IN THE SUPREME COURT OF FLORIDA

GERALD EUGENE STANO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 63,947

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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

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

The following symbols will be used:

"R" - Record on Appeal

"SR" _ Supplemental Record on Appeal

STATEMENT OF THE CASE

On January 18, 1983, the fall term of the grand jury in and for Volusia County, Florida, returned an indictment charging GERALD EUGENE STANO with the premeditated murder of Susan Bickrest by manual strangulation and drowning in violation of Section 782.04, Florida Statutes. (R 450) On that same date, the grand jury also indicted GERALD EUGENE STANO with the premeditated murder of Mary Kathleen Muldoon by shooting and drowning her on or about November 11, 1977, in violation of Section 782.04, Florida Statutes. (R 451)

Stano was declared insolvent and the Office of the Public Defender was appointed to represent him. (R 452)

On February 8, 1983, the appellant was arraigned on the charges and entered pleas of not guilty. (R 284-287) On February 9, 1983, Appellant's counsel filed a demand for discovery. (R 453)

On March 11, 1983, the appellant, through counsel, requested leave to withdraw his previously entered pleas of not guilty and announced his intention to plead guilty as charged to each of the two indictments. (R 288-289) The appellant also waived the sentencing jury. (R 289)

A plea colloquy ensued, following which Appellant was re-arraigned on both charges. (R 293-297) The appellant then entered pleas of guilty to each of the two indictments. (R 298-300) The plea colloquy continued, following which the state set forth the factual basis for each of the two pleas. (R 303-318)

The trial court accepted each of the pleas and specifically found that they were made knowingly, intelligently and voluntarily with the advice of competent counsel with whom Appellant was satisfied. (R 312, 318-319) The trial court adjudicated the appellant guilty of each of the two offenses. (R 323)

On June 7, 1983, Appellant filed a motion to preclude imposition of the death penalty. (R 459-486) This motion was eventually denied by the trial court. (R 620)

Sentencing proceedings without a jury were held before the Honorable S. James Foxman, Circuit Judge, on June 8-10, 1983. (R 1) Prior to the proceedings, Appellant's counsel and the trial court conducted an inquiry of the appellant regarding any personal objections that Mr. Stano might have to the proceedings or to Judge Foxman. (R 12-14) The appellant convinced the court that he was satisfied.

On June 13, 1983, Appellant filed a Motion In Limine relating to the suppression of the testimony of the probation officer who prepared the presentence investigation report and the restriction of the use of that report. (R 615-619) In open court, the state and Appellant's defense counsel, in effect, stipulated that the presentence investigation report could not be used to establish any aggravating circumstances, although the court could consult it generally. The report could be used to establish or negate mitigating circumstances in the case. The state announced that it did not intend to call the probation officer to testify. (R 14-23) The trial court denied

Appellant's request that certain portions of the presentence investigation report which were obtained in violation of Appellant's constitutional rights be deleted for appellate purposes. (R 23-25)

Prior to the testimony, defense counsel invoked the rule of sequestration of witnesses. (R 26) The state proceeded with their opening statement followed by the defense. (R 27-32)

Several medical experts and law enforcement officials testified at the sentencing hearing. (R 33-227) Appellant and the state entered into a stipulation regarding findings of one medical expert who was unavailable for the hearing. (R 112-115)

At the conclusion of all of the evidence, both the state and the defense rested. (R 227) The trial court heard closing arguments, following which sentencing was set for June 13, 1983. (R 233-282)

On June 13, 1983, the trial court sentenced the appellant to death by electrocution on each of the two charges. (R 326-335, 626-631) Written findings of fact in support of each death penalty were filed by the trial court. (R 621-625; SR 3-6)

On July 8, 1983, Appellant filed a Consolidated Notice of Appeal. (R 634) This appeal follows.

STATEMENT OF THE FACTS

A. Statement of Facts as to the Murder of Susan Bickrest.

On December 19, 1975, Gerald Stano went to P.J.'s Bar in his 1973 green on green Plymouth Satellite. (R 212-213) The bar was having a special on drinks consisting of two for the price of one. Mr. Stano had a couple of drinks before leaving the bar at closing time. (R 213) He decided to ride around town for a little while. Coming out of the bar, he spotted a sandy-brown-haired girl getting into a white Camaro with a black top. The girl, Susan Bickrest, drove away in one direction while Mr. Stano went the other direction. (R 213) Mr. Stano stopped to get a six pack of beer at a convenience store and began thinking about the girl before finally deciding to see if he could find her. (R 213-214) He drove up the road before seeing the same white Camaro driving on one of the side streets. He decided to follow her home in an attempt to engage in conversation. (R 214) He followed her to Derbyshire Apartments, arriving sometime between the hours of 3:00 and 4:00 A.M. (R 214-215)

Ms. Bickrest parked her car at the apartment as Mr. Stano pulled up behind her car and the pair began to talk. (R 215) At his invitation, Ms. Bickrest climbed into Mr. Stano's car voluntarily, and he suggested that they go for a ride. During the ride, Ms. Bickrest wondered what was going on and started to get "a little on the crabby side". (R 215) Stano was of the opinion that she knew "something was going to happen." (R 217, 522) He hit her in the face with his right hand which

succeeded in stunning her and keeping her quiet for a little while. (R 215, 218)

At one point in the drive, Stano had to stop for a rest stop. Bickrest attempted to get out of the car at that point, but Stano pushed her back in the car and locked the doors. (R 218) His car had anti-theft locks which made it difficult to unlock if your hands were perspiring. (R 218-219)

Mr. Stano got on to Interstate 95 before Ms. Bickrest began "bitching and raising hell". (R 215) At that point, Mr. Stano pulled the car over to the side of the road and strangled her. (R 215) He carried Ms. Bickrest to a marsh area and laid her down in a sandy area. (R 215-216)

On December 20, 1975, the body of Susan Bickrest was found floating in Spruce Creek near Moody Bridge. (R 189) Lieutenant Carl Clifford of the Volusia County Sheriff's Department was dispatched to the area where he commandeered a small boat and recovered the body. (R 188-191) The body was found approximately seventeen (17) miles from Ms. Bickrest's apartment. The driving time between the two points was approximately twenty-five (25) minutes. (R 196-197)

Dr. Arthur Schwartz, the associate medical examiner for the Seventh Judicial Circuit and an expert in forensic pathology, performed the autopsy on Susan Bickrest. (R 33) He found a bruised eye with some swelling, some very superficial scratches on her nose, a small laceration on her inner lip, signs of manual strangulation and evidence of drowning. (R 36) The evidence of drowning was characterized by over-inflation of the lungs and

pulmonary edema. The injury to her lower lip was consistent with the blocking of her mouth with some soft material. (R 47) Some clay material was also found in her body which indicated that she drowned in shallow water. (R 51) Dr. Schwartz was of the opinion that the cause of death was manual strangulation as well as drowning. (R 51) Dr. Schwartz admitted that it was within the realm of medical probability that Bickrest lost consciousness very quickly upon the onset of the attack as a result of the manual strangulation. (R 53) Her death was not a quick one, but she could have easily been unconscious shortly after the attack began. (R 54, 59-60)

Dr. Arthur Botting, the District Medical Examiner for the Seventh Judicial Circuit, and also an expert in forensic pathology, examined Dr. Schwartz's autopsy report, Schwartz's deposition, the police report and several crime lab reports. He also determined that strangulation could have resulted in immediate unconsciousness long before death. (R 83-84) Dr. Botting was of the opinion that there was insufficient information contained in the reports to confirm that death had been caused by drowning. (R 85) The hyper-inflated lungs and pulmonary edema could have just as likely been caused by manual strangulation. (R 87) Dr. Botting was uncomfortable with the conclusion that drowning was a cause of death. (R 87-88) However, Dr. Botting admitted that he had never examined the body of Ms. Bickrest. This, in and of itself, could have confirmed for Dr. Schwartz the conclusion that drowning was a cause of death. (R 85)

B. Statement of Facts as to the Murder of Kathleen Muldoon.

In November of 1977, Gerald Stano was driving down Seabreeze Boulevard in Daytona Beach when he stopped at the Silver Bucket Bar. He met a young lady there who entered Mr. Stano's car and the pair headed for the beach. Mr. Stano's confession reveals that Ms. Muldoon thought they were heading for the beach in order to "party". (R 558) Once the pair reached the beach, they engaged in conversation about sex. Mr. Stano was in favor of it, while Ms. Muldoon was not. A small argument started which ended with Mr. Stano striking Muldoon's head with his hand. He was of the opinion that the blow rendered her semi-conscious, since she thereafter remained quiet. (R 558)

Stano drove to New Smyrna Beach, some twenty (20) miles south of the pair's initial meeting. (R 180-181, 558-559) He pulled over to the side of the road and Ms. Muldoon "jumped a little". (R 559) Stano instructed Muldoon to open the door and get out. She complied with his instructions, he slid over and also got out on the passenger's side with his .22 automatic pistol. (R 559)

Another argument ensued, before Stano hit her hard enough in the head causing her to fall to the ground. He then shot her in the right side of the head with his gun. (R 559) He returned to his car and drove back to his home in Daytona Beach. (R 559)

Kathleen Muldoon's body was found on November 12, 1977 in a remote wooded area of New Smyrna Beach. She was face down in a drainage ditch filled with nine (9) to ten (10) inches of

water. (R 167-168) The ditch was in an area of tidal action and may not have had water in it at the time the body fell into it. (R 184-185) The chief investigating officer admitted that the body of Kathleen Muldoon could have fallen into the ditch from the edge of the roadway which would be consistent with Stano's confession. (R 186) On October 9, 1982, following his arrest, Mr. Stano led the police to where he left Ms. Muldoon's body back in 1977. (R 174-178) This corresponded precisely with where the body was actually found.

Dr. Arthur Schwartz also performed the autopsy on Kathleen Muldoon. The autopsy revealed a gunshot wound to the right temple. The wound was of a close contact variety which would be consistent with the gun being placed close to the skin prior to firing. (R 62, 72) The bullet traveled three quarters of the way through the brain. (R 63) However, death from the bullet wound was not instantaneous. The doctor testified that death would have occurred in less than one hour, approximately thirty minutes. (R 73-74) There were signs of drowning, namely over-inflated lungs and evidence of pulmonary edema. (R 63) Dr. Schwartz was of the opinion that the cause of death was a combination of the bullet wound followed by termination by drowning. (R 74-75) There was heavy encrustation of sand and shells on the body, especially over the left knee and thigh. There was a small amount of this material on the right knee, although this was along the inner part of the leg and not directly on the knee cap. (R 71, 75-76) It was impossible to conclude what position Ms. Muldoon was in at the time of the

shooting. (R 76) Dr. Schwartz also admitted that it was possible that Ms. Muldoon lost consciousness immediately upon being shot. (R 76-77, 80)

Dr. Arthur Botting, the District Medical Examiner, examined the autopsy report prepared by Dr. Schwartz, Dr. Schwartz's deposition, the police report and several crime lab reports. (R 90-92) Dr. Botting was of the opinion in the Muldoon case as he was in the Bickrest case that there were insufficient facts to conclude that death was caused in part by drowning. (R 93) The pulmonary edema could have been the result of the gunshot wound. (R 94) Dr. Botting was not satisfied with Dr. Schwartz's conclusion as to drowning as the cause of death. (R 94) Dr. Botting's medical opinion was that it was more probable than not that Ms. Muldoon lost consciousness immediately from the blast effect of the gunshot wound. (R 94-95)

C. Statement of Facts as to Aggravating and Mitigating Circumstances that Apply to Both Cases.

The state entered into evidence certified copies of six (6) judgments and sentences wherein Stano had been adjudicated guilty of first degree murder and sentenced to life imprisonment on each of the six (6) cases. The fingerprints on each judgment and sentence were determined to be that of Mr. Stano. (R 96-109, 493-516, 532-553) In effect, defense counsel at trial and on appeal do not contest the applicability of the aggravating circumstance that Stano was previously convicted of another capital felony as set forth in Section 921.141(5)(b), Florida Statutes (1981).

Dr. Ann McMillan was unable to appear at the sentencing hearing. Both the state and the defense stipulated that Dr. McMillan, a psychologist qualified as an expert by the court, would have testified that it was her opinion within a reasonable medical probability that Stano had committed both murders while under the influence of extreme mental or emotional disturbance. She would also testify that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired at the time of the crimes. (R 113-115) The basis of her testimony included the extensive tests and reports which were entered into evidence at the hearing. (R 588-599)

Dr. McMillan's in depth probe of Gerald Stano's early childhood revealed the nature of his problems. He was taken away from his natural mother at the age of six (6) months by the New York Child and Welfare Department due to extreme neglect. At the time, he was malnourished and functioning at an animalistic level. (R 558) Once Gerald's adoptive parents had him for six (6) months, they returned to New York to finalize the adoption. As part of this process, Gerald was examined by a team composed of a psychiatric social worker, a nurse, a physician, a psychologist and a psychiatrist. Following this examination, the team concluded that at the age of thirteen (13) months, Gerald was "unadoptable". (R 588) Throughout his childhood and adolescence as well as his adult life, Gerald had extensive problems coping in society. (R 588-591) According to Dr. McMillan, this early neglect in Gerald's life was the root of his mental health problems which led to the murders.

Four (4) other mental health professionals who were qualified as experts testifed at the sentencing hearing. Frank Carrera, III, M. D., was of the opinion that Stano was not under the influence of extreme mental or emotional disturbance at the time of the crimes, nor was his capacity to conform his conduct to the requirements of the law substantially impaired. (R 120-122) To a limited extent, Dr. Carrera qualified his opinion as to Stano's capacity to conform his conduct. Dr. Carrera's interview of Stano regarding the murder of Muldoon did indicate that he was under the influence of alcohol at the time which did affect his control or lack of control of his actions. It was Dr. Carrera's opinion that the lack of capacity to conform one's conduct under the statute requires a total loss of control. (R 121-128) Dr. Carrera did concede that Stano was acting with extreme anger at the time of the murders. (R 129, 132)

George W. Barnard, M. D., was of the opinion that Stano was not under the influence of extreme mental or emotional disturbance at the time of the murders. The doctor also opined that Stano's capacity to appreciate the criminality of his conduct and the ability to conform his conduct to the requirements of the law was not substantilly impaired. (R 134-136) Dr. Barnard did concede that Stano suffered from a severe mental impairment. (R 136-137) He was acting with extreme anger at the time of the murders and failed to consider the women as people. (R 137-139) Dr. Barnard admitted that Stano's capacity to conform his conduct to the requirements of the law was definitely impaired. However, he did not feel that this impairment was substantial. (R 140-141)

Fernando Stern, M.D., testified that Stano was under the influence of mental and emotional disturbance at the time of the murders. (R 152-153) Dr. Stern felt that Stano knew that his actions were criminal, but was of the opinion that Stano's ability to conform his conduct to the requirements of the law was substantially impaired. (R 153-154)

Robert Davis, M. D., could not offer an opinion within a reasonable medical certainty as to whether or not Stano was acting under the influence of extreme mental or emotional disturbance at the time of the murders. (R 157) Dr. Davis was of the opinion that Stano did appreciate the criminality of his actions. Dr. Davis did not "believe" that Stano's ability to conform his conduct was substantially impaired. (R 157-158) Dr. Davis admitted that Stano had severe mental problems. In fact, Dr. Davis was of the opinion that Stano was mentally ill, diagnosing him as a sociopath. (R 157, 159)

In both cases, the trial court found that the evidence established three (3) non-statutory mitigating factors. Gerald Stano had an extremely difficult early childhood as set forth in Dr. McMillan's report. Secondly, Gerald Stano had marital difficulties. Finally, the court found as mitigating the fact that Gerald Stano confessed and pled guilty to these and other murders. (R 624; SR 6) However, the court decided that these mitigating factors were entitled to little weight. The trial court rejected the two (2) statutory mitigating circumstances relating to a defendant's mental status, adopting and approving the testimony of doctors Carrera and Barnard at the sentencing hearing. (R 624; SR 5-6)

The trial court found four (4) aggravating factors surrounding the murder of Susan Bickrest. (R 621-623) The court found three (3) aggravating factors surrounding the murder of Mary Kathleen Muldoon. (SR 3-5)

ARGUMENT

POINT I

APPELLANT'S DEATH SENTENCE WAS IMPERMISSABLY IMPOSED IN VIOLATION OF THE STATUTE, ARTICLE I, SECTIONS IX AND XVII OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. Introduction

Appellant, upon advice of counsel, pleaded guilty to first degree murder in both cases and waived his right to a jury at the sentencing hearing. (R 288-325) The trial judge, acting, therefore, without the benefit of a sentencing jury, heard testimony at a penalty phase hearing and considered a presentence investigation and psychiatric reports in order to consider the sentence he would impose. It was stipulated by counsel and agreed to by the court that the presentence investigation report would be used only for the purpose of establishing or negating mitigating circumstances and would not be used to support any finding of aggravating circumstances. (R 232-233) Following the hearing, the trial court sentenced GERALD EUGENE STANO to die in the electric chair for each of the two first degree murder convictions.

In Case No. 83-188-CC, involving the murder of Susan Bickrest on or about December 20, 1975, the trial judge found four (4) aggravating circumstances: (b) the defendant was previously convicted of six (6) first degree murders; (h) the crime was especially heinous, atrocious, or cruel; (i) the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; and (d) the

crime was committed while the defendant was engaged in a kidnapping. (R 621-623) The court ruled that three mitigating circumstances were present, i.e., (1) the defendant's difficult early childhood; (2) the defendant's marital difficulties; and (3) the confession and guilty pleas by the defendant to this and other murders. However, the court stated that while these additional factors where established, it found that they were entitled to little weight. (R 624)

In Case No. 83-189-CC, involving the murder of Mary Kathleen Muldoon on or about November 11, 1977, the trial judge found three aggravating circumstances: (b) the defendant was previously convicted of six first degree murders; (h) the crime was especially heinous, atrocious, or cruel; and (i) the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (SR 3-4) The court ruled that three mitigating circumstances were present, i.e., (1) the defendant's difficult early childhood; (2) the defendant's marital difficulties; and (3) the confessions and guilty pleas by the defendant to this and other murders. However, the court stated that while these additional factors were established, it found that they were entitled to little weight. (SR 6)

The sentence of death imposed upon GERALD EUGENE STANO must be vacated. The court found improper aggravating circumstances, considered evidence of non-statutory aggravating factors, and failed to give substantial weight to relevant and appropriate mitigating factors. The proper weighing of the applicable circumstances should have resulted in a life sentence.

B. As to both cases, mitigating factors, not found by the trial court, were present and the mitigating factors which were found were given improper weight, thus violating Appellant's constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

Evidence presented at the penalty hearing and information contained in the presentence investigation report clearly established strong statutory and non-statutory mitigating circumstances. A review of these mitigating factors clearly demonstrates that any proper aggravating factors were outweighed by these circumstances. This evidence included, but is not limited to the following factors.

The appellant was under the influence of extreme mental or emotional disturbance when the crimes were committed thus establishing the statutory mitigating circumstance set forth in Section 921.141(6)(b), Florida Statutes (1981). Additionally, Stano's capacity to conform his conduct to the requirements of the law was substantially impaired thus establishing the mitigating circumstance set forth in Section 921.141(6)(f).

At the sentencing hearing, counsel for the appellant and for the state stipulated that Dr. McMillan was of the opinion within a reasonable medical probability that GERALD STANO was under the influence of extreme mental or emotional disturbance at the time of the commission of each offense. She was also of the opinion that the appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. It was also stipulated that her reports contained in the presentence investigation report would form part of the underlying basis in support of her opinion. (R 112-115)

The defense also presented the testimony of Dr. Fernando Stern, another qualified expert in the field of forensic psychiatry, whose expert medical opinion was that Mr. Stano was under the influence of mental and emotional disturbance during the commission of each of the crimes. (R 152-153) Dr. Stern opined that Mr. Stano's capacity to appreciate the criminality of his conduct was unimpaired, however Mr. Stano's ability to conform his conduct to the requirements of the law was substantially impaired. (R 153-154)

Dr. Davis was unable to offer an opinion concerning the applicability of mitigating circumstance (b), relating to extreme mental or emotional disturbance. (R 157) He did not "believe" that Stano's ability to conform his conduct was substantially impaired as set forth in Section 921.141(6)(f). (R 157-158)

Doctors Barnard and Carrera aligned themselves with the state's stance that Mr. Stano did not fit either of these two (2) statutory mitigating circumstances. (R 120-122, 134-136) When questioned further about mitigating circumstance (f) dealing with an individual's ability to conform his conduct, Dr. Carrera qualified his opinion somewhat. It was Dr. Carrera's opinion that the statute required a <u>total</u> loss of control of one's ability to conform their conduct. (R 121-128) This was apparently the doctor's definition of "substantial impairment". Appellant contends on appeal that Dr. Carrera's action in misconstruing the statute resulted in an opinion which misled the trial court in finding that this mitigating circumstance had not been established. In his finding of fact in support of the

death penalty, the trial judge specifically adopted and approved the testimony of doctors Carrera and Barnard relating to his rejection of Stano's mental status as a mitigating circumstance. (R 624; SR 5-6)

In addition to the use of an incorrect standard by Dr. Carrera, the trial court also overlooked the extensive nature of Dr. McMillan's examinations, interviews and tests. Her report is clearly the most detailed of any of the professionals that examined Mr. Stano. (R 588-599) In addition to administering certain tests which the other doctors failed to do, Dr. McMillan conducted a three and one-half (3½) hour interview of Stano's parents, examined extensive documentation of his life, and spent six and one-half (6½) hours evaluating, interviewing and testing Mr. Stano personally. (R 591)

Dr. McMillan's findings that Stano fit the two (2) statutory mitigating circumstances relating to mental status relied heavily upon his early childhood. Gerald was taken away from his natural mother at the age of six (6) months by the New York Child Welfare Department due to extreme neglect. He was the fifth (5th) child of his natural mother, all of whom had been removed from the home by the state agency. At the time of his removal, he was malnourished, extremely neglected both physically and emotionally, and was functioning at an animalistic level. (R 558) Once Gerald's adoptive parents had him for six (6) months, they returned to New York to finalize the adoption. As part of this process, Gerald was examined by a team composed of a psychiatric social worker, a nurse, a physician, a psychologist and a psychiatrist. Following this examination, the team

concluded that at the age of thirteen (13) months, Gerald was "unadoptable". (R 588) Mrs. Stano eventually won the right to finalize the adoption. Throughout his childhood, adolescence and adult life, Gerald had extensive problems coping in society. (R 588-591)

In rejecting the two (2) statuory mitigating cirucmstances, the trial judge also overlooked the fact that all of the examining psychiatrists and psychologist were of the opinion that Stano had extreme mental problems. Dr. Barnard testified that Stano suffered from a severe mental impairment. (R 136-137) Both Barnard and Carrera thought that Stano was acting in response to extreme anger at the time of the murders. (R 129, 132, 137-139) Dr. Barnard stated that Stano did not consider his victims as people. (R 137-139) Both Barnard and Carrera also admitted that Stano's capacity to conform his conduct was definitely impaired. However, Barnard did not feel that this impairment was substantial. (R 140-141) As previously mentioned, Dr. Carrera mistakenly thought the statute required a total loss of control in this regard. Dr. Davis also admitted that Stano had severe mental problems, diagnosing him as a sociopath. (R 157-159)

Additionally, the trial judge rejected the two statutory mitigating factors based upon incompetent and improper testimony. During the testimony of Dr. Barnard, the prosecutor was exploring Stano's degree of impairment at the time of the murder. (R 142-143) Concerning Stano's control and whether his anger made him lose control, the prosecutor asked the doctor

about this concept and its relationship to "the delivery process to commit the murder." (R 143) Dr. Barnard responded that he would have to "get somewhat, I think, in the speculative situation" in order to answer that question. (R 143) Defense counsel objected to the doctor giving his opinion on the basis of sources other than his interviews with Mr. Stano, pointing out the possibility of speculation on that score. (R 143-144) The trial court overruled the objection and allowed the question. (R 144)

The doctor prefaced his opinion with the statement, "as I mentioned, there are some speculative elements here." (R 144) He then gave very damaging testimony concerning Stano's ability to control his anger at times in order to drive a longer distance before killing the victim. (R 144-145) The doctor concluded that "it's not like he's been suddenly overwhelmed by it." (R 145) Since the doctor himself prefaced his opinion with the caution that it was speculative, the testimony was incompetent and inappropriate to consider in establishing aggravating circumstances or in considering possible mitigating circumstances. Hence, the trial judge's rejection of the two statutory mitigating circumstances was clearly based upon improper testimony. The trial judge specifically adopted the testimony of doctors Barnard and Carrera in concluding that the circumstances were not established. (R 624; SR 5-6)

While the trial judge rejected the two (2) appropriate statutory mitigating circumstances, he did find that the evidence established three (3) non-statutory mitigating circumstances. In

so doing, the court added its finding that these three (3) mitigating circumstances were "entitled to little weight." (R 625; SR 6) The trial judge gives no reasons as to why these three (3) established mitigating circumstances were entitled to little weight in his opinion. As a result, Appellant feels extremely restricted in arguing this point on appeal. The trial judge was possibly thinking of this Court's opinion in Quince v. State, 414 So.2d 185 (Fla. 1982) by including this statement of conclusiveness in his written findings. It should be noted that the trial judge in the instant case was also the trial judge in Quince, supra.

However, the instant case is easily distinguishable from the facts in Quince, supra. There, this Court held that the trial judge was not unreasonable in failing to give great weight to the "substantial impairment" mitigating factor in light of the contradictory evidence. The evidence as to these three (3) established non-statutory mitigating factors found by the trial court in the instant case is not contradictory in the least. Therefore, Appellant contends that the trial court erred in concluding that these three (3) mitigating factors were entitled to little weight. Alternatively, this Court should remand for the entry of a more detailed finding of fact by the trial judge as to the possible reason for giving these factors little weight.

The fact that the trial court gave these non-statutory factors little weight without citing any reason, together with the strong statutory mitigating circumstances weigh heavily against any aggravating factors and calls for the reduction of Stano's sentence to life imprisonment.

C. As to both murders, the trial court erred in finding the existence of aggravting circumstance (i) resulting in a denial of Appellant's constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

In finding the aggravating circumstance of cold, calculated and premeditated as to the murder of Susan Bickrest, the trial court concluded that a high level of premeditation was present. (R 623) The trial judge had no doubt that Stano knew what he was ultimately going to do from the beginning. The judge cited a portion of Stano's confession where he stated that Bickrest wondered what was going on, felt that something was not kosher, and something was going to happen. (R 623) Additionally, the trial judge pointed to Stano's prevention of Bickrest's exit from the vehicle during the ride. The judge also cited the twenty five (25) minute, seventeen (17) mile drive to a secluded spot. In finding no pretense of moral or legal justification, the trial judge mentioned the lack of motive and apparent senseless nature of the murder. (R 623)

In finding that this aggravating factor was established by the evidence, the trial judge completely overlooked the testimony and reports of the mental health professionals that examined Gerald Stano. These clearly established that Gerald Stano's ability to control his conduct was definitely impaired. The only disagreement among the doctors was the degree of this impairment. Many of the doctors cited the extreme anger of Stano at the time of the murder. They testified that his actions were in response to the severe anger which he felt. (R 127-128, 138-140) This monumental anger would certainly mitigate the extreme

premeditation required to establish this aggravating circumstance.

It must be remembered that the level of premeditation required to establish this circumstance is much higher than the level of premeditation to convict in the guilt phase of a first degree murder trial. Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982). This Court has noted that this aggravating factor "ordinarily applies to those murders which are characterized as executions or contract murders, although that description is not meant to be all-inclusive." McCray v. State, 416 So.2d 804, 807 (Fla. 1982). Certainly the evidence does not establish beyond a reasonable doubt the high level of premeditation necessary to support a finding of this factor.

The fact that Stano reacted with extreme anger and without the requisite calculatedness, is clearly established by his confession. Once Ms. Bickrest became "crabby" Stano hit her in the face with his right hand while they were driving. (R 521) She was quiet for a short while, before she began "bitching and raising hell" on the interstate. (R 521) In response to this, Stano confessed that he "just pulled over and just strangled her right there and then...". (R 521) This clearly refutes the trial judge's conclusion that the murder contained the level of cold and calculated premeditation required to establish this aggravating circumstance. Rather than being anologous to an execution, contract-type murder, it is clear that Stano was reacting with rage to the woman's nagging protests.

Taking the psychiatric testimony as a whole, one could easily conclude that Gerald Stano at least felt morally justified

in the action that he took in strangling Ms. Bickrest. In his own mind, Ms. Bickrest was not even a human being. She had made him furious and the justifiable response, in his own mind, was to kill her.

The finding of this aggravating circumstance is improper for yet another reason. It is clear that one fact relied upon by the trial judge was Stano's statement indicating that Bickrest attempted to leave the car at one point, but was prevented by Stano's actions. (R 623) This was also relied upon by the trial judge in support of his finding that the murder was committed during the commission of a kidnapping and his finding that the murder was heinous, atrocious and cruel. (R 622) This clearly constitutes impermissible doubling of these two (2) circumstances. This Court has held that when one aspect of the case gives rise to two (2) or more aggravating circumstances, only one (1) circumstance can be considered. Provence v. State, 337 So.2d 783 (Fla. 1976). The trial court's finding of this aggravating circumstance must be stricken.

Concerning the murder of Mary Kathleen Muldoon, the trial court found that the aggravating circumstance of cold, calculated and premeditated was established by the evidence. (SR 4-5) The court found a high level of premeditation, stating that there was no doubt that Stano knew what he was ultimately going to do with Ms. Muldoon. The judge cited the thirty to forty-five minute drive covering twenty (20) miles to a secluded dirt road in support of this finding. He also cited the fact that Stano initially stunned Muldoon with a physical blow. He then ordered her out of the car, hit her again and promptly shot her. (SR 5)

The trial judge analogized the murder to a "contract execution." (SR 5) This was apparently based upon the close proximity of the gun to her head when it was fired. Finally, the trial judge concluded that there was no pretense of moral or legal justification, citing the apparent senselessness of the murder. (SR 5)

In finding that the evidence established this aggravating factor, the trial judge completely overlooked the extensive testimony and reports of the mental health professionals as he also did in the Bickrest case. These clearly established that Gerald Stano's ability to control his conduct was definitely impaired. The only disagreement among the doctors was the degree of this impairment. Many of the doctors cited the extreme anger of Stano at the time of this murder. They testified that his actions were in response to this severe anger which he felt. (R 127-128, 138-140) This extreme anger would certainly mitigate the extreme premeditation required to establish this aggravating circumstance. It must be remembered that the level of premeditation required to establish this circumstance is much higher than the level of premeditation to convict in the guilt phase of a first degree murder trial. Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982). This Court has noted that this aggravating factor "ordinarily applies to those murders which are characterized as executions or contract murders, although that description is not meant to be all-inclusive." McCray v. State, 416 So.2d 804, 807 (Fla. 1982). Certainly the evidence does not establish beyond a reasonable doubt the high

level of premeditation necessary to support a finding of this factor.

Taking the psychiatric testimony as a whole, one could easily conclude that Gerald Stano at least felt morally justified in the action that he took in killing Ms. Muldoon. In his own mind, Ms. Muldoon was not even a human being. She had made him furious and the justifiable response, in his own mind, was to kill her.

Additionally, the trial court relied upon an improper influence upon facts which were not in evidence. This occurred during the prosecutor's argument that the murder of Kathleen Muldoon was a cold and calculated act. (R 247) The prosecutor argued:

> In his confession, he says he used an automatic pistol, which either requires that he have predisposed, already chambered round. If he hadn't, he had to chamber it while he was there, and pull the hammer back in order to shoot if you had already previously chambered it. Again, a circumstance that indicates-- (R 247)

At this point, defense counsel objected to the prosecutor arguing facts which were not in evidence. Defense counsel correctly pointed out that there was no way to know how that pistol was operated and objected to the prosecutor arguing the improper inference. (R 248) In response, the trial court responded:

> THE COURT: Didn't it say "automatic"?
>
> MR. PEARL: Said "automatic", but there's more than one different kind of automatic, and Mr. Nixon is describing actions which might be necessary on one kind of an automatic pistol, but not another.

THE COURT: I think it's a fair inference. I'm going to let him continue. (R 248)

Appellant strongly contests the trial judge's conclusion that it was a fair inference. The prosecutor was certainly arguing facts which were not in evidence and the trial judge obviously relied upon this argument since he, in effect, overruled Appellant's timely objection. (R 248) The state could have brought in a firearm's expert to testify to the workings of all automatic pistols in support of their contention, if their contention was indeed correct. Better yet, the state could have attempted to meet its burden of proof and introduce the gun into evidence. We simply do not know from the evidence presented at the sentencing hearing if, in fact, Stano would have had to already have chambered a round or, chamber it while there and then pull the hammer back. By relying upon an unsupported inference from the prosecutor's argument, the trial judge allowed this to influence his finding that this aggravating circumstance was established. It is clear that aggravating circumstances must be proven beyond a reasonable doubt. William v. State, 386 So.2d 538, 542 (Fla. 1980). By relying on an inference upon argument based on facts not in evidence, the trial court erred in finding that this aggravating circumstance was proven beyond a reasonable doubt.

As to both murders, the trial judge relied upon incompetent, speculative testimony by Dr. Barnard in finding that this aggravating circumstance was established. Appellant relies upon the argument set forth in this brief on pages 20-21 in support of this contention.

This fact as well as the trial judge's other errors clearly demonstrate that the trial judge erred in finding this aggravating circumstance as to both murders. This resulted in a denial of Appellant's constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

D. As to both murders, the trial judge incorrectly found aggravating circumstance (h), thus violating Appellant's constitutional rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

In finding that the aggravating circumstance of heinous, atrocious and cruel was present in both murders, the trial judge cited Stano's lack of remorse. While recognizing that this was not an aggravating circumstance in and of itself, the trial court cited State v. Sireci, 399 So.2d 964 (Fla. 1981) for the holding that remorse is a proper factor to be considered in determining this aggravating circumstance. The trial court discussed at some length the complete lack of remorse of Gerald Stano as to both murders. (R 622-623; SR 4)

The trial judge's reliance on this factor nullifies its finding of heinous, atrocious and cruel. This is a necessary conclusion at least in part from this Court's recent decision in Pope v. State, ___ So.2d ___, 8 FLW 425 (Fla. S.Ct. Case No. 62,064, 10/27/83). There, this Court recognized the consistent misapplication of Sireci, supra. Additionally, this Court pointed to the problems inherent in the consideration of lack of remorse by a trial judge. In conclusion, this Court held that

lack of remorse should have no place in the consideration of any aggravating factors. Since the trial judge in the instant case apparently relied heavily upon this aspect, it is doubtful that he would have reached a similar conclusion absent this improper consideration.

Additionally, even if this Court does find a sufficient factual basis for the aggravating factor of heinous, atrocious, or cruel as to each murder, the finding is still improper because the judge failed to consider and weigh the fact that the perceived heinousness of the offense was directly caused by Stano's severe mental problems. This Court has recognized the causal relationship between these aggravating and mitigating circumstances in Huckaby v. State, 344 So.2d 29 (Fla. 1977), and in Miller v. State, 377 So.2d 882 (Fla. 1979).

In Huckaby, supra at 34, this Court held that the mitigating circumstances (which had not been found by the trial judge) must outweigh those in aggravation because the heinous nature of the crime was the direct consequence of the defendant's mental problems. Similarly, in Miller v. State, supra at 886, this Court again noted that the heinous nature of the offense resulted from the defendant's mental impairment. See also Jones v. State, 332 So.2d 615, 619 (Fla. 1976).

Gerald Stano's mental status in the instant case can clearly be seen as relating to the perceived heinousness of the offense. While the killings may have been committed with utter indifference [State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)], Stano's mental problems made it impossible for him to feel

anything. As defense counsel argued during the sentencing hearing, the trait of feeling for other people simply did not exist in Gerald Stano's psyche. Dr. Carrera pointed out that Gerald Stano's past was a significant contributor to the commission of these crimes. (R 125) Dr. Barnard testified that Gerald Stano did not consider Muldoon or Bickrest as people at the time of the murders. (R 137-138) Dr. Barnard also admitted that Stano had a severe impairment and was acting on an impulse arising from severe anger. (R 137-139)

The trial judge's reliance upon the apparent senseless nature of these crimes is likewise misplaced. By doing so, the trial judge reveals his complete disregard of the testimony and reports of all of the examining psychiatrists and psychologists. Their testimony reveals that it would have been surprising if Gerald Stano had had a motive for these murders. It appeared utterly and completely senseless to the trial judge due to his healthy psyche as opposed to Gerald Stano's obviously severe mental impairment.

Examining the specific facts surrounding the murders which the trial judge relied upon to find this aggravating circumstance, it is clear that they do no support this factor. As for the Muldoon murder, the trial judge pointed out that she was knocked half conscious by a blow from Stano's hand. After driving some distance, he had her exit the car before hitting her again in the head hard enough to knock her down. He then placed the pistol to her head and shot her. (SR 4) Citing Simmons v. State, 419 So.2d 316 (Fla. 1982), the trial judge found that two

(2) blows were sufficient to support this criteria. The judge concluded that Muldoon was probably terrified during the ride following the first blow. He cited the probability that she had time to contemplate her ultimate fate. (SR 4)

The only evidence of the "beating" is contained in Stano's written statement. (R 558-559) Simmons, supra at 319, found that the aggravating circumstance of heinous, atrocious or cruel was not established based in part upon the lack of evidence that the victim was subjected to "repeated blows while living". Keeping in mind that this Court's standard regarding this aggravating circumstance, i.e. that the capital felony must be "accompanied by such additional acts as to set the crime apart from the norm of capital felonies" [State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)], Appellant seriously doubts that two (2) blows by a human hand sufficiently sets this crime apart from the norm of captial murders. There is no medical evidence which indicates that Stano hit Muldoon more than twice. Stano's "beating" of Muldoon was not a proper or accurate consideration by the trial judge in support of a finding of this aggravating circumstance.

Muldoon undoubtedly had no inkling of what might happen until Stano initially hit her in the head with his hand. (R 558) Stano stated that the blow rendered her half uncounscious, as evidenced by her complete silence following the blow. This contradicts the trial judge's conclusion that she had time to contemplate her ultimate fate. She was probably in a daze.

Furthermore, there is no evidence that she ever saw the gun. (R 559) Stano never admitted ordering her out of the car

at gunpoint. It is just as likely as not that Muldoon did not know what was going to happen to her. See Maggard v. State, 399 So.2d 973 (Fla. 1981) It is well established that aggravating circumstances must be proven beyond a reasonable doubt. William v. State, 386 So.2d 538, 542 (Fla. 1980); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The state has certainly failed to meet this burden with regard to this aggravating factor.

Likewise, the state has failed to establish this aggravating circumstance regarding the murder of Susan Bickrest. The trial judge cites the fact that Susan Bickrest was strangled. (R 622) In addition, the trial judge concludes that there was evidence that she was beaten. The judge cites her swollen left eye with a bruise below, scratches on the nose and lacerations of the lip. (R 622) The trial judge states that, "While the beating here may not be so severe the evidence indicates she was struck more than once while alive." (R 622)

Under the reasonable doubt standard required to establish aggravating circumstances, Appellant contends that this evidence does not conclusively establish that Bickrest was beaten while alive. Certainly the few injuries that were discovered on her face could have been the result of the one (1) blow admittedly delivered by Stano. (R 622) Certainly the evidence does not establish beyond a reasonable doubt that Bickrest was hit "repeatedly".

Close scrutiny of the medical testimony of Dr. Schwartz who performed the autopsy on Susan Bickrest supports Appellant's contention. The doctor characterized the bruise beneath her left

eye as small. (R 45) Furthermore, the doctor admitted that the bruise could have been inflicted as many as five (5) hours before her death. (R 54-55) This would have been prior to any contact with Gerald Stano. (R 520-524) The scratches on Ms. Bickrest's nose were due to a slanting blow (not necessarily from another person) that was "quite superficial". Likewise, this injury could have occurred several hours before her death which would have been prior to any contact with Stano. (R 36, 46-47, 58-59) Dr. Schwartz also testified that the nose scratches could have been incurred accidentally by Ms. Bickrest. (R 58-59) The two (2) rather faint marks on Ms. Bickrest's lower lip opposite her incisor teeth were consistent with her mouth being blocked by a soft material. (R 45, 47) Conceivably, this rather minor injury could have been caused by some other method. Either way, Appellant contends that the injury certainly does not constitute evidence of a beating. The testimony of the medical examiner clearly contradicts the trial judge's finding that Ms. Bickrest was struck more than once while alive, much less the conclusion that she was beaten by Stano.

The trial judge cited Smith v. State, 407 So.2d 894 (Fla. 1981) in support of his conclusion that strangulation can justify a finding of this aggravating circumstance. (R 622) This reliance was clearly misplaced. In Smith, supra at 903, this Court found the manner in which the defendant strangled his victims to be heinous, atrocious and cruel. There, Smith described how both women "struggled, shook spasmodically and looked into his eyes as he choked them." Id. at 903. This Court

relied upon the unnecessarily torturous act inflicted upon the victim in finding that this aggravating circumstance had been established. The instant case provides no such description of the manner in which Stano strangled Ms. Bickrest. Indeed, Appellant's action in strangling Ms. Bickrest appears to have been a quick one with no indication that Ms. Bickrest suffered. (R 521) Appellant contends that strangulation alone without any torturous manner cannot justify a finding of this aggravating circumstance.

The trial court also relied upon Dr. Schwartz's testimony that Bickrest's death by strangulation was "prolonged". (R 622) While this is an accurate assessment of the testimony, it completely overlooks Dr. Schwartz's testimony that it was within the realm of medical probability that Ms. Bickrest lost consciousness very quickly upon the onset of the attack. (R 53, 59-60) From that point on, she did not suffer.

The trial court also relied upon its conclusion that Ms. Bickrest knew of her ultimate fate. (R 622) This also overlooks the fact that Stano's confession indicates that he hit her in the face shortly after their initial encounter. Stano believed that she was stunned from that point on as indicated by her long period of silence. (R 521, 523) Appellant contends that she had little time to contemplate her ultimate fate. Even though she probably felt that the situation was not "kosher", she could not have known precisely what was happening. If she had known it is unlikely that she would have continued her argumentative behavior. The trial judge's conclusion that she

did know her fate rests upon an inference that goes beyond the requisite standard for proving aggravating circumstances.

It is also clear that the trial judge relied upon the fact that Bickrest attempted to escape but was prevented from doing so in his conclusion that this circumstance was established. As previously mentioned, this fact was also relied upon in support of the finding that the murder was committed during the commission of a kidnapping as well as the finding that the murder was cold, calculated and premeditated. (R 622-623) This constitutes impermissible doubling as prohibited in Provence v. State, 337 So.2d 783 (Fla. 1976).

In light of the above argument, the trial court obviously erred in finding that the state had established the aggravating circumstances of heinous, atrocious or cruel beyond a reasonable doubt as required by State v. Dixon, supra. The court's reliance upon this aggravating circumstance violated Appellant's constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution. This aggravating circumstance must be stricken.

E. As to the murder of Susan Bickrest, the trial judge incorrectly found aggravating circumstance (d), thus violating Appellant's constitutional rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

In its written findings of fact, the trial court concluded that the murder was committed while the defendant engaged in a kidnapping. (R 622) The trial court relied upon Stano's admission that he prevented Ms. Bickrest from attempting

to leave the car at one point during the ride. (R 622) The court also relied upon Stano's admission that he hit her and the fact that he strangled her when she "starting raising hell". (R 622) The trial court concluded that Stano forcibly confined Ms. Bickrest during the course of the murder. The court further found that the confinement was not merely incidental to the murder and that it facilitated the crime. (R 622)

Initially, Appellant contends as he did in previous argument, that the underlying felony must be proven by proof independent of Stano's confession. Trial counsel argued this during closing argument, but apparantly the trial court ignored this contention. In finding direct evidence of kidnapping, the trial court relied exclusively upon Stano's confession wherein he admitted to preventing her from leaving the car. (R 622) Appellant contends that the trial judge's finding of a kidnapping, when there was no evidence of such other than statements made by Appellant, violated the corpus delicti principle.

This Court considered a similar argument in Smith v. State, 407 So.2d 894 (Fla. 1981), wherein Smith contended that the trial court erred in finding a significant history of prior criminal activity where the only evidence of such came from statements made by Smith. In holding that the trial judge's finding did not mandate reversal, this Court pointed out that the lack of a significant history of prior criminal activity was a mitigating factor. This Court seemed to distinquish the situtation based upon the fact that the trial court's finding

involved a mitigating circumstance rather than an aggravating circumstance, pointing out that only aggravating circumstances must be proven beyond a reasonable doubt. Id. at 901. Since the instant case involves the aggravating circumstance (d), i.e. during the commission of a kidnapping, the corpus delicti principle would apply. This is logical since aggravating circumstances must be proven beyond a reasonable doubt and, under the corpus delicti principle, independent proof of a crime other than a confession is required before one may be convicted. Sciortino v. State, 115 So.2d 93 (Fla. 2d DCA 1959). Therefore, the trial court's finding of this aggravating circumstance must be stricken on that basis alone.

The trial court's finding of this aggravating circumstance must be stricken for other reasons also. As previously argued in other portions of this brief, the trial judge used the fact that Bickrest attempted to escape to support his finding of two (2) other aggravating circumstances. (R 622-623) This clearly constitutes impermissible doubling as prohibited in Provence v. State, 337 So.2d 783 (Fla. 1976).

Furthermore, it is clear that the state failed to prove a kidnapping beyond a reasonable doubt. It is undisputed that Susan Bickrest accompanied Gerald Stano voluntarily in his car for purposes of conversation. (R 521) He asked her if she wanted to go for a ride and "she climbed in you know and just talked for a little bit and ahh we got back out there on the road..." (R 521)

The only "evidence" which could be construed to begin to establish an underlying felony is Stano's admission that Bickrest attempted to get out of the car at some point during the ride to which he responded by pushing her back and locking the car doors. (R 523) Appellant contends that this is wholly insufficient to establish the crime of kidnapping beyond a reasonable doubt. Besides being an uncorroborated admission, this statement established false imprisonment at most. This is the necessary conclusion from the failure of the state to prove beyond a reasonable doubt the reason for Appellant's prevention of Ms. Bickrest from leaving the vehicle. It is certainly a reasonable hypothesis of innocence (at least to kidnapping) that Stano prevented her from leaving simply to prolong his social contact with her hoping that their relationship would improve. Where there is a reasonable hypothesis of innocence, an appellate court and a trial judge must accept that conclusion. See McWatters v. State, 375 So.2d 624 (Fla. 4th DCA 1979). The conclusion that Appellant had no dire intentions at the time he falsely imprisoned Ms. Bickrest is revealed by his confession which indicates that he suddenly strangled her in a fit of rage. (R 521) Since the state proved false imprisonment at most, this aggravating circumstance must fall.

Even if this Court does find that the evidence was sufficient to prove kidnapping beyond a reasonable doubt, Appellant contends that the confinement of Ms. Bickrest was merely incidental to the murder. Appellant contends that the imprisonment did not substantially facilitate the murder, nor was

it substantial in and of itself. Harkins v. State, 380 So.2d 524 (Fla. 5th DCA 1980). For this as well as the other reasons already argued, this aggravating circumstance should be stricken.

F. Conclusion

According, Gerald Stano's death sentence was based in substantial part on improper and unsupported aggravated factors. In addition, the sentencing judge ignored evidence of strong and material mitigating factors, and gave unjustifiably little weight to those mitigating factors which he found. These errors are not harmless; the judge utilized these erroneous findings and standards in sentencing Stano to the violent termination of his life. Gerald Stano's death sentence must be vacated and remanded for the entry of a life sentence.

POINT II

IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS GUARANTEED UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO PRECLUDE IMPOSITION OF THE DEATH SENTENCE AND IN SENTENCING HIM TO THE ULTIMATE SANCTION.

Following the pleas of guilty and prior to the sentencing hearing, Appellant filed a written motion to preclude imposition of the death penalty. (R 459-486) The motion requested that the trial court sentence Gerald Stano to life imprisonment rather than death based upon the contention that such a sentence was consistent, rational and proportional when one compared similar cases. This argument was orally presented to the trial judge during the sentencing hearing as well. (R 279-280) On June 13, 1983, the trial judge entered a written order denying the motion. (R 620) On that same day, the trial judge sentenced the appellant to death for each of the two (2) murders. (R 326-335, 621-631)

A plurality of the United States Supreme Court has approved proportionality review whether such is provided by statute, see Gregg v. Georgia, 428 U.S. 153 (1976), or by case law, see Proffitt v. Florida, 428 U.S. 242 (1976). Proportionality has been discussed in at least two (2) ways by the United States Supreme Court. In several instances, the Court has examined whether the death penalty was proportionate to the crime for which it was imposed. See, e.g., Coker v. Georgia, 433 U.S. 584, 591-92 (1977) (sentence of death grossly disproportionate to

crime of rape when no life taken); Gregg v. Georgia, 428 U.S. 153, 187 and n. 35 (1976) (declining to address whether death penalty disproportionate for crimes such as kidnapping or armed robbery but noting that death penalty not invariably disproportionate to murder). Secondly, the Court has examined whether the penalty in the case was proportionate to other sentences imposed for similar crimes. See Gregg v. Georgia, supra at 198. This type of review is applicable to the instant case.

This standard of review was the concern in Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982). There, a majority of the California Supreme Court did not undertake any proportionality review on direct appeal. People v. Harris, 28 Cal.3rd 935 at 964, 171 Cal.Rptr. 679, 923 P.2d 240 (1981). The court refused to consider Harris' arguments concerning the constitutionality of the death penalty and gave no indication that any type of proportionality review, as required under Gregg v. Georgia, supra, and Proffitt v. Florida, supra, was undertaken. In response, the United States Court of Appeals, Ninth Circuit, vacated the previous denial of Harris' habeas corpus petition and instructed the district court to grant the petition relieving him from the sentence of death unless the California Supreme Court undertook a determination of whether the penalty in that case was proportionate to other sentences imposed for similar crimes. It should be noted that a petition for certiorari from the decision in Harris v. Pulley, supra, was granted by the United States Supreme Court on March 21, 1983. See 103 S.Ct. 1425.

This was precisely the type of relief requested of the trial court below in the instant case. In the instant case, Gerald Stano confessed, entered pleas of guilty to both murders, and waived his right to an advisory jury at the penalty phase. As pointed out in the motion to preclude imposition of the death penalty, Stano had previously pleaded guilty to three (3) first degree murders and been sentenced to three (3) consecutive terms of life imprisonment on each. (R 459) Pursuant to plea negotiations, no charges were filed against Mr. Stano for three (3) other murders to which he also confessed. In sentencing Mr. Stano to three (3) life terms on those cases, the trial judge (who was also the judge in the instant cases) cited Mr. Stano's cooperation in solving these crimes and allowing the families of the victims to cease wondering about the girls who had been missing for so long. (R 476-477)

It is axiomatic that consistency, rationality and proportionality can best be achieved by comparing similar crimes. Appellant urges this Court to compare the two (2) charges in the instant case with the total of six (6) murders for which Mr. Stano was previously sentenced to consecutive life terms. Appellant submits that a comparison reveals that no discernible differences exist. Mr. Stano was prosecuted by the same assistant state attorney and was sentenced by the same circuit judge on all of the Volusia County cases. The circumstances surrounding the murders in the instant case are no more persuasive to impose the ultimate sanction than were the circumstances surrounding the six (6) previously disposed of murders committed

by Mr. Stano in Volusia County, as well as the three (3) convictions and life sentences arising from the Eighth Judicial Circuit. Indeed, the circumstances surrounding each case are almost indistinguishable. As trial counsel argued, Mr. Stano was, in effect, sentenced to death due to his bad memory at the time he was giving statements on all of the Volusia County cases. (R 279-280)

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

While adhering to his view that the death penalty is, under all circumstances, cruel and unusual punishment, Justice Marshall concurred in the judgment of the plurality which vacated Sondra Lockett's death sentence with the following observation:

> The opinions announcing the judgment of the court in Gregg v. Georgia, ... Gurck

> v. Texas, ... and Proffitt v. Florida, ... upheld the constitutionality of the death penalty, and the belief that a system providing sufficient guidance for the sentencing decision maker and adequate appellate review would assure "rationality," "consistency," and "proportionality" in the imposition of the death sentence. (citations omitted)

Lockett v. Ohio, 438 U.S. 586, 621 (1978).

To prevent the arbitrary and capricious imposition of the death penalty, it is imparative that similar cases be treated equally. For this reason as well as the cases, authorities and policies cited herein, Appellant contends that the trial court erred in denying the motion to preclude imposition of the death penalty and in sentencing Gerald Stano to death on each of the two (2) cases. Rationality, consistency, proportionality and justice require that Gerald Stano be sentenced to life imprisonment rather than death.

POINT III

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

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

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

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

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized

sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

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

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

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

The Elledge Rule (Elledge v. State, 346 So.2d 998 (Fla. 1977)), if interpreted to automatically hold as harmless error

any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the 8th and 14th Amendments to the United States Constitution.

The Amendment of Section 921.141, Florida Statutes (1979) by adding aggravating factor 921.141(5)(i) (cold and calculated) renders the statute in violation of the 8th and 14th Amendments to the United States Constitution because it results in death being automatic unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating. Application of this aggravating circumstance to this particular defendant is violative of his constitutional protections against ex post facto laws, since the crimes were committed in 1975 and 1977, while the statute was amended in July of 1979. Amend. V, VIII and XIV, U.S. Const.; Art. I, Sec. 9 and Art. X, Sec. 9, Fla. Const. This contention is raised in spite of this Court's holding in Combs v. State, 403 So.2d 418 (Fla. 1981). Trial counsel specifically objected on these grounds in a timely fashion. (R 269)

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

Additionally, a disturbing trend has become apparent in this Court's recent decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the

trial court's decision in imposing the ultimate sanction. Quince v. Florida, ____ U.S. ____, 32 C.L. 4016 (U.S. Sup.Ct. Case No. 82-5096, Oct. 4, 1982) (Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death 12
sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833,834 (1978) cert. denied, 414 U.S. 956 (1979) (emphasis added).

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

CONCLUSION

Based upon the foregoing cases, authorities and policies cited herein, Appellant respectfully requests that this Honorable Court vacate each of the two (2) death sentences and remand to the lower court with instructions to sentence Gerald Stano to life imprisonment on both cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered to the Honorable Jim Smith, Attorney General, in his basket at the Fifth District Court of Appeal, and a copy mailed to Mr. Gerald Eugene Stano, Inmate No. 079701, Seminole County Sheriff's Office, 4290 S. Orlando Drive, Sanford, Florida 32771 this 3rd day of January, 1984.

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