IN THE SUPREME COURT OF FLORIDA

CASE NO: 64,307

HARRY DEAN HUDDLESTON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (CONT')

INTRODUCTION

The Appellant, HARRY HUDDLESTON, was the Defendant in the Court below. The Appellee, THE STATE OF FLORIDA, was the Prosecution in the Court below. In this brief, the parties will be referred to as they stood before the lower court. The symbol "R." will be used to designate the Record on Appeal. All emphasis is added unless otherwise indicated.

STATEMENT OF THE CASE

On March 2nd, 1983, an indictment was filed charging the Defendant with First Degree Murder and Armed Robbery. (R. 1-2a).

A jury trial was held on June 27th to 29th, 1983, before the Honorable Arthur I. Snyder, Judge of the Circuit Court(Criminal Division) of the Eleventh Judicial Circuit in and for Dade County, Florida. (R. 3-17). On June 29th, 1983, the Defendant was adjudicated guilty as charged as to both counts of the indictment. (R. 109-112).

On June 30th, 1983, the jury rendered an advisory sentence of life imprisonment without the possibility of parole for twenty-five years as to the first count of the indictment. (R. 118).

On July 7th, 1983, the trial court Judge rejected the jury's advisory sentence and sentenced the Defendant to death by electrocution as to the first count of the indictment, with a concurrent life sentence as to the second count of the indictment. (R. 119-125).

This appeal follows.

STATEMENT OF THE FACTS

The first witness for the prosecution at the Defendant's trial was United States Air Force Master Sergeant Manuel Powell. Sergeant Powell testified that in addition to his duties as a Master Sergeant, he was the Assistant Night Manager at the Homestead Air Force Base Non-Commissioned Officers Club. (R. 436). Part of Sergeant Powell's duties in this regard was dispensing the paychecks of the employees. (R. 438). Prior to February 4th, 1983, the Defendant was an employee at the club. (R. 437).

Sergeant Powell testified that in the early morning hours of February 5th, 1983, at approximately 1:00 A. M., the Defendant came by the club to pick up his paycheck. (R. 438). After he gave the Defendant his paycheck Sergeant Powell saw the Defendant go to the gameroom of the club. (R. 444). Sergeant Powell left the club at approximately 3:00 A. M. The Defendant left at the same time. Sergeant Powell walked to his car, and saw the Defendant walk to his bicycle. (R. 447).

James Westbrooks, the club manager, was the second witness for the prosecution. Mr. Westbrooks testified that the Defendant had been employed at the club for approximately one year. (R. 450). On the evening of February 4th, 1983, Mr. Westbrooks was off duty and at the club as a patron only. He did not see the Defendant. (R. 451).

The following morning Mr. Westbrooks arrived for work at the club at approximately 7:10 A. M. (R. 453). He saw that the cashier's door and safe were open. (R. 453). Mr. Westbrooks went to the rear of the club and discovered the body of Dawn Perkins, the general cashier, on the floor

of the ladies room. He immediately called the police. (R. 465).

Bradley Jansen, a security policeman at the Homestead Air Force Base testified that on the previous evening, he had let the Defendant on the base through the West gate at approximately midnight. (R. 468). The Defendant had a civilian employee identification card. (R.468). While doing a routine building patrol with another officer at approximately 4:00 A. M., Officer Jansen observed the Defendant sleeping in the corner of an unfinished building next to the club. (R. 478). When Officer Jansen awoke the Defendant, the Defendant told him that he was sleeping there because he had nowhere else to go. (R. 481). Officer Jansen took the Defendant and his bicycle to the patrol office. (R. 482). At approximately 5:30 A. M. he escorted the Defendant off the base through the north gate. (R. 483).

The prosecution's next witness, Sergeant William McCormick, the night chief of the Security Police, testified that he questioned the Defendant at the patrol office at approximately 4:00 A. M. (R. 489). The Defendant told him that he had come to the club to pick up his paycheck. (R. 491). Later, he had no place to stay so he had gone to sleep in a shed behind the club. (R. 492). When Sergeant McCormick found out the Defendant was no longer employed at the base, he took the Defendant's civilian identification card and had the Defendant escorted off the base. (R. 492). Later, Sergeant McCormick was called to the club by Mr. Westbrooks. When he saw the victim in the ladies room he ordered all gates to the base closed. (R. 495).

Sergeant Carl Baaske of the Metro-Dade Public Safety Department testified that he responded to the club shortly after 8:00 A. M. and immediately secured the area. (R. 501). When the homicide detectives arrived they

gave Sergeant Baaske the Defendant's name and address as a person who had earlier been seen in the area. (R. 503). Sergeant Baaske responded to the Defendant's address, approximately four to five miles from the base. (R. 504). The Defendant agreed to accompany Sergeant Baaske back to the base, at which point he was read his Miranda rights. According to Sergeant Baaske, the Defendant appeared to be wet and was shaking. The Defendant took his jacket back with him to the base. (R. 509). Sergeant Baaske had security guards posted at the Defendant's residence. (R. 510).

Detective Rafael Nazario interviewed the Defendant upon the Defendant's return to the base. (R. 689). Detective Nazario noticed blood on the Defendant's jacket. (R. 689). The Defendant was again read his Miranda rights, whereupon he told Detective Nazario that he had come to the base to pick up his paycheck and had gone to sleep in the shed next to the club because he had nowhere else to go. (R. 695). When Detective Nazario confronted the Defendant with the fact that there was blood on his coat and "point blank asked him did he kill the victim", the Defendant replied "Yes, Sir." (R. 703). According to Detective Nazario, the Defendant told him he needed the money because his girlfriend was pregnant, and he wanted to marry her. (R. 703).

The Defendant was arrested, and proceeded to tell Detective Nazario all of the details of the crime.[1/] The Defendant took Detective Nazario

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The Defendant's description of the actual crime was consistent with the medical examiner's testimony that the cause of death was a combination of three types of wounds: 1) Blunt trauma; 2) Strangulation; and 3) Stab Wounds. (R. 642).

back to his residence. There, the Defendant showed Detective Nazario where the money from the robbery was located as well as the clothing he wore during the attack. (R. 717). Additionally, the Defendant later returned to the base with Detective Nazario and showed him the path he took from the base after the crime and where he had disposed of one of the murder weapons (a knife) and other evidence. (R. 720).[2/] Later, at approximately 3:35 P. M., the Defendant returned with Detective Nazario to the Homicide office where he gave a full formal statement to him. (R. 722). According to the testimony of Detective Nazario, the formal statement he took from the Defendant is the best record of the version of events that the Defendant related to him. (R. 760).

2/

All of the physical evidence introduced against the Defendant at trial, including the money, clothing, one of the murder weapons, sketches of both murder weapons, the victims keys, and blood and hair comparisons, was obtained as the direct result of the Defendant's cooperation with Detective Nazario.

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND SENTENCING THE DEFENDANT TO DEATH WHERE A) THE TRIAL COURT MISAPPLIED ONE OF THE STATUTORY AGGRAVATING FACTORS; B) FAILED TO TAKE INTO CONSIDERATION ANY OF THE NUMEROUS NON-STATUTORY MITIGATING FACTORS PRESENTED BY THE DEFENDANT; AND C) FAILED TO UTILIZE THE PROPER LEGAL STANDARD FOR OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPROSONMENT.

II. WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PRE-TRIAL MOTION TO STRIKE THE PETIT JURY VENIRE,OR, ALTERNATIVELY, TO AFFORD THE DEFENDANT AN OPPORTUNITY TO PRESENT EVIDENCE TO SUBSTANTIATE HIS CONSTITUTIONAL CLAIM THAT THE JURY SELECTION PROCESS OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA DOES NOT COMPORT WITH DUE PROCESS AND EQUAL PROTECTION OF LAW.

ARGUMENT

I. THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND SENTENCING THE DEFENDANT TO DEATH WHERE A) THE TRIAL COURT MISAPPLIED ONE OF THE STATUTORY AGGRAVATING FACTORS; B) FAILED TO TAKE INTO CONSIDERATION ANY OF THE NUMEROUS NON-STATUTORY MITIGATING FACTORS PRESENTED BY THE DEFENDANT; AND C) FAILED TO UTILIZE THE PROPER LEGAL STANDARD FOR OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT

A. THE TRIAL COURT MISAPPLIED ONE OF THE STATUTORY AGGRAVATING FACTORS

In the instant case, in overriding the jury's recommendation of life imprisonment and sentencing the Defendant to death, the trial court judge found the presence of four statutory aggravating factors: 1) That the Defendant was previously convicted of a felony involving the use of, or threat of violence, to-wit: the armed robbery in count two of the indictment; 2) that the capital felony was committed for the purpose of avoiding or preventing an arrest; 3) that the capital felony was especially heinous, atrocious or cruel; and 4) that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R. 120-122). The Defendant submits that this fourth aggravating factor was misapplied to the facts of this case.

In Jent v. State, 408 So.2d 1024 (Fla. 1981) this Court was faced with a due process challenge to this statutory aggravating factor based upon Jent's argument that every person convicted of premeditated murder would start the sentencing proceeding with one aggravating circumstance already established. In rejecting Jent's argument, this Court held that the proof of this aggravating circumstance requires a greater level of premed-

itation than the amount necessary for a conviction of First Degree Murder. As later stated by this Court in McCray v. State, 416 So.2d 804, 807 (Fla. 1982);

> That aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive.

Thus, in McCray, supra, this Court held this aggravating factor to be inapplicable where the facts revealed that after robbing a van the Defendant encountered the van's owner, yelled "this is for you, mother-fucker", and shot him three times in the abdomen.

Similarly, in Mann v. State, 420 So.2d 578 (Fla. 1982), this Court, citing Jent, supra, found this aggravating factor to have been misapplied where the ten year old victim was abducted on her way to school and was later found dead from a skull fracture and with stab wounds.

In the instant case, the trial court's written sentencing order refers to no facts which would support it's bare legal conclusion that this aggravating factor was present To the contrary, the prosecution's own evidence, although sufficient during the guilt phase to prove premeditation, belies this greater level of premeditation as required by Jent, e.g. an execution or contract murder. Initially, it must be remembered that the uncontradicted testimony of the prosecution's own witnesses revealed that when only a few hours before the homicide the Defendant was discovered in the shed behind the Non-Commissioned Officers Club, rather than "lying in wait" for his victim, as the prosecution theorized, the Defendant was asleep. Thus, the lateness of the hour, combined with the Defendant's drinking the previous evening, make it quite possible that had the Defendant not been awoken by Officer's Jansen and McCormick, no robbery or homicide would have

occured the following morning. (R. 478). In any event, when awoken, the Defendant told both Officers' Jansen and McCormick that he was asleep in the shed only "because he had nowhere else to go", (R. 481), an explanation he later repeated to Detective Nazario both orally and in his formal statement. (R.102, 695). In fact, in his formal statement to Detective Nazario, which, as admitted by Detective Nazario remains the best record of the version of events that the Defendant related to him, (R. 760), the Defendant stated that even though he had planned to steal money from the club prior to that evening, it was not until after he was inside the club that he planned to hurt the victim. (R.96,98). Indeed, when asked by Detective Nazario "why did you kill Dawn", the Defendant gave the following response:

> I really don't know why. It seemed like I just blacked out -- well, not blacked out, but something. I can't really explain it. (R. 100).

Certainly then, this case is readily distinguishable from those cases in which this Court has found that the homicide was committed in a cold, calculated and premeditated manner. See, e.g., Hill v. State, 422 So.2d 816 (Fla. 1982), where this Court found the homicide to have been cold, calculated and premeditated, where the Defendant made the decision to rape and murder the victim "substantially before" the time that he picked her up; and Bolender v. State, 422 So.2d 833 (Fla. 1982), where this aggravating circumstance was properly applied where the Defendants' engaged in a course of robbery, torture, kidnapping and murder to get their drug dealing victims to reveal the location of their cocaine.

Accordingly, the trial court judge's bare legal conclusion herein that this aggravating factor is applicable, supported by neither facts nor law, must be reversed.

B. THE TRIAL COURT FAILED TO TAKE INTO CONSIDERATION ANY OF THE NUMEROUS NON-STATUTORY MITIGATING FACTORS PRESENTED BY THE DEFENDANT

In Songer v. State, 365 So.2d 696 (Fla. 1978), on re-hearing, this Court held that Florida's Death Penalty Statute does not limit mitigating factors to those enumerated in the Statute. Nonetheless, in the instant case, despite the Defendant's presentation of substantial non-statutory mitigating evidence in his own behalf during the sentencing phase of his trial, the trial court judge made no reference to this evidence at all in his sentencing order. Instead, the trial court merely found the existence of one mitigating factor: the Defendant had no significant history of prior criminal activity. (R. 122). And, despite the importance of this mitigating factor 3/, the trial court overrode the jury's recomendation of life imprisonment and sentenced the Defendant to death. Clearly, the trial court's action in failing to even consider any non-statutory mitigating evidence was error. See, e.g., Welty v. State, 402 So.2d 1159 (Fla. 1981); Jacobs v. State, 396 So.2d 716 (Fla. 1981).

The Defendant submits that there were at least six areas of non-statutory mitigating factors presented to the jury upon which they could have based their recommendation of life imprisonment which were ignored by the trial court judge in his sentencing order: 1) the Defendant's exemplary employment background; 2) the Defendant's remorse; 3) the Defendant's willingness to accept responsibility for his actions; 4) the Defendant's cooperation with law enforcement officials; 5) the Defendant's history of drug abuse; and 6) the Defendant's personal and family situation. Taking

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See Taylor v. State, 294 So.2d 648 (Fla. 1974), wherein this Court gave italicized emphasis to this mitigating factor.

each of these areas separately the testimony presented to the jury reveals the following:

1. The Defendant's Past Employment

The Defendant's unrebutted testimony at the sentencing hearing revealed that while he was in high school he lived on the Charleston Air Force Base in South Carolina. (R. 912). When the Defendant's father got stationed overseas the Defendant remained in South Carolina and began working for the government. (R. 913). Subsequently, the Defendant left South Carolina and went to Oklahoma where he worked as an automotive engineer for two and a half years. (R. 913). When the Defendant's parents returned to the United States to Pope Air Force Base, the Defendant moved back with them and started working at the Non-Commissioned Officers Club there. (R. 913). After the Defendant's father was stationed overseas again, the Defendant, at the request of the manager of the Non-Commissioned Officers Club at the Homestead Air Force Base, moved to Florida where he began work at the club at the Homestead Air Force Base. (R. 913). The Defendant remained employed there until the time immediately preceeding the instant case. (R. 437). Clearly, the Defendant's exemplary employment record is a proper non-statutory mitigating factor that could have been but was not considered by trial court judge. See McCampbell v. State, 421 So.2d 1072 (Fla. 1982).

2. The Defendant's Remorse

Throughout the course of these proceedings it was apparent that the Defendant had exhibited extreme remorse for his actions. This remorse was manifested in both the Defendant's immediately confessing to the crime to Detective Nazario, as well as the Defendant's testimony before the jury at the sentencing hearing. (R. 911-980). Certainly, if a Defendant's lack of

remorse may be considered as applicable to a consideration of whether or not the aggravating factor of "heinous, atrocious, and cruel" is present beyond a reasonable doubt, see Sireci v. State, 399 So.2d 964 (Fla. 1981), then the positive exhibition of remorse should be an applicable non-statutory mitigating factor to consider.

3. The Defendant's Willingness To Accept Responsibility For His Actions

In the instant case the Defendant testified at the sentencing hearing that he accepted the fact that he committed a homicide, and that he was willing to accept appropriate punishment for his actions. In fact, the record herein reveals that not only was the Defendant willing to plead guilty to these charges, but at no time were any motions filed to suppress either the Defendant's confession or any of the other physical evidence obtained from the Defendant or his residence. (R. 919-930).

In Washington v.State, 362 So.2d 658, 667 (Fla. 1975), this Court held that a Defendant's willingness to accept responsibility for his crime may, in an appropriate case, be considered as a non-statutory mitigating factor in evaluating the propriety of a death sentence. In Washington, this Court held that Washington's willingness to accept responsibility for his crime was speculative in light of the fact that Washington only surrendered after his accomplices had been apprehended and he became the focus of suspicion. Here, unlike Washington, the Defendant fully confessed to Detective Nazario upon his first being asked if he committed the crime and before the police could establish the Defendant's guilt through any accomplices. In fact, it was only after the Defendant accepted responsibility for his actions, confessed to Detective Nazario and allowed his residence to be searched, that the police were able to put together a case against him.

4. The Defendant's Cooperation With Law Enforcement Officials

As previously mentioned in the Statement of the Facts portion of this brief, the Defendant fully cooperated with all law enforcement officials involved in this case. All of the physical evidence introduced against the Defendant at trial was obtained as a direct result of the Defendant's co-operation with Detective Nazario, including the money, clothing, one of the murder weapons, sketches of both murder weapons, the victim's keys, blood and hair samples, and the Defendant's transcribed confession. All of these facts were clearly placed before the jury for it's consideration. Any objective review of the record makes clear that the jury could have been influenced in it's recommendation for life imprisonment by the Defendant's cooperation and that it too is a non-statutory mitigating factor that should have been addressed by the trial court judge in his sentencing order.

5. The Defendant's History Of Drug Abuse

The jury heard testimony from the Defendant that he had been using all kinds of drugs since the age of twelve, and the night prior to the homicide he had consumed both marijuana and LSD. (R. 917). Although the Defendant testified that he was not offering his drug use as an excuse for his actions, nor as an attempt to justify what he had done, it was a possible explanation for the fact that during the actual homicide he found himself unable to either stop or control his actions. (R. 925,927). This testimony was consistent with the Defendant's statement to Detective Nazario the day of his arrest that at the time of the homicide "it seemed like I just blacked out". (R. 100). Again, the jury could have been influenced by this testimony and considered it a mitigating factor at arriving at it's advisory sentence of life imprisonment. See, e.g., Norris v. State, 429 So.2d 688 (Fla. 1983).

6. The Defendant's Personal And Family Situation

The Defendant testified that at the time of the homicide his life was "falling apart". The Defendant had just lost his job, had a drug problem, his girlfriend was pregnant and contrary to the Defendant's wishes wanted to put the baby up for adoption, and his parents were on the verge of getting a divorce. (R. 918). All of these factors relating to the Defendant's family background and social life could have influenced the jury in their recommendation of life imprisonment. See Shue v. State, 366 So.2d 387 (Fla. 1978), wherein this Court elaborated on the Defendant's troubled family life; McCampbell v. State, 421 So.2d 1072, (Fla. 1982), wherein this Court mentioned the Defendant's home life as a proper non-statutory mitigating factor.

Clearly, all of the above non-statutory mitigating factors which were not addressed by the trial court in it's sentencing order provide an arguable basis upon which the jury might have recommended life imprisonment rather than death. In light of the decisions of this Court relating to the status and treatment of jury recommendations under the Capital Felony Statute, see (C) infra, these factors, which were ignored by the trial court, become significant.

C. THE TRIAL COURT FAILED TO UTILIZE THE PROPER LEGAL STANDARD FOR OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT

Because the jury's recommendation in a capital case represents the judgement of the community as to whether the death penalty is appropriate, the jury's recommendation is entitled to great weight. Goodwin v. State, 405 So.2d 170 (Fla. 1981).Thus, in the leading case of Tedder v. State, 322 So.2d 908 (Fla. 1975), this Court held that:

> In order to sustain a sentence of death following a jury recommendation of life the facts suggesting a sentence a death should be so clear and convincing that virtually no reasonable person could differ. 322 So.2d at 910.

In the instant case, the trial court judge, at both the sentencing hearing and in his written order, failed to follow this standard. Rather, in imposing a sentence of death, the trial court judge merely stated that he "disagreed" in the jury's recommendation that the penalty of life imprisonment be imposed. (R. 124). Nowhere did the trial court judge attempt to articulate how reasonable men would not differ on the matter of sentencing. See Smith v. State, 402 So.2d 933 (Fla. 1981).

Indeed, defense counsel respectfully submits that the application of this standard belies logic, to say the least. Simply stated, the trial court judge should only have overruled the jury's recommendation of life imprisonment if reasonable men could not differ as to the appropriateness of death. Yet, for this jury to have recommended life imprisonment in the first instance, at least six of the jurors obviously must have differed as to whether death was appropriate. Thus, in the absence of special circumstances not present herein, e.g. the trial court having additional information concerning the Defendant not avaiable to the jury,[4] or, the jury recommendation being the result of an emotional appeal by defense counsel,[5] to affirm the trial court's overriding of this jury's recommendation of life would be tantamount to ruling that at least half of the Defendant's jury was composed of "unreasonable men" (A ruling which would in and of itself raise serious

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4/ See Smith, supra.

5/ See Herzog v. State, 439 So.2d 1372 (Fla. 1983); Cannady v. State, 427 So.2d (Fla. 1983); White v. State, 403 So.2d 331 (Fla. 1981).

constitutional questions), or that the trial court judge has the authority to unilaterally substitute his judgement for the judgement of twelve reasonable representatives of the community.6/ Obviously, neither ruling would be appropriate herein.

A survey of some of this Court's most recent dispositions of various capital cases will aid in putting the facts of this case into the perspective necessary to permit this Court to ascertain whether "virtually no reasonable person could differ" as the appropriateness of the death penalty. The case at bar will thus be seen to properly fall within that group of cases wherein this Court has reduced a sentence of death to life imprisonment following a jury recommendation of life.

For example, in McKennon v. State, 403 So.2d 389 (Fla. 1981), this Court reversed the trial judge's imposition of the death penalty over a jury recommendation of life imprisonment, despite the fact that the homicide of the Defendant's employer by beating, strangling, stabbing and the slicing of her throat, was held to be heinous, atrocious and cruel. In McKennon, only one mitigating factor was found, the Defendant's age.

Again, in McCampbell v. State, 421 So.2d 1072 (Fla. 1982), where the Defendant shot a security guard during the course of a robbery, this Court reversed the trial court's imposition of the death penalty over the jury's

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It should be noted that both the defense counsel and the prosecution extensively voir dired all of the prospective jurors with regard to their ability to recommend death in an appropriate case. All of the jurors herein affirmatively stated that they were capable of doing so.

recommendation of life. This, notwithstanding the presence of three aggravating factors and no statutory mitigating factors. This Court's decision was based upon the presence of non-statutory mitigating factors which could have supported the jury's recommendation of life.

And, in Herzog v. State, 439 So.2d 1372 (Fla. 1983), the Defendant, after an argument with his female roommate, tried to suffocate her with a pillow. When the attempt failed he and another roommate dragged the victim into the living room of their apartment and strangled her to death with a telephone cord. The following morning, the victim's body was wrapped in a garbage bag, driven to Alligator Alley, drenched with gasoline and set afire. Although no statutory mitigating factors were present to offset the aggravating factor of the Defendant having prior convictions for robbery and asault, this Court reversed the trial court's imposition of the death penalty over the jury's recommendation of life because of the presence in the record of non-statutory mitigating circumstances which the trial court failed to consider. Citing Tedder, supra, this Court reiterated that a jury recommendation is to receive great weight, and should only be overruled if "no reasonable person could differ" as to the appropriateness of death. See also Hawthorne v. State, 436 So.2d 44 (Fla. 1983); Foster v. State, 436 So.2d 56 (Fla. 1983); Washington v. State, 432 So.2d 44 (Fla. 1983); Norris v. State, 429 So.2d 688 (Fla. 1983); Cannady v. State, 427 So.2d 723 (Fla.1983); Walsh v. State, 418 So.2d 1000 (Fla. 1982); Gilvin v. State, 418 So.2d 996 (Fla. 1982).

Finally, in the instant case, the Defendant was twenty-three years old at the time of the commission of the homicide. During the penalty phase of the proceedings both the prosecutor and defense counsel argued to the jury that, after weighing the evidence, they could consider the Defendant's

age as a mitigating factor. (R.1014,1028). As stated by the prosecutor:

> The next mitigating factor that you'll be instructed upon that you can consider is the age of the Defendant at the time of the crime, and this is a judgement call by you, whether you feel that the Defendant who is before you, twenty-three years old, deserves a consideration of that as a mitigating factor. (R. 1014).

Additionally, the trial court judge instructed the jury on the Defendant's age as being a possible mitigating factor. (R. 1014).

Obviously, the jury, based upon counsels' arguments and the Court's instructions, could have found the Defendant's age to be a mitigating factor, even though the trial court judge was not necessarily compelled to reach the same conclusion. For, as opined in Peek v. State, 395 So.2d 492 (Fla. 1981), there is no per se rule which pinpoints a particular age as an automatic aggravating or mitigating factor. Rather, the propriety of a finding with respect to the circumstance depends upon the evidence adduced at the trial and sentencing hearing. See also e.g., Cannady v. State, supra, where this Court ruled that the jury could have considered the age of the Defendant, twenty-one, as a mitigating factor.

Thus, when all of the above factors are considered, it is apparent that the imposition of the death sentence in this case by the trial court, after the jury's recommendation of life imprisonment, represented a blatant disregard for the terms of the applicable statute, and for the precedent of this Court. A capital punishment statute applied inconsistently is arbitrary and capricious and runs afoul of both the State and Federal Constitutions. Accordingly, this Court must reduce the Defendant's sentence in Count One of the indictment from that of death by electrocution, to life imprisonment.

II. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PRE-TRIAL MOTION TO STRIKE THE PETIT JURY VENIRE, OR ALTERNATIVELY, TO AFFORD THE DEFENDANT AN OPPORTUNITY TO PRESENT EVIDENCE TO SUBSTANTIATE HIS CONSTITUTIONAL CLAIM THAT THE JURY SELECTION PROCESS OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA DOES NOT COMPORT WITH DUE PROCESS AND EQUAL PROTECTION OF LAW.

Prior to trial, the Defendant filed a Motion challenging the petit jury selection in his case. The Defendant requested that the trial court conduct and evidentiary hearing directed towards this issue and thereafter strike the petit jury impanelled to try his case and impanel another venire which would fairly represent the community of the Eleventh Judicial Circuit of Florida and comport with due process and equal protection of law. (R. 29-30).

In support of his Motion, the Defendant filed a detail memorandum of law with supporting affidavits and offers of proof. (R. 31-43). The Defendant readopts both his previously filed Motion and memorandum of law, and requests this Honorable Court to grant him a new trial with a new petit jury selection procedure which satisfies the mandates of the equal protection and due process clauses of the United State Constitution.

CONCLUSION

At the time of the instant homicide, the Defendant was only twenty-three years old, had never previously been in any trouble, and had an exemplary employment background. Suddenly, the Defendant's life began to "fall apart". The Defendant had a drug problem, lost his job, his girlfriend was pregnant and wanted to put the baby up for adoption, and the Defendant's parents were on the verge of getting divorced. At that point, the Defendant committed an admittedly heinous, atrocious and cruel homicide which legally contained other aggravating factors. Immediately thereafter, however, the Defendant exhibited extreme remorse, a willingness to accept responsibility for his actions, and totally cooperated with all of the law enforcement officials investigating this case.

It is clear that under a totality of the circumstances the Defendant did not commit "the most aggravated and unmitigated of most serious crimes", State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), and that there was a reasonable basis for the jury's recommendation of life imprisonment. Accordingly, this Court should reduce the Defendant's sentence in Count One of the indictment from that of death by electrocution, to life imprisonment.

Additionally, the Defendant requests this Honorable Court to grant him a new trial at which the petit jury selection process will comport with both the equal protection and due process clauses of the United States Constitution.

Respectfully submitted,

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BY _____
LAWRENCE BESSER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: ATTORNEY GENERAL'S OFFICE, 401 N.W. 2nd Avenue, Miami, Florida, 33128 this 8th day of February, 1984.

BY: Lawrence Besser
LAWRENCE BESSER