IN THE SUPREME COURT OF FLORIDA

JOEL DALE WRIGHT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 64,391

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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On April 22, 1983 the Grand Jury for Putnam County, Florida returned a four count indictment accusing JOEL DALE WRIGHT (hereafter Appellant) of committing first degree murder [violation of Section 782.04, Fla. Stat.], sexual battery [violation of Section 794.011(3), Fla. Stat.], burglary of a dwelling [violation of Section 810.02(3), Fla. Stat.] and, grand theft-second degree [violation of Section 812.014, Fla. Stat.], (R 5-6).[1] The Office of the Public Defender was appointed to represent Appellant (R 10), and Appellant entered a plea of not guilty as to each allegation contained in the indictment (R 35-37).

[1] (R) Refers to the Record on Appeal of the instant cause, Supreme Court Case No. 64,391.

A notice of alibi was filed by Appellant (R 57-58), and the following pretrial motions, among others, were resolved by the trial court as follows:

Appellant's Motion To Suppress Pretrial Statement (R 64-65, 156) was denied following a hearing occurring on August 12, 1983 (R 487-612). The statement sought to be suppressed, made by Appellant, was to the effect that "if I confess to this I will die in the electric chair, if I don't talk I stand a chance of living." (R 64). The basis of the suppression was that the statement was an invocation of the right to remain silent, and as such could not be commented upon. A further basis was that the State's intentional and deliberate act of not recording the interrogation of Appellant, whereby the context of the statement could be determined, also rendered the statement inadmissible (R 601-606). The court found as a matter of law that the statement was not an invocation of the right to remain silent (R 141), and further found that competent substantial evidence existed to show that the statement was voluntarily made (R 366). The introduction of the statement formed the basis of a motion for mistrial, which motion was denied (R 2415-2416).

The State filed a Notice Of Intent To Use Similar Fact Evidence (R 152), which intended use was objected to by Appellant (R 155). Following a hearing (R 612-620), the court overruled Appellant's objection to introduction of evidence concerning Appellant's burglary of the murder victim's home approximately a month prior to the murder (R 367). The objection to such testimony was timely renewed at trial prior to

the testimony being adduced, and again overruled (R 2383-2387). Introduction of the testimony formed the basis of a motion for mistrial, which motion was denied (R 2401-2402).

The State filed a motion in limine to preclude Appellant from mentioning to the jury that he had successfully passed a polygraph test concerning the murder of MS. LIMA PAIGE SMITH (R 373). Appellant argued that the election by the State to administer the polygraph to Appellant and other suspects of the murder, the sole exception being Charles Westberry, should be admissible notwithstanding that the results of such tests were not (R 459-463). Appellant was instructed by the court, however, not to mention to the jury that one of the police officers who interrogated Appellant was a polygraphist (R 462).

The matter proceeded to a twelve member jury trial in the Circuit Court for Putnam County, the Honorable Robert R. Perry presiding (R 846-2925). During the trial, at the conclusion of the State's case, the State received an anonymous phone call directing them to possibly inculpatory evidence (R 2322-2325). After a witness for the defense arrived from out of state to attend the trial in order to explain and identify the evidence [a glass piggy bank decanter] the State decided not to use the evidence (R 2345).

However, profferred testimony of a defense witness, discovered after the close of the evidence but prior to any argument or instructions of law being given the jury, was ruled inadmissible due to the prejudice accruing to the State (R 2677-2678) The jury returned guilty verdicts as to each offense

charged, to wit: first degree murder, sexual battery, burglary and grand theft - second degree (R 2910-2917, 688).

The sentencing phase of trial (R 2929-3013) produced a nine to three recommendation in favor of death (R 695, 3008). Judge Perry followed the recommendation, finding no mitigating circumstances and four aggravating circumstances, to wit: (1) murder committed while in the commission of a burglary, (2) murder committed for purpose of preventing lawful arrest, (3) murder especially heinous, atrocious or cruel and (4) murder committed in cold, calculated and premeditated manner (R 707-715, 3049-3076).

The court further adjudicated Appellant guilty of sexual battery, burglary, and theft (R 715-716), and imposed respective sentences of ninety-nine years imprisonment with jurisdiction retained over one-third and with credit to be received for 158 days time served, a consecutive fifteen year term of imprisonment with jurisdiction retained over one-third, and a consecutive five year term of imprisonment (R 717-721).

A Motion For New Trial was filed by Appellant (R 700-704), which motion was denied September 21, 1983 (R 706). A Notice Of Appeal was timely filed October 14, 1983 (R 730) and the Office of the Public Defender was appointed to represent Appellant for the purpose of his appeal (R 728-729, 738). This brief follows.

STATEMENT OF THE FACTS

LIMA PAIGE SMITH was a seventy-five year old school teacher who resided by herself in a secluded old house near Third Avenue in Palatka, Florida (R 795-800, 1583). Ms. Smith's brother lived nearby. On Friday morning, February 5, 1983 the brother took Ms. Smith grocery shopping, as was their usual practice (R 1583-1586). The pair returned home around 1:00 p.m., and Ms. Smith began carrying the groceries from her automobile into her home as the brother walked on to his house (R 1586). The brother did not assist in carrying in the groceries because Ms. Smith would not permit anyone to enter her home, probably due to the extreme untidiness thereof (R 803-807, 1586). This was the last time she was seen alive.

The next evening Ms. Smith's half-nude body was discovered amid the trash between her bed and bedroom wall (R 812, 1587-1591, 1596-1601). She had been repeatedly stabbed in the neck with a pocketknife-like instrument, and had died as a result thereof (R 822, 1815-1822). Dead sperm was present in the vagina of Ms. Smith, the vagina receiving serious injury while Ms. Smith was still alive (R 1820-1821, 2001). Insufficient sperm was recovered upon which to perform an A-B-O blood grouping analysis (R 2006).

An expert forensic pathologist opined at trial that the injuries to Ms. Smith had been inflicted from the front by a right-handed person (R 1834, 1848-1849), and that though inconclusive, the best estimate of the time of death was between 5:00 p.m. and 9:00 p.m. on February 5, 1983 (R 1853).

On February 5, 1983, Appellant resided with his parents, whose home neighbored Ms. Smith's (R 1969). That afternoon Appellant and two friends transported scaffolding from a worksite to Stokes' Landing (R 1863-1865, 2530). Appellant was thereafter dropped off at his parents' home around 5:00 or 6:00 p.m. in order for him to clean up, and was then picked up around 8:00 p.m. in order to attend a fish fry/poker party at his employer's house (R 1866-1868, 1895-1898). Some drinking ensued, and Appellant won approximately $30.00 in the poker game (R 1869, 1881, 1896, 2532). Appellant was taken home around 1:00 a.m. Sunday morning (R 1898-1899), but was unable to get in because his parents had locked the doors and gone to bed (R 1970, 2532-2534). Appellant walked to Charles Westberry's house (R 2534). From 1:00 to 3:00 a.m. dogs barking in the neighborhood woke up several of Ms. Smith's neighbors, who investigated outside of their homes but saw nothing unusual (R 1970-1971, 2299-2302).

Mr. Jackie Bennett, also one of Ms. Smith's neighbors, was at a local "hangout" when he observed three strangers walk down Third Avenue [the victim's street] between 10:00 p.m. and 12:00 p.m. on Saturday evening and later seen by him around 3:00 a.m. (R 2484-2488). Mr. Bennett did not observe Appellant walking toward Charles Westberry's house (R 2493-2494). However, proffered testimony of Ms. Kathy Waters, which testimony was excluded, established that a person similar in appearance to Appellant was walking away from Third Avenue on State Road 19 toward Charles Westberry's residence around 1:00 a.m.; at the

same time three suspicious acting persons were congregating on Third Avenue in the shadow of a big oak tree near the Smith residence (R 2613-2619, 2624, 2633-2636, 2654-2657).

Appellant, who is left-handed (R 2477, 2480), testified at trial that he walked to Charles Westberry's house after being locked out of his parents' house, ariving at Charles' home around 1:00 a.m. on Sunday morning (R 2534-2535). After being let in by Charles, Appellant went to sleep on a couch in the living room, and was awakened the next morning by Charles' young nephew between the hours of 6:30 and 8:00 a.m. (R 2534-2537, 1945-1946, 1953-1955).

INDEPENDENT EVIDENCE

The evidence of Appellant's guilt consisted solely of the following:

The police compiled eleven fingerprint cards filled with latent prints discovered in Ms. Smith's residence, but of the eleven cards only two prints were identified (R 2051). One fingerprint belonged to Detective Douglas, the other belonged to Appellant (R 2038-2039, 2051). Appellant's fingerprint was recovered from a portable burner plate found in Ms. Smith's bedroom (R 2039, 819-820). The State presented evidence showing that Appellant had entered Ms. Smith's residence approximately a month before the murder (R 2390-2392, 2396). The fingerprint "quite possibly" could have remained intact upon the stove for more than one year (R 2057).

Hair specimens obtained from the person and clothing of Ms. Smith were inconsistent with hair specimens obtained from Appellant (R 2079-2080, 2094-2095). A combing of the pubic region of Ms. Smith produced a pubic hair, other than Ms. Smith's, demonstrating "some" characteristics of Caucasian pubic hair, but the hair was later determined not to be suitable for comparison with the standards supplied by Appellant (R 2094).

Appellant stated to an interrogating police officer "[i]f I confess to this I'll die in the electric chair; if I don't talk I stand some chance of living" (R 2351).

Appellant observed to a friend prior to the murder that "It is getting about time for [Ms. Smith] to die", which statement was viewed by the friend as a comment upon the elderly and frail condition of the victim (R 2380-2382).

TESTIMONY OF CHARLES WESTBERRY

Charles Westberry testified that Appellant came to his trailer after daylight Sunday morning (R 2132) and, after entering the living room of the trailer, Appellant allegedly announced that he had killed Ms. Smith (R 2132). Charles, not wishing to be overheard, had Appellant accompany him outside (R 2133).

They sat in Charles' inoperable pickup truck because it was raining (R 2133). Appellant allegedly told Charles that he (Appellant) had attended a party at T. L. Geck's house earlier on Saturday evening, and that upon returning home Appellant thought he observed Ms. Smith asleep in her automobile (R 2134).

Appellant entered Ms. Smith's house through a rear window and found her pocketbook (R 2134). Appellant obtained money from the purse and was in the act of wiping off the purse when he saw Ms. Smith standing in the hallway (R 2135). Appellant allegedly stated that he then found a knife and "cut her throat" (R 2135), discovered a jar with some change inside, found a rag and wiped off everything touched, proceeded outside and wiped the window down, and then obtained a rake and raked the ground under the window to cover up any footprints (R 2135-2136).

Allegedly Appellant, while still sitting in the pickup truck, pulled money out of his pockets and counted it, thereafter giving most of it to Charles (R 2137-2138). Charles entered the trailer and obtained keys to his girlfriend's automobile (R 2138, 1925-1926), and Appellant and Charles drove to a "7-11" store to get coffee (R 2142). Charles at this time noticed a blood stain under Appellant's ear and had him wipe it off (R 2142). They next drove past the victim's house on their way to purchase cigarettes from a different store (R 2144). Returning to Charles' home, Appellant laid down on the couch and Charles went to a back bedroom (R 2146). Charles arose in a few minutes, however, because his nephew was awake and making noise, but Appellant remained on the couch (R 2146). When later asked by Charles, Appellant swore he did not rape Ms. Smith (R 2136).

While crying uncontrollably and after suffering from nightmares (R 2173, 2476), Charles related substantially this same story weeks later to his ex-wife, (R 2169-2170), and thereafter Westberry's ex-wife notified the police (R 2476).

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION BY RESTRICTING APPELLANT'S RIGHT OF CROSS-EXAMINATION.

The right of cross-examination is included in the Sixth Amendment's guarantee of a defendant's right "to be confronted with the witnesses against him", and said right is applicable to the states pursuant to the due process clause of the Fourteenth Amendment. Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place a witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them... To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial...

Alford v. United States, 282 U.S. 687, 692-694, 51 S.Ct. 218, 75 L.Ed. 624, 627-629 (1931). Similarly, Article I, Section 16 of the Florida Constitution provides an accused the right "to confront at trial adverse witnesses." The free exercise of this right is the mainstay of the adversary system of truth finding.

As held by this Court in Coxwell v. State, 361 So.2d 148 (Fla. 1978), "Where a criminal defendant in a capital case, while exercising his Sixth Amendment right to confront and cross-examine the witnesses against him, inquires of a key prosecution witness regarding matters which are both germane to that witness' testimony on direct examination and plausibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error." Id. at 152.

With these principles firmly in mind, Appellant submits that the trial court unreasonably restricted Appellant's right of cross-examination:

Pathologist

The pathologist testified at trial that the time of death of Ms. Smith was different than previously determined, the change due to information as to the eating and sleeping habits of Ms. Smith later received from unspecified sources (R 1824-1827). On cross-examination the court would not permit defense counsel to inquire of the pathologist concerning the sources of information used to determine the new time of death unless the questions were predicated upon prior testimony adduced at trial (R 1837-1838). Appellant submits that such a restriction was improper, and that Appellant was entitled to establish the sources of the doctor's opinion as to the time of death of Ms. Smith, notwithstanding that the "sources" themselves did not testify at trial.

Kenneth Goodson

On direct examination, the State established that Kenneth Goodson had known Charles Westberry ten or twelve years and had seen him between six and ten o'clock on the evening of the murder (R 1962), but Goodson did not recall seeing Appellant that evening (R 1963). On cross-examination, defense counsel sought to develop how well the witness knew Appellant by attempting to inquire about an incident occurring in March (R 1964). An objection by the State based upon "beyond the scope of direct" was sustained by the trial court (R 1964-1965). Appellant respectfully submits that the ruling unduly restricted the inquiry to February 5th or 6th, and thus unfairly deprived Appellant of any opportunity to develop that witness's bias, credibility and/or knowledge of Appellant. Cf. Hannah v. State, 432 So.2d 631 (Fla. 3d DCA 1980).

Walter Perkins

Deputy Perkins, an eight year veteran of the Putnam County Sheriff's Office, participated in the arrest and interrogation of Appellant (R 2349, 2357, 2361). It was this officer's practice not to make any contemporaneous record of an interrogation of a suspect and it was this officer to whom Appellant allegedly stated, "If I confess to this, I will die in the electric chair. If I don't talk I stand a chance of living" (R 2351, 2363). The officers memory as to the content of the unrecorded interrogation had decreased drastically, in that the above statement was the only part of the interrogation recalled

at trial by the deputy (Cf. R 547-548) On cross-examination, Appellant asked the deputy whether "the ends that you seek to gain justify whatever means you have to employ; is that correct?" (R 2357). A State objection was immediately sustained (R 22357). The deputy was similarly asked if any proof existed whereby the context of Appellant's statement could be determined, an objection to which question was sustained (R 2370). Appellant submits that these questions of a trained police officer who deliberately does not record the interrogation of a first degree murder suspect were proper and should have been allowed, in that the questions go straight to the officer's credibility. Appellant had the right to have the jury observe the officer's demeanor in answering questions that ask if the officer was lying or being "selective" in his recall (R 2359), especially where the record shows that police previously lied under oath about whether a plan existed to arrest Appellant (Cf. R 507, 528, 541-542, 549-550).

Charles Westberry

Charles Westberry, the key witness for the State, was asked by defense counsel "[w]ere you also advised by [the prosecutor] or anyone else that by having been charged with the crime of accessory after the fact, later reduced under your contract to compounding a felony, that you have in effect as a matter of law been immunized from ever being prosecuted yourself for the murder of LIMA PAIGE SMITH?" (R 2163). A hearsay objection by the State was sustained (R 2164).

It is evident, however, that the testimony was not being elicited for the truth of the matter contained therein, but only to establish that a statement had been made to motivate Westberry to testify in order to escape culpability for the murder. The State was able to dwell upon the condition of the agreement whereby Westberry agreed to testify "truthfully" (R 2161). Appellant was entitled to fully explore oral representations made by the State that induced Westberry to enter into the agreement, which agreement was introduced into evidence and relied upon by the State (R 2210-2214). This limitation of cross-examination clearly denied Appellant the right to confront his accuser. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Fulton v. State, 335 So.2d 280 (Fla. 1976); Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982).

When Westberry admitted to lying to Detective Douglas, defense counsel inquired of Westberry how to determine which version was the truth (R 2168, 2204). An objection was immediately sustained (R 2168). Similarly, when Westberry added facts to a sworn version previously given the police, defense counsel inquired as to whether such testimony appeared to be "a recent invention" (R 2181). An objection was again sustained (R 2181).

Appellant sought to establish that Westberry and Appellant had routinely stolen metals to sell for huge profit, which line of questioning was objected to by the State on the basis that the testimony was intended only to prove bad character or propensity (R 2186). Appellant disagreed, and argued that

such testimony was needed to fully develop the relationship between the State's key witness and Appellant, and to show that a motive existed for Westberry to try to eliminate Appellant whereby Westberry would be the sole participant in the lucrative enterprise (R 2186-2188, 2191-2192). Appellant further submits that such testimony was proper to demonstrate that Westberry's testimony was influenced by the hope that his illegal activity, known by the police and prosecutor, would not result in charges being filed if Westberry testified favorably to the State. The court disallowed the proffered testimony (R 2192).

> The right to confrontation under the Sixth and Fourteenth Amendments may in certain cases require an opportunity to develop issues of bias by cross-examination. (citation omitted). All witnesses are subject to cross-examination for the purpose of discrediting them by bias, prejudice or interest and this is particularly so where a key witness is being cross-examined. (citations omitted).

D. C. v. State, 400 So.2d 825 (Fla. 3d DCA 1981), See also Hannah v. State, supra. Clearly the preclusion of such testimony denied Appellant "the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test". Alford, supra.

The omission of such testimony was driven home by the State in closing argument where the State argued "I ask you to ask yourself the ultimate question; why is Charles Westberry going to submit himself to criminal prosecution so that he can also submit his friend to criminal prosecution? What's [sic] so dastardly did Appellant do to Charles Westberry to make him do

that? What testimony have you heard that there was anything so dastardly done by Appellant to Charles Westberry? None. Nothing." (R 2726)

Appellant respectfully submits that each of the foregoing questions constituted proper cross-examination, in that each question concerned the credibility of the witnesses. Some latitude must be given in the cross-examination of the State's key witnesses during the trial of a capital crime. No latitude whatsoever was given here, to the extent that Appellant was denied the right to effectively confront his accuser. Accordingly the convictions of Appellant require reversal.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, BY REFUSING TO ALLOW APPELLANT TO REOPEN HIS CASE IN ORDER TO PRESENT NEWLY DISCOVERED EXCULPATORY EVIDENCE, WHICH EVIDENCE WAS DISCOVERED AFTER THE "TECHNICAL" CLOSE OF ALL THE EVIDENCE BUT PRIOR TO ANY ARGUMENT OR INSTRUCTION OF LAW BEING GIVEN THE JURY.

At the close of all the evidence, an overnight recess was taken. The next morning, defense counsel was approached by a witness named Mrs. Waters (R 2608), and Appellant at that time moved to reopen the case (R 2675). Mrs. Waters' testimony was proffered, and such proffer established that the witness had come forward after friends attended the trial and indicated to her that she may have testimony relevant to Appellant's defense (R 2610-2613).

Specifically, Mrs. Waters proffered that on the night of the murder she attended a church revival, and left to drive some children home in her van around 12:30 a.m. on Sunday morning (R 2613-2614). She proceeded down State Road 20, and turned south on State Road 19, where she observed[2] a "lanky-skinny", white young person wearing dark pants (R 2615-2617) with medium length hair (R 2634) walking north on State Road 19 toward Charles Westberry's residence (R 2654-2655). She commented to her passengers that "[we aren't] the only ones out at this time of night" (R 2679).

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[2] The jury would have had the benefit of first-hand comparison of this description to Appellant, whereas this Court has only the description of Appellant contained in the sworn arrest report (R 11). Appellant submits that the descriptions comport sufficiently to raise a jury question.

Proceeding south on State Road 19, Mrs. Waters next observed a young person run across the road near Messer's Store (R 2617). Mrs. Waters slowed and looked down Third Avenue where she had previously resided next to Ms. Smith, and saw three persons congregating in the shadow of a large oak tree (R 2618) in the vicinity of Ms. Smith's house (R 2624).

Judge Perry recognized that the aforesaid testimony tended to corroborate the testimony of Appellant (R 2645), and Appellant agreed that the State should have a reasonable time within which to investigate the testimony of Mrs. Waters (R 2663, Cf. 2322-2342, 2674-2675). The judge alluded to a possible violation of the rule of sequestration, but excluded the testimony based solely upon prejudice that accrued to the State (R 2677-2678). Appellant respectfully submits that the prejudice accruing to the State was minimal compared to the prejudice accruing to Appellant, and that the trial court clearly abused its discretion in censoring relevant and exculpatory evidence from the jury in the trial of a capital felony.

The purpose of a trial is not simply to convict a defendant after a few meaningless gestures are performed. The objective is to truly search for and find the truth.

> Where a defendant offers evidence which is of substantial probative value and such evidence tends not to confuse or prejudice, all doubts should be resolved in favor of admissibility. (citation omitted). Where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission. (citation omitted).

Moreno v. State, 418 So.2d 1223, 1225 (Fla. 3d DCA 1982).

Clearly a defendant, in support of an alibi defense, may present evidence tending to show that someone other than he/she committed the charged offense. See Lindsay v. State, 69 Fla. 641, 68 So. 932 (1915); Pahl v. State, 415 So.2d 42 (Fla. 2d DCA 1982); Watts v. State, 354 So.2d 145 (Fla. 2d DCA 1978); Corley v. State, 335 So.2d 849 (Fla. 2d DCA 1976). If the rights to be heard and to confront witnesses are to be meaningful a defendant must be able to present testimony to corroborate his own testimony. In the instant case, Judge Perry viewed the testimony as being cumulative (R 2860-2861). Although sometimes a fine line may exist between "cumulative" and "corroborative" evidence, certainly where but one witness testifies in conformity to a defendant's alibi testimony in a capital case the testimony is not cumulative, and no reasonable person could think so.

Appellant respectfully submits that the correct disposition of this point on appeal is controlled by Steffanos v. State, 80 Fla. 309, 86 So. 204 (1920). The material aspects of the Steffanos's case are identical to those here, in that the defense and the prosecution announced "rest", whereupon the trial recessed. The defendant then sought to reopen the case to present testimony of newly discovered witnesses relevant to his defense. The trial court refused to reopen the case, and this court properly and promptly reversed, stating:

> To preclude one from introducing evidence so material to his defense and persuasive, perhaps, of his innocence, merely because he had said that he had no more testimony to offer, is to enforce a rule of procedure almost to the point of a denial of justice. It is to sacrifice liberty to a mere form of

> procedure or courtroom usage, the observance of which is to bring about the orderly introduction of evidence by the respective parties. But such rules ought not to be applied with such technical precision and unbending rigor as to produce injustice. (citation omitted) They should be enforced or relaxed in the furtherance of justice. The motion was to reopen the case, but the case was not technically closed. The judge had not charged the jury; the counsel had not begun the argument; the case had not been submitted. It had only reached that stage where each party announced that it rested; that there was no more evidence to be introduced. The court then took a recess. Upon convening on Monday following, the motion was made. Whatever delay or confusion may have resulted in the trial of the case by permitting the witness to testify might have been fully requited by the establishment of defendant's innocence, for it was the province of the jury to weigh the evidence introduced and place a value upon its probative force.
>
> Even if the case had been technically closed, it would have been an abuse of discretion to refuse to open the case and permit the evidence to be introduced, upon the proper showing being made as to why it had been previously omitted. (citation omitted).
>
> While the record does not disclose that any showing was made when the motion was submitted, yet the cause had not proceeded so far that the ends of justice would have been defeated, or the orderly processes of the court disturbed, by an admission of the testimony.
>
> The refusal to allow the evidence to be introduced under the circumstances was an abuse of discretion, which was harmful to the defendant, and was therefore error.

Steffanos, supra at 206.

It is respectfully submitted that here the trial court abused its discretion in refusing to allow Appellant to reopen the case prior to it being submitted to the jury. The ultimate sanction sought to be imposed upon Appellant by the State require that the defendant be afforded every reasonable opportunity to put before the jury evidence concerning his innocence. It is manifest that the trial court was not even-handed in its rulings as to the prejudice attendant "newly discovered evidence" (Compare R 2323-2342, 2673-2675, 2677). The State had the ability to fully cross-examine Mrs. Waters concerning her testimony. She provided the names of her [Mrs. Waters'] daughter Micky, age four, daughter Casey, age twelve, Linda Pierce, age fifteen, and Russell Garner, age nineteen, as the people being in the van at the time (R 2628), and further provided the name of Baer Garner to corroborate her route and the time she left the revival (R 2614, 2632). These specifically identified people could have been contacted and deposed by the State with minimal delay and effort. The Court, however, ruled that it was too prejudicial for the State to even attempt to do so. It is respectfully submitted that under the existing circumstances, the trial court unquestionably abused its discretion and committed reversible error in refusing to allow Appellant to reopen his case in order to present newly discovered exculpatory evidence.

POINT III

THE TRIAL COURT DEPRIVED APPELLANT OF A FAIR TRIAL BY AN IMPARTIAL JURY GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION BY INSTRUCTING THE JURY, OVER OBJECTION, THAT EVIDENCE OF A PRIOR CRIME COMMITTED BY APPELLANT "WILL BE CONSIDERED BY YOU FOR THE LIMITED PURPOSES OF PROVING... IDENTITY...ON THE PART OF THE DEFENDANT."

Over objection (R 2384-2389), Paul House was permitted to testify that approximately a month before the murder of Ms. Smith he (Paul House) and Appellant, at Appellant's instance, entered the Smith residence during the day through a rear window in order to view the unusual condition of the house (R 2389-2393). Paul found a small amount of money while rummaging through the garbage (R 2392, 2397) and thereafter he and Appellant left through the same rear window (R 2395).

The State argued that such evidence was relevant to prove knowledge by the defendant as to the availability of a point of entry to the Smith residence, and that it showed the lack of mistake or accident in going into the house (R 616). Defense counsel, however, argued that insufficient similarities existed between the offenses for the prior entry to be probative of anything (R 616, 618). The foregoing argument occurred during the pretrial hearing concerning the use of similar fact evidence, and the testimony was ruled admissible (R 619).

The objection to the use of such testimony was renewed at trial prior to its introduction (R 2384). The State then requested that the preliminary William's Rule instruction be

given in its entirety (R 2383-2384). Defense counsel specifically objected to the giving of the whole preliminary instruction and argued that the William's Rule testimony was only legally acceptable to prove preparation or knowledge (R 2386-2387). The trial judge, over objection, instructed the jury as follows:

> Ladies and gentlemen, the evidence you are about to receive, or that portion of that concerning evidence of other crimes allegedly committed by the defendant, will be considered by you for the limited purposes of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident on the part of the defendant. And you shall consider that evidence only as it relates to those issues. However, this defendant is not on trial for a crime that is not included in the indictment.

(R 2388-2389). (emphasis added) A similar instruction, over objection, was given during the final jury charge. Appellant respectfully submits that the foregoing instruction constituted reversible error, bearing in mind that the final instructions were in writing and submitted to the jury for use during deliberations.

The only real question before the jury sub judice concerned the identity of the perpetrator[s] of the sexual battery and murder of Ms. Smith. The law is abundantly clear that the identity of the perpetrator of a crime cannot be inferred from the occurrence of a prior crime unless a pervasive similarity exists between the facts of the two crimes, and some unique characteristic present in the commission of both offenses strongly suggests that the same person[s] committed the crimes.

> The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of the factual situations being compared. A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar fact to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant.

Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981). See also Hodges v. State, 403 So.2d 1375 (Fla. 5th DCA 1981).

In Drake, this Court held that reversible error occurred where testimony concerning the commission of two prior, specific criminal acts by the defendant was admitted into evidence over timely objection. There were no unusually distinctive characteristics committed in the crimes that would legally support the inference that the defendant, who was known to have committed the prior crimes, also committed the latter crime.

So, too, in the case sub judice, no unusually distinctive characteristics exist that would legally support an inference that the perpetrator[s] of the murder of Ms. Smith were the same as had previously trespassed in her residence. Specifically, Appellant's prior trespass occurred during the day when the house was unoccupied and while Appellant was accompanied by another individual. Appellant's avowed purpose at the time of entry was not to steal [ergo: burglary] but rather to show Paul House "[w]hat the place looked like inside" (R 2390) [ergo: trespass]. The fact that Paul House rummaged through the garbage and eventually took some money cannot be attributed to Appellant,

who, the testimony indicates, did not intend to steal anything at the time of entry. The entry through the same window allegedly used by the murderer[s] has no independent or unusual significance, for duplicitous entry through the only unsecured portal would logically be expected.

As argued by defense counsel below, the only possible legal relevance of such testimony, as enunciated in Williams v. State, 110 So.2d 654 (Fla. 1959), was to show Appellant's possible knowledge that the window was unsecured (R 2387-2388). It is evident that the "Williams Rule" instruction found in the Florida Standard Jury Instructions in Criminal Cases, Second Edition at page 50, which instruction was read over objection in its entirety by the judge, is not simply to be read verbatim. Rather the use of brackets around the words [motive], [opportunity], [intent], [preparation], [plan], [knowledge], [identity], [the absence of mistake or accident] clearly indicates that those particular uses of the testimony are legally acceptable only where requested and supported by the proof adduced at trial. cf. "Use of Brackets", Fla. Std. Jury Inst. in Crim. Cases p. xxii.

Had the proof of guilt been overwhelming, the improper instruction to the jury, even over objection, may have been harmless error. However the proof of guilt here was extremely tenuous. For aught that appears in the record, the jury improperly determined that Appellant committed the murder of Ms. Smith because they were instructed that they could legally infer that the identity of the perpetrator[s] of the crimes was the

same in both instances. The instruction that the similar fact testimony could be so used was timely objected to. This Court's attention is respectfully drawn to the State's use of the Williams Rule testimony. NOT ONCE was it argued to the jury that the prior burglary showed knowledge of an unsecured point of entry to the Smith residence. Rather, the State argued only propensity to commit crime and/or identity concerning the prior incident (See: R 2738-2739, 2743, 2709-2812, 2815, 2822).

The fact that Williams Rule testimony is admissible for one purpose does not and cannot provide the State with carte blanche authority to use the testimony indiscriminately...to improperly show identity as well as propensity...and to have the court, over objection indiscriminately instruct the jury as to the proper use of the testimony. Appellant respectfully submits that the giving of the instruction over objection constitutes reversible error.

POINT IV

THE TRIAL COURT VIOLATED THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY PERMITTING A POLICE OFFICER, OVER OBJECTION, TO COMMENT UPON APPELLANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT.

"If I confess to this I'll die in the electric chair. If I don't talk I stand some chance of living." (R 2351). Prior to trial this statement was sought to be suppressed because the statement was a comment upon the exercise of Appellant's right to remain silent and because the context within which the statement was made, as intended by the police, could not be determined (R 64-65, 156).

A fair reading of the record establishes that the statement here at issue occurred during a custodial interrogation of Appellant after Miranda warnings. The statement was followed by a request for an attorney, which resulted in the termination of the interrogation (R 548). During the questioning Appellant had disavowed any knowledge of the murder (R 547). Deputy Perkins, however, recorded only one statement of Appellant, and Perkins could not thereafter remember, either at trial or at the suppression hearing, any of the conversation leading up to or following the statement (R 558). Perkins admitted, however, that he intended to "[g]et out of [Appellant] anything [he] could that might constitute an admission of any kind to the crime involving Ms. Smith" (R 2360-2361). Appellant respectfully submits that the above statement constituted a comment upon Appellant's right to remain silent, notwithstanding Judge Perry's ruling "[a]s a matter of law" to the contrary (R 141).

CONTEXT OF STATEMENT

It is clear that the police here made a conscious decision not to record the interrogation of Appellant for the sole purpose of making it the word of an accused murderer against the word of "disinterested" policemen. The record clearly shows that the same "disinterested" policemen previously lied as to the existence of a plan to arrest Appellant (Cf. R 507, 528, 541-542, 549-550). The motives of the police in extracting Appellant from his home without informing him or his parents that he was being arrested for the murder of Ms. Smith are questionable. The State argues that the deception was necessary in order to peacefully obtain the custody of Appellant and to save him from embarrassment (R 2370-2373). Appellant submits that this explanation is patently unreasonable, and that the real reason was to prevent an attorney from being contacted prior to interrogation being completed in a police controlled environment.

Appellant's family would be informed of the arrest as soon as the police deigned to allow Appellant to use the telephone. There is nothing whatsoever in the record to indicate that Appellant had in any way ever resisted the police. Quite the contrary, Appellant had previously, voluntarily gone with the police to take (and pass) a polygraph examination conducted in Clay County. Appellant's diminutive size (R 11) heavily weighs against any suggestion that avoidance of violence was the reason to delay in advising Appellant that he was under arrest.

The holding in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) was necessitated by such police misconduct, and the law concerning the interrogation of a suspect evolved from Miranda as a prophylactic measure in order to deter future police misconduct. Appellant submits that such intentional tactics as here employed by the police in order to circumvent the deterrence intended by Miranda should quickly be discredited. Specifically, as a matter of policy the police here intended to deprive a defendant accused of first degree murder the ability to produce the actual content of a custodial interrogation. A defendant has the right to have his entire statement considered and the State cannot seek to utilize one specific statement out of context. Notwithstanding that a defendant has the ability to give "his" version of what was said, it is common sense that the general public is more receptive to the word of a police officer as opposed to the word of an accused first degree murderer, and a defendant is prejudiced where the police intentionally deprive him of an accurate recording of custodial interrogation only to thereafter use a statement out of context.

By baiting a defendant and editing the reply the police can obviously generate incriminating statements at will that would otherwise be neither inculpatory nor admissible. An example is in order. A policeman prods, "C'mon, why don't you admit doing this and we'll give you a break?" A defendant replies, "I've heard about this murder. If I confess to it I'll die in the electric chair. If I don't talk I stand a chance of living. I know my rights, and I'm not going to answer any more

of your questions. I already told you I did not do it. I want a lawyer." It is readily seen that the context within which a statement is made more often than not determines its admissibility and its incriminating nature.

This is not a situation where a spontaneous statement was rendered, or recording equipment was not available for the police to employ. Rather this is a calculated act by police whereby they consciously deprived a defendant of the ability to accurately demonstrate what was said and the context within which it was said. It goes without saying that the wherewithal to record the interrogation was at all times with the police. Appellant wishes to stress that he is not here arguing that all unrecorded statements made by a defendant during any interrogation are inadmissible. It is simply contended that here the bad faith of the police, affirmatively established by the record, mandates the suppression of the statement. What valid reason would the police have not to record the interrogation of a defendant? Appellant submits that the statement was obtained by the police unreasonably and in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Miranda v. Arizona, supra.

COMMENT ON RIGHT TO REMAIN SILENT

It is clear that the prosecution may not use at trial the fact that a defendant stood mute or claimed his privilege to remain silent in the face of accusation. Miranda v. Arizona, supra, Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14

L.Ed.2d 106 (1965); Trafficante v. State, 92 So.2d 811 (Fla. 1957); Bennett v. State, 316 So.2d 41 (Fla. 1975). Obviously, the best way to exercise the right to remain silent is simply to refrain from saying anything. But the fact that a defendant said "I do not wish to say anything" also unquestionably amounts to the invocation of his right to remain silent, and as such the statement may not be used at trial. Cf. Ford v. State, 431 So.2d 349 (Fla. 5th DCA 1983). Indeed, most preliminary questions [name, date of birth, address, etc.] deserve answering by the innocent defendant, who feels compelled to explain his innocence. If a defendant has been questioned, and has answered questions, but then decides at some point to invoke his right to remain silent, clearly he may then state "I do not want to talk to you anymore" and still be within the proscription of comment upon exercise of the right Cf. Lucas v. State, 335 So.2d 566 (Fla. 1st DCA 1976); Peterson v. State, 405 So.2d 997 (Fla. 3d DCA 1981).

Thus, in order to ascertain whether a remark constitutes a comment upon the right to remain silent, the context of the statement must be examined. Donovan v. State, 417 So.2d 674 (Fla. 1982). In Donovan, supra, a record of the circumstances surrounding the utterance of a statement existed, and the court held that the statement there was not a comment upon the exercise of the defendant's right to remain silent, but instead a part of the predicate to establish that a different statement introduced into evidence had been freely and voluntarily given.

In the instant case however, we are intentionally deprived of the context within which the statement was made. We do know that only the one statement was recorded, by a police officer who wanted to get any admission out of the Appellant that he could. We know that the statement was made contemporaneously with the invocation of the right to an attorney. We know that Appellant disavowed any knowledge of the murder of Ms. Smith, and has steadfastly maintained his innocence. We know that either Officer Perkins is telling the truth and the police had a plan to arrest Appellant, or Captain Miller and Deputy Douglas are telling the truth when they say that no plan existed for the arrest and apprehension of Appellant from his home. [Clearly the two versions do not comport. (Cf. R 507, 528, 541-542, 549-550)].

Appellant respectfully submits that the trial court erred in permitting, over objection, the officer to testify that Appellant stated "If I confess to this I'll die in the electric chair. If I don't talk I stand some chance of living.", in that the statement was a comment upon the exercise of Appellant's right to remain silent. Accordingly the conviction must be reversed.

POINT V

THE CONVICTION FOR GRAND THEFT SECOND DEGREE MUST BE REVERSED WHERE THE CORPUS DELICTI OF THE CRIME WAS NOT ESTABLISHED OTHER THAN BY THE CONFESSION OF THE DEFENDANT.

The corpus delicti in a criminal case is made up of two elements, (1) that a crime has been committed, and (2) that some person is criminally responsible for the act. Ruiz v. State, 388 So.2d 613 (Fla. 3d DCA 1980), reviewed denied 392 So.2d 1380 (Fla. 1981); Nelson v. State, 372 So.2d 949 (Fla. 2d DCA 1979); Clark v. State, 229 So.2d 877 (Fla. 1st DCA 1970). In order to establish the first aspect of corpus delicti...the fact that a crime has been committed...proof of criminal agency of an occurrence is necessary. Miles v. State, 160 Fla. 523, 36 So.2d 182 (1948). Though corpus delicti may be shown by the use of circumstantial evidence, proof of corpus delicti resting upon circumstances must be established beyond a reasonable doubt by the most convincing, satisfactory, and unequivocal proof compatible with the nature of the case. Lee v. State, 96 Fla. 59, 117 So. 699 (1928); Deiterle v. State, 101 Fla. 79, 134 So. 42 (1931); Freeman v. State, 101 So.2d 887 (Fla. 2d DCA 1958).

In the instant case, aside from Charles Westberry's account of Appellant's "confession" to the crime of theft, there is no proof to establish the taking of property of Ms. Smith. Charles Westberry related that Appellant confessed to getting all[3] of the money "scattered around" in Ms. Smith's pocket book

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[3] Notwithstanding that "all" of the money was allegedly taken from the house, at least two dollars in plain view was left undisturbed by the murderer[s] (R 1743-1744).

(R 2134-2135), that he also found, took, and secreted in the woods behind Ms. Smith's house a jar of change also obtained from the house (R 2135). Westberry testified that Appellant, while seated in the pickup truck confessing to the crime, produced two hundred and ninety some odd dollars and gave most of it to Westberry (R 2138). Appellant submits that this testimony alone is insufficient to establish the "occurrence" of a theft of Ms. Smith's property.

Assuming, arguendo, that Appellant did possess money allegedly taken from the purse of Ms. Smith, no independent proof was adduced to establish that the money was indeed taken from Ms. Smith. The confession, alone, of a defendant will not suffice to prove that a crime was committed. Appellant here wishes to stress that at no time previously has he disavowed the occurrence of any of the crimes averred by the State to have been committed. It is quite clear that some person[s] (other than Appellant) committed the burglary, sexual battery, and murder. It is now apparent, however, that the State has failed to prove that a theft occurred contemporaneously with the other crimes. Appellant maintains his factual innocence as to all charges, but here the State did not legally prove the occurrence of the theft. Accordingly, the conviction for grand theft second degree must be reversed.

POINT VI

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RESTRICTING THE FINAL ARGUMENT OF DEFENSE COUNSEL CONCERNING THE LAW GOVERNING CIRCUMSTANTIAL EVIDENCE, AND/OR BY THEN REFUSING TO INSTRUCT THE JURY, UPON TIMELY REQUEST, AS TO THE LAW GOVERNING CIRCUMSTANTIAL EVIDENCE.

At the inception of defense counsel's final argument, the State objected to defense counsel arguing that the jury would soon be called upon to judge whether the State had proved its case beyond and to the exclusion of a reasonable doubt, to a moral certainty (R 2752). The court admonished defense counsel in the presence of the jury that he would tell the jury that the burden of proof is beyond and to the exclusion of a reasonable doubt, and that "[m]oral certainties, we'll leave alone" (R 2752).

The rule is well established, however, that where the State relies upon circumstantial evidence, the circumstances taken together must be of a conclusive nature and tendency producing to a moral certainty that the accused and no one else committed the offense. See Codie v. State, 313 So.2d 754 (Fla. 1975); Myers v. State, 43 Fla. 500, 31 So. 275 (1901); J. K. v. State, ___ So.2d ___, (Fla. 3d DCA 1984)[9 FLW 862]; Owen v. State, 432 So.2d 579 (Fla. 2d DCA 1983); Green v. State, 408 So.2d 1086 (Fla. 4th DCA 1982).

The argument sought to be developed by defense counsel to the jury was a correct statement of the law, yet defense counsel was chastised by the court in front of the jury that "[m]oral certainties, we'll leave alone." Appellant submits that

the foregoing mandate to defense counsel was also an instruction to the jury to leave moral certainties alone.

Appellant acknowledges that the giving of an instruction on circumstantial evidence rests solely within the sound discretion of the trial court. See Williams v. State, 437 So.2d 133 (Fla. 1983). Appellant submits, however, that a palpable abuse of such discretion occurred here. Specifically, the State relied heavily on circumstantial evidence.

A specific instruction on the law governing circumstantial evidence was timely requested here by defense counsel, but denied by the trial court "[b]ecause I think that in so far as it applies to the charges in chief is [sic] covered by the charges in chief" (R 2864). It is now a truism that the law governing circumstantial evidence is ordinarily adequately espoused in the standard instructions covering burden of proof. In the ordinary case, however, the clarity of the law concerning circumstantial evidence and burden of proof has not been muddied by judicial instruction that "[m]oral certainties we'll leave alone".

The giving of an instruction upon the law governing circumstantial evidence should not be at the whim of the trial court. It is respectfully submitted that a palpable abuse of discretion occurred here where the trial court refused, upon timely request, to specially instruct the jury upon the law governing circumstantial evidence after unduly restricting defense counsel's closing argument addressing this precise area of the law, and where the court further erroneously chastised defense counsel to leave moral certainties alone.

POINT VII

THE TRIAL COURT ERRONEOUSLY FOUND THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

> (E) WHETHER THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.
>
> FINDING:
>
> This murder was not committed while effecting an escape from custody, but among other reasons was committed for the avowed purpose of preventing this defendant's arrest on burglary charges, and subsequent imprisonment therefore. The defendant's statement to the State's witness, CHARLES WESTBERRY, to the effect that he killed the victim because he did not want to go back to prison indicates such purpose.
>
> This aggravating circumstance is present.

(R 711)

The law is clear that when the victim is not a law enforcement officer, an intent to avoid arrest is not present unless it is clearly shown that the dominant or only motive for the murder was the elimination of a witness. Clark v. State, ___ So.2d ___, (Fla. 1983) [9 FLW 1]; Menendez v. State, 368 So.2d 1278 (Fla. 1979). The court's finding is facially defective, in that alludes to the existence of other reasons for the murder and further states that Appellant's alleged statement "indicates" the motive for the killing. It is not enough that aggravating factors be indicated, they must be proved beyond a reasonable doubt. This finding is supported by neither the law nor the record and accordingly it must be reversed.

POINT VIII

THE TRIAL COURT ERRONEOUSLY FOUND THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDITATED MURDER, IN THAT SAID FINDING WAS UNSUPPORTED BY THE EVIDENCE AND THE FINDING CONSTITUTED A DOUBLING-UP OF THE AGGRAVATING CIRCUMSTANCE OF ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER.

Over objection (R 2931-2933), the trial court instructed the jury upon and later found to exist the aggravating circumstance of "cold, calculated and premeditated murder" (R 3068-3069). In support of this finding, the court entered the following written findings of fact;

FINDING

> In addition to and beyond the finding in paragraph H, the increase in the violent nature of the crimes committed by the defendant as well as the time involved in the crimes prior to the murder should be noted. The first crime to occur was a burglary, a non-violent crime. Because of the extremely messy condition of the house it must have taken some appreciable time for the defendant to have found the object of his search - the victim's money. The second crime to occur, a theft, was also non-violent. The victim's money was spread among the other contents of her purse causing some delay in its retrieval from the purse, including dumping the contents on the florr [sic]. The third crime to occur, though not charged, was the initial crime of violence - battery. The defendant beat the victim about her face, but this was not enough, he obtained possession of a knife from within the premises, probably from the kitchen, several rooms away from where the murder occurred. At that point and time, the defendant evinced an intent to kill Lima Paige Smith. But that wasn't enough, prior to stabbing her to death, he committed his second crime of violence - rape, a crime of the

> very nature of which consumed additional time. Finally, after having far more than ample time for reflection, time to change his mind the defendant in a cold, calculated and premeditated manner stabbed the victim twelve times resulting in her death.
>
> This aggravating circumstance is present.

(R 712-713). These "findings" simply mirrored the findings made in reference to the aggravating circumstance of "especially heinous, atrocious or cruel" found in paragraph H (R 712), and as such this circumstance constitutes an impermissible doubling up of circumstances. Cf. Hill v. State, 422 So.2d 816 (Fla. 1982).

It is firmly established that the aggravating circumstance of cold, calculated and premeditated murder applies to those murders which are characterized as executions or contract murders, or to where a preexisting plan to murder was present. White v. State, ___ So.2d ___, (Fla. 1984) [9 FLW 29]. Though affirming the death sentence, this Court in White reversed a finding that a killing was cold, calculated and premeditated where the evidence established that the killing of a store clerk occurred incidently to a robbery as opposed to part of a preconceived plan.

> The trial court also found that the killing was cold, calculated and premeditated. We do not find evidence in the record before us to support a finding beyond a reasonable doubt that there was the kind of heightened premeditation and cold calculation that will permit this factor to be a part of the weighing process. Cf. Cannady v. State, 427 So.2d 723 (Fla. 1983) (defendant stole money from Ramada Inn, kidnapped a night auditor, drove him to a wooded area and

> shot him; defendant said he had not meant to shoot the victim - factor not found); Middleton v. State, 426 So.2d 548 (Fla. 1982) (defendant confessed that he sat with a shotgun in his hands for an hour looking at the victim as she slept and thinking about killing her, factor found); Bolender v. State, 422 So.2d 833 (Fla. 1982), cert denied, 103 S.Ct. 2111 (1983) (defendant held the victims at the gunpoint and ordered them to strip, then beat and tortured them during the evening before killing them - factor found); Mann v. State, 420 So.2d 578 (Fla. 1982) (ten year old girl abducted and suffered several cuts and stab wounds and a fractured skull - factor not found); Jent v. State, 408 So.2d 1024 (Fla. 1981), cert denied, 457 U.S. 1111 (1982) (defendant beat woman, transferred her in a car trunk where four men raped her, put her back in the trunk and took her to a game preserve where the defendant and another poured gasoline on her and set her on fire while alive - factor blended into one with heinous, atrocious and cruel factor); Combs v. State, 403 So.2d 418 (Fla. 1981), cert denied 456 U.S. 984 (1982) (defendant first sold cocaine to the victims, then, saying he was leading them to a party, lead them instead to a wooded area and held a gun on them, demanded the cocaine and then shot them - factor found).

White, supra at 931.

An example of a valid finding of the aggravating circumstance of cold, calculated and premeditated murder is found in the case of Hill v. State, 422 So.2d 816 (Fla. 1982). In Hill, a defendant asked a friend earlier on the same evening of the murder and prior to the abduction if he wanted to help rape a twelve year old victim. The young girl's body was found two days later. Sub judice, even if the trial court's findings were accurate (which Appellant does not concede) it cannot be said that the aggravating circumstance of cold, calculated and premeditated murder was established beyond a reasonable doubt.

Aggravating circumstances are used to justify the imposition of the death sentence. Clearly in every first degree murder that is not a felony murder there exists, time for reflection, and more than this is required in order to justify imposition of the death sentence. The "premeditation" required to find the circumstance of cold, calculated and premeditated is the premeditation that exists with a planned course of conduct. There is nothing to suggest that the murder here at issue was planned in any way whatsoever.

Appellant submits that the finding that the murder was cold, calculated and premeditated is unsupported and erroneous, and must therefore be reversed. Further, Appellant respectfully contends that because the jury was instructed upon this aggravating circumstance over specific objection, the weighing process conducted by the jury to render a recommendation of life or death was tainted, and accordingly a new sentencing proceeding must be had.

POINT IX

AS APPLIED, SECTION 921.141, FLORIDA STATUTES VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY DENYING A DEFENDANT DUE PROCESS OF LAW, IN THAT THE EXISTENCE OF AGGRAVATING AND/OR MITIGATING CIRCUMSTANCES, AS QUESTIONS OF FACT, ARE FOUND BY THE TRIAL JUDGE AS OPPOSED TO A JURY OF THE DEFENDANT'S PEERS.

Appellant does not quarrel with a process whereby the court applies the facts established by the jury to impose a death sentence. Rather, Appellant takes issue with having the court determine the facts used to impose the death sentence. Specifically, Section 921.141, Fla.Stat. requires that a weighing process occur whereby the jury and the trial court weigh specific, statutory aggravating circumstances against mitigating circumstances. The jury then recommends a sentence, and the trial court considers this recommendation in imposing the sentence. However, as presently applied, there are no written findings of aggravating or mitigating circumstances made by the jury, nor of the facts found by the jury in consideration of the question of whether such circumstances exist. Instead, the trial court determines the facts anew after the jury issues its recommendation. Thus, the facts determined by the jury are not necessarily the same facts determined or used by the judge.

The Sixth Amendment to the United States Constitution guarantees the defendant the right to a jury trial by his peers. This right is applied to the states by the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). It is manifest that the facts of a case are determined

by the jury during the guilt phase. Notwithstanding that the bifurcated penalty phase is a separate proceeding, it remains a part of the trial. Principles of collateral estoppel and res judicata apply to those facts previously determined by the jury during the guilt phase, and those facts control.

Aggravating circumstances and mitigating circumstances are comprised of facts. Aggravating circumstances must be proved beyond and to the exclusion of a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). Although mitigating circumstances must be proved to a somewhat lesser standard, it remains that a burden of proof exists for both categories. The determination of whether a party has met a burden of proof falls exclusively within the province of the jury, and it is unconstitutional for the judge to step in and usurp the role of the jury during a trial.

An example is in order. This Court's attention is respectfully drawn to the findings made by the trial court concerning the presence of the aggravating circumstance of cold, calculated and premeditated murder in the instant case. Included in its findings are facts that the theft was the second crime to occur, that the victim's money was spread among other articles in the purse, that the Appellant beat the victim about her face, and that he thereafter obtained a knife, at that point evincing (forming) the intent to kill the victim, that Appellant then raped the victim in a time consuming manner, and that Appellant then stabbed the victim twelve times (R 713). The existence of most if not all of these "facts" was necessarily previously

determined by the jury, especially those facts concerning 1) the order of the crimes that were committed and, 2) when the intent to murder was formulated. The facts found by the court, however, were not enumerated by the jury and were not necessarily established by the rendition of a guilty verdict by the jury. For the judge to redetermine these critical facts infringes upon the right to a jury trial by one's peers.

Further, insofar as mitigating circumstances, it is never known whether the jury found the presence of one or more mitigating circumstances. The failure of a judge to find mitigating circumstances does not establish that the jury found none. Yet the law currently applied is that a death sentence is presumed valid if more than one valid aggravating circumstance exists in the absence of any mitigating circumstances. This presumption ignores that the jury, too, considered the presence vel non of the aggravating and mitigating circumstances to render the advisory recommendation, which recommendation is supposed to have great weight. Cf. Williams, supra.

Appellant submits that Section 921.141, Florida Statutes, as applied, violates the Sixth and Fourteenth Amendments to the United States Constitution by depriving the defendant of his right to a jury trial by his peers. Facts that were to have been determined by the jury were here determined unconstitutionally by the judge. Accordingly, the death sentence herein must be vacated.

POINT X

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 would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The Florida capital sentencing scheme fails to provide notice to the capital defendant of the aggravating circumstance upon which the State intends to rely, and thus denies due process of law. See Cole v. Arkansas, 333 U.S. 196 (1948). The state's statement of aggravating circumstances ordered by the court in this case noticing the defense on all aggravating circumstances in the statute was not made in good faith because the state conceded in its closing argument that some aggravating circumstances did not apply. (R497,417,717)

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. 685 (1975) supra, and does not define "sufficient aggravating circumstances." The statute, further,

does not sufficiently define for the jury's consideration each of the aggravating circumstance listed in the statute. See Godfrey v. Georgia, ____ U.S. ____ 64 L.Ed.2d 398 (1980).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner.

Execution by electrocution is a cruel and unusual punishment.

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 trial court in the regard erred when it failed to grant Appellant's motion to preclude challenges for cause. (R715)

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. See Initial Brief of Appellant 45-59, Elledge v. State, case number 52,272, served June 2, 1980.

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. See Initial Brief of Appellant Gilvin v. State, Fla. S.Ct. Case Number 50,743, served April 13, 1981.

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

The Florida Supreme Court does not independently weigh and re-examine aggravating mitigating circumstances.

Defining "Reasonable doubt" as the trial court did as "a doubt for which there is a reason" denies due process by shifting the burden of proof to the defendant to prove "a reason." (R308)

CONCLUSION

BASED UPON the argument and authority contained herein, it is prayed that this Honorable Court will grant the following relief:

POINTS I, II, III, IV, and VI - Reversal of Appellant's conviction and remand for a retrial.

POINT V - Reversal of the conviction for Grand Theft - Second Degree.

POINTS VII and VIII - Reduction of the death sentence to a sentence of life imprisonment, with imposition of a twenty-five year minimum mandatory.

POINTS IX and X - Declaration that §921.141, Fla.Stat., as applied, is unconstitutional, and reduction of the death sentence to a sentence of life imprisonment, with imposition of a twenty-five year minimum mandatory.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
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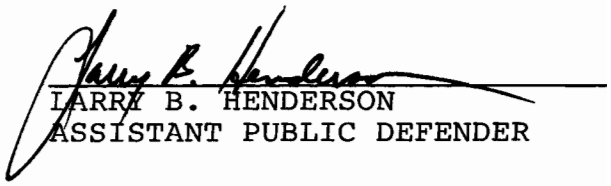
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida and Mr. Joel Dale Wright, Inmate No. 749768, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 30th day of April, 1984.



LARRY B. HENDERSON
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