IN THE SUPREME COURT OF FLORIDA

GERALD EUGENE STANO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 64,687

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The following symbols will be used:

"R" - Record on Appeal.

"SRA" - Supplemental Record on Appeal filed May 21, 1984, consisting of transcripts of Appellant's statements.

"SRB" - Supplemental Record on Appeal filed June 1984, consisting of the evidence introduced.

STATEMENT OF THE CASE

On March 3, 1983, the fall term of the 1982 Grand Jury for the Eighteenth Judicial Circuit of the State of Florida for Brevard County, returned a first degree murder indictment charging Gerald Eugene Stano with the murder of Cathy Lee Scharf. (R 2213-2214) On September 1, 1983, the spring term of the 1983 Grand Jury of the Eighteenth Judicial Circuit of the State of Florida for Brevard County, returned an identical indictment. (R 2211-2212)

The appellant was brought to trial on the charge on September 26, 1983 to September 30, 1983 following which a mistrial was declared when the jury was unable to reach a unanimous verdict. (R 1314-1613)

Numerous pre-trial motions were filed by the appellant. These included a motion in limine regarding challenges for cause, a motion for change of venue, a request to waive jury for penalty phase and restrict death qualification of jury during voir dire, a motion to dismiss, a motion for discharge, a motion in limine, a motion for statement of aggravating circumstances, a motion for individual voir dire and sequestration of jurors, a motion to declare Florida's death penalty unconstitutional and a demand for discovery of penalty phase evidence. (R 2327-2328, 2331-2333, 2361-2362, 2368, 2372, 2374-2375, 2406-2413, 2442-2445, 2446-2449, 2454-2455, 2458-2459, 2460-2461)

Prior to the trial, Appellant withdrew his previously made motion for change of venue. (R 2294)

The state filed a motion to declare certain witnesses unavailable which, following a hearing, was denied as premature. (R 1615-1644) At a second hearing, the trial court granted the state's motion to compel testimony. (R 1765-1781) Immediately prior to the retrial, the court declared the witnesses unavailable and granted the state's motion to use their former testimony over defense objection. (R 12-26)

This cause proceeded to trial again on November 28 through December 2, 1983. (R 1)

During voir dire, the trial court limited the scope of examination over defense objection. (R 135-136, 156-157) The trial court also granted the state's challenge for cause as to juror Nattile over defense objection. (R 210-211)

During the trial, the court refused to allow Appellant to present certain evidence at either the guilt or the penalty phase. (R 393-395, 1258-1262, 1463-1467, 1470-1484, 1783-1817)

Appellant's objection to the qualification of Dr. Molina as an expert was overruled. (R 611-618) Likewise, Appellant's objection to Dr. Bass answering a question beyond the realm of his qualifications was also overruled. (R 684)

Appellant's objection to the method by which certain witnesses' testimony was presented at trial was also overruled. (R 696-702)

A taped statement of the appellant was played over defense objection. (R 977-999)

Following the close of the state's case-in-chief, Appellant moved to strike certain testimony which was denied.

(R 1004-1006) A motion for judgment of acquittal based upon the insufficient evidence of corpus delicti was also denied. (R 1007-1010)

Appellant proffered the testimony of Douglas Cheshire and Tom McCarthy but did not present this testimony to the jury. (R 1013-1030)

The motion for judgment of acquittal was renewed and denied. (R 1031)

During the consideration of written questions from the jury during deliberations, the appellant was absent. Trial counsel waived his presence. (R 1132-1134)

Following deliberation, the jury found the appellant guilty of first degree murder. (R 1136, 2259)

The penalty phase of the trial was held on December 5 through 6, 1983. (R 1141) Prior to its commencement, Appellant offered to stipulate to the aggravating circumstance involving prior convictions for violent felonies. The state and the court refused to accept this stipulation. (R 1145-1153)

Throughout the penalty phase, much evidence was introduced concerning the details of Appellant's other murder convictions. This was done over defense objection. (R 1171-1203)

Certified copies of Appellant's previous judgments and sentences for first degree murder were introduced over objection. (R 1168-1170)

Two psychiatrists testified for the state during which Appellant objected to certain testimony. (R 1211-1212, 1242) These objections were overruled.

Appellant's objection to the trial court's instruction on the aggravating circumstance involving the fact that the murder was committed during the commission of a felony was overruled. (R 1253-1254) Appellant also objected to the applicability of the aggravating circumstance involving premeditation. (R 1255)

Appellant again offered certain proffered testimony at the penalty phase and was again rebuffed. (R 1258-1262)

The appellant testified in his own behalf at the penalty phase during which the defense objected to certain questioning on cross-examination. These objections were overruled. (R 1266, 1836-1837)

Following deliberation, the jury returned with a recommendation of 10-2 that Gerald Stano be sentenced to the ultimate sanction. (R 2248)

Appellant's motion for new trial was denied. (R 1305-1308)

The trial court sentenced Gerald Stano to death in the electric chair. In so doing, the trial court found four aggravating circumstances and rejected all mitigating evidence. (R 1309-1311, 2230-2236)

STATEMENT OF THE FACTS

GUILT PHASE

On January 19, 1974, Dennis Farrell was hunting wild hogs with his friend Alexander Myers near Hallover Canal in Brevard County, Florida. (R 653-654) The pair were deep into thick woods when they smelled the odor of something that had died. (R 656-657) Shortly thereafter, they observed a body covered with palmettos on the other side of a ditch. (R 657) They got to within 15 feet of the body before they got back into their jeep and drove to the canaltender to whom they reported their find. (R 658-659) A deputy arrived and they took him to the scene. (R 660)

Investigator Steven Kendrick of the Brevard County Sheriff's Department, reported to the site where the body had been found. (R 750-755) It was covered with 8-9 palmfronds which Investigator Kendrick did not examine to determine if they had been cut or broken. (R 758, 791-792) The body was in the canal from the waist down. (R 793) Investigator Kendrick recovered two rings that day which were located on the left hand of the body. (R 762) Approximately one week later he found another ring which was buried in the mud approximately three feet below the head of the body. (R 763-766) The body was clothed in a tank top shirt with red blouse which had yellow stripes. She wore blue jeans but no shoes. (R 622) Two empty .22 casings were found approximately seventeen and twenty feet respectively from the body. These were on the other side of the canal. (R 781-782) The casings were from an automatic weapon. (R 782) No

spent bullets were found in the area. (R 786) Investigator Kendrick took approximately 50-60 color photographs of the area which were missing at the time of trial. (R 791)

Raul G. Molina, M. D., was the assistant medical examiner who performed the autopsy on the body. (R 611-620) Due to the extreme amount of decomposition, Dr. Molina was unable to determine the cause of death. (R 621) He identified the victim as a Caucasian female, approximately twenty years old, five feet two inches tall and one hundred and ten pounds. (R 623) He estimated that the body had been in the woods for approximately four to eight weeks. (R 623) The skin from the upper torso was gone as was that from the left side of the head and neck. (R 624) Dr. Molina was able to rule out large trauma to the skull, face, neck or body due to the absence of fractures. (R 624) Dr. Molina was unable to rule out stabbing, natural death, drug overdose, heart attack, cancer, brain tumor, pneumonia, asthma or thousands of other illnesses as the cause of death. (R 625, 635-637) The area surrounding the body was stained by a brownish spot which could have possibly been blood. (R 626) A sample of this was collected and turned over to the police for lab analysis. (R 632) The state never introduced any evidence of these test results. Dr. Molina found no bone chipping in the rib cage which would have been consistent with stabbing. (R 634-635) Three upper central front teeth were missing from the skull. These were probably missing after death in the opinion of Dr. Molina. (R 642-643)

Cathy Lee Scharf was last seen by her mother on December 14, 1973. (R 723-727) Cathy had dinner at home that night and her mother was aware that she had plans to go out that evening with some friends. (R 728-729) Cathy left the house that night around 7:00 with Debbie Harris. (R 729) She had on a multi-colored blouse with blue jeans and black shoes and was carrying a purse. (R 731) Cathy was approximately five feet five inches tall and weighed one hundred and fifteen pounds with medium-length blond hair. (R 731)

Charles Evans, a neighbor of the Scharfs, saw Cathy on December 15, 1973, at approximately 9:00 a.m. in the vicinity of the Port Orange Recreation center. She was walking alone in a southerly direction on U.S. 1 wearing jeans and a short coat. (R 804-806) When Cathy Scharf failed to report to work on December 14, her parents waited until the 15th or 16th of December to report her disappearance to the Port Orange Police. (R 744)

Several months following her disappearance, two small boys who were fishing between Port Orange and New Smyrna Beach found a wallet which they turned over to Lawrence Silvia. (R 686-689) Using the identification contained in the wallet, Mr. Silvia called Edith Scharf who came and retrieved the wallet from him. (R 690) This wallet was identified as belonging to Cathy Scharf. (R 734) Mrs. Scharf turned it over to the Port Orange Police. (R 734-735)

Inspector S. R. Dewitt, Jr. of the Brevard County Sheriff's Department, took the skull found at the scene to the office of Dr. Stanton Bass in Dade County. (R 677, 811-815) Dr.

Bass is a dentist who was qualified as an expert witness in dentistry and the identification of teeth and fillings. (R 666, 669) Dr. Bass was the dentist of Cathy Scharf as well as her parents. (R 669) Dr. Bass had last seen Cathy as a patient in 1967 when she was ten years old. (R 679-680, 682)

Upon his initial examination of the skull, Dr. Bass found that there were five amalgam restorations on the first four permanent molars. (R 678) The filling work appeared to be of the same technique that Dr. Bass employed in an amalgam restoration. (R 678) He was unable to say with certainty that it was definitely his work. (R 681-682) Upon a comparison with the teeth of the skull with that of the dental chart of Cathy Scharf, Dr. Bass concluded that the restoration on the four first permanent molars of the skull corresponded exactly with the restorations indicated on the chart. (R 679) The teeth of the skull had no other dental work on any of the other teeth. (R 679-680, 682) Upon her last visit to Dr. Bass, Cathy Scharf still had twelve deciduous teeth (baby teeth). The skull that Dr. Bass examined had no deciduous teeth. (R 683) Over defense objection, Dr. Bass was permitted to testify that there was no doubt in his mind that the skull was that of Cathy Scharf. (R 684)

On March 6, 1981, Sergeant Paul Crow of the Daytona Beach Police Department met with the appellant and advised him of his constitutional rights. The appellant agreed to talk to Sergeant Crow. (R 865-868) The appellant stated that in the early 1970's he picked up a young white female hitchhiking in

Port Orange off of U.S. 1. He took her to a skating rink on Nova Road but they did not stop. He drove south on Nova Road back to U.S. 1 and continued in a southerly direction toward the Titusville/Merritt Island area. They stopped briefly at a small park by the river on the way. He described the girl in her early teens, wearing a multi-colored shirt, a wrangler jean jacket and blue jeans. He also stated that she was wearing a ring or some type of jewelry. While they were headed toward the Merritt Island Skating Rink on A1A, the couple argued and the appellant either stabbed her in the chest or shot her. He was unable to remember exactly which method was employed. He took her body from the car to a small pond which had little or no water in it. He covered her body with small palmfronds and left. (R 869-870) On August 11, 1982, Johnny Manis, a homocide investigator with the Deputy Sheriff's Office interviewed Gerald Stano. (R 967-968) Stano advised Manis that he had picked up a young lady on U.S. 1 in 1973 around the holiday Christmas season. (R 996) During the drive, Stano stated that he was half intoxicated. (R 989)

Stano admitted that he drank a six-pack on weekdays. On weekends, he usually consumed two to three cases of beer which he would frequently chase with Jack Daniels Whiskey. (R 998)

During the ride, she got "mouthy" and he hit her in order to keep her quiet. He also advised her that he would kill her. He turned off of A1A and drove to the back of an orange grove. She attempted to run from him and he stabbed her several times. (R 973) He stabbed her when she tried to exit the car.

She was unable to unlock her car door when he put a wrist lock on her and stabbed her. (R 474) He carried her body and put it on the canal bank. (R 973) He described the girl as having blondish-brown hair, wearing a multi-colored blouse and carrying a clutch purse. She wore Indian type jewelry. (R 973-974) He probably threw her purse out of the car on the way back to Daytona Beach. In Daytona Beach, he went to the Starlite Skate Center and roller skated. (R 474) These two statements were the only evidence that the state presented at the first trial concerning the details of the actual murder. (R 1847-2205)

However, by the time of retrial, the state had secured Clarence Albert Zacke as a state witness. (R 887) His residence was the Brevard County Jail and he had been sentenced to state prison. Zacke had five felony convictions and five sixty year concurrent sentences. He met Gerald Stano in jail. (R 888) In August of 1983, Stano and Zacke were in the exercise yard when they discussed Stano's case. According to Clarence Zacke, Gerald Stano told him that he picked up the victim while she was hitchhiking on a highway. She wanted to go to the beach and he took her to some woods in Merritt Island. He turned off the main road. When she questioned him, he told her that it was time for her to pay for her way by engaging in sex. The couple argued and the appellant attempted to kiss her. She fought and told him that he was repulsive. He hit her, opened her car door and kicked her out of the car. He got out and beat her while she was on the ground. He then stabbed her a few times though not very deeply. Zacke testified that the appellant told him that he

then choked her. He explained to Zacke that he then choked her until she passed out whereupon he would stop until she revived. This process was repeated several times according to Zacke. Zacke testified that the appellant told him that the victim requested that he stop. (R 893-895) Zacke stated that the appellant killed the girl by stabbing and choking her. He then dragged her body a short distance and covered it with palmfronds. (R 896)

Clarence Zacke's testimony was substantially impeached on cross-examination. He knew Gerald Stano in Florida State Prison back in January of 1983. There, they once talked face to face for approximately ten minutes. They also talked on two other occasions at the prison. Zacke admitted that he had previously been under five consecutive sixty year sentences rather than concurrent sentences. He admitted that he had traded testimony in a murder case for a reduction in his sentence. (R 905-906) Zacke had previously had a presumptive parole release date of 1999. At the time of trial, Zacke was of the opinion that he would be released in 1985. (R 925-927) In exchange for his testimony against Mr. Stano, the state had promised to return a confiscated pickup truck and help Zacke in his attempt to transfer from Florida State Prison to a different institution (preferably Cross City Prison). At the time of trial, the truck had already been returned to Sherry Zacke. Zacke placed a $6,000.00 value on the truck. (R 907) Zacke had every reason to believe that the state would accomplish his transfer to the preferred prison. He had listed five prisons in the order of

preference. (R 907-908) At the time of trial, the state had requested the transfer. Zacke had seen the letter that the prosecutor had written to Louie Wainwright. (R 909)

Although Zacke had the information to which he testified prior to the first trial, he waited because he thought that the state had a strong case against Mr. Stano. When the first trial ended in a mistrial, he knew that their case was not strong. He then contacted the state through his attorney and offered to help. (R 910-913)

Although it was not presented to the jury, the defense proffered the testimony of Douglas Cheshire, the State Attorney of the Eighteenth Judicial Circuit. (R 1013-1026) Mr. Cheshire's knowledge of Clarence Zacke's reputation for truth and veracity in the community was based solely on conversations with his staff arising from criminal investigations. (R 1023-1026) Appellant also proffered the testimony of Tom McCarthy, the Police Chief of Satellite Beach. Prior to that employment, he had been a policeman with the city of Eau Gallie and the city of Melbourne. He had known Clarence Zacke for ten to fifteen years and testified that his reputation for truth and veracity in Melbourne was extremely bad. (R 1028-1029)

PENALTY PHASE

The extensive and thorough psychological report and tests on Gerald Stano by Dr. Ann McMillan was stipulated into evidence. (R 1265) Dr. McMillan's in depth probe of Gerald Stano's early childhood revealed the nature of his problem. He was taken away from his natural mother at the age of six months by the New York Child and Welfare Department due to extreme neglect. At the time, he was malnourished and functioning at an animalistic level. Once Gerald's adoptive parents had him for six months, they returned to New York to finalize the adoption. As part of this process, Gerald was examined by a team composed of a psychiatric social worker, a nurse, a physician, a psychologist and a psychiatrist. Following this examination, the team concluded that at the age of thirteen months, Gerald was "unadoptable". Throughout his childhood and adolescence as well as his adult life, Gerald had extensive problems coping in society. According to Dr. McMillan, this early neglect in Gerald's life was the root of his mental health problems which led to the murders. One could conclude from Dr. McMillan's report that it was her opinion within a reasonable medical probability that Stano had committed the murder while under the influence of extreme mental or emotional disturbance. It could also be concluded that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the crime. (SRB 92-103)

The state presented copies of six certified judgments and sentences dealing with Stano's convictions for first degree

murder. (R 1154-1170) The state also introduced detailed testimony and evidence concerning Stano's conviction for the murder of Mary Carol Maher in Volusia County. (R 1171-1192) The state also presented similar detailed evidence regarding his convictions for the murders of Ann Arceneaux and Janine Ligotino in Alachua County. (R 1192-1203)

Dr. Frank Carrera, III, a psychiatrist, testified that his past examinations of Gerald Stano in 1981 and 1983 led him to the conclusion that Gerald was competent to stand trial and was sane at the time of the offense. He was unable to detect any sign of a major medical disorder. He did not think that Gerald was suffering from extreme emotional or mental disturbance at the time of the offense nor did he feel that his capacity to appreciate the criminality and to conform his conduct to the requirements of the law was substantially impaired. (R 1203-1214) Dr. Carrera did concede that Stano had a defective conscience and fit the clinical traits of an antisocial personality disorder. (R 1216-1217) Dr. Carrera also admitted that at the time of his examinations, Stano had been on medication commonly used for people with severe mental problems. (R 1219-1220) Dr. Carrera also admitted that paranoia and schizophrenia could be intermittent in its appearance and could be triggered by alcohol and criticism from one of the opposite sex. (R 1220-1221)

Dr. George W. Barnard examined Stano under similar circumstances. (R 1236-1238) His conclusions mirrored those of Dr. Carrera. (R 1239-1243)

The jury returned with a vote of 10-2 in the recommendation for the death penalty. (R 1297-1298) The trial court found four aggravating circumstances: (1) that the defendant was previously convicted of another capital felony or of a felony involving the use of a threat or violence to the person; (2) that the murder was committed while the defendant was engaged in the commission of or an attempt to commit the crime of kidnapping; (3) that the murder was especially heinous, atrocious, or cruel; and (4) that the murder was cold, calculated and premeditated without any pretense of moral or legal justification. The trial court rejected all mitigating circumstances, both statutory and non-statutory. (R 2230-2235)

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN LIMITING APPELLANT'S VOIR DIRE EXAMINATION OF THE VENIRE RESULTING IN A DENIAL OF DUE PROCESS AND THE RIGHT TO A FAIR TRIAL.

During individual voir dire of prospective juror Erb, Ms. Erb stated that, although she had read some media accounts of the crime, she would "Try very hard to be impartial." (R 126) Ms. Erb stated that she was feeling extreme emotion, namely terror, at the time of the examination. (R 126, 129-130) Ms. Erb was aware that the appellant had been previously convicted of a felony. (R 132-134) Appellant's defense attorney asked Ms. Erb how she would go about blocking out of her mind the facts that she already had been exposed to through the media. (R 135) At this point, the trial court sua sponte precluded that line of inquiry. (R 135) The prosecutor objected after the fact. (R 135) Appellant's defense attorney asked Ms. Erb how the pretrial publicity was going to effect her deliberations if she were selected as a juror. She replied that she would "Block it out". (R 135-136) When defense counsel again attempted to ascertain how she planned to accomplish this, the prosecutor's objection was sustained. (R 136)

Shortly after the questioning of Ms. Erb, Appellant's defense counsel requested clarification of the trial court concerning its ruling about restricting voir dire. (R 156) The prosecutor argued that the jury had no obligation to block out facts known to the jurors prior to trial, rather simply being required to rely upon the evidence presented in the courtroom.

(R 157) The court ruled that the question was objectionable and refused to allow the defense to continue asking it. (R 157) Throughout the voir dire, numerous, if not most of the veniremen indicated that they knew something about the case from pretrial publicity but could put this knowledge aside if selected. (R 139, 142, 162, 188, 201, 203, 309, 365, 473, 517, 583-584) Several prospective jurors indicated that they would have difficulty putting aside this prior knowledge. (R 179, 272, 308, 315, 369, 471, 494, 501, 513, 519, 521, 525)

Voir dire examination of prospective jurors by counsel is assured by Fla.R.Crim.P. 3.300(b). Jones v. State, 378 So.2d 797 (Fla. 1st DCA 1980). The purpose of voir dire, "Is to obtain a fair and impartial jury to try the issues in the cause". Keene v. State, 390 So.2d 315, 319 (Fla. 1980). "Subject to the trial court's control of unreasonably repetitious and argumentative voir dire questioning, counsel must have an opportunity to ascertain latent or concealed pre-judgments by prospective jurors which will not yield to the law as charged by the court, or to the evidence." Jones, supra at 798. Even when counsel for a party has already had an opportunity to examine a particular juror, circumstances may dictate that he be granted further and reasonable interrogation to pursue a line of questioning opened up during the other party's examination. Barker v. Randolph, 239 So.2d 110 (Fla. 1st DCA 1970). The trial court's failure to commit such, "Further and reasonable interrogation" may amount to an abuse of discretion. Id. at 113. See also Ritter v. Jiminez, 343 So.2d 659, 661 (Fla. 3d DCA 1977) ("Trial attorney should be

accorded ample opportunity to elicit pertinent information from prospective jurors on voir dire examination").

It is imminently clear from the record that this case involved a vast amount of pretrial publicity relating to the crime as well as the first attempt by the state to try the appellant which ended in a mistrial. Most of the venire knew something about the case. In fact, both the state and the appellant filed motions for change of venue which were later abandoned. (R 171, 2273, 2294, 2361-2362) In light of these facts, it was certainly proper, indeed critical, for the defense attorney to inquire (during individual voir dire) of the jurors' ability to set aside their knowledge of the case derived from media accounts. This was an attempt by defense counsel to probe beyond the pat answer given by prospective jurors that even though they are intimately familiar with details of the case through the media, they would be able to put aside any preconceived notions and decide the case based upon the evidence and the court's instructions. In this regard, it is crucial to note that a juror's statement that he can return a verdict based upon the standards is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so. Singer v. State, 109 So.2d 7 (Fla. 1959) This was precisely what defense counsel was attempting. A defendant's challenge to a juror for cause should be sustained in a criminal case where an examination of all of the evidence leaves a reasonable doubt of that juror's impartiality. Blackwell v.

State, 101 Fla. 997, 132 So. 468 (1931) (emphasis added).

In examining jurors on voir dire, wide latitude is allowable. Cross v. State, 103 So. 636, 89 Fla. 212 (1925). Voir dire examination of jurors should be so varied and elaborated as would seem to require in order to obtain fair and impartial jurors whose minds are free of all interests, bias or prejudice. Gibbs v. State, 193 So.2d 460 (Fla. 2d DCA 1967). Art. I, §§ 9 and 16, Fla.Const. and Amend. V, VI, and XIV U.S. Const.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN IMPROPERLY RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE AT BOTH PHASES OF THE PROCEEDINGS WHERE SUCH EVIDENCE WAS CRUCIAL TO HIS DEFENSE THEREBY RESULTING IN A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT.

At the first trial which ended in a mistrial when the jury deadlocked, the state moved in limine to preclude the defense presentation of evidence tending to show that the appellant had falsely confessed to other murders. (R 1463-1466) The defense indicated that they did intend to introduce testimony to that effect. (R 1466-1467) After hearing much argument on the issue as well as a proffer of the testimony of Dr. Stern and Officer James Kappel, the trial court ruled the evidence to be inadmissible. (R 1470-1484, 1783-1817) The proffer and argument made at the first trial was incorporated into the second trial by stipulation of the parties. (R 393-395) The trial court also incorporated its previous rulings on this issue. The evidence was proffered and excluded at both the guilt and the penalty phases of the trial. (R 1258-1262)

The proffered testimony of Dr. Fernando Stern consisted of his expert opinion that certain people do confess to crimes which they have not committed. Dr. Stern opined that the appellant could be that type of person. The appellant does enjoy the limelight and thus might be more likely to falsely confess to murders. One more case would make no major difference in the appellant's legal plight. (R 1785-1795)

Detective James S. Kappel, a detective with the St. Petersburg Police Department interviewed the appellant in January of 1983 concerning a homocide in the St. Petersburg area. (R 1796-1798) At that time, the appellant confessed to the offense and recited details of the murder. (R 1798-1799) He gave two other fairly consistent incriminating statements on two other occasions regarding the same homocide. (R 1799-1800) The police later developed information which showed that another individual had actually committed the homocide to which the appellant had confessed. That individual was indicted and was awaiting trial at the time of the proffer. (R 1800-1802) The appellant later admitted to Detective Kappel that he had lied about his involvement in the murder. (R 1811-1812) Detective Kappel was initially impressed with the appellant's ability to point out the site of the murder. (R 1814) However, his doubts as to the validity of the confession arose from Appellant's recitation of other details which did not coincide with the facts revealed by the police investigation. (R 1814-1817)

Evidently, the appellant had also falsely confessed to another homocide in New Jersey to Detective Kinzer. However, Appellant's motion to pay for Detective Kinzer's transportation to Florida in order to proffer his testimony on this issue was denied prior to the second trial. (R 1675-1677) This was a denial of Appellant's constitutional rights to equal protection under the law. Amend. XIV, U.S. Const.

The right of an accused to present witnesses to establish a defense is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14 (1967). Indeed, this right is a cornerstone of our adversary system of criminal justice. Both the accused and the prosecution present a version of facts to the judge so that it may be the final arbiter of truth. Id.; United States v. Nixon, 418 U.S. 683, 709 (1974).

While the precise point involving false confessions appears to be a novel one in Florida, the right of a defendant to present evidence is not. Subject only to the rules of discovery an accused has an absolute right to present evidence relevant to his defense. Campos v. State, 366 So.2d 782 (Fla. 3d DCA 1979); Roberts v. State, 370 So.2d 800 (Fla. 2d DCA 1979).

At the trial level, the state relied on three cases. Grove v. State, 365 S.W.2d 871 (Tenn. 1963) rejected the argument (presented as one of first impression) that the defendants should be permitted to introduce a number of confessions to unrelated crimes for the purpose of showing that the confessions made in the instant case were coerced or forced through beating or otherwise. Appellant contends that this case can be distinguished based upon the contention of Grove that his confession was coerced. The appellant's defense in this case was grounded upon his willingness to falsely confess to numerous murders since, considering the extensive number of murders to which he had already confessed, one more would be meaningless.

The state also relied upon the case of Grove v. State, 45 A.2d 348 (Md. 1946) which held that the defendant was not entitled to introduce false confessions to unrelated crimes in order to cast doubt upon the truth of the confession of the crime

charged in the indictment. It must be noted that both Grove cases also tend to revolve on the principle of law that confessions to other crimes must be separated if possible from the confessions to the crime for which a defendant is on trial. This situation is distinguished from the usual rule that a party is entitled to the introduction of the entire conversation being introduced into evidence where a part of it is introduced. Appellant points out that this rule is generally applied in order to save a defendant from prejudice through the introduction of irrelevant and inflammatory evidence of other crimes tending to prove criminal disposition. Appellant submits that where the defendant seeks the introduction of evidence to other crimes and is willing to suffer the consequences, he should be permitted to do so. The appellant was apparently willing to take the risk that the introduction of such evidence might open the door to cross-examination as to Appellant's confessions which prove to be true. (R 1480-1481) In fact, Appellant testified at the penalty phase and admitted to several murders. (R 1825-1828, 1831-1832) The proffered evidence becomes even more relevant when one considers that the state's own witness testified that Stano had a definite problem regarding his own untruthfulness. (R 1249)

The state also relied upon the ancient case of State v. Humphrey, 128 P. 824 (Or. 1912) which held that similar evidence was properly excluded as being confusing to the issue, unprofitable and irrelevant. The rationale of the court in that case is simplistic and conclusory resulting in little aid to the resolution of this problem.

In State v. Smith, 377 S.W.2d 241 (Mo. 1964) the defendant was on trial for throwing acid in the victim's face. The defendant had earlier told several people that he had committed this crime. Id. at 242-243. At trial he claimed his daughter had committed the crime. She took the stand to say that she had committed this offense. The Missouri Supreme Court held that it was reversible error to not allow the defendant to present evidence of previous sexual advances (by the victim) towards Smith's daughters. (The daughter had claimed such an advance on the day in question). The court held that this evidence was admissible to support the defendant's theory of the case, to explain his earlier false confession and to impeach a key prosecution witness.

In Commonwealth v. Graziano, 331 N.E.2d 808 (Mass. 1975) the Massachusetts Supreme Court dealt with a similar issue. The defendants were attempting to introduce evidence to contradict a key prosecution witness and to show that a third party had actually committed the crime. The court found reversible error in the failure to allow the defendants to bring out testimony that the alleged guilty party owned the gun, had ammunition for it, that he sold drugs, that the victim owed him money for drugs and that he acted suspiciously after the homocide. Id. at 811-812. The court held that all of this evidence was admissible as either impeachment evidence or to show that a third party committed the crime. Id.

An analogous case in Florida is that of Tafero v. State, 406 So.2d 89 (Fla. 3d DCA 1981). There, the court held

that it would be error to exclude penalty phase evidence that a third person had confessed to a prior conviction considered as an aggravating circumstance. In fact, a defendant may not be precluded from offering as a mitigating factor any aspect of his character and record. Perry v. State, 395 So.2d 170 (Fla. 1981). (emphasis added). Appellant contends that the proffered evidence related to an aspect of his character, i.e. his propensity to confess to murders that he did not commit.

In any event, the appellant contends that this Court should adopt a more enlightened approach than the cases cited by the state below. There is little doubt that the proffered testimony is very trustworthy. The trial court simply found it to be irrelevant. No challenge was made to the reliability of the evidence. In light of the case law cited at the beginning of this argument, this Court should adopt a rule allowing wide latitude in the presentation of evidence by a defendant in a capital trial. It is clear that a trial may not frustrate a defendant's legitimate right to present his defense by strict adherence to state evidentiary rules. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). No such rule prevails over the fundamental demand of due process of law in the fair administration of criminal justice. United States v. Nixon, supra at 713. In the weighing process, the fundamental constitutional right to present witnesses should predominate. The Sixth Amendment right to present evidence is supreme, and any doubts must be resolved in favor of that fundamental right. The exclusion of the proffered testimony deprived Appellant of a fair trial.

POINT III

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE, OVER OBJECTION, THE FORMER TESTIMONY OF JOHN AND EDITH SCHARF, CONTRARY TO ARTICLE I, SECTIONS 9 AND 16, FLORIDA CONSTITUTION AND AMENDMENTS SIX AND FOURTEEN, UNITED STATES CONSTITUTION.

During the first trial which ended in a mistrial, John and Edith Scharf, the parents of the victim, testified. (R 1351-1359) Prior to the second trial, the Scharfs indicated their unwillingness to testify at a retrial due to the emotional trauma that they endured as a result of their previous testimony. The state filed a motion to declare the Scharfs unavailable which, following a hearing, was denied as premature. (R 1615-1644) Another hearing was held on November 3, 1983, on the state's motion to compel testimony. (R 1765-1780) The defense joined in the state's motion indicating their intention to subpoena the Scharfs as witnesses also. (R 1778) At the hearing, the Scharfs indicated their unwillingness to obey the subpoenas and testify at any retrial. The court granted the motion to compel testimony and so informed the Scharfs. (R 1780-1781)

On December 2, 1983, John and Edith Scharf had complied with the Court's order to the extent that they were available in the courtroom immediately prior to the commencement of jury selection. (R 12) The state again called them as witnesses on the state's renewal of the motion to determine their availability as witnesses. (R 12-13) John Scharf testified that he had been ordered to appear and that was the reason that he was present.

(R 15) However, Mr. Scharf indicated his unwillingness to comply with that part of the order that he testify at trial. (R 15) Mr. Scharf testified that he realized that he was risking contempt of court and possible fines and/or imprisonment. Mr. Scharf concluded that he had already testified at the prior trial, so he saw no reason for doing it again. (R 17) In response to the judge's question, Mr. Scharf stated that he believed that he would have to persist in his refusal to testify even if it meant that the trial could not commence. (R 17) Mr. Scharf also believed that he would have to persist in his refusal to testify even in light of a possible appellate court reversal based on this point. (R 18) Mr. Scharf did not believe that either he or his wife would testify. (R 19) Mrs. Scharf's testimony was similar to that of her husband in that she indicated her intention not to testify. (R 20-24) The trial court ruled that the Scharfs were unavailable within the meaning of Florida Evidence Code and granted the state's motion to use the transcripts of their previous testimony. (R 26)

Appellant recognizes that a witness is unavailable if, among other things, he persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so. §90.804(1)(b), Fla.Stat. (1983). It should initially be kept in mind that the burden of proof falls upon the party seeking to introduce the former testimony of an unavailable witness. Magna v. State, 350 So.2d 1088 (Fla. 4th DCA 1977); Outlaw v. State, 269 So.2d 403 (Fla. 4th DCA 1972); and, Habig v. Vastin, 117 Fla. 864, 158 So. 508 (1935). Appellant contends on

appeal that the state failed in carrying its burden of showing that John and Edith Scharf were unavailable to testify. John and Edith Scharf appeared in court to testify at the first trial which ended in a mistrial. (R 1351) They also appeared and testified at a motion hearing on November 3, 1983. (R 1765-1780) Prior to the first trial, Edith Scharf testified at a deposition which she had trouble completing as a result of her emotional trauma. (R 21-22) Pursuant to the trial court's order, John and Edith Scharf were both present immediately prior to jury selection at the second trial. At that time, they both testified as to their unwillingness to testify. (R 13-24) Immediately thereafter, the trial court declared the Scharfs to be unavailable as witnesses. (R 26)

Appellant takes issue with this ruling by the trial court. No attempt was made to actually call the Scharfs as witnesses at trial. It should be noted that the Scharfs complied with the trial court's order to be present at trial. In fact, the Scharfs never missed a court appearance, be it deposition, hearings or trial. Each time they were called as witnesses, both John and Edith Scharf took the stand and testified, even though it may have been somewhat reluctantly. Appellant contends that the state failed to meet its burden of proof that the Scharfs were unavailable as witnesses, since the state never actually called the Scharfs as witnesses at trial. Appellant contends that the proper procedure, especially since the Scharfs were apparently present at the courthouse, would have been to call them as witnesses at the appropriate time of trial. This could

have been done outside the presence of the jury if either party was of the opinion that prejudice would accrue otherwise. At that point, the court and the parties would actually know the extent that the Scharfs were unavailable to testify. If they refused to take the stand or took the stand and refused to testify, then and only then would they be truly unavailable under the rule.

It is certainly conceivable that one or both of them would have taken the stand and testified, although with reluctance. This appears to be especially true in the case of John Scharf who repeatedly used the term "believe" regarding his opinion concerning the likelihood of either he or his wife testifying at trial. (R 13-20) The mere reluctance of a witness to attend a trial, understandable or not, does not mean that the state is unable to procure his attendance so as to make such witness unavailable. McClain v. State, 411 So.2d 316 (Fla. 3d DCA 1982). It is interesting to note that although the Scharfs were informed of the fact that they were risking imprisonment and/or fines, the record does not reflect that these were ever used as leverage to persuade them to testify. Perhaps if a fine or sentence had been imposed, one or both of the Scharfs would have changed their minds and indicated a definite willingness to testify.

An analagous situation is presented in the recent case of United States v. Johnson, 35 Crl 2226 (6th Cir., No. 84-1148, 6/11/84). There, a key witness indicated his refusal to testify against his alleged partners. Prior to trial, the government

filed a "Motion to Compel Testimony of Witness Timothy Dwayne Neal and to Hold Such Witness in Civil Contempt Upon His Refusing to Testify." At a hearing, Neal announced that he would not testify at the trial. The court subsequently adjudged him in civil contempt. The U.S. Court of Appeal for the Sixth Circuit held that such "anticipatory contempt" was improper. The court noted that the proper procedure would be to proceed to trial and call Neal as a witness. If he refused, he could then be adjudged in contempt of court and incarcerated until he agreed to testify or until the trial ended. The government found this method unsatisfactory because jeopardy would attach after the trial had begun and Neal was crucial to their case. The appellate court declined to find that this was a justification. The court pointed out two problems that were immediately apparent. Initially, it is unclear that a statement of intent not to comply in the future is a "refusal." Secondly, it is unclear that the refusal occurred during a "proceeding." The court also noted that Neal had previously changed his mind once about testifying and there was no guarantee that he would in fact have refused to testify if called as a witness at trial. The instant case is analagous in its facts.

The state failed to meet its burden of proof in establishing that the Scharfs were unavailable as witnesses. The trial court's ruling was premature since it came prior to the time that the Scharfs would actually be called as witnesses. It is also not clear that the Scharfs would have persisted in their refusal to testify if they had actually been called as witnesses.

As pointed out before, the Scharfs were present at every court appearance and obeyed every court order. Furthermore, John Scharf's testimony is not conclusive as to his absolute refusal to testify at trial. (R 1320) The trial court's ruling declaring the Scharfs unavailable as witnesses was in error and the introduction of their former testimony over defense objection constitutes reversible error. (R 1719-1749)

POINT IV

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION AND ALLOWING A STATE WITNESS TO TESTIFY AS TO AN ULTIMATE ISSUE WHICH WAS BEYOND HIS EXPERTISE AND QUALIFICATIONS THEREBY DENYING APPELLANT HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL.

Stanton Bass, the dentist for Cathy Scharf when she was a child, was qualified as an expert in dentistry and the identification of teeth and fillings. (R 666-669) Dr. Bass examined the skull of the victim found at the scene and compared its teeth with the dental chart of Cathy Scharf. (R 677-678) Upon his initial examination of the skull, Dr. Bass found that there were five amalgam restorations on the first four permanent molars. (R 678) The filling work appeared to be of the same technique that Dr. Bass employed in an amalgam restoration. (R 678) However, Dr. Bass was able to say only that it was his method of doing work. He was unable to say with certainty that it was definitely his work. (R 681-682) Dr. Bass testified that the amalgam restorations on the four first permanent molars of the skull corresponded exactly with the restorations indicated on the dental chart of Cathy Scharf. (R 679) The teeth of the skull had no other dental work on any of the other teeth which also corresponded with the last time that Dr. Bass saw Cathy Scharf which was in 1967. (R 679-680, 682) Upon her last visit to Dr. Bass, Cathy Scharf still had 12 deciduous teeth (baby teeth). The skull that Dr. Bass examined had no deciduous teeth in it. (R 683)

On redirect examination, the prosecutor asked Dr. Bass if he had an opinion as to whether or not the teeth in the skull were those of Cathy Scharf. (R 684) The defense objected on the grounds that Dr. Bass had been qualified as an expert in dentistry but not forensic dentistry. (R 684) The objection was overruled and Dr. Bass testified that there was no doubt in his mind that the skull was that of Cathy Scharf. (R 684)

Appellant contends that Dr. Bass' conclusion that the skull was that of Cathy Scharf was beyond his expertise and qualifications as an expert witness. Dr. Bass had previously testified that the filling work of the teeth in the skull was similar to his technique of an amalgam restoration. Both the dental chart and the skull were introduced into evidence and the jury could have reached its own conclusion about the similarities between the two. Appellant submits that this comparison with the aid of Dr. Bass' unobjectionable testimony was within the ordinary understanding of the jury. Expert testimony should be excluded where the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form conclusions from facts. Johnson v. State, 393 So.2d 1069 (Fla. 1980); Nelson v. State, 362 So.2d 1017 (Fla. 3d DCA 1978). The jury was just as capable as Dr. Bass of reaching a conclusion on this ultimate issue.

An analogous case is that of Wright v. State, 348 So.2d 26 (Fla. 1st DCA 1977). A medical examiner testified that, from his examination of the body, the victim's injuries had been inflicted shortly prior to her being buried, allegedly

accidentally, by her husband's bulldozer, resulting in death by suffocation. This testimony constituted the principle element of the state's theory of premeditation. The doctor was a medical doctor who had done his residency in pathology and, thereafter, four years of forensic science and one year of forensic pathology. He testified that he was a specialist in pathology and had been employed as a forensic pathologist for seven years. He had been qualified as an expert witness in forensic pathology in excess of forty or fifty times. The appellate court held that his testimony that many of the deceased's injuries had not come from being run over by the bulldozer, but rather occurred shortly prior to being buried was beyond the competence of the medical examiner. Even though there was no objection at the trial level, the appellate court found that the doctor's testimony had such an effect on the verdict that its admission fell within the definition of fundamental error.

In the instant case there was a timely and specific objection that the question was beyond the realm of Dr. Bass' qualifications. (R 684) Appellant does not contest Dr. Bass' ability to testify concerning the similarities between certain filling work done on the skull's teeth and that of the dental chart of 10 year old Cathy Scharf. It was the ultimate conclusion of Dr. Bass that the skull of the victim was that of Cathy Scharf. This conclusion was beyond his expertise and qualifications. It was also an issue that the jury should have been allowed to reach its own conclusion about. The trial court's act in allowing the testimony over defense objection denied Appellant

his constitutional right to due process of law and to a fair trial. Amend. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla.Const.

POINT V

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S TIMELY AND SPECIFIC OBJECTION AND EXCUSING THE DEPUTY CLERK OF THE COURT FROM THE RULE OF WITNESS SEQUESTRATION AND ALLOWING HER TO TESTIFY THUS DEPRIVING APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

There was much discussion and argument concerning the method that the former testimony of John and Edith Scharf would be presented at trial. (R 696-703) Defense counsel simply wanted the typed former testimony to be introduced into evidence for consideration by the jury without formally presenting it to them in open court. (R 696-697) This objection was overruled as were other defense objections to the method of presenting the testimony. When the prosecutor announced his intention to call the deputy clerk of the court who was presiding at this as well as the previous trial, defense counsel objected, contending that the court as well as the court personnel should appear impartial. Defense counsel contended that the act of the clerk in testifying at trial destroyed this appearance of impartiality. (R 698) The purpose of the clerk in testifying was to establish the fact that the Scharfs had testified at the previous trial as well as to authenticate certain exhibits which had been introduced through the testimony of the Scharfs. (R 700, 705-713) Defense counsel pointed out that arrangements should have been made prior to trial for the deputy clerk of the court to be listed as a witness for purposes of trial and another deputy clerk could have presided at the instant trial. (R 701) Defense counsel also objected based upon the fact that the deputy clerk was now in

violation of the rule of sequestration. (R 701) The trial court overruled the objections finding that the testimony of Julie Black, Deputy Clerk of the Court, was purely administrative and did not result in any prejudice to the appellant. The trial court also announced her excusal from the rule of sequestration of witnesses. (R 701-702)

In the conduct of a trial, a judge is charged with the duty of administering the law fairly, honestly and impartially. Williams v. State, 143 So.2d 484 (Fla. 1962). Each step of the proceeding should be taken in an atmosphere of absolute impartiality, as the cold neutrality of both the court and the jury is indispensable to the administration of justice. Rockett v. State, 262 So.2d 242 (Fla. 2d DCA 1972). Especially in the trial of a capital case, the judge's neutrality should be unquestionable. Williams v. State, 143 So.2d 484 (Fla. 1962).

Appellant contends on appeal as he did at trial that the excusal of the deputy clerk of the court from the rule of sequestration and her action in testifying resulted in a loss of the trial court's appearance of impartiality. Appellant is not suggesting that the trial court was in fact not impartial. However, the fact that court personnel so closely associated with the trial judge as is the deputy clerk of the court who presides at trial, actually took the stand and testified as a witness affected the jury's perception of the trial court's impartiality. Due to the fact that the jury's perception of the trial court's impartiality became skewed, Appellant was denied his right to a fair and impartial trial. Art. I, §§ 9 and 16, Fla.Const.; Amends. V, VI, and XIV, U.S. Const.

POINT VI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE OF CORPUS DELICTI WAS INSUFFICIENT TO SHOW THAT THE CAUSE OF DEATH WAS THE CRIMINAL AGENCY OF ANOTHER THEREBY DENYING APPELLANT HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW.

At the conclusion of the state's case-in-chief, Appellant moved for a judgment of acquittal based upon the insufficiency of the evidence to prove the corpus delicti with respect to the element of a criminal agency of another person being the cause of death. (R 1007-1008) Counsel pointed out that the medical examiner was unable to pinpoint the cause of death. The trial court denied the motion, ruling that criminal agency had been sufficiently shown through evidence relating to the location of the body and the prior health and emotional well-being of the victim. (R 1008)

In homicide cases, as in other criminal cases, the corpus delicti cannot be proven solely by a confession or admission, and admissions or confessions are not admissible until the corpus delicti is proven independently of the confession. Jefferson v. State, 128 So.2d 132 (Fla. 1961); Smith v. State, 135 Fla. 835, 186 So. 203 (1939); Drysdale v. State, 325 So.2d 80 (Fla. 4th DCA 1976). The term "corpus delicti," as applied to any particular offense, means that the state must establish that the specific crime charged has actually been committed.

> The corpus delicti is made up of two elements: (1) that a crime has been committed, as for example, a man has been killed or a building has burned; and (2) that some person is criminally responsible for the act. It is not sufficient merely to prove the fact that

> the person died or the building burned, but there must be proof of criminal agency of another as the cause thereof. Sciortino v. State, 115 So.2d 93, 95 (Fla. 2d DCA 1959).

The purpose which underlies the rule is, "[T]o prevent a conviction on the sole basis of a defendant's misguided confession to a crime which did not occur". State v. Allen, 335 So.2d 823 (Fla. 1976); Ruiz v. State, 388 So.2d 610 (Fla. 2d DCA 1980). This reason is extremely important in the instant case. See Point II and (R 1249) It is submitted that, without reference to the appellant's confession, the state cannot prove corpus delicti of the crime charged in the instant case.

The three (3) elements which must be proved in order to establish the corpus delicti in a homicide case are: (1) the fact of death; (2) the identity of the decedent; and (3) the criminal agency of another person as the cause of death. Jefferson v. State, supra; Drysdale v. State, supra at 82-83; Jones v. State, 360 So.2d 1293, 1298 (Fla. 3d DCA 1978). The state must establish a prima facie showing of these three (3) elements in order for a confession to be admissible. Jones v. State, supra; Sciortino v. State, 115 So.2d 93 (Fla. 2d DCA 1959). The issue below and on appeal regarding this argument is the sufficiency of evidence to establish the third element: that the death was caused by the criminal agency of another.

This element in a homicide case means evidence that shows that the acts causing the death were not the results of natural or accidental causes, or by the decedent's own hand but were by the hand of another under such circumstances that the

killing would amount to homicide in any of its degrees. Jefferson v. State, supra, at 135-136; Drysdale v. State, supra at 83. The state's proof, then, must exclude the reasonable possibility of suicide or natural or accidental death.

The state wholly failed to meet this burden in the instant case. The only witness presented by the state in an attempt to establish cause of death was Dr. Raul G. Molina, the pathologist who performed the autopsy. Dr. Molina was unable to determine the cause of death due to the decomposition of the body. (R 611-613, 620-621) Dr. Molina was able to rule out trauma to the skull, face, neck or body as a cause of death. (R 624) Around the body was a brownish spot which was possibly blood. (R 626) While samples of the substance were taken, there was no evidence of test results. (R 632) Dr. Molina was unable to rule out stabbing as the cause of death but he was also unable to rule out drug overdose, heart attack, cancer, brain tumor, pneumonia, asthma, or thousands of other illnesses. (R 635-637)

At one point Dr. Molina testified that the victim's death was not a natural one. (R 637) However, when confronted with a prior inconsistent statement, the doctor agreed that natural death could not be ruled out but the circumstances suggest that the body could have been stabbed. (R 639-640)

While some circumstantial evidence was offered by the state on the issue of corpus delicti, the appellant contends that it is willfully lacking. The trial judge appeared to rely in part upon the fact that the body was covered with palmfronds when

discovered. On this point, it is interesting to note that Investigator Kindrick did not check to see if the fronds were cut or broken. (R 791-792) From the evidence of the extreme mass of vegetation in the area, it is easy to assume that loose palmfronds could have fallen or blown on top of the body. The victim's stable state of mind prior to her disappearance is of minimal significance.

The instant case is easily distinguishable from this Court's opinion in Bassett v. State, ___ So.2d ___, 9 FLW 89 (Fla. S.Ct. Case No. 58,803, 3/8/84). This Court held that corpus delicti had been sufficiently established under somewhat similar circumstances. However, in Bassett, supra, two skeletons were found on top of each other and one had a fractured jaw and an injured rib, both of which occurred at or near the time of death. Perhaps most importantly, the medical examiner in Bassett rendered an expert opinion that within a reasonable medical certainty, the victims died as the result of another's criminal act. This is completely lacking in the instant case. The state has thus failed to rule out accidental, natural or suicidal cause of death, and has failed to establish that the cause of death was by the hands of another. Corpus delicti is lacking in this case. The trial court erred in denying the motion for judgment of acquittal.

POINT VII

THE TRIAL COURT ERRED IN CONDUCTING PORTIONS OF THE TRIAL WITHOUT THE PRESENCE OF THE APPELLANT THEREBY DENYING HIM HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL STAGES OF THE TRIAL GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The appellant was not present on two occasions during his trial proceedings. The first instance occurred on July 14, 1983, during a status conference prior to the first trial which ended in a mistrial. Appellant's counsel's requests that Mr. Stano be present for all hearings including the one held that date were denied. (R 1737-1743) The second absence occurred when the jury submitted written questions to the trial court including an inquiry as to whether or not they had all of the evidence as well as a request for a tape recorder to play Appellant's confessions. Although the prosecutor was concerned by Appellant's absence, defense counsel waived Mr. Stano's presence and the trial court approved. (R 1132-1134) The answer to their questions were composed and given to the jury without Appellant's presence.

A criminal defendant has the constitutional right to be present at stages of his trial where fundamental fairness might be thwarted by his absence. Snyder v. Massachusetts, 391 U.S. 97 (1934); Francis v. State, 413 So.2d 1175 (Fla. 1982). This Court held in Francis, supra, that a defendant was entitled to a new trial where he was involuntarily absent during a portion of jury selection (specifically during the exercise of peremptory challenges). It made no difference that his counsel waived his

presence since Francis did not personally acquiesce in or ratify this waiver. Recently, in Herzog v. State, 439 So.2d 1372 (Fla. 1983), this Court held that the voluntary absence of a defendant during a defense motion to suppress certain photographs was not error in spite of the waiver of the defendant's presence by his counsel. The underlying rationale of the court was based upon the fact that the absence was voluntary and was not during a crucial stage of the trial. The motion hearing dealt with the defense's request to suppress certain photographs as evidence. The trial court elected not to rule on the admissibility of the photos at that time, but rather, to rule on the photos individually before they were introduced. In reaching this holding, this Court specifically declined to answer the question of whether a defendant's involuntary absence, during a non-crucial stage of the trial for a capital offense, would be error.

Certainly, Rule 3.180, Florida Rules of Criminal Procedure, would not indicate that either of the instances in the case at hand was a crucial stage of trial. The rule does not recite either instance as being one where the presence of the defendant is mandated. However, Appellant contends that the rule is not exclusive. Evidently, trial counsel below was of the opinion that Mr. Stano's presence at the status conference was critical since he objected on numerous occasions to his absence. While the consideration of written questions by the jury may not at first glance appear to be a crucial stage, Appellant contends that a defendant in a capital case has a per se right to be present at all stages whether or not an appellate court considers

it a crucial stage. Appellant contends that every stage is crucial to a capital defendant. This arises from his right to participate, at least on a limited basis in his defense. See Faretta v. California, 422 U.S. 806 (1975). This Court has held in the past that any communication with the jury outside the presence of the prosecutor, defendant and defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless. Ivory v. State, 351 So.2d 26 (Fla. 1977). Ivory, supra, specifically overruled Kimmons v. State, 178 So.2d 608 (Fla. 1st DCA 1965) to the extent that it was in conflict with the Ivory opinion. Kimmons, supra, held that the sending of a written instruction to the jury, in the absence of the defendant and his attorney, is at most an irregularity which could not require reversal when no prejudice is shown to have resulted.

Appellant contends that both stages in the proceedings below where crucial stages of trial as are all stages of trial. Since Gerald Stano did not voluntarily absent himself from these proceedings, he was denied his constitutional right to be present at all stages of his trial. A new trial is mandated. Amend. VI and XIV, U.S. Const.

POINT VIII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S TIMELY AND SPECIFIC OBJECTION AND ALLOWING THE STATE TO CONDUCT AN EXTENSIVE, IRRELEVANT AND PREJUDICIAL CROSS-EXAMINATION OF THE APPELLANT DURING THE PENALTY PHASE AS WELL AS ENGAGE IN IMPROPER ARGUMENT THUS DEPRIVING APPELLANT HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

The appellant testified in his own behalf at the penalty phase. (R 1820-1841) During direct examination, the appellant testified that he confessed to numerous murders because of his realization that he needed psychiatric help. (R 1821-1822) On cross-examination, Mr. Stano admitted to the murders of numerous girls. He maintained that he pled guilty to all of the murders of which he was guilty, but denied that he had killed Cathy Scharf. (R 1825-1828, 1831-1835) At the time of trial, Mr. Stano had been sentenced to death on two Volusia County murders and had received sentences of life imprisonment on all of the other crimes. (R 1839) Focusing in on the two Volusia County cases which resulted in death sentences, the prosecutor elicited testimony that Mr. Stano pled guilty to those two murders and waived his right to an advisory jury at the penalty phase. Mr. Stano took this action with no assurances as to what his sentence might be. (R 1834-1835) The prosecutor seemed incredulous that Mr. Stano held out any hope that he would receive life sentences on these two cases when he entered his pleas. (R 1835-1836)

The following inquiry then occurred:

MR. MOXLEY (prosecutor): Question... Do you plan to collaterally attack the competency of your lawyer; do you plan to attack the competency of your lawyer on appeal---

MR. FREELAND (defense counsel): I'm going to object, this is irrelevant.

THE COURT: Overruled.

Question (by Mr. Moxley): Do you plan to attack the competency of your lawyer-- who was your lawyer? Howard Pearl, right?

Answer: Yes.

Question: He was your lawyer. You have an automatic appeal from those two death penalties you received by Judge Foxman, don't you?

Answer: Yes, I have.

Question: Are you going to appeal?

Answer: Yes, I am.

Question: Are you going to raise any and all errors that you can possibly see as a result of those two death penalties that Judge Foxman gave you? Are you?

Answer: Yes, sir.

Question: Are you going to attack the competency of your lawyer, Howard Pearl?

Answer: I haven't had a chance to consult with my appeal attorney at this time.

Question: But it is not the same person as Howard Pearl, is it?

Answer: No, sir, it's not. That's the Seventh Judicial, is what Howard Pearl worked for. My appeals are in the Fifth.

> Question: Are you going to explain to that appellate attorney, of course, the reason that you pled and the reason that you waived a jury trial before the same Judge who told you he wanted to give you death, right; you're going to do that, you're going to tell him that, aren't you?
>
> Answer: (no response).
>
> Question: Yes, I agree, you are.
>
> Answer: Yes, I am.
>
> (R 1836-1837)

Later, on recross, the prosecutor again explored this territory:

> Question: Would it be a fair statement, sir, that the reason you don't admit Cathy Scharf is you don't want to have a good appeal case go to the Supreme Court of Florida so that the death penalty will actually be affirmed; is that another reason why you denied Cathy Scharf's case?
>
> Answer: I don't follow you on that.
>
> Question: I know you don't....
>
> (R 1840)

Appellant contends on appeal that the prosecutor's line of questioning on cross-examination of Mr. Stano was totally irrelevant, beyond the scope of direct examination, assumed facts not in evidence and constituted evidence of a non-statutory aggravating circumstance. Appellant also contends that the prosecutor engaged in flagrant misconduct which resulted in a denial of Appellant's right to a fair trial.

The prosecutor did not stop with the improper questioning. He also argued during closing argument that Mr. Stano should be given the death penalty on this case due to the

likelihood that the two death sentences received on the Volusia County cases would eventually be reversed. (R 1276) He further stated in closing argument over a timely and specific defense objection that, "The reason we are here is because we believe there is a need for one valid appeal proof death penalty, given the amount of time and effort that must be expended in court--". (R 1279) This was clearly improper and inflammatory thus requiring a new penalty phase.

The prosecutor's belief that Mr. Stano's two death sentences arising from Volusia County is nothing more than that, his personal belief. It has no basis in fact and consequently, assumed facts not in evidence. In effect, the questioning and argument constituted direct testimony by the prosecutor. It is well established that it is highly improper for an attorney to state facts of his own knowledge which are not in evidence. United States v. Rodriguez, 585 F.2d 1234 (5th Cir. 1978); Fla.Bar.Code Prof.Resp., E.C. 7-24; ABA Code Prof.Resp. B.R. 7-106(c). It is error for a prosecutor to imply that he has additional knowledge about the case which has not been diclosed to the jury. Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982). This was what the prosecutor did in this case. The error was compounded by the fact that the argument and questioning dealt with a different case of Stano's and its effect on his ultimate fate.

The Supreme Court of the United States has observed that the average juror has confidence that the obligations which so plainly rest upon the prosecuting attorney will be faithfully

observed. Consequently, the Court noted, improper suggestions, insinuations, and assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. Berger v. United States, 295 U.S. 78, 88 (1975).

In essence, the prosecutor was telling the jury that they should recommend the death penalty in the instant case because it was the prosecutor's opinion that the death sentences currently imposed upon Mr. Stano would not survive the initial appeal. This also constitutes evidence of an argument on a non-statutory aggravating circumstance. This is clearly prohibited under the case law. Proffitt v. Florida, 428 U.S. 242 (1976); Elledge v. State, 346 So.2d 998 (Fla. 1977). The argument can be analogized to a prosecutor arguing that a defendant's young age should be considered as an aggravating circumstance rather than mitigating since he could be paroled if he weren't sentenced to death. Such would clearly constitute improper argument as to a non-statutory aggravating circumstance. See Teffeteller v. State, 439 So.2d 840 (Fla. 1983) Since this undoubtedly had a great effect upon the jury's recommendation for death, a new sentencing hearing is required.

Not content with improperly questioning the appellant about his future attacks on his past lawyer's effectiveness, the prosecution corss-examined on matters outisde those offered in mitigation, thereby attempting to force him to prove aggravating circumstances for the state. In State v. Dixon, supra, this Court condemned such a practice in the following manner:

> Another advantage to the defendant in a post-conviction proceeding, is his right to appear and argue for mitigation. The state can cross-examine the defendant on those matters which the defendant has raised, to get to the truth of the alleged mitigating factors, but cannot go beyond them in an attempt to force the defendant to prove aggravating circumstances for the state. A defendant is protected from self-incrimination through the Constitutions of Florida and the United States. Fla. Const., art. I §9, F.S.A., and U.S. Const., Amend. V. In no event, is the defendant forced to testify. However, if he does, he is protected from cross-examination which seeks to go beyond the subject matter covered on his direct testimony and extend to matters concerning possible aggravating circumstances.

283 So.2d at 7-8.

Gerald Stano testified in mitigation solely to his mental problems, his cooperation with the police, and his feelings for other people. (R 1820-1823) The prosecutor then cross-examined Stano in detail regarding his past murders and his appeal of his two death sentences. This is clearly in violation of the dictates of State v. Dixon, Id. Appellant offered four pages of testimony in mitigation while the state used nineteen pages of cross-examination, the majority of which improperly dwelled upon aggravating circumstances. To allow such testimony places an undesirable chill on his exercise of the right to testify in mitigation. Such a procedure alone would deny a defendant due process of law and constitute cruel and unusual punishment.

Section 921.141(1), Florida Statutes (1983), permits, at the penalty phase, the introduction of any evidence deemed

relevant to the nature of the crime, the character of the defendant and pertaining to the aggravating or mitigating circumstances. Defense counsel's timely objection that the line of inquiry was totally irrelevant was imminently correct and should have been sustained by the trial court. The improper questioning and argument did nothing but inflame the jury such that they voted to recommend the ultimate sanction. Appellant fails to discern any possibility that such error could be considered harmless. An order vacating the death sentence and remanding for a new sentencing hearing is the only conceivable solution. Amend. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

POINT IX

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S NUMEROUS OBJECTIONS AND ALLOWING CONTINUING TESTIMONY, EVIDENCE AND ARGUMENT CONCERNING SPECIFIC DETAILS ABOUT APPELLANT'S PRIOR CAPITAL CONVICTIONS RESULTING IN THAT EVIDENCE BECOMING A FEATURE OF THE PENALTY PHASE THEREBY DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

One aggravating circumstance that the state may attempt to prove is that the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. §921.141(5)(b), Fla.Stat. Prior to the commencement of the penalty phase, defense counsel offered to stipulate to this aggravating circumstance. (R 1148) Defense counsel stated that he recognized that the state normally is allowed to present some details of the prior convictions, but expressed fear that this evidence would become the focal point of the entire penalty phase. The trial court agreed with the state that the evidence was admissible and suggested that Appellant object on an individual basis. (R 1152) The state refused to accept Appellant's stipulation to this aggravating circumstance. (R 1152-1153)

Throughout the penalty phase extremely detailed evidence and testimony was permitted over objection concerning the murders of Mary Carol Maher, Ann Arceneaux and Janine Ligotino. The autopsy protocal on Ms. Maher was admitted as well as several color slides of her dead body. (R 1174-1176, 1179-1180, 1189) Stano's detailed confession concerning the murders of Maher, Arceneaux and Ligotino was also introduced at the penalty phase. (SRA 1-40; R 1192, 1200-1203) Body photographs and autopsy

reports were also introduced concerning the murders of Arceneaux and Ligotino. (R 1199-1200) In addition to this evidence, the prosecutor also relied heavily upon these murders during his closing argument to the jury. (R 1269-1272, 1276)

Appellant recognizes that the general rule in Florida is to allow evidence at the penalty phase concerning the events which resulted in the prior convictions. Elledge v. State, 346 So.2d 998 (Fla. 1977). However, Appellant contends on appeal as he did at trial that the extreme detail and large amount of testimony, evidence and argument concerning Appellant's prior murder convictions resulted in this becoming a feature of the penalty phase. Appellant was thus denied his right to a fair and impartial proceeding. A defendant is entitled to a fair and impartial penalty proceeding, free from prejudicial and inflammatory statements. Singer v. State, 109 So.2d 7 (Fla. 1959).

A mere counting of pages of the transcript of the penalty phase reveals that most of the time was used to deal with the details of Stano's previous murders. Almost all of the physical evidence introduced by the state dealt with the prior offenses. The majority of the witnesses presented by the state also testified solely about the prior crimes.

While some evidence and testimony is understandable, Appellant contends that the state simply went too far in the instant case. Appellant wishes to analogize the instant situation with that presented in Williams v. State, 117 So.2d 473 (Fla. 1960). Williams held that the state may not make a prior

or subsequent offense a feature instead of an incident of the trial. The court expressed concern that the testimony of collateral crimes degenerates from the development of facts pertinent to the issue of guilt into a character attack. Appellant recognizes that Williams dealt with the guilt phase of a non-capital offense. However, Appellant is attempting to draw an analogy. While normally such evidence is not admissible in criminal trials, it is admissible as Williams Rule evidence under certain circumstances. However, just as Williams v. State, supra, prohibits such evidence from becomming a feature instead of an incident at trial, Appellant contends that a similar rule should be adopted in capital cases regarding the introduction of evidence of prior crimes at the penalty phase. Otherwise, a captial defendant's prior criminal acts become the focal point at trial and result in a denial of a defendant's constitutional right to a fair proceeding. Amend. V, VI, VII and IX, U.S. Const.; Art. I, §9, Fla.Const.

POINT X

APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED IN VIOLATION OF THE STATUTE, ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. Mitigating factors, not found by the trial court, were present thus violating Appellant's constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

Evidence presented at the penalty hearing through the introduction of Dr. McMillan's report as well as the testimony of Gerald Stano clearly established strong statutory and non-statutory mitigating circumstances. A review of these mitigating factors clearly demonstrates that any proper aggravating factors were outweighed by these circumstances. This evidence includes but is not limited to the following factors.

Appellant was under the influence of extreme mental or emotional disturbance when the crime was committed thus establishing the statutory mitigating circumstance set forth in Section 921.141(6)(b), Florida Statutes (1983). Additionally, Stano's capacity to conform his conduct to the requirements of the law was substantially impaired thus establishing the mitigating circumstance set forth in Section 921.141(6)(f).

At the sentencing hearing, the report and tests of Dr. Ann McMillan was stipulated into evidence. (R 1265) It is true that the state presented the testimony of two witnesses who disagreed with the conclusions of Dr. McMillan. (R 1203-1249) The trial court adopted the finding of these two psychiatrists in rejecting the two statutory mitigating circumstances. (R 2232)

In so doing, the trial court clearly overlooked the extensive nature of Dr. McMillan's examinations, interviews and tests. Her report offers much more detail than that of the testimony of the two psychiatrists presented by the state. In addition to administering certain tests which the other doctors failed to do, Dr. McMillan conducted a three and one-half hour interview of Stano's parents, examined the extensive documentation of his life, and spent six and one-half hours evaluating, interviewing and testing Mr. Stano personally.

It should also be noted that defense counsel objected to doctors Carrera and Barnard testifying concerning the applicability of the two statutory mitigating circumstances relating to a defendant's mental status based upon the fact that the two psychiatrists had not examined Mr. Stano regarding the instant offense. (R 1211, 1242) Appellant also predicates the trial court's error on this ground.

The trial court also rejected Appellant's extremely harsh early childhood as a non-statutory mitigating circumstance. The trial court concluded that while the evidence showed that Gerald was abused from birth to approximately six months of age, he later received adequate care and treatment from his adoptive family. (R 2233) The trial court pointed out that both psychiatrists testified that abused children do not necessarily turn out to be premeditated murderers. (R 2233) This completely overlooks the fact that Gerald's problems did in fact arise from his early childhood. While not all abused children grow up to become murderers, this is not to say that an individual can control his

destiny in this regard once he has been the victim of such treatment.

The trial court also rejected the fact that the appellant had confessed to committing numerous capital offenses. (R 2234) The trial court concluded that this mitigating circumstance would not apply since the appellant denied that he had in fact killed Cathy Lee Scharf. In effect, the trial court is punishing the appellant for maintaining his innocence in this particular case. The defense proffered evidence that the appellant had falsely confessed to two other murders in the past. (R 1675-1677, 1785-1817) Appellant contends that it is fundamentally unfair for the trial court to punish the appellant as a result of his exercise of his constitutional rights to protest his innocence.

The trial court incorrectly rejects Gerald Stano's musical abilities as a mitigating circumstance, stating that no evidence thereof was offered. (R 2234) This only indicates the trial court's lack of attention to Dr. McMillan's report which clearly states that the only area in which Gerald did well was the field of music. (SRB 93)

Gerald Stano also chose to testify at the penalty phase. He testified that he realized that he needed help and this was the reason for his confessions. He testified that the trial proceedings had changed him resulting in his development of feelings for his victims and their families as well as his own parents. He pointed out that all of his convictions were the direct result of his confessions. (R 1820-1822)

Appellant contends that the trial court erred in totally rejecting all mitigating factors, both statutory and non-statutory. The evidence established certain mitigating circumstances which Appellant submits weigh heavily against any aggravating factors and call for the reduction of Stano's sentence to life imprisonment.

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

The trial court concluded that the murder was committed while the defendant was engaged in the commission of or an attempt to commit the crime of kidnapping. (R 2231) The court cited the fact that Stano picked up the victim "under the pretense of taking her to a nearby skating rink, instead he drove south, struck her to keep her quiet, drove approximately thirty miles to a remote area in Brevard County, Florida, where he detained her for approximately an hour before finally killing her. Defendant's vehicle was equipped with special door locks to hinder escape." (R 2231)

Initially, Appellant contends that the underlying felony must be proven by proof independent of Stano's statements. In finding direct evidence of kidnapping, the trial court relied exclusively upon Stano's statements regarding details of that day. Appellant contends that the trial judge's finding of a kidnapping, when there was no evidence of such other than statements made by the appellant, violated the corpus delicti principle.

This Court considered a similar argument in Smith v. State, 407 So.2d 894 (Fla. 1981), wherein Smith contended that the trial court erred in finding a significant history of prior criminal activity where the only evidence of such came from statements made by Smith. In holding that the trial judge's finding did not mandate reversal, this Court pointed out that the lack of a significant history of prior criminal activity was a mitigating factor. This Court seemed to distinguish the situation based upon the fact that the trial court's finding involved a mitigating circumstance rather than an aggravating circumstance, pointing out that only aggravating circumstances must be proven beyond a reasonable doubt. Id. at 901. Since the instant case involves the aggravating circumstance (d), i.e. during the commission of a kidnapping, the corpus delicti principle would apply. This is logical since aggravating circumstances must be proven beyond a reasonable doubt, and under the corpus delicti principle, independent proof of a crime other than a confession is required before one may be convicted. Sciortino v. State, 115 So.2d 93 (Fla. 2d DCA 1959). Therefore, the trial court's finding of this aggravating circumstance must be stricken on that basis alone.

Furthermore, it is clear that the state failed to prove a kidnapping beyond a reasonable doubt as required by State v. Dixon, 283 So.2d 1 (Fla. 1973). The evidence established that Stano picked up the victim while she was hitchhiking. This was done voluntarily on her part. The evidence also established that on the drive south, the couple stopped at a small park by a

river. (R 869) His confession to Paul Crow indicated that the couple argued and that Stano immediately stabbed or shot her. (R 870) Any movement would certainly be incidental to the crime of murder under these facts. Harkins v. State, 380 So.2d 524 (Fla. 5th DCA 1980). Even under the details of the statement testified to by Clarence Zacke, Appellant contends that the evidence does not establish beyond a reasonable doubt that a kidnapping occurred. (R 893-897) This also holds true for the statement given to Johnny Manis. (R 973) There was absolutely no evidence that the appellant had installed the anti-theft door locks in order to hinder the escape of anyone. It is just as consistent that he was protecting his automobile from theft.

We confront once again the problem of which statement of Stano to utilize. Should the trial court and this Honorable Court be allowed to pick and choose various facts from each of the various conflicting statements in order to find and uphold certain aggravating factors. Appellant thinks not. This would be fundamentally unfair.

C. The trial court incorrectly found aggravating circumstance (h) thus violating Appellant's constitutional rights guaranteed by the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

In finding that the murder was especially heinous, atrocious or cruel, the trial court cited details contained in Clarence Zacke's testimony regarding the "jailhouse confession" which Gerald Stano allegedly made to Zacke. (R 2231) Appellant contends that this was error. In picking and choosing among the

various statements given by Gerald Stano regarding this murder, the trial court arbitrarily selected the least credible evidence. This evidence was not even available at the first trial. Zacke admitted that he was in the business of trading testimony for concessions from the state. He had previously had a presumptive parole release date of 1999. At the time of trial, Zacke was of the opinion that he would be released in 1985. In exchange for his testimony against Stano, the state had returned a confiscated pickup truck to Sherry Zacke and was also attempting to secure his transfer from Florida State Prison to a more pleasant institution. This transfer had in fact been requested by the state. It is interesting to note that Mr. Zacke came forward only after the initial mistrial. (R 905-913)

In contrast, Stano's confession to Sergeant Paul Crow as well as the one to Johnny Manis contained details of the killing which would not support a finding that it was heinous, atrocious or cruel. (R 869-870, 973-974)

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

In Huckaby, supra, at 34, this Court held that the mitigating circumstances (which had not been found by the trial judge) must outweigh those in aggravation because of the heinous nature of the crime was the direct consequence of the defendant's mental problems. Similarly in Miller v. State, supra, at 886, this Court again noted that the heinous nature of the offense resulted from the defendant's mental impairment. See also Jones v. State, 332 So.2d 615, 619 (Fla. 1976). Additionally, the trial court relied solely on Appellant's various confessions in finding this circumstance. This violates the corpus delicti principle. Appellant incorporates the argument on this issue set forth in Point X, B.

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

While Appellant recognizes that this Court has rejected the initial contention in this subpoint, Appellant contends that the application of this aggravating factor renders the statute unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution. Section 921.141, Florida Statutes (1979) was amended by adding (i)(cold and calculated). Application of this aggravating circumstance to this particular case is violative of the appellant's constitutional protection against ex post facto laws, since the crime was committed in 1973 or 1974, while the statute was amended in July of 1979. This

contention is raised in spite of this Court's holding in Combs v. State, 403 So.2d 418 (Fla. 1981). Defense counsel specifically objected on these grounds below. (R 1255)

In finding that this aggravating circumstance was established, the trial court cited, "careful preparations for his actions by equipping his vehicle with special locks which made it difficult if not impossible for his victim to escape." (R 2232) The court also cited the thirty mile distance from the point of initial encounter to the scene of the death. The court once again relied upon the testimony of Clarence Zacke regarding the alleged details of murder. The court also cited Stano's concern with the condition of his vehicle and clothes rather than the life of the victim. (R 2232)

Appellant fails to see how Stano's concern with his vehicle and clothes relates to the finding that the murder was cold, calculated and premeditated. Appellant can see absolutely no connection, especially since this concern was apparently after the murder.

We once again encounter the difficulty of the fact that the state introduced testimony relating three different and conflicting statements by Stano concerning details of the crime. Once again, the trial court chose to select the most incredible testimony, that of Clarence Zacke.

Appellant also disputes the trial court's finding that the anti-theft locks were placed on Stano's car specifically to hinder the escape of Cathy Lee Scharf. The evidence is just as consistent with Stano protecting his car from theft. Certainly

the evidence does not meet the level required to establish an aggravating circumstance. State v. Dixon, 283 So.2d 1 (Fla. 1973).

The fact that a distance of thirty miles separated the initial point of encounter and that of the scene of the murder does not establish this circumstance. There is no evidence that Stano knew of the ultimate result of the encounter. The evidence could be just as easily construed to conclude that Stano decided to kill Scharf once they reached the scene. It must be remembered that the level of premeditation required to establish this circumstance is much higher than the level of premeditation to convict in the guilt phase of a first degree murder trial. Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982). This Court has noted that this aggravating factor "ordinarily applies to those murders which are characterized as executions or contract murders, although that description is not meant to be all-inclusive." McCray v. State, 416 So.2d 804, 807 (Fla. 1982). Certainly the evidence does not establish beyond a reasonable doubt the high level of premeditation necessary to support a finding of this factor.

Additionally, Appellant again adopts the corpus delicti argument set forth in Point X, B.

E. Conclusion

Accordingly, Gerald Stano's death sentence was based in substantial part on improper and unsupported aggravated factors. In addition, the sentencing judge ignored evidence of strong and

material mitigating factors. These errors are not harmless; the judge utilized these erroneous findings and standards in sentencing Stano to the violent termination of his life. Gerald Stano's death sentence must be vacated and remanded for the entry of a life sentence.

POINT XI

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. A motion to declare Florida's death penalty unconstitutional was filed by the appellant and denied by the trial court. (R 1728, 2458-2459)

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). This contention was raised below at trial. (R 1774-1777, 2446-2449)

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, 446 U.S. 420 (1980).

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

Execution by electrocution is a cruel and unusual punishment. Amend. VIII, U.S. Const.

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

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968). This contention was specifically raised below. (R 2368)

The trial court also erred in granting the state's challenge for cause as to juror Nattile over defense objection. (R 210-211) Nattile was opposed to the death penalty and stated his inability to consider it as a possible punishment. However this would not prohibit him from being fair and impartial in the determination of guilt or innocence. (R 29, 60-64, 87-88, 115-116, 123, 160, 210-211) Appellant contends that juror Nattile's statements fall far short of the certainty required by Witherspoon, supra. See also Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983).

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. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based upon the foregoing cases, authorities and policies, Appellant respectfully requests that this Honorable Court grant the following relief:

1. As to Point VI: Vacate the judgment and sentence and remand for discharge;

2. As to Points I, II, III, IV, V and VII: Vacate the judgment and sentence and remand for a new trial;

3. As to Points VIII and IX: Vacate the death sentence for the imposition of a life sentence or, in the alternative, for a new penalty phase;

4. As to Point X: Vacate the death sentence and remand with instructions to impose a life sentence;

5. As to Point XI: Declare the death penalty unconstitutional, vacate the death sentence and remand with instructions to impose a life sentence.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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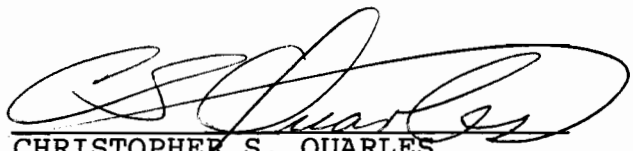
ATTORNEY FOR APPELLANT

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 32014 and Mr. Gerald Eugene Stano, Inmate No. 079701, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 12th day of July, 1984.



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