IN THE FLORIDA SUPREME COURT

KENNETH MICHAEL GARDNER, :

Appellant, :

vs. : Case No. 64,541

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Appellee's statement that Ken Gardner was the "group leader/facilitator"(Brief of Appellee, p.1) among the four persons who committed the crimes involved herein constitutes an opinion, not a fact which enjoys support in the record.

Appellee claims that there was an "attempted decapitation" of the victim herein, Joseph Holda (Brief of Appellee, p.1). There is nothing in the record, however, to show that the person who slit Holda's throat was purposely trying to decapitate him. The perpetrators were alone in the store with Holda, and, presumably, there was nothing to prevent them from accomplishing a decapitation if this was their aim.

Appellee also says Joseph Holda's wallet was taken by Ken Gardner "during the struggle" (Brief of Appellee, p.1). However, Tony Capers testified that Gardner slit Holda's throat and then took his wallet. (R2106) Expert medical testimony proved that Holda was already dead before his throat was cut (R2569-2570), and so he could not possibly have been struggling against the taking of his wallet.

At page two of its brief, Appellee states that Ken Gardner "had Larry Hadley return the borrowed car with gasoline money. (R2109)" This is inaccurate. Tony Capers testified that he, Debra Tyler, and Kenny Gardner (not Gardner alone, as Appellee implies) "took five dollars and gave it to Hadley so he could return his friend's car and give his friend five dollars." (R2109)

Appellee's conclusions at page two of its brief that "[t]he trial court has drafted a most complete, cogent findings as

to aggravating and mitigating circumstances" and that "[t]here is record support for the findings" are mere opinions which do not belong in a Statement of the Case and Facts and should be stricken from the brief, or at least not considered by this Court.

ISSUE I.

THE COURT BELOW ERRED IN REFUSING TO TAKE CORRECTIVE MEASURES AFTER THE ASSISTANT STATE ATTORNEY ASKED AN IMPROPER VOIR DIRE QUESTION WHICH MISSTATED THE LAW.

Contrary to Appellee's assertion, the prosecutor's rephrased question to Juror Truong was in no way "the functional equivalent of a currative [sic] instruction" (Brief of Appellee, p.3). The words he used did not correct his misstatement of the law. Furthermore, curative instructions are given by the court, not the assistant state attorney.

The jury which tried Ken Gardner had to wait until the very end of the trial to be told by the court that the law regarding accomplice testimony was not what the prosecutor had represented it to be at the beginning of the trial.

ISSUE II.

THE COURT BELOW ERRED IN REFUSING TO GRANT DEFENSE CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS, FORCING GARDNER TO EXERCISE PEREMPTORY CHALLENGES TO EXCUSE THESE JURORS, AND IN REFUSING TO ALLOW GARDNER TO EXERCISE MORE THAN TEN PEREMPTORY CHALLENGES AFTER TELLING COUNSEL HE WOULD PROBABLY ALLOW EACH SIDE A TOTAL OF SIXTEEN PEREMPTORY CHALLENGES.

Ken Gardner will rely upon the argument contained in his initial brief with regard to this issue.

ISSUE III.

THE COURT BELOW ERRED IN FAILING TO CONDUCT ADEQUATE INQUIRIES CONCERNING SEVERAL DISCOVERY VIOLATIONS COMMITTED BY THE STATE AND IN NOT PROVIDING APPROPRIATE RELIEF TO GARDNER FOR THESE VIOLATIONS.

A. Deposition Of Larry Hadley

The State places undue emphasis on the fact that Larry Hadley did not testify at Ken Gardner's trial as a witness for the State due to his mental incompetence. But earlier on in the proceedings below he was competent. As late as the hearing of September 21, 1983 all parties apparently believed Hadley to be competent. At that hearing Judge Schaeffer ruled that counsel for Ken Gardner was entitled to take Hadley's deposition, at a time when Hadley's attorney was available to attend. (R3177) It was not until September 26, 1983 that Hadley's condition had deteriorated so that he could not testify for the State, in whose custody he had remained for months. (R876-877,881-882)

Appellee's position seems to be that no prejudice accrued to Gardner from his being prevented from deposing Larry Hadley because Hadley did not actually testify for the State. This position blithely ignores the fact that Larry Hadley completely pervaded Ken Gardner's trial through the testimony of other witnesses, and that Hadley himself thus was, in effect, "present" in the courtroom, even to the point of his voice being heard on the tape of the "body bug" conversation Hadley had with Gardner outside

Angel's Bar immediately prior to Gardner's arrest. The State's argument also ignores the fact that Gardner had a right to depose Hadley not only in order to prepare to meet any testimony Hadley might give against him at trial, but also to see what Hadley was prepared to say in Gardner's favor. Hadley might have been willing to admit that it was he, rather than Ken Gardner, who stabbed Joseph Holda, which is what Gardner told the police. (R2330-2331) Or Hadley might have given other testimony that would have aided Gardner, but Gardner was not able to depose him to find out. If Hadley had given a deposition containing testimony useful to the defense, even if Hadley had not been available to testify at trial due to his mental condition, Gardner would have been able to put Hadley's testimony into evidence by introducing the deposition itself, or testimony of a witness (such as the court reporter) as to what Hadley said. §90.804(2), Fla.Stat. (1983); Richardson v. State, 247 So.2d 296 (Fla.1971); Brinson v. State, 382 So.2d 322 (Fla.2d DCA 1979).

B. Names Of Tony Capers And Debra Tyler As State Witnesses

Ken Gardner will rely upon the argument contained in his initial brief with regard to this sub-issue.

C. Photopack Viewed By Lester Stewart

Appellee erroneously states that Lester Stewart testified to identifying Larry Hadley's picture from the photopack in question. (Brief of Appellee, p.10). The record shows that Stewart only testified to selecting a picture from the photopack as depicting the man he saw on the afternoon Joseph Holda died; Stewart

did not identify Larry Hadley as being the person shown in the picture. (R1732-1734) Detective McManus supplied the testimony regarding whom Stewart picked from the photopack. (R2311,2317-2319)

D. Lab Results On Scrapings Taken From Polk's Hardware Store

Appellee refers to the fact that "[p]hysical evidence from the medical examiner's office was listed on the Discovery 'cover sheet' (R266)." (Brief of Appellee, pp.12-13). The cover sheet listed: "Victim's clothing, hair samples, swabbings and blood from M.E.'s office." (R266) It said nothing concerning any blood scrapings taken from the hardware store, let alone any lab report dealing with such scrapings.

ISSUE IV.

THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE PRIOR CONSISTENT STATEMENTS MADE BY KEY PROSECUTION WITNESS TONY CAPERS IN ORDER TO BOLSTER THE TESTIMONY HE GAVE AT TRIAL.

Ken Gardner will rely upon the argument contained in his initial brief with regard to this issue.

ISSUE V.

THE COURT BELOW ERRED IN ALLOWING THE STATE TO ELICIT TESTIMONY FROM DETECTIVE RICHARD McMANUS CONCERNING LARRY HADLEY'S CHARACTER AND PERSONALITY.

In Hixon v. State, 165 So.2d 436 (Fla.2d DCA 1964), from which Appellee quotes at page 20 of its brief, the court reversed the defendant's conviction for first degree murder because the

State failed to rebut the presumption that the defendant continued to be insane after he had been so adjudicated. The reversal was based in large part on the limited opportunity the State's non-expert witnesses had to observe the defendant. The State's non-expert witness here, Richard McManus, similarly had little opportunity to observe Larry Hadley. McManus' rather vague testimony showed that he spent about five hours with Hadley on one day, and had talked to him since then. (R2475-2476)

In addition, the case of United States v. Minor, 459 F.2d 103 (5th Cir. 1972), cited by Appellee in its brief, points out that testimony of lay witnesses concerning a defendant's mental capacity requires that the facts underlying such opinion also be admitted into evidence. McManus did not testify concerning what facts he relied upon in making his assessment of Larry Hadley's psychological profile.

Character evidence generally is inadmissible. §90.404(1), Fla.Stat. (1983). Here the evidence was irrelevant. The prosecutor conceded he was merely anticipating what defense counsel might say in closing argument; this was his rationale for introducing character evidence pertaining to Larry Hadley. (R2474)

Even if Hadley's character had been admissible, the State did not seek to prove it the correct way, by reputation or specific instances of conduct, as required by section 90.405 of the Florida Statutes.

Finally, Appellee's brief does not even address the portion of Gardner's argument under this issue which deals with the State's violation of the witness sequestration rule.

ISSUE VI.

THE COURT BELOW ERRED IN UNDULY RESTRICTING GARDNER'S CROSS-EXAMINATION OF SEVERAL STATE WITNESSES, THUS DEPRIVING HIM OF HIS CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSERS.

In Padgett v. State, 64 Fla. 389, 59 So. 946 (Fla.1912), cited by Appellee in its brief, this Court referred to the great latitude that should be allowed in conducting cross-examination. the Court noted:

> ...[C]onsiderable latitude should be permitted in the propounding of questions on cross-examination which seek to test the memory or credibility of the witness.

59 So. at 949.

ISSUE VII.

THE COURT BELOW ERRED IN REFUSING TO GRANT GARDNER'S REQUEST FOR A MISTRIAL WHEN DETECTIVE McMANUS TESTIFIED THAT LESTER STEWART HAD AGREED TO TAKE A POLYGRAPH TEST.

Appellee's reliance on Johnson v. State, 166 So.2d 798 (Fla.2d DCA 1964) is misplaced. In Johnson, unlike here, it was the defendant who elicited the only specific testimony concerning a polygraph examination. Also, the Johnson court made it clear in the portion of the opinion quoted by Appellee in its brief that a polygraph reference may well constitute reversible error if an inference is raised as to the result thereof. Here such an inference clearly was raised when Detective McManus testified soon after his remark concerning Lester Stewart's offer to take a polygraph test that Stewart was no longer a suspect when the police completed their investigation. (R2295-2296)

ISSUE VIII.

THE COURT BELOW ERRED IN REFUSING TO CONSIDER RELEVANT EVIDENCE BEARING UPON THE VOLUNTARINESS OF STATEMENTS GARDNER MADE TO THE POLICE WHILE IN THEIR CUSTODY AND IN ADMITTING THESE STATEMENTS INTO EVIDENCE WHEN THE STATE HAD FAILED TO PROVE THEY WERE MADE VOLUNTARILY.

For some unknown reason Appellee discusses Gardner's motion to suppress tangible evidence under this issue. This issue in Gardner's initial brief dealt only with statements made by Gardner, not with suppressing tangible evidence.

There was no "procedural default" under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), as alleged by Appellee, due to Gardner's failure to present proof at one of the suppression hearings. As discussed in Gardner's initial brief, it was the State's burden, not Gardner's, to prove that his statements were made freely and voluntarily.

ISSUE IX.

THE COURT BELOW ERRED IN ALLOWING THE STATE TO ELICIT TESTIMONY FROM ONE OF ITS WITNESSES WHICH CONSTITUTED COMMENT ON GARDNER'S ABSOLUTE RIGHT TO REMAIN SILENT.

Appellee refers to the fact that Gardner did not request a curative instruction or move for a mistrial. These would have been useless acts in view of the trial court's ruling that the line of questioning the prosecutor was pursuing was proper. See State v. Heathcoat, 442 So.2d 955 (Fla.1983).

The State suggests that the proper test to use in examining whether a comment constitutes an improper reference to

the defendant's exercise of his right to remain silent is one culled from federal cases, to-wit:

> Was the language used intended to be or was it of such character that the jury naturally and necessarily would take it to be a comment on the failure of the accused to testify.

(Brief of Appellee, p.32). But this is not the test that must be used in Florida courts. As stated in Gardner's initial brief, the test in Florida is whether the prosecutor's comment is fairly susceptible of being construed by the jury to refer to the defendant's right to remain silent. David v. State, 369 So.2d 943 (Fla.1979); Samosky v. State, 448 So.2d 509 (Fla.3d DCA 1983), pet.for review denied, 449 So.2d 265 (Fla.1984). In particular, what the prosecutor intended by his question or remark is of no moment in Florida. In Trafficante v. State, 92 So.2d 811,814 (Fla.1957) this Court stated:

> In summary,our law prohibits any comment to be made, directly or indirectly, upon the failure of the defendant to testify. This is true without regard to the character of the comment, or the motive or intent with which it is made, if such comment is subject to an interpretation which would bring it within the statutory prohibition and regardless of its susceptibility to a different construction. The comment of the State Attorney herein might merely have been lapsus linguae in the heat of argument, but it constituted a violation of F.S. §918.09, F.S.A., supra.[1]

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[1] Section 918.09, Florida Statutes (1957), which forbade the prosecutor from commenting on the failure of the accused to testify in his own behalf, was repealed by Laws 1970, chapter 70-339, section 180, but the same provision appears in Rule 3.250 of the Florida Rules of Criminal Procedure.

The State's suggestion that a prosecutorial comment on the defendant's right to remain silent may be harmless error in Florida is also erroneous. As stated in Gardner's initial brief, such a comment is reversible error without regard to the doctrine of harmless error. Donovan v. State, 417 So.2d 674 (Fla.1982); David, Trafficante and Samosky, all supra.

ISSUE X.

THE COURT BELOW ERRED IN DENYING GARDNER'S MOTIONS FOR MISTRIAL DUE TO SEVERAL INSTANCES OF IMPROPER COMMENTS BY THE COURT AND BY THE PROSECUTING ATTORNEY.

With regard to the motion for mistrial Ken Gardner made during Tony Capers' testimony, Appellee's brief quotes a portion of the record, but conveniently omits the most damaging comment made by the prosecutor in the jury's presence. The relevant sequence of events occurred as follows:

> BY MR. MENSH [defense counsel]:
>
> Q. Mr. Capers, as I was saying, on the 23rd of March, you went out and used a special connection and made a purchase of some very strong, very effective, heavy-duty marijuana, did you not?
>
> MR. YOUNG [prosecutor]: Judge, just for the record, that is in direct contravention of what the Court just ruled at the Bench, and I will object.
>
> MR. MENSH: May Counsel approach the Bench, your Honor?
>
> MR. YOUNG: Judge, what is the point if he'll turn around and do it against the Court's ruling?
>
> MR. MENSH: May Counsel approach the Bench?

> THE COURT: I think that you are sort of sidestepping what I have suggested you do at Bench, so why don't you rephrase your question?
>
> MR. MENSH: Yes. May I approach the Bench, please?
>
> MR. YOUNG: Judge, the law is such that if you don't let him, it is an automatic reversal. May we approach the Bench?
>
> THE COURT: All right.
> [Emphasis supplied]

(R2155) Clearly, the prosecutor was attacking the personal integrity of defense counsel and therefore, contrary to Appellee's suggestion, the case of Briggs v. State, 455 So.2d 519 (Fla.1st DCA 1984), which Gardner cited in his initial brief, is most relevant.

(In addition to the prosecutor's remarks, the trial court's accusation that defense counsel was "sidestepping" his ruling was improper.)

Appellee also states that Gardner's motion for mistrial after the prosecutor made his remarks disparaging defense counsel was based on the prosecutor's interference with Gardner's latitude of cross-examination. This was only one ground for the motion; Gardner initially moved for a mistrial because of the prosecutor's highly prejudicial outburst in the presence of the jury. (R2156)

Appellee claims that Gardner "overlooks that a mistrial is to be neither manufactured nor invited" (Brief of Appellee, p.37), but offers no explanation of how Gardner manufactured or invited a mistrial. Gardner did nothing to impel the court and the prosecuting authority to make prejudicial remarks before the jury.

ISSUE XI.

THE COURT BELOW ERRED IN GIVING THE JURY INCORRECT AND MISLEADING JURY INSTRUCTIONS, AND IN REFUSING TO INSTRUCT ON THE DEFENSE OF VOLUNTARY INTOXICATION AND ON ALL PROPER LESSER INCLUDED OFFENSES.

A. Incorrect and Misleading Instructions

Appellee states that Ken Gardner was "free to produce" Larry Hadley as a witness if Hadley's testimony was so significant. (Brief of Appellee, p.40). This is totally incorrect. Only the State, not the defense, had the power to immunize Hadley and compel his testimony.

Interestingly, Appellee does not challenge Gardner's argument that the trial court's instruction on the unavailability of Larry Hadley and Debra Tyler was erroneous as it applied to Debra Tyler; Appellee's argument concerns itself only with Larry Hadley. Apparently, Appellee is in tacit agreement with Gardner that the court's instruction that Debra Tyler was unavailable as a witness to either side was erroneous.

Nor does the State address Gardner's argument that the court should not have given the instruction on intent contained in the standard jury instruction on burglary.

B. Defense of Voluntary Intoxication

Appellee says that voluntary intoxication is not a defense to first degree felony murder if it is not a defense to the underlying felony. (Brief of Appellee, p.41). In this case, the underlying felony was robbery. (R2736) Intoxication is a defense to the specific intent crime of robbery. Woods v. State,

12 So.2d 111 (Fla.1943). See also Bell v. State, 394 So.2d 979 (Fla.1981) and State v. Heathcoat, 442 So.2d 955 (Fla.1983). In fact, in Jacobs v. State, 396 So.2d 1113 (Fla.1981), a case cited by Appellee in its brief, this Court specifically addressed the precise situation involved in the instant case, where the defendant sought to assert the defense of voluntary intoxication in a felony murder case where robbery was the underlying felony:

> Thus a defendant charged with first degree felony murder on account of a killing during the commission of a robbery may defend himself on the ground that he was too intoxicated to entertain the intent to rob.

396 So.2d at 1115.

Appellee's argument also overlooks the fact that the murder was submitted to the jury below on theories of both premeditation and felony murder. (R2694-2699) Surely Gardner was entitled to instructions relative to defenses to either theory.

Appellee seems to confuse the defense of voluntary intoxication with the defense of insanity. Gardner is aware of no Florida case holding that the degree of voluntary intoxication must be tantamount to a condition of insanity in order to constitute a defense to a specific intent crime. Appellee states at pages 41-42 of its brief:

> The crux of the argument [made by the assistant state attorney below in opposing a jury instruction on the defense of voluntary intoxication] was that Gardner never established he was in an unconscious or wholly incapacitated state or that as a result of intoxication Gardner was in a fixed state of insanity. Linehan v. State, supra at 250,251.

Appellee's citation to Linehan v. State, 442 So.2d 244 (Fla.2d DCA 1983) is inappropriate. In Linehan the court was referring

to intoxication as a defense to a general intent crime when it referred to "an unconscious or wholly incapacitated state" and "a fixed state of insanity," not to specific intent crimes such as the first degree murder and robbery with which Ken Gardner was charged.

Appellee further states that the intoxication must have occurred before the defendant formed his intent to commit the crime in order to constitute a defense. (Brief of Appellee, p.41). That is the situation that exists here. Gardner drank the beer and smoked the extra-potent sensama marijuana before he and the other three participants discussed plans on the ride back from Tarpon Springs. (R2081-2082,2083,2088,2091-2092,2094,2158,2164-2166,2200-2201).

C. Lesser Included Offenses--Murder In The First Degree

Appellee takes the position that Adams v. State, 341 So.2d 765 (Fla.1976) is controlling on the question of whether or not the court below should have instructed the jury on third degree felony murder as a lesser included offense of first degree felony murder. Adams does not dispose of this question. The issue in Adams involved the propriety of an instruction the trial court gave on second degree felony murder. This Court found no impropriety in the instruction, essentially because Adams could only have been convicted of second degree felony murder if he perpetrated the underlying felony as an accessory before the fact, but did not personally engage in it, a scenario which clearly was not supported by the facts of the case. Adams did not address the

issue of whether a trial court is required to instruct the jury on third degree felony murder under the facts of the instant case.[2/]

Adams actually supports Gardner's position. Gardner agrees, consistently with Adams, that second degree felony murder would not be an appropriate lesser included offense of first degree felony murder in his case. That is why, as Gardner explained in his initial brief, third degree felony murder is the next appropriate lesser included offense under first degree felony murder, only one step removed therefrom.

D. Lesser Included Offenses--Robbery With A Deadly Weapon

Appellant must correct an incorrect argument contained in his initial brief. A review of the record on appeal shows that the trial court did in fact instruct the jury on robbery with a weapon and robbery without a weapon as lesser included offenses of robbery with a deadly weapon (R2740-2741,2743), contrary to the implication of Appellant's initial brief. Appellant apologizes to the Court and opposing counsel for any inconvenience occasioned by this error.

With regard to the other argument Gardner made under this sub-issue--that the trial court should have instructed on the lesser included offenses of aggravated assault and assault--Appellee asserts that attempt, grand theft first degree, grand theft second degree, battery, and aggravated battery are "categorized with

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[2/] Third degree felony murder is listed as a lesser included offense of first degree felony murder in the Florida Standard Jury Instructions in Criminal Cases (schedule of lesser included offenses) at p.258.

descending significance" at page 266 in the schedule of lesser included offenses contained in the Florida Standard Jury Instructions in Criminal Cases. (Brief of Appellee, p.45). It does not appear that the lesser included offenses listed in the schedule are in fact listed in order of "descending significance" in view of the fact that some misdemeanors are listed ahead of some felonies.

ISSUE XII.

THE COURT BELOW ERRED IN REFUSING GARDNER'S REQUEST TO CONDUCT INDIVIDUAL, SEQUESTERED VOIR DIRE ON THE DEATH PENALTY.

The case of Branch v. State, 212 So.2d 29 (Fla.2d DCA 1968), which Appellee cites at page 46 of its brief, is inopposite to Gardner's argument, as it did not involve the death penalty. (The defendants in Branch were charged with conspiracy to commit robbery and robbery.)

Stone v. State, 378 So.2d 765 (Fla.1979), also cited by Appellee on page 47 of its brief, did involve the death penalty, but the defendant's request for individual voir dire was not based on the capital punishment aspect of the case; he wished to avoid contamination of jurors by other jurors who had specific knowledge of the crime.

Appellee contends that Gardner's argument was rejected on collateral attack in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978)(Brief of Appellee, p.46), but the Fifth Circuit there was concerned with the fact that two veniremen who had conscientious scruples against the death penalty were excluded from

Spinkellink's jury, not with the absence of individual, sequestered voir dire on the death penalty, which is the issue Gardner has raised.

ISSUE XIII.

THE COURT BELOW ERRED IN REFUSING TO ALLOW GARDNER TO SUBSTITUTE PRIVATE COUNSEL FOR HIS COURT-APPOINTED ATTORNEY AND TO ALLOW NEW COUNSEL ADEQUATE TIME TO PREPARE FOR THE SENTENCING HEARING.

Appellee says that "[i]n no way was Mr. Bergman retained for representation as he was negotiating fee with Appellant's family" (Brief of Appellee, p.47). This is not an accurate statement. Ken Gardner and Larry Bergman both considered him to have been retained. At the hearing of November 4, 1983 Bergman expressed his willingness to represent Gardner. (R2940-2941) Clearly, he had been retained, whether or not final arrangements for his fee had been made.

Appellee's suggestion that

> [t]o have allowed trial counsel to withdraw and substitute Mr. Bergmen [sic] would perhaps have generated a bona fide Strickland v. Washington, __U.S.__, 80 L.Ed.2d 674, __S.Ct.__ (1984) claim

(Brief of Appellee, p.47) is unwarranted. Bergman requested time to prepare for the sentencing hearing, and there is no indication in the record that he was intending to do a less-than-capable job of representing Ken Gardner.

Appellee's reliance on Wiltz v. State, 346 So.2d 1221 (Fla.3d DCA 1977) is misplaced. In Wiltz the appellate court was dealing with a situation where the defendant had wanted the trial

court to appoint a different lawyer to represent him after the public defender's office had been appointed. The court held that he had no right to appointed counsel of his own choice. Here Ken Gardner had retained Larry Bergman to represent him.

Appellee also cites Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978)(Brief of Appellee, p.48), a case which actually supports Gardner's argument. The court in Gandy found an abuse of discretion in the trial court's refusal to grant Gandy a continuance until his retained attorney was available to represent him at trial.

The record here does not disclose that any previous continuances of the sentencing hearing had been granted to Gardner prior to the one he requested on November 4. The continuance was requested for a legitimate purpose, and there is nothing to suggest that any unusual inconvenience would have resulted to litigants, witnesses, opposing counsel or the court had it been granted. Gandy.

A portion of the Supreme Court's holding in Chandler v. Fretag, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4 (1954) which was quoted with approval in Gandy, 569 F.2d at 1322, is particularly relevant to this issue:

> Petitioner did not ask the trial judge to furnish him counsel; rather he asked for a continuance so that he could obtain his own. The distinction is well established in this Court's decisions. [Citations omitted.] Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified. [Footnote and citations omitted.]

99 L.Ed. at 9-10.

ISSUE XIV.

THE JURY WHICH RECOMMENDED THE PENALTY OF DEATH FOR GARDNER WAS TAINTED BY HEARING INADMISSIBLE EVIDENCE IN AGGRAVATION.

Appellee initially claims that some of the statements Ken Gardner made during his conversation with Larry Hadley outside Angel's Bar were admissible because they showed that Joseph Holda's murder was cold, calculated, and premeditated (Brief of Appellee, p.51). The State cites the following statements made by Gardner during this conversation in support of this contention: (1) Gardner's saying that Larry Hadley was "an accessory to the fact." (2) "Nobody can touch us." (3) "I'm an ex-cop and I don't give a shit. I'm an ex-cop." (Brief of Appellee, p.51). None of these statements has any probative value toward establishing the aggravating circumstance urged by Appellee.

Appellee also claims the taped conversation

> goes to show, in anticipatory rebuttal, that Gardner was not acting in the domination of Hadley, Tyler, or Capers.

(Brief of Appellee, p.51). But Gardner did not argue that he was so dominated. Furthermore, Appellee cites no legal authority to back up his claim that inadmissible evidence may be introduced on the ground that it constitutes "anticipatory rebuttal."

The State additionally asserts that Gardner's suggestion to Larry Hadley that he leave town supports the aggravating circumstance that Joseph Holda's murder was committed for the purpose of avoiding arrest or hindering law enforcement. However, the mere fact that Gardner may have told Hadley, approximately a month after the crime, to leave town provides no support for this aggravating circumstance.

Appellee discusses the case of Engle v. State, 438 So.2d 803 (Fla.1983), cert.denied, __U.S.__, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984), which Gardner cited in his initial brief, but does not even attempt to distinguish Engle as it applies to the introduction of Debra Tyler's statement into evidence at the penalty phase of Gardner's trial. Engle is right on point, and Tyler's statement should not have been admitted.

ISSUE XV.

THE TRIAL COURT ERRED IN SENTENCING GARDNER TO DEATH BECAUSE THE SENTENCING JUDGE ANNOUNCED THAT HE WOULD GIVE UNDUE WEIGHT TO THE JURY'S RECOMMENDATION, AND THE WEIGHING PROCESS INCLUDED INAPPLICABLE AGGRAVATING CIRCUMSTANCES AND EXCLUDED AN EXISTING MITIGATING CIRCUMSTANCE.

A.

The Trial Court Erred In Announcing That He Would Give Great Weight To The Jury's Recommendation That Gardner Be Sentenced To Death.

In addition to the matters discussed in Gardner's initial brief, the next-to-the-last paragraph in the trial court's findings in aggravation and mitigation provides the "documentation" sought by Appellee to show that the court gave undue weight to the jury's death recommendation. (Brief of Appellee, p.54). That paragraph reads:

> This Court does, therefore, find that the aggravating circumstances of this capital felony are such that no reasonable person could differ as to the aggravating circumstances outweighing the mitigating circumstances and this Court, in reviewing all of the evidence as required by statute, does now impose the sentence of death on KENNETH GARDNER.

(R419) The court's use of the phrase "no reasonable person could differ as to the aggravating circumstances outweighing the mitigating circumstances" shows that he was applying the standard set forth in Tedder v. State, 322 So.2d 908 (Fla.1975) for overriding a jury recommendation of life imprisonment, which is the practice this Court condemned in Ross v. State, 386 So.2d 1191 (Fla.1980).

B.

The Trial Court Erred In Instructing The Jury On, And Finding The Existence Of, The Aggravating Circumstance That The Capital Felony Was Committed For The Purpose Of Avoiding Or Preventing A Lawful Arrest And Effecting An Escape From Custody.

Appellee errs in saying that Gardner "places no weight on the testimony of Tony Capers" (Brief of Appellee, p.54). Capers' own testimony showed that Gardner had abandoned any idea of eliminating witnesses by agreeing with Capers' plan merely to render the man in the store unconscious. (R2094-2095)

The fact that Gardner may have later said he had no choice but to kill the man (Brief of Appellee, p.55) is not probative of this aggravating circumstance.

This is not a case such as Riley v. State, 366 So.2d 19 (Fla.1978), cert.denied, 459 U.S. 981, 103 S.Ct. 317, 74 L.Ed.2d 294 (1982), Lightbourne v. State, 438 So.2d 380 (Fla.1983), cert. denied, __U.S.__, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984), or Clark v. State, 443 So.2d 973 (Fla.1983), cert.denied, __U.S.__, 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984), in which the victim knew the defendant and could readily have identified him.

C.

The Trial Court Erred In Instructing The Jury On, And Finding The Existence Of, The Aggravating Circumstance That The Capital Felony Was Especially Heinous, Atrocious Or Cruel.

Appellee cites Demps v. State, 395 So.2d 501 (Fla.1981), cert.denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981) in support of its argument under this sub-issue. Demps, however, provides strong support for Gardner's position. The victim in Demps, as the victim here, died of stab wounds. The victim in Demps lived for some time after being stabbed, long enough to be taken to three separate medical facilities before he expired. Joseph Holda lived for at most five minutes after the wounds were inflicted, and most likely no more than two or three minutes. (R2571) The victim in Demps thus suffered much longer than did Joseph Holda. This Court rejected the trial court's finding that the murder committed by Demps was especially heinous, atrocious or cruel, and should reject it here as well.

D.

The Trial Court Erred In Instructing The Jury On, And Finding The Existence Of, The Aggravating Circumstance That The Capital Felony Was Committed In A Cold, Calculated And Premeditated Manner Without Pretense Of Moral Or Legal Justification.

Ken Gardner will rely upon the argument contained in his initial brief with regard to this sub-issue.

E.

The Trial Court Should Have Found Gardner's Intoxication At The Time Of The Crimes To Be A Mitigating Circumstance.

Ken Gardner will rely upon the argument contained in his initial brief with regard to this sub-issue.

CONCLUSION

Upon the arguments presented in this brief and his initial brief, Ken Gardner renews his prayer for the relief requested in his initial brief.

Respectfully submitted,

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TENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 7th day of December, 1984.

Robert F. Moeller
ROBERT F. MOELLER

RFM:js