51 pages

IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,767

Leon Circuit Court
No. 82-455

WILTON AMOS ROSS,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

BRIEF OF APPELLANT

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INDEX

TABLE OF CASES

TABLE OF CASES

PRELIMINARY STATEMENT

The Appellant in this cause was the defendant in the trial court and will be referred to as the appellant and/or the defendant. The Appellee in this cause is the State and will be referred to as the State and/or the appellee. The entire record in this case including the transcript of the trial and motions is numbered consecutively and will be referred to by the letter "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE

On February 19, 1982, the Appellant, Wilton A. Ross, was arrested and charged with first degree murder in the Circuit Court, in and for Leon County, Second Judicial Circuit, State of Florida, and the Public Defender was appointed to represent him (R-3-11). On March 10, 1982, the grand jury returned an indictment for first degree murder (R-1-2). On September 13, 1982, the defense filed a motion to declare Section 921.141 Florida Statutes (1981) unconstitutional and a motion to compel disclosure of the aggravating circumstances (R-36-44). Both these motions were denied on September 24, 1982 (R-172,174). On October 1, 1982, shortly before the case was to be tried, the State informed the defense that it would be using another person represented by the Public Defender's office as a witness at trial. Consequently, the Public Defender for the Second Judicial Circuit filed a certification of conflict of interest and Felix Johnston, Jr. was appointed by the Court to represent the defendant (R-54).

On May 16, 1983, this case was tried before a jury and on May 19, 1983, the jury returned a verdict finding the appellant guilty as charged of first degree murder (R-84). On May 20, 1983, the jury was impanelled for the penalty phase and nine jurors entered an advisory verdict for the death penalty (R-85).

On May 25, 1983, the Court entered judgment and sentenced the defendant to death (R-86-114). An amended motion for a new trial was filed on May 25, 1983, and denied June 1, 1983 (R-139-140, 194). On June 1, 1983, notice of appeal, judicial acts to be reviewed, motion for order of insolvency, motion for order directing court reporter to transcribe notes, motion to withdraw as defense counsel, and written directions to the clerk were filed (R-145-148,150,153-154,156). On that same date the Court entered an order of insolvency, and order directing the court reporter to transcribe notes, designated the Public Defender for the Second Judicial Circuit to handle the appeal, and an order permitting Felix Johnston, Jr. to withdraw as counsel (R-149, 151,152,155). A motion and order for extension of time to file the transcript was filed July 14, 1983. On October 6, 1983, the Public Defender certified a conflict of interest and withdrew from the case and the present counsel was appointed.

STATEMENT OF FACTS

The State's first witness was Donnie Crum who testified that on February 16, 1982, at about 9:30 he saw a body on the shore and reported it to the Sheriff's Department (R-353-354).

The State's next witness was the chief investigating officer, Sgt. Keith Daws. He testified that he received a call about a body at Lake Talquin about 2:00 or 2:30 p.m. on February 16, 1982. After looking at the body he turned the scene over to Sheriff Woodham (R-358-359). On February 17th, shortly after midnight, he contacted the defendant at Williams' Landing on Lake Talquin which is one or two miles from Coe's Landing (R-360-384). When the witness entered the defendant's houseboat he sat on the bed and noticed that the mattress was wet (R-371). After reading the defendant his Miranda warnings, he told him he wanted to talk to him about the victim. The defendant responded "That woman gives me hell all the time." The defendant advised that the last time he had seen his wife was on Sunday (R-372). The defendant was then taken to the Sheriff's Department where he gave a statement that his wife had put him on the river Monday night about 9:00 at 90 West at the bridge on the Ochlockonee River. He was out working all night long and didn't get home until 3:00 or later in the morning of the 16th (R-373). Sgt. Daws. Sgt. Daws seized a hammer from the houseboat and a boat

and motor from the Ross' home on Silver Lake Road (R-374-375). In September he was asked to check the motor to see whether or not the shear pin was broken on the boat motor and found that it was (R-376). On cross-examination Keith Daws stated that the victim was dressed in shirt and underwear when she was found but had no pants. A pair of pants which may have been victim's were found at Joe Budd's Landing one and one-half miles east toward Coe's Landing (R-379). The defendant was completely cooperative with law enforcement officers and in his statement did not say whether or not he had had to paddle in coming back from fishing (R-380-382). The defendant has a houseboat and two other boats (R-384).

Deloy Harrison took the stand and testified that he saw the defendant Tuesday morning between 11:00 and 12:00 noon on February 16th at Williams' Landing. He said it was unusual for defendant to be driving the victim's truck as he had never seen him do that before and he asked where Gladys was. Defendant responded that she was mad at him and was at home. Further, Mr. Harrison stated that the defendant said his hand was sore. This witness identified the victim as being the defendant's wife, Gladys Ross (R-390-394). On cross-examination, he stated that defendant and victim were usually happy when he saw them He stated that his father, Carlton Harrison, who was also a State witness, had a serious drinking problem. He worked as a catfish fisherman and said it was not unusual for the fishermen to be up working at night (R-397,401).

Meloni Folson testified for the State that she lives at Williams' Landing about 100 yards from the Ross' houseboat. On the night of February 15th she was coughing so she got up and heard voices coming from the houseboat. She heard a voice saying "Get a hold of yourself. Calm down. Straighten up." The witness stepped outside her door and hear some more voices and then a bump like a door slamming and no further noises. This was between 11:00 and 12:00 that night (R-402-405).

Carlton Harrison testified that he saw the defendant the night of the murder at about 9:00 o'clock at night. The defendant landed his boat and came up wet. The weather conditions were foggy and light rain. The defendant stated that his wife was supposed to meet him there and the two men walked to a nearby neighbor's house to try to call her. When they were unable to reach his wife, the defendant went with Chuck Bruner to the store and bought a six-pack of beer. He asked Carlton to go with him back to Coe's Landing but Carlton said he would not. The defendant then left in his boat towards Williams' Landing. Carlton did not observe any injury to the defendant's hand at that time. He testified that the defendant did not come into his trailer to dry out and that he did not loan him any dry clothes. The witness admitted having drinking problems but stated that he was sober that night (R-408-428).

Chuck Bruner testified that he is a near neighbor to Carlton Harrison. On the night of the murder the defendant and Carlton knocked on his door about 9:15 to 9:30. The defendant called his home and no one was there. They then called Williams' Landing and spoke to Carl Hager who stated that he could not see the victim's truck down at the houseboat. The defendant stated that something was wrong because "Gladys never done me this way." He did not observe any injuries to the defendant's face or hand at that time. Carlton was not drinking that night. (R-430-434).

On cross-examination he stated that Carlton did have the shakes and was sick. The weather was rainy, cold and windy. The defendant left between 9:30 to 10:00 but the witness did not know whether he immediately left or whether he went to Carlton's trailer. He stated that the defendant did not appear mad or upset and was nice as could be. In all the time he had known the defendant and his wife he had never seen the defendant in that truck without the wife (R-436-440). Carl Hager was the next witness to take the stand and testified that around 9:30 or 10:00 the night of the murder he had received a call from Chuck Bruner and looked for the victim's truck but didn't see it. He stated that it was possible for it to have been there and him not be able to see it. The next morning the defendant had appeared in his store looking haggard as if he had been up all night and drinking. He bought a six-pack of beer. Hagger asked him in a joking way "Did Gladys kick you out last night?" The defendant replied "Yes, for the last fucking time." The defendant then said that his wife had put him out and didn't pick him up afterwards, and her excuse was that she was too tired and went to bed. Mr. Hagger said he had never before seen the defendant drive the truck with the boat and trailer behind it without Gladys (R-458-460). The witness said that he heard a boat motor around midnight and that he saw the defendant betwen 10:00 and 11:00 the next morning. He also stated that at that time his rental boats were green (R-462-463).

The victim's son, Kenny Robertson, took the stand and testified that on February 16th he saw the defendant washing down the pink boat over behind the house on Silver Lake Road. As he walked over to talk to him, the defendant turned and went into the house. He stated that it was unusual for the defendant to drive the truck or to be washing out the boat at the house with a hose. Usually they would just rinse it out with a five gallon can of water at the lake. He also observed that the pink boat was not tied down well on the trailer (R-466-469). On cross-examination he admitted that he did not like the defendant and had seen him strike his mother one time. He stated he went to school with Dennis Harwood, a key State's witness and that his brothers had talked to Harwood after his mother was killed (R-470-474). Sgt. Bill Gunter testified that he was the custodian of the evidence in this case. On cross-examination he stated that he had been scratched by bushes every time he had gone catfishing with bush hooks (R-478-487.

Nayola Darby testified as to some aerial photographs she had taken of the general area (R-490).

The Florida Department of Law Enforcement expert, Rick Maxey, testified that he gathered crime scene evidence. At High Bluff Landing he collected a pair of pants and observed bare footprints. He tested the wet mattress for blood and got a possible result on the bottom of the mattress (R-497-502). He also testified that the paint on the defendant's pink boat was flakey (R-529).

The medical examiner, John Mahoney, testified that he conducted an autopsy. In the body itself he did not observe liver mortis which indicated that the body had changed positions between the time of death and the time that he observed it. However, by observing a photo of the body in situ, he observed that the liver mortis, or collection of the blood, indicated that the body had been moved after death (R-542-546,574). The witness described extensive bruises, scratches and lacerations to the face, injuries to the nose, lips and a chipped front tooth. Most of the injuries were caused by a blunt instrument such as a human fist or foot except for one laceration which was caused by a different but unknown blunt instrument (R-547-549). There were six injuries to the scalp, one of which had pushed the bone through a large vein permitting air to be sucked in through the laceration, carried to the heart, and causing death by embolism (R-550-559). There was multiple bruising over the chest and shoulder (R-555-556). There were injuries on the left hand and arm that were consistent with defensive acts by the victim. The right hand was grasping some hair and appeared to have been used offensively (R-557,561). The bruises were fresh and occurred premortem (R-556). The victim was blood type O and the blood under her fingernails was blood type A which indicates that the assailant would probably have scratches (R-564). A vaginal swab revealed the presence of sperm and there were indications of sex from 24 to 48 hours before death or after

death. There were no indications of violent sex right after death (R-565). There was no evidence that the victim had been drinking alcohol (R-566). Finally, the witness stated that the defensive injuries showed that the victim was conscious during a portion of the attack. Once she sustained the deep displaced skull fracture she was probably unconscious. There is no way of knowing at what point during the assault that the fatal injury occurred (R-574).

The next witness to testify was Robert Tricquet. Sgt. Tricquet took the defendant's fingerprints on February 18, 1982, and observed that he had an injury to his right hand (R-616-617).

The next witness to testify was a fingerprint expert, Dan Hasty, who stated that a fingerprint, apparently made with blood, had been found on a white metal support post of the houseboat. Mr. Hasty identified this fingerprint as belonging to the defendant (R-626-627).

Dorothea Mungen testified as a blood expert. She stated that the defendant's blood was type A and the victim's blood was type O. She was able to identify the fingerprint found on the white metal support post as being human blood but was unable to determine the actual blood type (R-638). She was able to identify a blood stain similar to the victim's blood on the dock by the houseboat and on the victim's clothing. She was able to identify the blood type under the defendant's fingernails

as matching that of the victim's (R-640-641). She was unable to determine a type for the other blood stains but determined that some of them were human blood. Finally, she was able to determine that there was blood on the hammer but not whether it was human or animal (R-638).

Larry Smith's testimony is presented as a fiber expert. He stated that fibers found in the defendant's hair, on a fallen tree near the body, in the defendant's pink boat, and on the edge of the dock near the houseboat, are all consistent with fibers from the purple blanket found close to the victim's body (R-662). There were no fibers matching the blanket in the defendant's nail samples (R-666).

Dennis Harwood testified that he was placed in the same cell as the defendant in June of 1982. He had represented himself in his case and done well and had been dubbed by the local press as "F. Lee Harwood". He became friends with Ross (R-682). During the time from June to September of 1982, the defendant would tell Harwood his version of what had happened and Harwood would say that is ridiculous and no one will believe it. Harwood asked to look at the defendant's discovery papers but the defendant said "No. You might say something, and I'd have to kill you, too." (R-683). Harwood stated that he had no deals with the State and that after he made his original statement in September of 1982, that he was confined in various jails under unpleasant circumstances until February of 1983. At that time he found

a piece of razor blade in his food and was released from jail (R-684). Harwood testified that originally the defendant told him the same story that he had told the law enforcement officers. He stated that his wife had dropped him off on the river for him to check his lines. She was supposed to meet him back at Williams' Landing where they had a houseboat. He went to Coe's Landing and was soaking wet. He went to Carlton Harrison's trailer and dried his clothes off there. He then went to a man's house who owned a little store and had called Williams' Landing and someone there said they did not see his wife there. He stayed around there trying to get the fellow to open up the store but he was watching something on television. Finally they left and got a six pack of beer and he went back to Carlton Harrison's. He was there a little while and left going to Williams' Landing. On the way he sheared a pin and had to paddle to the boat trailer. When he got there no one was there and he went inside and laid down on his sleeping bag on the floor (R-690-691). Harwood stated that he never read any of the defendant's police reports or other discovery that he had with him in the cell (R-693). Harwood then stated that he told the defendant that his story had a lot of holes in it. To begin with, no one would believe that he didn't have a pair of pliers to fix the shear pin if he had been cat-fishing because everyone uses pliers when they are catfishing. Harwood then said if you tell me the truth I can help you (R-695). One day, the defendant said, I'll tell you the truth but if you ever tell anyone you"ll be dead. The defendant then told him the

same story up to the point where he left Carlton Harrison's on his way back to Williams' Landing and had sheared a pin in his motor. At that point the defendant said the truth was that he had sheared the pin but he fixed it because he did have pliers. After fixing it he went to the houseboat and when he got there his wife was there. She was arguing at him and he didn't feel like putting up with it because he had been out on the lake. He hit her with a hammer and after he realized what he did, he just continued to hit her. After that he tried to devise a way to make it look as though someone else had done it and had sexual intercourse with her after the death. Then he placed her body over his shoulder and was carrying her on the dock out to his boat and dropped her two or three times getting her to the boat. The he said that he put her in the boat and paddled out into the lake. At this point Harwood stated that the first version of the story had been in error in that the defendant had not fixed the sheared pin yet but fixed it after he paddled out into the lake. Defendant told him that he didn't want to take a chance of cranking the boat motor up where someone would hear him. He put the body on the bank because he wanted to make it look as though someone else had raped and killed her. On the way back he hit another stump and sheared a pin in the boat motor. He had to paddle on in and went in the trailer and fell asleep. When Harwood asked what happened to the hammer, the defendant responded that he knows Lake Talquin really good and there's plenty of deep holes out there in that lake. The defendant also stated that Joe Pittman was her ex-husband and at one time had

taken a gun and threatened to kill Gladys. She had him put in jail and the defendant was going to try to make it look as though Joe Pittman had done it (R-696-699).

On cross-examination Dennis Harwood stated that he had no deal with the State except his own safety and had not told the Public Defender that he was supposed to get work release (R-702). He said the defendant did not put the body in the lake because he was afraid they would drag the lake. Further, the defendant told him he didn't mean to kill the victim and didn't mean to hurt her (R-705). Harwood was confronted with his inconsistent statements in that in his previous statement he had stated that the body was left on the shore because the defendant was afraid they would drag the lake,whereas in his trial testimony he stated that the defendant left it on the shore because he was going to blame it on someone else (R-703-704). He was confronted with an inconsistent statement in that he now stated that the shear pin broke quite close to the houseboat, whereas before he had had stated that the pin had broken far out from the houseboat (R-706). He was confronted with an inconsistent statement in that now he did not recall the defendant saying that the victim had been drinking, whereas in an earlier statement he recalled that the defendant said the victim had been drinking heavily (R-707). The defendant did tell him that he had injured his knuckle taking a boat off a trailer and not in the fight with the victim (R-708). Harwood admitted having up to four previous convictions and having been declared incompetent (R-713-715). Harwood testified that he had been angry with the

defendant for hitting him in the back with a shoe and threatening to strike him on another occasion (R-717).

Edward Thornton testified that he was held in the same jail cell as the defendant and Harwood. He stated that they argued every day and during one of the arguments the defendant stated "I'll kill you just like I did my wife." The defendant got red in the face and went and sat down on his bunk (R-725-727). On cross-examintion, Thornton admitted that he had a sentencing pending and that his lawyer told him they were waiting to sentence him until after he testified. He has seen the defendant run Harwood out of his cell and has known Harwood to lie about where he got cigarettes and other stuff which came from the defendant. The argument during which the defendant made the remark about killing Harwood started out joking and might have been a joking comment (R-730-732). At one time Harwood took an overdose of sleeping pills (R-735).

Linda Hensley testified as a hair expert. She stated that of the 56 hairs found clutched in the victim's right hand, 48 could have been the defendant's hair and 6 could have been the victim's hair (R-747). Of the hairs found on the log at the scene where the body was found, two could have been the victim's and one could have been the defendant's. Of the hairs found on the dock one could have been the defendant's and one could have been the victim's. Finally, of the 59 hairs found on the nail in the bottom of defendant's pink boat, all 59 were probably the victim's hair (R-749-751).

Keith Daws was recalled to the stand and stated that in the defendant's original statement to Daws, the defendant stated he was not at Coe's Landing. The defendant also advised him that he had not noticed the wet mattress or floor. Sgt. Daws testified that the boat was soaked with water; the floor was squashing with water and the mattress was dripping (R-765-767). Sgt. Daws admitted that the door of the houseboat was slightly open and it was raining and storming which could have caused the floor to be wet from rain. Further, the defendant told him that his hand had been hurt in a boat trailer accident (R-774-775). At this point the State rested their case and a motion for judgment of acquittal by the defense was denied (R-778).

The first witness for the defendant was his original defense counsel, Assistant Public Defender Ed Harvey. Mr. Harvey testified that the defendant made a complaint about Dennis Harwood going through his papers before Mr. Harwood became a witness for the State in September. Mr. Harvey requested that the defendant give him all of the legal materials in his cell and requested that Harwood be transferred to another cell. The witness stated that he was concerned that Harwood would make up a "confession" (R-788-789).

Pete Sanderson testified that he was in the same jail cell as the defendant and Harwood and saw Harwood into Skebo's legal materials at least four different times. (R-792-793).

Howard O'Dell also testified that he observed Harwood reading the defendant's legal materials on one occasion for at least fifteen

minutes. He observed Harwood take the envelopes containing the materials out of the box under the defendant's bed (R-796-799).

The defense called Rickey Pittman who testified that he knew Wilton Ross and his wife and observed them camping alongside the lake on several occasions. The weekend before the victim was killed on a Monday, he saw them camping and helped load their stuff into their boat. He identified Exhibit P-1 as the same boat that they were using to camp. He testified that they had a blanket with them that they were sitting on by the fire (R-800-803).

Joe Johnston, an officer with the Game and Fresh Water Fish Commission, testified that he was assigned to Lake Talquin. It is two miles from Coe's Landing to Williams' Landing and further by the channel. He knew Wilton and Gladys Ross and saw them quite often. They always appeared very happy and he saw them camping out with lots of gear on several occasions. When he saw them, the defendant was usually running the boat and Gladys was up front. He took pictures of a foot print at High Bluff Landing where the pair of pants was found. High Bluff Landing is one mile from where the body was found. It rained hard the night of the murder (R-807-816).

Dr. Kenneth Hausfeld said he treated the defendant for a hand injury at the jail on February 19th. At that time the wound was at least 4 to 5 days old and was infected. It is possible the injury could have occurred February 15th (R-820-823).

The defendant called Robert Zapp as a witness to say that he went with Skebo to check his fish lines a short time before the murder occurred. After they drove up and got out of the truck the victim stepped out with a gun and fired over their heads and

scared him (R-825).

Wilford Jiles testified that he was an investigator for the Public Defender's office and in that capacity interviewed Carlton Harrison two or three weeks after the defendant's arrest. Carlton told him that the defendant had drank a six-pack of beer and left the trailer about 12:00. Carlton stated that the defendant was wet and had been drinking (R-834-838).

Chester Brown, also an employee of the Public Defender's office, stated that he interviewed Harwood who told him that Mr. Meggs had promised him work release and that if he did not get it he would not testify (R-843-845).

The last witness to take the stand was the defendant. The defendant admitted that he had seven felony convictions. He and his wife were married in the same boat which he was accused of transporting her body approximately a year earlier. They fished together and had a good marriage (R-847-848). They only had one blanket which was the same type as the State's Exhibit 43 and they both used it when they took it camping that weekend (R-854-858). On the day before the murder, his wife's ex-husband, Joe Pittman, came over and helped him build a catfish basket because the defendant had hurt his hand earlier in a boat trailer accident and it had got infected (R-859-861). His wife took him out on the river and told him she would have a few beers and pick him up between 9:00 and 10:00 o'clock that night. He was running his boat with a small 3-horse power engine and and had lights on it. He got to Coe's Landing at 9:30 or 10:00 o'clock and Carlton Harrison

came out. The defendant thought he had probably been drinking. Defendant said he never told the police he was not at Coe's Landing that night. They told him three witnesses could put him and her at a landing and they were arguing that night. He told them that's absolutely not true (R-869-873). At Coe's Landing he used Chuck Bruner's phone to call the house and then Williams' Landing. He could not find his wife. He went to the store and got a six-pack of beer and some cigarettes. He needed to pay back Carlton for a pack he had borrowed from him earlier. He then went to Carlton's trailer, turned on the gas heater, dried off a little bit and drank two beers waiting for his wife to show up. Carlton drank the other four beers and he finally gave up and left after 1:00 a.m. (R-875-879). He followed the channel back to Williams' Landing instead of cutting straight across the lake because his lights were reflecting against the mist and he couldn't see well. Half a mile out he sheared a pin and paddled in the rest of the way. The truck was at the houseboat but there was no trailer on it. The door of the houseboat was open about an inch and he had no lights on the boat execpt for his lighter. It was about 3:00 a.m. when he arrived, since he had to paddle 20 or 30 minutes to make the last half mile. A few days earlier his wife's daughter had phoned that she was coming down and he thought his wife must have gone with her and left the truck there for him. Her purse was there so he knew she would be coming back there so he went to sleep on the boat and went home the next morning. The next morning he made some coffee and tried to call her sons, Charles and Denny, but they were not home. The victim had gone

off like this four times before in the previous year so he just assumed that had happened again. He does not recall seeing Kenny that morning. He cleaned his catfish and washed his boat out (R-880-887). At 10:00 or 10:30 he went to Williams' Landing where he saw Deloy Harrison and Don Parr cleaning fish. They asked him where his wife was and he said "at the house" because he felt it was none of their business that she had gone off and left and he didn't know where she was. Later Mr. Hager asked him if his wife had put him out and he replied, "Yes, but ain't going to do it no more." He went back to the houseboat and went to sleep waiting for her to come back. He had spread the sleeping bags on the bed and didn't notice anything wrong (R-888-890).

The defendant said that he was awakened by Keith Daws. The defendant thought Daws was coming to arrest him for a DWI charge. Daws asked him where his wife was and he told him he didn't know. Daws said "Are you worried about her?" and he said "Yes" and said he was going to call the law in the morning if she hadn't come. Daws asked him "Did you wife ever get on to you anytime?" and he said "Yes, she stays on my ass all the time." The defendant was referring to her not wanting him to drink and drive because he assumed Daws was there for the DWI charge. Daws then arrested him and the defendant stated that he wanted an attorney. Daws asked defendant if he would work with them to try to find out how did this and the defendant agreed that he would. At 2:00 or 3:00 a.m. in the morning they went to the house at Silver Lake, searched the trailer and took the boat (R-891-894). Defendant

stated that when he and his wife were out catfishing he usually ran the boat and when it was cold she would lay down in the bottom of the boat and cover up with the blanket. The night his wife dropped him off at the river she was wearing blue jeans. He had driven her truck before but the seat was stuck at a setting for her so he did not usually drive it (R-897). The defendant was released and a few days later he called Sgt. Daws who told him to come down and sign some papers so his wife's body could be released. When he arrived at the police station, they took pictures of his hand even though when Keith Daws had talked to him at the houseboat he had made the statement "I can tell its an old wound." They also took pictures of him with his shirt off (R-898-899). Defendant stated that Harwood was in the same jail cell as he was and one time when he was called out to see his attorney he went back to get his glasses and found that Harwood had all his papers out. Defendant was very concerned and told his attorney who stated that he did not trust Harwood and would send someone to pick up his papers. This was about two weeks before Harwood made a statement to the State Attorney. He may have threatened to kill Dennis in a joking manner in the cell while scuffling but never said "Like my wife." (R-900-905).

On cross-examination the defendant stated that he could fish with his hurt hand but not sharpen a knife and that it was not true that his hand was hurting so much the next morning he couldn't roll up the window. He said he probably scratched his face in the bushes

but that he did not go in the bushes after seeing Chuck Bruner. He went to his houseboat so he would have a place to sleep and did not stay with Carlton because Carlton only had one small single bed. He was not aggravated that the victim didn't show up. He was able to paddle his boat with his hurt hand (R-906-911). Defendant stated that the next morning he found the boat trailer behind the house on Silver Lake Road. They never locked the houseboat and when he threw the sleeping bag over the houseboat mattress he never noticed that it was wet. He stated the floor was wet where the door was open but he doesn't think the rain would have wet the mattress (R-912-915). Defendant took the boat back to his house because it is closer to Highway 90 where he was going to fish as soon as his wife came home. He got along all right with his wife. She had left him four times and would tell him it was none of his business (R-917-918). When they were out on the lake and it was rough weather, his wife would lay down in the boat (R-922). When asked about the bloody fingerprint on the boat support, defendant stated he cut his finger taping up a broken window a week earlier and that it was undoubtedly his own blood. He didn't notice anything wrong in the houseboat because the first time it was dark and the second time he just went in and laid down. Keith Daws never asked him if they were at Coe's Landing, Larry Campbell asked him that question. The houseboat did not look as if someone had burglarized it. He did not talk to Kenny, his wife's son, because he did not see his truck there (R-925-927). He told Parr and Deloy Harrison that his wife was at home because he was embarrassed that she left overnight and he didn't know where she was. His boat bangs badly in rough water which is why his would lay down (R-928).

The defendant rested and the State introduced one rebuttal witness, Gene Revell. Mr. Revell testified that on the night after the murder when they went down to question the defendant that he was unable to roll the window down with his right hand and had to reach over and use his left hand. On cross-examination he admitted that if the defendant had an injury on the top of his hand it would have bumped against the door as he rolled the window and would have hurt him (R-938-940).

After the jury rendered a verdict of guilty of first degree murder, the trial entered the penalty phase. The State entered three particularly gruesome photographs of the victim's wounds over the strenuous objection of defense counsel (R-1051). Frances Smith took the stand for the defendant and stated that she was a friend of the family and asked the jury not to impose the death penalty (R-1053). Mary Stevens testified that she had known the defendant for many years and had raised his girls. She stated he did have a high temper but the only way he could have done something like kill his wife would have been if he was drinking. She stated he was an alcoholic but never realized it (R-1055-1056).

John Ross took the stand and stated that he was the defendant's brother. He stated the defendant was not that kind of a violent person even though he was not an angel (R-1057).

Bobby Ross, another brother of defendant, testified that the defendant can't hold his liquor and that he is under the influence after two or three beers. "It doesn't take much for him." He also stated the defendant had three children that he has always supported

(R-1058-160).

Mildred Roberts testified that defendant's problem was drinking and that every time he ever got into trouble it was when he was drinking (R-1061-1062).

Defense counsel then informed the Court that contrary to his advice that the defendant wished to make a statement to the jury. The defendant started his statement by saying his attorney wanted him to admit guilt and say he was sorry so he could get a life sentence. He had taken the worst the prisons had to give (R-1064). He stated both he and his wife were alcoholics but he was not drunk that night (R-1066). The defendant testified that the witnesses against him and those who refused to come forward were lying and responsible for sending him to the electric chair (R-1065-1073). His wife's ex-husband had a large insurance policy on her and she carried a gun for protection at all times (R-1074). The defendant discussed his testimony as a state witness in a murder trial and his six previous convictions which included stealing beer, burning a car in retaliation for the burning of his own car, two burglaries, grand theft of a boat motor, escape, reckless driving, and eluding the police (R-1075-1078,1086). He expressed feeling for the family and stated he would have shot the man who did it to his mother (R-1079). He loved his wife with all his heart and never fought with her or laid his hand against her (R-1080). He described a domestic argument between he and his wife which was alluded to by her son, Kenny Robertson, and denied striking her (R-1081). Another time his wife

called the defendant's mother and told her she would blow his brains out. The defendant asked the jury to give him a life sentence so he could have a longer time to appeal his case (R-1083). The true story was not presented in court but if it had been true, I would deserve to burn (R-1084).

On cross-examination, the defendant stated he and his wife were not drinking that day. He also said he was on the boxing team in prison (R-1088).

POINTS ON APPEAL

POINT I.

THE TRIAL COURT ERRED IN FAILING TO GRANT MOTION FOR JUDGMENT OF ACQUITTAL IN THAT (A) THE CIRCUMSTANTIAL EVIDENCE DID NOT SUPPORT THE VERDICT AND (B) THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATION TO SUSTAIN A CONVICTION OF FIRST DEGREE MURDER.

POINT II.

THE TRIAL COURT ERRED IN REFUSING TO DISMISS FOR CAUSE A JUROR WHO WAS A RELATIVE OF THE PROSECUTOR.

POINT III.

THE TRIAL COURT ERRED IN PERMITTING A WITNESS TO TESTIFY FOR THE STATE WHOSE NAME HAD NOT BEEN PROVIDED IN DISCOVERY.

POINT IV.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE MITIGATING CIRCUMSTANCES OF SUBSTANTIAL IMPAIRMENT OF THE APPELLANT'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT AND WHETHER THE APPELLANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

POINT V.

THE DEATH PENALTY WAS IMPROPERLY IMPOSED IN THAT THE TRIAL COURT (A) IMPROPERLY FOUND THE AGGRAVATING CIRCUMSTANCES THAT THE HOMOCIDE WAS ESPECIALLY HEINOUS AND (B) ERRED IN FAILING TO CONSIDER APPELLANT'S LIFELONG ADDICTION TO ALCOHOL AND HIS INTOXICATION AT THE TIME OF THE OFFENSE AS A MITIGATING FACTOR ONLY BECAUSE THE APPELLANT TESTIFIED HE WAS SOBER AT THE TIME OF THE OFFENSE.

POINT VI.

FLORIDA STATUTES, §921.141 (1981) IS CONTRARY TO THE CONSTUTITIONS OF THE UNITED STATES AND THE STATE OF FLORIDA ON ITS FACE AND AS APPLIED IN THIS CASE.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN FAILING TO GRANT MOTION FOR JUDGMENT OF ACQUITTAL IN THAT THE CIRCUMSTANTIAL EVIDENCE DID NOT SUPPORT THE VERDICT AND THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATION TO SUSTAIN A CONVICTION OF FIRST DEGREE MURDER.

A. The circumstantial evidence was insufficient to sustain the jury verdict.

The State's theory at trial was that appellant's wife had dropped him off to go fishing on the evening of February 15, 1982, and agreed to pick him up at Coe's Landing later the evening. When defendant arrived at Coe's Landing, wet and cold, she wasn't there. Defendant left Coe's Landing at about 10:00 p.m. He was angry and became angrier as he ran his boat across Lake Talquin to Williams' Landing where they kept their houseboat. When he arrived at the houseboat they argued and he beat her severely causing death around midnight. He then transported her body in his pink boat and left it on the shore of the lake (R-327-340).

Appellant's theory, which he told the deputies when he was arrested and also testified to at trial, was that he had stayed at Coe's Landing until 1:00 a.m and had not arrived at the houseboat at William's Landing until 3:00 a.m. His wife's truck and keys were there so he assumed she had gone with her daughter and left the truck and keys for him. He did not see her again after she dropped him off on the river.

In support of its theory, the State argued scientific evidence which showed that the victim had hair of the same type as the appellant clutched in her right hand; she had blood of the same type as

the appellant's under her fingernails; the appellant had blanket fiber in his hair which matched the blanket found near the victim; the victim's hair was found on a nail in appellant's boat; the appellant's bloody fingerprint was found on a support on the houseboat; human blood, whose type could not be determined, was found in numerous places on the houseboat; blood of the victim's type was found on the wet mattress in the houseboat and on the dock outside the houseboat. Other evidence against the appellant was Harrison's statement that the appellant left Coe's Landing around 10:00; the appellant's face was scratched and his hand was hurt after the murder but not before; the next day the appellant told a witness his wife was at home; the appellant told another witness that his wife had thrown him out for the last time and had not picked him up because she was tired and went to bed; the appellant washed the boat out with a hose the next day; the appellant's statements are contradictory; the appellant later told a cellmate he'd kill him like his wife; and finally, that appellant confessed guilt to a cellmate.

In support of his theory, the appellant argued that the bloody fingerprint had been placed on the metal support the week before the murder when he cut his finger taping a broken window; his wife's hair was in the bottom of the boat because she often laid down to escape the cold wind; the blanket fiber was in his hair because they slept in the blanket the day before while camping, which was verified by a witness; the next day the appellant told a witness his wife was at home because he was embarrassed to say he didn't know where she was; that he did not deny being at

Coe's Landing but denied being there arguing with his wife; he hurt his hand in a boat trailer accident before the murder; there was no incriminating blood or fiber under the appellant's nails; forty percent of the population have A type blood; the hair evidence was not conclusive; there were no major scratches on face or body; when the defense investigator interviewed Carlton Harrison, Carlton stated that the appellant left his trailer at 12:00 instead of 10:00; the State witness, Hager, testified the appellant was not angry when he was at Coe's Landing; although the paint on the pink boat was flakey, not a single flake of pink paint was found on the victim, the blanket or at the scene; there had been a rash of prisoners coming forth with false "confessions" at the Leon County Jail after reading defendant's discovery and the appellant was concerned about this before Harwood gave his statement to the State; Harwood denied reading the discovery but three witnesses saw him do so; and appellant washed the boat out at the house as he usually did because it was closer to Highway 90 where he intended to fish when his wife returned.

After evaluating all of the evidence, the appellant's explanation of the evidence is a reasonable one and the conviction should be overturned.

B. There was insufficient evidence of premeditation to sustain a conviction.

The evidence presented by the Stated showed that even if the appellant did commit the offense, it was not a premeditated crime. The State argued that the appellant was angry when he

left Coe's Landing and became angrier as he traveled through the cold, wet night in his open boat. The State theorized that appellant began arguing and fighting with his wife when he arrived at the houseboat (R-1097). Clearly, the State believed the assailant acted in a moment of anger.

The appellant was also intoxicated. A defense investigator testified that State's witness, Carlton Harrison, told him a few weeks after the murder that the appellant had been drinking that night and drank a six-pack of beer before leaving Coe's Landing (R-836-838). The appellant testified that he drank two beers and his brother testified that two beers were enough to make the appellant drunk (R-879-1059).

Other State witnesses verified that the assailant acted in a fit of anger. A neighbor who was 100 yards from the houseboat heard the victim say, "Get a hold of yourself, calm down, straighten up." She heard some more voices, a thump and then silence (R-403-405) Dennis Harwood testified that the appellant admitted acting out of anger, striking the victim with a hammer but not intending to kill her. After thinking she was dead, he continued to beat her up to make it look as if someone else had done it (R-697,705).

The medical examiner's testimony is consistent with these facts in that he can say there was a physical fight in which the victim was defending herself (R-561). This was the stage at which the neighbor heard loud voices. In his rage the appellant struck the victim with the hammer. Either this was the "thump" the

neighbor heard or it was the sound of her body falling. At this point the victim must have fallen unconscious because the neighbor heard no further voices. The assailant, believing she was dead, panicked and decided to cover up by continuing to strike the unconscious woman. Actually, she did not die until some time later as all the injuries were inflicted before the time of death (R-549).

Even the State Attorney argued that this was a crime committed in a moment of rage. Until the moment of the fatal hammer blow, it appeared to be an unpleasant, but all too common domestic fight with the victim trying to bring the attacker to his senses. The State's own witness, Dennis Harwood, stated that the appellant said the act of the hammer blow was not done with a premeditated intent to kill but was an act imminently dangerous to another and evincing a depraved mind regardless of human life (R-705). The evidence does not support premeditation in this case and the verdict should be reduced to second degree murder.

POINT II.

THE TRIAL COURT ERRED IN REFUSING TO DISMISS FOR CAUSE A JUROR WHO WAS A RELATIVE OF THE PROSECUTOR.

During the voir dire examination by appellant's trial attorney, one of the jurors, Isabelle Lockhart, stated she believed the State Attorney handling the case, Willie Meggs, was a relative of hers. (V. II, TR 213). She was not sure of the exact relationship but had seen Mr. Meggs at several family reunions. (V.II, TR 213). Counsel moved to strike Ms. Lockhart for cause based on the family relationship between the juror and the State Attorney. This was denied by the trial court at which time the appellant used a pre-emptory challenge to strike her from the jury.

Subsequent to this time appellant exhausted his pre-emptory challenge. The appellant then moved the trial court for an additional pre-emptory challenge based on the Court's failure to strike Ms. Lockhart for cause. This motion was denied. (V.II, TR 296-297).

Section 913.03(9), Florida Statutes, states that a challenge for cause may be made where a juror is related by blood or marriage within the third degree to an attorney of either party. In Jenkins v. State, 380 So.2d 1042 (Fla. 4th DCA 1980) the court stated that an abundance of caution would seem to require the trial court to grant a challenge for cause where a relationship is within the first three degrees and the related prospective juror is directly connected with the State Attorney's Office.

An appellant should not be compelled to exercise one of his pre-emptory challenges on a juror who is subject to challenge for cause. Padgett v. State, 95 Fla. 131, 161 So.18 (Fla. 1928). The existence of any of the statutory grounds for challenge for cause entitles a party to have the challenge sustained and the juror excused for cause. Boca Teeca Corporation v. Palm Beach County, 291 So.2d 110 (Fla. 4th DCA 1974). To wrongfully require an appellant to exhaust his pre-emptory challenge is harmful error. Young v. State, 85 Fla. 348, 96 So. 381 (Fla. 1923).

Finally, in Leon v. State, 396 So.2d 203 (Fla. 3rd DCA 1981) the court stated that the general rule is that it is error for a court to force a party to exhaust his pre-emptory challenge on persons who should be excused for cause because it has the effect of abridging the right to exercise pre-emptory challenge.

In the case at bar, the appellant moved to strike juror Isabelle Lockhart for cause because of her belief that she was related to the State Attorney handling the case. She was not sure of the degree of the relationship but it is equally possible that it was within the third degree as that it was without. It is appellant's position that in such a case the benefit of the doubt should be given to the appellant and the juror should be stricken for cause.

By refusing to strike Ms. Lockhart for cause, the trial court forced the appellant to use a pre-emptory challenge. The appellant later exhausted his pre-emptory challenge and was forced to accept a juror whom he believed to be unacceptable.

In so doing, the trial court abridged the appellant's right to exercise his pre-emptory challenge by requiring him to exhaust his pre-emptory challenge on jurors who should have been stricken for cause. Such a denial of the appellant's rights constitute reversible error.

Wherefore, for the foregoing reasons the appellant requests that this Court reverse the Trial Court and remand the case for a new trial.

POINT III.

THE TRIAL COURT ERRED IN PERMITTING A WITNESS TO TESTIFY FOR THE STATE WHOSE NAME HAD NOT BEEN PROVIDED IN DISCOVERY

At trial the State called Edward Thornton who testified that he was a cellmate of the appellant and Dennis Harwood. One day when they were scuffling the appellant said, in what may have been a joking manner, "I'll kill you like I did my wife." The appellant then got red in the face and sat down on his bunk (R-725-727,732).

Defense counsel objected to this witness as he was not listed in discovery (R-448-453). The Court conducted a Richardson hearing at which the former defense counsel, Asst. Public Defender Edward Harvey, testified that Edward Thornton's name was mentioned in the pre-trial materials in Dennis Harwood's deposition and in Bill Williams' statement. The Public Defender withdrew because they also represented Edward Thornton; however, this was not mentioned in any of the pleadings or letters to Felix Johnston. and Mr. Harvey had no independent recollection of telling Mr. Johnston that Thornton would be a witness (R-593-597).

The Defense argued that Mr. Thornton's testimony should be excluded in that Mr. Thornton was an important State witness, the Defense had not been notified that he would be a State witness, and the defense was prejudiced. In spite of a recess to take Thornton's deposition, the defense was unable to investigate witnesses who would have impeached his credibility or his testimony on the third day of a murder trial (R-425-597). An admission of this testimony was contrary to Rule 3.220, Florida Rules of Criminal Procedure.

POINT IV.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE MITIGATING CIRCUMSTANCES OF SUBSTANTIAL IMPAIRMENT OF APPELLANT'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT AND WHETHER THE APPELLANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

During the trial phase and the penalty phase, evidence was presented that the appellant was a lifelong alcoholic and was intoxicated at the time of the offense. His mother testified that he had a drinking problem and that every time he got into trouble it was related to drinking (R-1061-1062). The appellant admitted being an alocholic and that his offenses were alcohol related. (R-1066,1078). A family friend testified the only way the appellant would do anything like this was if he was drinking (R-1055). Although the appellant alleged he was sober the night of the murder, he admitted buying a six-pack of beer and drinking at least two beers shortly before heading back to Williams' Landing (R-879). His brother testified that appellant could not hold his liquor and was drunk on two or three beers (R-1059). In a statement to an investigator a few weeks before the murder, Carlton Harrison said the appellant was drinking and drank a six-pack of beer shortly before the murder was committed (R-837-838). The Court refused to instruct the jury as to the mitigating circumstances that appellant was under the influence of extreme mental or emotional disburtance and/or that his capacity to appreciate the criminality of his conduct or conform to the requirements of law were substantially impaired only because appellant testified he was sober:

"MR. JOHNSTON: Let the record show I wanted (f) under the statute, which is - -

THE COURT: The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

MR. JOHNSTON: That's right.

THE COURT: The Defendant says in his comments he was not drunk.

MR. JOHNSTON: Well, he hadn't said that at the trial part.

THE COURT: No, but the instructions that I give the jury is that they will make the decision as to the recommended sentence on the evidence that they heard during the course of the trial and the evidence that they heard during the course of the penalty proceeding. He had a flat-footed statement he was not drunk. I don't see where that gets to impairment.

MR. JOHNSTON: All-right.

THE COURT: I don't see the influence of extreme mental or emotional disturbance in the context of that. So, I, quite frankly, do not see any statutory mitigating circumstances (R-1092-1093).

It was reversible error to refuse to instruct the jury on mitigating circumstances when there was evidence presented both during the trial in chief and the penalty phase which could have supported such a jury finding. The decision of whether a particular mitigating circumstance is proven and the weight to be given to it rests with the jury as well as the judge. Smith v. State, 407 So.2d 894 (Fla. 1981) cert.den. 103 S.Ct. 2260. The jury cannot consider or weigh a mitigating circumstance if they are never instructed on that circumstance.

The effect of the error was compounded by the prosecutor's argument in which he highlighted the fact that were were no specific mitigating circumstances other than the general aspects of the appellant's character, record and the offense (R-1098).

In Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981) the court considered very similar facts. Mellins was convicted of battery on a law enforcement officer. She testified that she had been drinking but was not intoxicated. On cross-examination the officer testified that she was intoxicated. The trial court refused to instruct on the defense of intoxication because Mellins testified she was not intoxicated. The State argued that since the defense counsel had argued intoxication to the jury anyway, the failure to instruct did not injuriously affect the substantial rights of the appellant. The court found that Mellins was entitled to a jury instruction on every defense suggested by the testimony. The jury is admonished to take the law from the court's instructions and defense counsel's summation cannot relieve the court of its duty to give an appropriate instruction. (395 So.2d at 1209).

The trial court refused to instruct on the mitigating circumstances only because the appellant testified he was sober (R-1092-1093). This was clearly error when there was other testimony which the jury could have considered in support of the mitigating circumstances. Omission of the appropriate mitigating circumstance instruction was particularly prejudicial where the jury was not instructed on any other mitigating circumstance and only one aggravating circumstance.

POINT V.

THE DEATH PENALTY WAS IMPROPERLY IMPOSED IN THAT THE TRIAL COURT (A) IMPROPERLY FOUND THE AGGRAVATING CIRCUMSTANCES THAT THE HOMOCIDE WAS ESPECIALLY HEINOUS AND (B) ERRED IN FAILING TO CONSIDER THE APPELLANT'S LIFELONG ADDICTION TO ALCOHOL AND HIS INTOXICATION AT THE TIME OF THE OFFENSE AS A MITIGATING FACTOR ONLY BECAUSE THE APPELLANT TESTIFIED HE WAS SOBER AT THE TIME OF THE OFFENSE.

A. The trial court improperly found that the homocide was especially heinous, atrocious and cruel.

When considering the aggravating circumstances of whether the crime was especially heinous, atrocious and cruel, the trial court is to determine whether the crime was a conscienceless or pitiless crime which was unnecessarily tortuous to the victim. McCrae v. State, 395 So.2d 1145 (Fla. 1980). In this case the facts as presented by the State showed that the appellant and victim were engaged in a violent, domestic quarrel. The neighbor heard raised voices. She heard the victim tell the assailant to get ahold of himself, calm down, straighten up. Ms. Folson stepped outside to hear even better. There were more words exchanged, a loud thump and then silence (R-404-405).

Although there was evidence of a brutal beating, apparently most of his was inflicted after the victim lost consciousness in a benighted attempt to "cover up" the crime. The appellant's cellmate, Dennis Harwood, stated that the appellant told him that he did not intend to kill the victim but struck her during an angry altercation. When he thought she was dead, he continued to strike her and had sexual intercourse to make it look as if someone had raped and killed her (R-697-705). The neighbor's testimony that

there were loud voices, a thump and silence corroborate Harwood's version of the events.

The medical examiner's evidence does not indicate whether the victim was conscious or unconscious during the beating. He did say that the victim was not dead when the injuries were inflicted and was conscious long enough to sustain some defensive blows to her left arm and to clutch her assailant's hair in her right hand. (R-574).

Mrs. Ross was a tough person. She lived a hard life fishing for catfish, cleaning houses, and camping out on cold nights with just a piece of visqueen for shelter. She was known to be involved in violent physical encounters with her husband and others. Her son and the appellant described an argument over his doing to visit an ex-wife and child which involved the victim crashing into the side of his truck with her car (R-472,1082). On another occasion, the appellant said his wife called his mother and stated she was going to blow Skebo's brains out (R-1082,1083). After his arrest, the appellant was informed of a violent altercation between the dead woman and another man in which the other man threatened to kill her (R-1080). Appellant testified that his wife always carried a gun because her ex-husband had threatened to kill her (R-1074). Finally, Bobby Zapp verified that one night a few days before the murder, he had gone out to the lake with Skebo and the victim had frightened him by firing a shot over their heads (R-824-825).

Mrs. Ross was not one to be easily subdued. On the night of

her death she was obviously involved in a physical altercation. There were loud voices. She was trying to calm her assailant down. At the same time she was defending herself. She parried some blows with her left arm and snatched out a hank of hair with her right. It was very possibly this action that enraged the assailant to the point of striking a blow with a hammer causing instant unconsciousness. Believing her to be dead, the assailant then continued the beating in an inept attempt to make it look as if someone else had killed and raped her.

The State argued, and the Court found, that the victim suffered a long period of tortuous beating before her death. This theory was necessary for the State to prove that the killing was especially heinous but it does not fit the testimony presented by the State of the neighbor or the alleged confession to cellmate Harwood. If the victim had been conscious during all of the beating, as argued by the State, there would certainly have been screams and cries of pain. The neighbor's testimony corroborates the alleged confession to Dnnis Harwood. Harwood's statement was also corroborated by a stain on the dock where the appellant said he had dropped the body and the sheared pin on the motor which appellant said he had broken on the way back. Hence there was no "cold, calculated plan to kill." Magill v. State, 386 So.2d 1188 (Fla. 1980).

This case can be compared to to Halliwell v. State, 323 So. 2d 557 (Fla. 1975) where the appellant killed in a rage and the sentence was reduced to life imprisonment.

Finally, this case is very similar to the facts in Herzog v. State, 8 FLW 383 September 30, 1983, where the appellant beat the victim, suffocated her with a pillow and strangled her with a cord. In this case, as in Herzog, supra, there was a heated argument in a domestic relationship. There were no such additional acts to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessary tortuous to the victim.

Where the finding that the murder was especially heinous is the only aggravating circumstance, it is insufficient to sustain the sentence imposed. It is a particularly "slender reed" to support a death sentence. Randolph v. State, 8 FLW 446 November 18, 1983, J. McDonald's dissent.

B. The trial court erred in failing to consider the appellant's lifelong addiction to alcohol and his intoxication at the time of the offense as a mitigating factor only because the appellant testified he was sober at the time of the offense.

In rejecting the mitigating circumstance of substantial impairment of the appellant's capacity to appreciate the criminality of his conduct and/or that the appellant was under the influence of extreme mental or emotional disturbance, the trial court refused to consider other evidence presented during the trial and penalty phase of the appellant's intoxication and addiction to alcohol because the appellant himself testified he was sober.

During the trial phase and the penalty phase, evidence

was presented that the appellant was a lifelong alcoholic and was intoxicated at the time of the offense. His mother testified that he had a drinking problem and that every time he got into trouble it was related to drinking (R-1061-1062). The appellant admitted being an alcoholic and that his offenses were alcohol related (R-1066-1078). A family friend testified the only way the appellant would do anything like this was if he was drinking (R-1055). Although the appellant alleged he was sober the night of the murder, he admitted buying a six-pack of beer and drinking at least two beers shortly before heading back to Williams' Landing (R-879). His brother testified that appellant could not hold his liquor and was drunk on two or three beers (R-1059). In a statement to an investigator a few weeks before the murder, Carlton Harrison said the appellant was drinking and drank a six-pack of beer shortly before the murder was committed (R-837-838).

It is apparent that the judge was offended by the appellant's penalty phase statement:

> "Before treating of mitigating factors, the Court is constrained to comment with regard to the appearance by the Defendant to testify on his own behalf during the sentencing proceeding. After presenting the testimony of an aunt, two brothers and the mother of the Defendant, defense counsel requested a bench conference, informed the Court and prosecution that the Defendant insisted upon testifying and that he had advised the Defendant not to testify. Counsel requested the Court to declare a short recess so that he might once again urge the Defendant not to testify; leave was granted. Shortly thereafter, court was reconvened and out of the presence of the jury, defense counsel stated for the record that the Defendant insisted upon testifying against counsel's advice that to do so would be against his best interests. The sagacity of that advice was soon demonstrated.

> The Defendant's testimony effectively negated possible mitigating considerations and denuded defense counsel of potentially efficacious argument in support thereof. When the 35 minute rambling discourse concluded, it was evident that the defendant had been as inept in the commission of his other criminal enterprises as he had been in the murder for which he stands convicted (R-99-100)".

Regardless of his personal feelings toward the appellant, the Court is required to consider all the evidence in order to exercise the required "reasoned judgment" as to which cases can be satisfied by life imprisonment. Jacobs v. State, 396 So.2d 1113 (Fla. 1981). Not only did the court prevent the jury from considering the only possible mitigating evidence, the judge refused to consider it himself. There is no way that the court could have conducted a meaningful "weighing process" when he failed to consider the appellant's addiction to alcohol and intoxication in the balancing process. Proffitt v. Florida, 428 U.S. 242, 259-260 (1976).

In Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981) the court specifically found that a jury can consider other evidence of intoxication even though a defendant testifies that he was not intoxicated. If the court chose to rely on appellant's testimony that he was sober without weighing the evidence, he should also have relied on his testimony that he was innocent of the crime. There was no justifiable basis for the court to refuse to weigh the evidence in considering the mitigating factors.

Finally, the court emphasized that the victim suffered a terrible beating and pain before she died. There was no evidence

presented at trial to show that the victim was conscious during the infliction of all the wounds as assessed by the court. In fact, there was evidence presented that she was not conscious. The court had access to a deposition of the medical examiner in which he stated that the victim would have immediately lost consciousness from the fatal blow but could have lived anytime from minutes for up to an hour afterwards.

The trial court erred both in finding that this crime was especially heinous and in refusing to consider mitigating testimony in the weighing process of determining whether to impose a death sentence.

POINT VI.

FLORIDA STATUTES SECTION 921.141 (1981) IS CONTRARY TO THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF FLORIDA ON ITS FACE AND AS APPLIED IN THIS CASE.

The United States Supreme Court in Proffitt v. Florida, 428 U.S. 242,253, 49 L.Ed.2d 913,923, 96 S.Ct. 2960 (1976) found that, on its face, Florida's capital sentencing system satisfied the constitutional deficiencies identified by the Court in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972). An important ground for the holding in Proffitt v. Florida, supra, was the Court's perception that the Supreme Court of Florida's review of capital cases would assure statewide consistency, fairness, and rationality in the even-handed operation of Section 921.141, Florida Statutes. Proffitt v. Florida, at 428 U.S. 290-260, 49 L.Ed.2d 926-927. In Gardner v. Florida,at 428 U.S. 439 51 L.Ed. 2d 393, 97 S.Ct. 1197 (1977), the Court reaffirmed its due process Profitt-based notion that:

> ...the State must administer its capital-sentencing procedures with an even hand. 430 U.S. at 361.

The principles of Proffitt and Gardner are brought forward in Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980), where once again it was noted that if the state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Capital crimes must be defined in a way that obviates standardless discretion. With all due respect to the Supreme Court of Florida's judicial struggle to interpret Florida's death penalty statute in a constitutional fashion, it is suggested that the quest has fallen short

of its goal.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), it was determined that the aggravating circumstances detailed in §921.141(6) [now 5], Florida Statutes, actually define those crimes -- when read in conjunction with Florida's first degree murder and sexual battery statutes -- to which the death penalty is applicable in the absence of mitigating circumstances. Dixon, 283 So.2d at 9. The judicial construction of the statutory aggragating circumstances as set forth in Dixon did not lay to rest contentions concerning their applicability to any given factual situation. The opinions from the Supreme Court of Florida in capital cases have continued to define the aggravating circumstances set forth in §921.141(5), Florida Statutes, and in contravention of Proffitt, Gardner and Godfrey, are uniform only to the extent that they are, at best, unpredictable, inconsistent, and subject to growth by decision. For example, compare: Dixon, supra; Knight v. State, 338 So.2d 201 (Fla. 1976); Adams v. State, 341 So.2d 765 (Fla. 1976); Halliwell v. State, 323 So.2d 557 (Fla. 1975); Menendez v. State, 368 So.2d 1278 (Fla. 1979); Magill v. State,initially reported at 383 So.2d 901, corrected opinion reported at 386 So.2d 1188 (Fla. 1980); and Armstrong v. State, 399 So.2d 953, 962-963 (Fla. 1981) on what constitutes an especially heinous, atrocious or cruel murder. Compare: Dixon, supra; Songer v. State, 322 So.2d 481 (Fla. 1975); Adams v. State, supra; Aldridge v. State, 351 So.2d 942 (Fla. 1977); Ford v. State, 375 So.2d 496 (Fla. 1979); and Stone v. State, 378 So. 2d 765 (Fla. 1979), on what constitutes

the creation of a great risk of death to many persons.

Indeed the judicial endeavor to create uniformity in deciding who should live or die has an inherent defect which is best evidenced by the Court's deicision in Vasil v. State, 374 So.2d 465 (Fla.1979). Therein, a jury-recommended and judge-imposed death sentence was reduced to life because four members of the Court could not agree that such sentence was warranted. This result occurred even though there appeared to have been several statutory aggravating circumstances proved in the Vasil case. Be that as it may, the Supreme Court of Florida has not specifically and without dissent judicially noticed that the criteria set forth in Section 921.141, Florida Statutes, are imprecise. Brown v. State, 381 So.2d 690, 696 (Fla. 1980). Furthermore, the absolute inability to administer Florida's capital sentencing statute in a constitutionally-required statewide, consistent, fair, non-arbitrary or capricious and even-handed way is, by inference, demonstrated by the Supreme Court of Florida's decision and opinion in Witt v. State, 387 So.2d 922 (Fla. 1980). Justice England's concurring opinion in Witt tellingly recognizes the problem:

> The heightened problem of law changes in Florida's capital punishment scheme is exemplified by a look at only two cases from among our many. Sawyer v. State, 313 So.2d 680 (Fla. 1975), cert.denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976), and Brown v. State, 367 So.2d 616 (Fla. 1979), illustrate the point that the outcome of a capital case may depend simply upon the speed with which the trial and the appellate process progress.
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> * * * * * *
>
> The consequence of our decision today, of course, is that, unless the United States Supreme Court

> determines otherwise, individuals in Florida may well be executed for crimes similar to those committed by others who have been spared the death penalty. Disparities in sentencing will occur--dispite all the rhetoric about death being different and the courts exercising special scrutiny to prevent arbitrariness--simply to preserve overriding societal needs. Witt v. State, Justice England concurring at 931 and 932.

The time has come for this Court to constitutionally recognize and hold, that:

> Though the justice of God may indeed ordain that some should die, the justice of man is altogether and always insufficient for saying who these may be. ...(Attribute to Charles L. Black).

The appellant would assert that the imposition of a sentence of death, by any means, constitutes cruel and/or unusual punishment contrary to Article I, Section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

Additionally, the defendant alleges that §921.141, Florida Statutes (1981), is unconstitutional on its face and as applied in that the procedures established therein may, in whole or in part, violate the following constitutional guarantees:

A. The right to trial by jury, Article I, Sections 16 and 22 of the Florida Constitution and the Sixth and Fourteenth Amendments to the United States Constitution;

B. The right not to be twice put in jeopardy for the same offense. Article I, Section 9 of the Forida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution;

C. The right to due process of law. Article I, Section 9 of the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution;

D. The right to equal protection of the law. The Fourteenth Amendment to the United States Constitution.

This Court has set aside other death sentences where a violent, domestic dispute resulted in the death of one of the participants. It would be contrary to the even-handed, balancing process required by the Constitutions of the State of Florida and the United States to uphold the death penalty in appellant's case.

CONCLUSION

The Appellant asks the Court to grant a new trial on the merits in that the trial court erred in failing to grant judgment of acquittal, in refusing to dismiss for cause a juror who was a relative of the prosecutor, and in permitting a witness to testify who was not listed in the discovery to the Appellant.

The Appellant asks the Court to remand for a rehearing on the penalty or to reduce the sentence to life on the grounds that the Court failed to find Section 921.141, Florida Statutes, unconstitutional, failed to give jury instructions on mitigating circumstances, improperly found the crime was especially henious, and failed to consider mitigating evidence of alcohol addition and intoxication.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Assistant Attorney General Richard Patterson, The Capitol, Tallahassee, Florida, by U.S. Mail ~~Hand Delivery~~, this 11th day of January, 1984.

Respectfully submitted,

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