U.S.31, 102 S.Ct. 2211, 72L.Ed.2d 652 (1982). There we said that -

> "an Appellate Court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment."
>
> 397 So.2d at 1123 (footnotes omitted). See also Spinkelink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976).

As stated the Court has clearly enunciated its function in the Review of capital cases and the instant case lacks substantial, competent evidence in support of the verdict and judgment of premeditated murder.

Similar to WILLIAMS, Supra, where the only proof of guilt is circumstantial, this court said:

> (3) This Court is not unmindful, that "where the only proof of guilt 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." McARTHUR v. STATE, 351 So.2d 972, 976 n. 12 (FLA.1977). See also JARAMILLO v. STATE, 417 So.2d 257 (Fla.1982).

Compare FITZPATRICK vs. STATE 437 So.2d 1072 (FLA. 1983) wherein the Appellant asserted there was insufficient proof of premeditation to support a conviction for first degree murder, however this Court held (5) at P.1076 that the Appellant began "shooting after the Police announced their presence", thereby killing Deputy Heist. Clearly, the Court felt this was sufficient evidence of the necessary element of premeditation. This case lacks any of the necessary proof

beyond and to the exclusion of any reasonable doubt, the case should be remanded for a new trial. Additionally, the Court charged the Jury (R-1767)(AA-47) that "there are two ways a person may be convicted of first degree murder" one is premeditated and the other is felony murder. "That in order to convict of first degree felony murder, it is not necessary for the State to prove that the Defendant had a premeditated design or intent to kill." (R-1768)(AA-48). But the indictment specifically charged that Appellant killed POPE "from a premeditated design to effect the death." No mention of first degree felony murder in the indictment. Accordingly, there was no formal charge of felony murder of the Appellant.. The Court erred in giving the felony murder charge when in fact the Appellant was charged with premeditated murder. Florida Statute 782.04 (1)(a) is clear in its definition of murder -

> "The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or attempt to perpetrate any ... robbery ... shall be murder in the first degree, etc."

To convict the Appellant of felong murder he must be charged with felony murder. The State saw fit to charge the Appellant with "Premeditated Murder" but failed to prove it beyond a reasonable doubt. Accordingly, the Appellant should be granted a new trial. Certainly felony murder is not a lesser included offense to premeditated murder, and notwithstanding

trial Counsel did not object to the Jury charge, the inclusion of the felony murder jury charge is such fundamental terror as to require reversal of the conviction. The standard form Jury instruction for murder - first degree - includes felony murder but is stated in the alternative, accordingly an indictment which does not so charge is defective.

Proof of the existence of one state of facts will not sustain a conviction for another state of facts. BOOKER v. STATE 93 FLA 211, 111 So 476 (FLA. 1927); LONG v. STATE 92 So.2d 259 (FLA.1957). In general, to charge one with an offense defined by statute, the offense should be charged in the very language of the Statute. The indictment (R-1701)(AA-1) did not follow the statutory language of F.S. 782.04(1)(a); this defect was preserved for Appellate review by Appellant's Motion to Dismiss the Indictment (R-1733)(AA-25) which was denied by the court on November 4, 1982.

POINT IV

THE COURT ERRED IN ALLOWING INTRODUCTION OF STATES EXHIBIT NO. 26 (A PHOTOGRAPH OF LYLE SALIN), OVER OBJECTION.

The Court erred in allowing the introduction of State's Exhibit 26 (a photograph of Lyle Salin)(R-887, over objection. Error was brought to Court's attention as specific ground of motion for new trial (AA-53)(R-1803) and its review is sought as a judicial act to be reviewed (AA-64) (R-1838).

In WILSON v. STATE 436 So.2d 908 (FLA 1983) at 910:

> The admission of photographic evidence is within the trial court's discretion and that court's ruling will not be disturbed on appeal unless there is a showing of clear abuse. COURTNEY v. STATE 358 So.2d 1107 (FLA. 3d DCA) cert. denied. 365 So.2d 710 (Fla. 1978) PHILLIPS v. STATE, 351 So.2d 738 (Fla. 3d DCA 1977), cert. denied. 361 So.2d 834 (Fla.1978); ALLEN v. STATE, 340 So. 2d 536 (Fla. 3d DCA 1976); REED v. STATE, 224 So. 2d 364 (Fla. 4th DCA 1969). No such abuse has been demonstrated in the instant case. This Court has held on numerous occasions that photographs will be admissible into evidence "if relevant to any issue required to be proven in a case." STATE v. WRIGHT, 265 So. 2d 361, (Fla. 1972). See also ADAMS v. STATE, 412 So. 2d 850 (Fla.), cert. denied. 103 S.Ct.182 (1982). WELTY v. STATE, 402 So.2d 1139 (Fla.1981); STRAIGHT v. STATE, 397 So.2d 903 (Fla.) cert. denied, 454 U.S. 1022 (1981); FOSTER v. STATE, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885 (1979).

Appellant contends the Trial Court abused its discretion in admitting into evidence the "mug shot" of Lyle Salin, a known transvesite taken some four months after the murder with which the Appellant was charged. The photograph had no

probative value, was highly prejudicial to the Appellant and was not "relevant to any issue required to be proven in the case". Appellant preserved his right to present this error on appeal in that trial counsel objected to introduction of the Exhibit (R-887) having prior thereto moved for a mistrial on the issue of the Exhibit and the characterization of Salin as a transvestite (R-884). Accordingly the Court erred in refusing to grant a mistrial after the comment by Detective Feltgen and admitting State Exhibit No. 26 into evidence.

POINT V

UPON REVIEW BY THE COURT MAY A SENTENCE OF DEATH BE AFFIRMED WHERE THE TRIAL COURT ERRED IN ITS FINDING OF AT LEAST TWO OF THE FOUR AGGRAVATING CIRCUMSTANCES WHICH WERE NOT SUPPORTED BY COMPETENT EVIDENCE NOTWITHSTANDING THE COURT FOUND NO MITIGATING CIRCUMSTANCES?

Appellant takes the position this question must be answered in the negative, especially when the Court considers the proportionality of the offense created against prior cases which have come before the Court.

In this case the Court found aggravating factors under Florida Statute 921.141 (5) applied:

(b) Previous conviction of felony using violence (AA-59)(R-1833)

(d) Committed while Appellant was engaged in commission of a robbery (AA-60) (R-1834);

(f) For pecuniary gain (AA-60)(R-1834);

(h) Wicked, evil, atrocious or cruel (AA-60)(R-1834);

(i) In cold, calculated and premeditated manner without any pretense or legal justification. (R-1798) and (AA-60) (R-1834)

Of the mitigating factors Florida Statute 921.141 (6)(R-1799) the Court found none applied. (AA-61)(R-1835).

As to the aggravating factors the Court considered (d) and (f) to overlap and accordingly found applicable four rather than five aggravating factors (AA-61)(R-1835)

Was the aggravating circumstance of heinous, atrocious and cruel proved beyond a reasonable doubt?

The Appellant takes the position that this question must be answered in the negative.

In LEWIS v. STATE, 377 So. 2d 640 (Fla. 1976), the Defendant shot the victim in the chest and several more times as the victim attempted to flee, this Court said (citing DIXON v. STATE, 283 So. 2d 1,9 (Fla. 1973), COOPER v. STATE, 336 So.2d 1133 (Fla. 1976), and TEDDER v. STATE, 322 So. 2d 908 (Fla. 1975), that to be "especially heinous" - - "the conscienceless or pitiless crime that is unnecessarily torturous to the victim." Also cited in BARCLAY v. STATE, 343 So. 2d 1266 (Fla. 1977), where the Court found the murder heinous in that the victim was stabbed while begging for mercy and then killed by shots to the head. Also ADAMS v. STATE, 341 So. 2d 765 (Fla. 1977), where the victim was beaten with a fire poker past point of submission and until grossly mangled.

As to heinous, atrocious and cruel, the Court held in FOSTER v. STATE, 369 So. 2d 928 (Fla. 979), that where the "defendant showed no compassion when he cut the victim's throat, beat him, dragged him into the woods, and cut his spine with a knife", that the homicide was, in fact, of a heinous nature. In addition, this Court set the standard for this

aggravating circumstance in COOPER v. STATE, 336 So. 2d 1133 (Fla. 1976), where a deputy was killed instantly by two gunshot wounds into the head, and held, at page 1141:

> (20) While we agree with the State that this execution-type murder may have been unnecessary, we agree with Cooper that the standard of an aggravating circumstance is whether the horror of murder is "accompanied by such additional acts as to set the crime apart from the norm ... the conscienceless or pitiless crime which is unnecessarily torturous to the victim." This murder was not in that category. Deputy Wilkerson was killed instantaneously and painlessly, without additional acts which make the killing "heinous" within the statutorily-announced "aggravating" circumstance.

Further, in FLEMING vs. STATE, 374 So. 2d 954 (Fla. 1979), where a deputy was killed by a single shot during a struggle for control of weapons, in considering the heinous, atrocious or cruel aggravating circumstance, this Court, quoting from DIXON v. STATE, 283 So. 2d 1,9 (Fla. 1973) at page 958, said:

> 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 necessarily torturous to the victim. (Emphasis added by the Court.)

In COMBS v. STATE, 403 So. 2d 418 (Fla. 1981), the Defendant fired three shots into the head of the victim (any of the

three could have caused death and either of two of them would have caused death), this Court held (at page 420) that the Trial Court did not err in finding as an aggravating circumstance that this murder was especially heinous, atrocious and cruel, in that (at page 421): "The circumstances are factually very similar to the robbery-execution slaying in SULLIVAN v. STATE, 303 So.2d 632 (Fla. 1974).

In SMITH v. STATE, 407 So. 2d 894 (Fla. 1981), the Appellant was found guilty of two murders wherein he choked, stabbed, slit one victim's throat and cut open the other victim's chest, this Court held (at page 903) that the manner in which the Appellant strangled the victims was "conscienceless or pitiless crime which is unnecessarily torturous to the victim" ... "which we have established as heinous, atrocious and cruel."

In VAUGHT v. STATE, 410 So. 2d 147 (Fla. 1982), Appellant shot the victim five times during the course of a robbery in discussing "the factor of heinous, atrocious or cruel has also been approved based upon the fact that the killing was inflicted in a "cold and calculated" or "execution-style" fashion, and although there was instantaneous death, it was accompanied by the infliction of physical pain and anguish.

In JONES v. STATE, 411 So. 2d 165 (Fla. 1982), the victim was killed by a single gunshot wound to the back of the head during a robbery, this Court found the murder heinous, atrocious or cruel, notwithstanding the death was caused by a single gunshot wound, because the Appellant ignored the victim's plea to be spared and shot him to death point-blank, in execution style, while the Appellant ignored pleas to spare the victim.

In ARANGO v. STATE, 411 So. 2d 172 (Fla. 1982), where the victim had an electrical cord around his neck, multiple lacerations to the face and two gunshot wounds to his head, the Trial Court found one aggravating circumstance of "especially heinous, atrocious or cruel" in that the beatings occurred prior to the murder, one mitigating circumstance and affirmed the sentence.

In ADAMS v. STATE, 412 So. 2d 850 (Fla. 1982), Appellant had taped an eight year old child's wrists, tried to have sex with her, where the cause of death was strangulation, this Court held (at page 857) that among other things, death by strangulation has been held to be especially heinous, atrocious and cruel.

In HITCHCOCK v. STATE, 413 So. 2d 741 (Fla. 1982), the murder was committed in the course of involuntary sexual battery on a thirteen year old girl, and Appellant subsequently choked and beat her to death, the Court held the

killing to be especially heinous, wicked or cruel as an aggravating circumstance.

In GRIFFIN v. STATE, 414 So. 2d 1925 (Fla. 1982), the killing of sixteen year old Keith Kirchaine, who, while visiting a store, was abducted and shot at least three times over pleas for mercy, was especially heinous, atrocious and cruel (page 1029).

In HARVARD v. STATE, 414 So. 2d 1032 (Fla. 1982), that notwithstanding that there was instantaneous death from gunshot wounds from a shotgum, this Court agreed with the Trial Court in its holding (at page 1036) that the Appellant's lying in wait for and stalking the victim, compounded by his previous harassment of her, constitute sufficient "additional acts" to justify application of the heinous, atrocious or cruel aggravating factor.

In MORGAN v. STATE, 415 So. 2d 6 (Fla. 1982), a prison inmate was stabbed ten times by Appellant, the Court approved the trial court's finding that the death was especially heinous, atrocious or cruel. While both MORGAN and the instant case involve stabbing deaths Morgan had one Griffin make a knife for him while both were inmates at Union Correctional Institution and the Defendant told Griffin he wanted the knife in order to stab a man who owed him $400.

In the case at bar, the Court found this crime to be "especially heinous, atrocious and cruel." However, in McCRAY v. STATE, 416 So. 2d 804 (Fla. 1982), this Court held that where the Defendant shot deceased three times in the abdomen, the Court found "that this crime was not especially heinous, atrocious or cruel", nor did the aggravating circumstance of "cold, calculated and premeditated manner without any pretense of moral or legal justification" apply. The Court further said the latter aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive. JENT v. STATE, 408 So. 2d 1024 (Fla. 1981).

Further, this Court said in MAGILL v. STATE, 428 So. 2d 649 (Fla. 1983), in defining heinous, atrocious that "it is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious and cruel; rather it is the entire set of circumstances surrounding the killing."

In LIGHTBORNE v. STATE, 438 So.2d 380 (Fla. 1983) this Court found the crime was especially heinous, atrocious or cruel (29 at 591). This Court commented that "the murder and events leading up to its consummation were carried out in an unnecessarily fortuitous way toward the victim ... that the victim was forced to submit to sexual relations with the

Defendant prior to her death, while pleading for her life ..." In this case there was evidence that the Appellant knew the victim and Neil O'Donnell testified that Pope met and departed Lefty's Bar (R-576) with a man later identified as the Appellant. (R-580). There was no evidence that the relationship between the victim and the Appellant was other than a casual "pick-up" apparently with sexual overtones. Absent was any evidence of bad feeling between the men.

The evidence does not support the finding that this particular murder was "especially heinous, atrocious or cruel." Roland Robert Keith Wright, the forensic pathologist who autopsied the body of the victim testified that while the victim died of multiple stab wounds, State Exhibit 29 (of the victim's back showed three stab wounds) (R-905), two of which were superficial, one of which penetrated the lung (R-906) and eight wounds to the front or side of the body, one of which penetrated the sac around the heart (R-908) (State Exhibit 30). A laceration to the back of the victim's head incurred Post Mortem (R-910)(State Exhibit 31). Moreover, the body of the victim was not mutilated nor tortured. From the evidence submitted to the Jury there was insufficient basis to draw the conclusion the killing was especially heinous, atrocious and cruel. Was the aggravating circumstance of cold and calculated, etc. proved beyond a reasonable doubt?

The aggravating circumstance of cold and calculated manner without any pretense of moral or legal justification was clarified by this Court in SMITH v. STATE 424 So.2d 726 (Fla. 1983) at 733:

> .. Premeditation is only to be relied upon as an aggravating factor when the capital felony was committed in a cold and calculated manner without any pretense of moral or legal justification. See COMBS v. STATE, 403 So.2d 418 (Fla. 1981), cert. denied, U.S. ___ 102 S.Ct. 2258, 72 L.Ed. 2d 862 (1982).

In JENT v. STATE 408 So.2d 1024 (Fla. 1981) the Court upheld a finding of cold, calculating and premeditated manner without any pretense of moral or legal justification as an aggravating circumstance where the Appellant poured gasoline on the still living woman and set her afire. This Court held in agreeing with the Trial Court, the homicide was not only especially heinous, atrocious and cruel, but was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification.

In LIGHTBORNE, Supra, this Court found the capital felony was committed in a cold, calculated and premeditated manner ... because the Defendant cut the telephone lines, entered at a time when others would most likely not be present, and effected an execution style killing using a pillow placed between the murder weapon and the victim's head. None of the indicia of proof is present in the instant case. The

only proof of this type was that the Appellant took a knife with him to the victim's residence. This could be proof that the Appellant intended to rob Pope, but in and of itself is insufficient to prove this particular aggravating circumstance.

One of this Court's recent pronouncements concerning the State's burden of proving beyond a reasonable doubt the aggravating circumstance of cold, calculated and premeditated manner without any pretense of moral or legal justification was in CANNADY v. STATE 427 So.2d 723 (Fla. 1983) at p.730 where the Court cited MANN v. STATE 420 So.2d 578 (Fla. 1982). In both cases the Court held there to be insufficient proof notwithstanding in MANN, the Defendant was convicted of killing a teenage girl who died from a skull fracture and who had been stabbed and cut several times.

While this Court has generally held that where there are two valid statutory aggravating factors weighed against the non-existence of any mitigating factor - in such case death is presumed to be the proper punishment. STATE v. DIXON 283 So.2d 1 (Fla. 1973) cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 295(1974) and JUSTUS v. STATE 438 So.2d 358 (Fla. 1983), the reasons for the rule do not seem appropriate when other factors are considered.

Compare LEWIS v. STATE 398 So.2d 432 (Fla. 1981) where this Court found that three of the aggravating circumstances of the four found by the Trial Judge were unsupported by the evidence and this Court remanded for resentencing. The Trial Court had found (6-8):

1) Appellant under sentence of imprisonment.

2) Had previously been convicted of crimes involving the use or threat of violence.

3) Knowingly created a great risk of death to many persons, and

4) Murder was especially heinous, atrocious and cruel.

That while the case was one of a Jury override, the Court found circumstances 2, 3 and 4 did not apply and this Court remanded for resentencing so that the single aggravating circumstance can be weighed by the Jury.

The U. S. Supreme Court held in ZANT v. STEPHENS 33 Cr. L. 3195 (decided June 23, 1983) that invalidation of one of several aggravating circumstances considered by a Jury in capital case does not invalidate a sentence of death, however, each of the aggravating factors must be proved beyond a reasonable doubt and failure of such proof results in lack of due process in the sentencing phase of the trial. Two of the aggravating factors in the instant case are unsupported in the record.

It is clear from the record the Court considered the

Appellant's prior criminal record (R-1660)(R-1665) as an "aggravating circumstance" while Florida law plainly provides that a Defendant's prior criminal record is not a proper "aggravating circumstance". MIKENAS v. STATE, 367 So.2d 606, 610 (Fla. 1978) the majority opinion stated (at page 610) "a substantial history of prior criminal activity is not an aggravating circumstance under the Statute. Since mitigating circumstances are present, ELLEDGE (346 So.2d 998)(Fla. 1977), dictates resentencing. MIKENAS and ELLEDGE had a mitigating factor. None was present in this case, however, if 50% of the aggravating factors are removed is it not logical that by the removal of the circumstances from consideration a different result could be reached. What appears to have been the Court's ruling in MIKENAS was that this Court felt the Trial Judge had doubled up the prior criminal record by finding not only MIKENAS had been convicted of a felony involving violence but for having a substantial history of prior criminal activity as a non-statutory aggravating factor.

Based upon BARCLAY v. FLORIDA 33 CR.L. 3292 (Decided July 6, 1983) by the United States Supreme Court this case should be remanded for resentencing. In BARCLAY, the Court said (p. 3296):

> "The crux of the issue, then, is whether the Trial Judge's consideration of improper aggravating circumstances so infects the balancing process created by the Florida Statute that it is constitutionally impermissible for the Florida Supreme Court let the sentence stand".

It is the function of this Court in the reviewing of each death sentence case to compare it with other Florida Capital Cases in order to determine whether "the punishment is too great" STATE v. DIXON, Supra.

The review function of this Court is to compare the facts concerning the crime and the character and background of other cases previously reviewed by the Court. This approach was confirmed by the U. S. Supreme Court in PROFFITT v. FLORIDA 428 U.S. 253 (1976):

> "The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reqeighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.' SONGER v. STATE, 322 So. 2d 481, 484 (1975). See also SULLIVAN v. STATE, 303 So. 2d 632, 637 (1974)." 428 U.S., at 253.

Moreover, Florida law requires the sentencer to find at least one valid statutory aggravating circumstance before the Death Penalty may even be considered (F.S. 921.141 (3)(a), and further requires the sentencer to balance statutory

aggravating circumstances against all mitigating circumstances and does not permit non-statutory aggravating circumstances to enter into the weighing process. BARCLAY p. 3296.

What the rationale of the Supreme Court seems to be that in the event the reviewing Court finds that certain of the aggravating circumstances are improperly found to apply or are not supported by evidentiary proof beyond a reasonable doubt, then the case should be remanded for resentencing. This includes either improperly found statutory aggravating circumstances or the consideration of nonstatutory aggravating circumstances. "What is important .... is an individualized determination on the basis of the character of the individual and circumstances of the crime" Zant, supra. (emphasis in original). The Court should compare this death sentence with other cases to determine whether "the punishment is too great" DIXON, Supra.

Appellant contends that from a review of cases decided by this Court since the reinstatement of the death penalty by the Legislature, the facts of this case do not support a sentence of death. As Justice Stevens and Powell state in the concurring opinion in BARCLAY, Supra,

> Analytically the Trial Judge must make three separate determinations in order to impose the death sentence: (1) that at least one statutory aggravating circumstance has been proved beyond a reasonable doubt; (2) that the existing statutory aggravating circumstances are not outweighed by statutory mitigating circumstances;[2] and (3) that death is the appropriate penalty for the individual defendant.[3]

That even if tests one and two are proven beyond a reasonable doubt, the Trial Judge (and this Court) must find that the death penalty is appropriate for the individual Defendant. That is even though the first two criteria have been met, it is nevertheless not appropriate to impose the death penalty. "The sentencer therefore not only weighs aggravating against mitigating circumstance but even in the absence of mitigating circumstances must weigh the statutory circumstances alone to determine their sufficiency. The U. S. Supreme Court has insisted "that capital punishment be imposed fairly, and with reasonable consistency, or not at all" EDDING vs. OKLAHOMA, 455 U.S. 104, 112 (1982).

CONCLUSION

That because of the grounds stated in Points I (allowing witnesses to testify over objection), Point II (Prosecutors Remarks about Defense Counsel)), Point III (The Courts error in charging the Jury on "Felony Murder" when the Appellant was charged with "Premeditated Murder"), Point IV (allowing into evidence irrelevant photograph of Lyle Salin, any of which errors are sufficient basis for the granting of a new trial. As to Point V (where improper statutory aggravating factors were considered), notwithstanding no mitigating factors were found, the death sentence is not appropriate for the Appellant for the crime committed and same should be reduced to life imprisonment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to ROBERT BOGEN, Assistant Attorney General, Attorney for Appellee, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, by mail this 14th day of December, 1983.

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