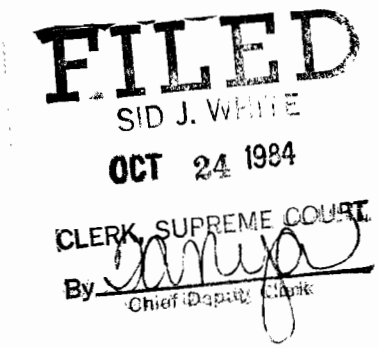
IN THE SUPREME COURT OF FLORIDA



ROBERT LARRY GIBSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 65,030

APPEAL FROM CIRCUIT COURT, CRIMINAL
DIVISION OF THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
Circuit Court Case No, 76-5794

APPELLANT'S FIRST BRIEF

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APPELLANT IS PRESENTLY ON DEATH ROW

IN THE SUPREME COURT OF FLORIDA

ROBERT LARRY GIBSON, *

Appellant, * CASE NO. 65,030

v. *

STATE OF FLORIDA, * REQUEST FOR ORAL ARGUMENT

Appellee. *

* * * * * * * * * * * * * * *

Appellant herein request oral argument pursuant to Rule 9.320 Fla.R.App.Pro.

CERTIFICATE OF SERVICE

I hereby certify that a true motion was hand/mailed delivered this 22nd day of October, 1984 to the Attorney Generals Office, 401 Northwest 2nd Avenue, Suite #820, Miami, Florida.

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES:

OTHER AUTHORITIES:

POINTS ON APPEAL

I. THE TRIAL COURT FAILED TO PROTECT THE APPELLANT'S RIGHTS BY IMPROPERLY CONSTRUING THE RULE 3.213 PROVISIONS.

II. THE APPELLANT'S RIGHT TO EFFECTIVE ASSISTANCE COUNSEL WAS DENIED BY TRIAL COUNSEL.

III. THE ACTION'S OF THE TRIAL COURT CAUSED THE INEFFECTIVENESS OF COUNSEL'S ASSISTANCE.

IV. THE TRIAL COURT INCORRECTLY APPLIED THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL LANGUAGE AS ONE OF THE AGGRAVATING CIRCUMSTANCES IN SENTENCING APPELLANT TO DEATH.

STATEMENT OF THE FACTS AND THE CASE

Robert Larry Gibson was arrested in June 1976. (R.520). A three-count indictiment charged the 21-year old Gibson with first degree murder, involuntary sexual battery and burglary.(R.1,3a). Gibson gave a confession alleging the following facts: Gibson taking advantage of an open window, entered the victim's apartment late at night. The victim and a child were sleeping in different rooms in the apartment. Gibson saw the victim who was a 27 year old woman. He left the apartment and sought a blunt instrument. When he returned to the apartment, the victim was still asleep. He struck her twice over the head with the instrument to keep her quiet. (R.461,462). He raped her.(R.457-481). The victim was found dead the next morning.

On July 15, 1976, the trial court ordered a psychiatric evaluation of the Gibson. (R.21). Three court-appointed psychiatrists evaluated him and submitted reports to the court. Each of the psychiatrists found the Gibson was competent to stand trial. (R.518,522,530).

On August 12, 1976, the Court then entered an order adjuding the Defendant competent.(R.24). The Defendant was put in the custody of prison officials.

In a memo dated September 22, 1975, the prison psychiatrist, Dr. A. C. Casademont, stated that the Defendant was dangerous to himself and to others and appeared "very paranoid".(Appendix A). On September 24, the Court ordered a

psychiatric re-evaluation. (R.29). On October 13, 1976, when the psychiatrist reports were submitted, and after a hearing, the Court entered two orders. The Court adjudged the Defendant incompetent and ordered him committed to the Division of Mental Health pursuant to Fla.R.Crim.P. 3.210.(R.28,30).

Later after a period of time which spanned over seven years the Appellant was tried by jury beginning on January 30, 1984 and ending in convicted a sentence of Death on February 3, 1984. (R.4-19). This is an appeal from that judgment and sentence. Hence, this Court has jurisdiction here and decide this appeal.

ARGUMENT

I. THE TRIAL COURT FAILED TO PROTECT THE DEFENDANT'S RIGHTS BY IMPROPERLY CONSTRUING THE RULE 3.213 PROVISIONS.

In 1976, Rule 3.210 provided that during the period of a defendant's hospital committment, the hospital is required to submit to the trial court periodic written reports relating to the Defendnats's condition. The reports must state: whether (1) there was a substantial probability that the Defendant would become competent to stand trial within the foreseeable future and (2) whether progress was being made toward that goal. In re Rules of Crim'l Procedure, 272 So.2d 65 (Fla. 1972). Fla.R.Crim.P. 3.210(3). If at any time a mental hospital finds the Defendant to be competent, it should release the Defendant to the Sheriff and notify the trial court that it did so. Upon receipt of such notification, the trial court is required to conduct a competency hearing. A criminal defendant shall not be proceeded against while he is incompetent. Cioli v. State, 303 So.2d 82,83 (Fla. 4th DCa 1974), Jones v. State, 421 So.2d 55,57 (Fla. 1st DCA 1982).

Chapter 394 of the Fla. Statutes, known as the "Baker Act" sets forth legislative standards and procedures regarding the retention and release of mentally ill persons who are committed to mental hosptial. The Baker Act requires the

appointment of hearing examiners to conduct hearings to determine whether continued hospitalizaiton is warranted. The hearing orders are appealable. Fla Stat. §394.457(6)(b)(1982). In addition, the Baker Act confers on involuntary mental patients the right to seek release from the hospital by writ of habeas corpus, Fla. Stat. §394.459(10)(1982).

A Section of the Baker Act was addressed to persons involuntarily comfined in a mental hospital under the Florida Rules of Criminal Procedure

At each hearing, the defendant is entitled to numerous procedureal protections. He is entitled to have an attorney present, to present evidence in his defense and to crossexamine witnesses against him. He has the right to release if he does not meet the criteria for involuntary hospitalization. §394.467(4)(a), Fla. Stat. (1982). In Florida, the legal standard to determine whether a person can be involuntarily committed to a mental hospital is whether there is reason to believe that he (1) is mentally ill and because of his illness is likely to injure himself or other is allowed to remain at liberty of (2) is in need of care or treatment which, if not provided, may result in neglect or refusal to care for himself and such neglect or refusal possess a real and present threat of harm to his well-being. §394.467(1)(b), Fla. Stat. (1981).

In 1980, Fla.R.Crim.P. 3.213 was enacted Rule 3.213 provides a safeguard to prevent indefinite confinement of an incompetent defendant prior to trial. Being a rule of

procedure, 3.213 is applicatle to the defendant although his case arose before the rule was enacted. Warwick v. State. Rule 3.213 provides that "at any time after 5 years after determining a person incompetent to stand trial when charged with a felony" a court shall dismiss the charges against the Defendant after a hearing if the court determines (1) that the Defendant remains incompetent to stand trial (2) "there is not substantial probability that the Defendant will become mentally competent to stand trial in the foreseeable future", and (3) the Defendant "does not meet the criteria for involuntary hospitalization set forth by law." Rule 3.213(a). The court also shall dismiss the charges if the court finds the existence of Criteria (1) and (2) above, but finds that the Defendant does meet the criteria for involuntary hospitalization. In the latter event, the Defendant may again be committed to the mental hospital. Rule 3.231(b). Rule 3.213 never provides that a criminal defendant should be set free because of his incompetency forever unmenaced by the threat of criminal charges. To protect against the result, with the Baker Act, when a person is subject to involuntary hospitalization and to be discharged of criminal charges pursuant to its provisions Rule 3.213 requires that the State Attorney be notified by the hospital before releasing him. Rule 3.213 advisory committee note (b). In addition, the Rule and the Statutes make the defense of the statute of limitations or the defense of former jeopardy inapplicable to criminal charges dismissed pursuant to Rule 3.213.

In the instant case, the Defendant was committed to the mental hospital not solely on the basis of his incompetence to stand trial, but also under civil commitment standards. For a period of five (5) years, the Defendant received mental health treatment and was evaluated. From time to time throughout the approximately seven (7) years of committment the Defendant was discharged from the hospital as competent and later recommitted after being adjudged incompetent.

In November, 1981, the trial court held a competency hearing. One of the psychiatrist who testified, Dr. Fallon, reported that the Defendant was incompetent to stand trial. Dr. Fellon testified that he could become competent when put in a hospital and "not confronted with the alleged offenses". (R.196). Dr. Fallon stated that the Defendant was "incapable apparently of tolerating" the stress of interacity with the attorney and of interacting in the courtroom.(R.197). The Court, upon hearing the testimony of two (2) psychiatrist as expert witnesses adopted Dr. Fallon's testimony and expressly found it "largely determinative of the court".(R.198).

The Court went on to state what effect Rule 3.213 had on his adoption of Dr. Fallons testimony:

> "I want the record to reflect as to issue No. 2, what effect, if any, this has on the Defendent's ability to,shal we say, beat the system. I am looking at you, Mr. Gibson, to tell you this. If you are under the assumption that with five (5) years at that hospital you can beat the criminal charges, you can forget it. Because number one (1),legally, as a matter of law, I have found you competent to stand trial. Therefore the five(5) rule is defeated". (R.199).

The court continued by stating: "Factually, I make the following findings: that there is a substantial probability that the Defendant will become mentally competent to stand trial in the foreseeable future. I base that on the fact I belive, as the doctor [Dr. Fallon] has expressed, that as soon as you get back to So. Fla., read just your enviornment, you become competent again to stand trial (R.199). Before the close of the hearing, and upon the suggestion of Dr. Fallon, the Defendant got a special recommendation for placement in the Behavior Disorder Program (R.201).

It is the duty of the appellant courts as well as the trial courts to protect interest of incompetent defendants whether their defenses be properly pleaded or not. Tretheway v. Tretheway, 115 So.2d 712, 714 (Fla. 2d DCA 1959). Cornelius v. Sunset Golf Course, 423 So.2d 567, 569 (Fla. 1st DCA 1982).

The Court made conflicting and irreconciable findings in the November 5, compentency hearing. The Court found that the Defendant "compentent as a matter of law". (R.199). The court erred in this finding since compentency is a factutal determination and cannot be determined as a matter of law. The Court also found that the Defendant evinced a substantial probability of becoming competent in the forseeable future. (R.199) This finding conflicts with the former finding and cannot be reconciled with it. When a Defendant is found to be competent, there is no issue of whether he will become competent in the foreseeable future.

The Court's findings that the Defendant had a substantial probability of becoming competent in the foreseeable future was based on those periods of hospitalization where the Defendant would be removed from the stress of the criminal process. By interpreting the Rule's provisions concerning "substantial probability of becoming competent" to include such temporary conditions served to thwart the operation of the Rule's remedy of dismissal after 5 years.

When the Rule encompassed the safeguard necessary to protect the Defendant's rights and the criminal justice process, the trial court should not be permitted to construe the Rule's provisions to reach a contrary result. Under the literal operation of the Rule, the Defendant would have been subject to continual commitment, but all criminal charges would have been drooped. Without the stress of the charges, the defendant would have had an improved chance of stabilization of his mental condition. The Defendant would be subject to reindictment at the State Attorney's discretion upon his release from the hospital. Under the trial court's interpretation of the Rule's effect on the instant case the defendant would also be impaired in his recovery by the threat of criminal process. The interpretation is not supported by the purpose of the Rule. Warwick v. State,

By so interpreting the rule, the trial court subjected Gibson to mental pressure and needless suffering amounting to cruel and unusual punishment.

II. THE DEFENDANT WAS REPRESENTED BY INEFFECTIVE COUNSEL IN VIOLATION OF HIS SIXTH AMENDMENT RIGHTS.

The defendant was declared indigent and was appointed an attorney for his defense. The right to counsel guaranteed by the Sixth Amendment is the right to the effective assistance of counsel. Strickland v. Washington, 104 S.Ct. 2052 (1984), In re Beverly, 342 So.2d 481 (Fla. 1977). A Defendant challenging his conviction ineffective assistance grounds must meet a two-part standard. Strickland, 104 S. Ct. at 2071.

A Defendant must prove that particular errors of counsel were "unreasonable". Strickland v. Washington, 104 S.Ct. at 2064. Trial counsel's errors were unreasonable. The Defendant's charges should have been dropped pursuant to Rule 3.213. On or about October 13, 1981, the defendant had been committed for five (5) consecutive years. When the charges were not dismissed trial counsel should have made an objection and moved for their dismissal contemporaneously to the court's recommittment order. At that time, no motion for dismissal of the charges was made. No formal objection was made by trial counsel to the Court's findings or method of disposing of the issue.

Counsel's failure to move for a dismissal of the charges cannot be justified as a tactical decision. The court adopted psychiatric testimony that the Defendant was incompetent. (R.198) His incompetency was found to be directly

related to the stress of the pending charges and impending criminal trial. If dropping the criminal charges would have aided the Defendant to overcome his mental incompetency, trial counsel should have done whatever was necessary to get the charges dismissed. If defense counsel "tactically" decided to ignore the opportunity to seek the remedy of Rule 3.213, his decision was certainly "unreasonable."

No motion to dismiss the pending charges pursuant to Rule 3.213 was made until August 9, 1983, upon appointment of new defense counsel, and after the Defendant had been incompetent for approximately seven (7) years. (R.112) The motion was denied. (R.214) Neither attorney ever sought release of the Defendant by habeas corpus writ.

If trial counsel had met the "reasonable" attorney standard, the Defendant would not have been committed to the mental hospital for over seven years. Actual prejudice is inherent in long delay. U.S. v. Beidler, 417 F. Supp. 608 (Fla. 1972). Evidence in support of the Defendant's case was being lost. Any memory that the Defendant had of the incident likewise was being lost. It is crucial for a criminal defendant to begin his defense as soon as possible after being charged. The effect of Defendant's lenghty committment was to deprive him of the opportunity to aid in his defense at the earliest possible time. But for Counsel's ineffectiveness, the Defendant's criminal charges would have been dropped and the State would have had the burden of reindicting the Defendant if it could.

III. TRIAL COUNSEL LACKED THE KNWOLEDGE, PREPAREDNESS AND ORGANIZATION NECESSARY TO RENDER REASONABLY EFFECTIVE ASSISTANCE AT THE SENTENCING PHASE.

Our law recognizes a Defendant's Right to effective assistance of counsel. Constitution of the United States, Sixth Amendment, Due Process Clause of the Fourteenth Amendment; Constitution of Florida, Declaration of Rights, Section 16, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Powell v. Alabama, 287 U.S. 45, 535 S.Ct 55, 11 L.Ed. 158 (1932)...5, 18; French v. State, 161 So.2d. 879 (Fla. 1st DCA 1964).

In Florida, whether or not one has been afforded the effective assistance of counsel has been determined by the Supreme Court of Florida in Knight v. State, 394 So.2d 997 (Fla. 1981), where the court adopted the four-pronged amalysis encompassed in United States v. DeCoster, (DeCoster III), 624 F.2d 196 (D.C. Cir. 1979). Under this analysis, ineffective assistance of counsel is established where (1) Petitioner has detailed the specific acts or omission of counsel in an appropriate pleading, (2) Petitioner has shown that the act or omission was a substantial and serious deficiency measurably below that of competent counsel, (3) Petitioner has shown that the specific serious deficiency, under the circumstances of the case, was substantial enough to demonstrate prejudice to this

defendant to the extent that the complained conduct likely affected the outcome of the court proceedings, (4) the State fails to rebut a prima facie showing of prejudice by proof beyond a reasonable doubt of no prejudice in fact.

Appellant submits to this court that the record of the trial court unequivocably establishes ineffective assistance of counsel under the Knight test.

On January 17, 1984, trial counsel requested a speedy trial and proceeded to trial. Upon its conclusion, the court proceeded immediately with the sentencing phase. Prior to beginning the proceedings, Appellant's counsel admitted to the court that he was unprepared and needed several days to get his case together (R.599). He asked for a continuance which was denied (R.601, 602). Since counsel had tried 4 or 5 capital murder cases before (R.601), he should have investigated the applicable law and prepared for the sentencing phase from the very outset of the case. His failure to do so was not "reasonable" and rendered him ineffective. Furthermore, the prosecuting attorney had discussed the probability of the State seeking the death penalty in this case (R.602). Thus, Appellants counsel had adequate notice of the State's intentions and should have prepare his case in defense of he death penalty.

Counsel's ineffectiveness is also demonstrated by his lack of knowledge concerning the procedure at the sentencing phase, and the special jury instructions outlinging the mitigating and aggravating circumstances (R.600). Trial

counsel was compelled to ask the court for guidance and to explain the procedure at this crucial stage of a death case (R.605,606). In addition, Counsel went to the Public Defender's Office for help in proceeding with the Sentencing Phase (R.600). Clearly, trial counsel was not prepared or knowledgeable in proceeding with the sentencing phase. "[A] defendant is entitled to the reasonably competent assistance of an attorney acting as his deligent conscientious advocate." United States v. DeCoster, 487 F.2d 1197 at 1202 (D.C. Cir. 1973). Appellant's counsel provided an inadequate argument or plea in favor of Appellant's life. He simply read the aggravating and mitigating circumstances from a list (provided by the Public Defender's Office) and attempted to relate them to Appellant's case in an "off-the-cuff" manner. Even the prosecting attorney, Jay Novick, stated, "Judge, I don't think Mr. Soven [Appellant's Counsel] should have ever accepted this appointment." (R.600).

All of the foregoing omissions and deficiencies when combined amount to ineffective assistance of counsel, King v. State, 407 So.2d 904 (Fla.1981) (indicating allegations [of omissions, deficiencies] may be considered in series or in combination). See United State v. Easter, 539 F.2d 663 (8th Cir. 1979); Commonwealth v. Zapata, 455 Pa.205, 314 A.2d 299 (Penn 1974) (Significant errors of constitutional magnitude; and combinations of a number of other errors, can deprive a defendant of ineffective assistance of counsel).

In Vaught v. State, 410 So. 2d. 147 (Fla. 1983), (Fla.S.Ct. 1983) the Florida Supreme Court recognized as sufficient grounds for a finding of ineffective assistance of counsel the omission of failure to conduct pretrial preparation, research and investigation and failure to present available mitigating evidence. The Court held that the appeallant's allegations of these grounds entitled him to an evidentiary hearing.

Thus, trial counsel should have prepared a mitigating case for the penalty phase. He should have investigated and presented to the jury various crimes to demonstrate the severity intended by the legislature to set a felony murder apart from the norm, and warrant the death penalty. Trial counsel should have presented numerous reasons why Appellant should live and not tell the jury that it punishes people who need help by killing them. (R.587). Counsel's remarks fail to address the inappropriateness of the death penalty in this case or to elicita concern for a treating instead of ignoring Appellant's mental condition.

Trial counsel's inadequate plea for Appellant's life, along with his other errors or deficiencies, made a complete farce of Appellant's fundamental right to the effective assistance of counsel. As far as demonstrating prejudice to Appellant as a result of the errors committed, ineffective assistance of counsel which results in the failure to put on a mitigating case at the penalty phase of a capital trial can never amount to harmless errror.

IV. THE CIRCUIT COURT'S DENIAL OF COUNSEL'S REQUEST FOR CONTINUANCE RESULTED IN THE INEFFECTIVENESS OF COUNSEL'S ASSISTANCE.

The Circuit Court erred when it denied trial counsel's request for a continuance and forced him to proceed with the sentencing phase since it was apparent that counsel was unprepared. According to White v. Ragen, 324 U.S. 760, 764 (1945), ..."not only does due process require that a defendant, on trial in a state court upon a serious criminal charge and unable to defendant himself, shall have the benefit of counsel...but that it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel." Powell v. Alabama, 287 U.S. 45; Avery v. Alabama, 308 U.S. 444; Exparte Hawk, 321 U.S. 114, 115-116; House v. Mayo, supra. (324 U.S. 42).

In the instant case, trial counsel admitted that he had never handled a death penalty phase and was not prepared to go forward (R.599, 601-602). The trial judge stated that she had informed both sides that if the jury returned a guilty verdict, the penalty phase would immediately follow. (R.604). However, Counsel can not find such a statement reflected in the record.

Even if, the trial court had made such statement prior to the trial, it was certainly unreasonable for trial counsel not to prepare for the penalty (sentencing) phase, and

this would further demonstrate the ineffectiveness of trial counsel as discussed earlier in this text.

However, considering the seriousness of the consequences in which Appellant faced, it was an abuse of the court's discretion to discipline or reprimand trial counsel (by forcing him to proceed) at the expense of Appellant's life.

Furthermore, "No policy consideration such as judicial economy should be used to justify depriving the defendant of his constitutional right to effective assistance of counsel" Gard, Ineffective Assistance of Counsel - Standards and Remedies, The Missouri Law Review, Volume 41, No. 4, Fall 1976, at 504. The trial court in justifying its decision to deny the continuance stated, "We're not going to do that. We're not having this whole system of justice down. That's a terrible thing you're doing" (R.602). Trial counsel continued to plead, "I never tried a penalty phase" and the court responded, "You got to start somewhere. This is it." (R.605). Even though the trial court felt that counsel was able to handle the sentencing (penalty) phase, too much was at stake for the court to start second guessing trial counsel's motive in making the request. Thus, putting aside the policy consideration of judicial economy, the trial court should have granted the request for a continuance. It has been shown that counsel quite able to handle the most complex criminal case, can be ineffective at handling the penalty phase of a capital murder case. Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, New York University Law Review, Volume

58, May 1983, at 303. The instant case is an excellent example of what Goodpaster was indicating in his article. Appellant's counsel may have effectively proceeded in the guilt phase of the case, but he certainly was not skilled or prepared to proceed further in the instant case. The foregoing omissions amount to serious deficiences beyond what would be expected of competent counsel. The trial court should have recognized this and granted trial counsel's request for a continuance in order to properly prepare for Appellant's case.

V. THE CIRCUIT COURT INCORRECTLY APPLIED THE ESPECIALLY HEINOUS ATROCIOUS, OR CRUEL LANGUAGE AS ONE OF THE AGGRAVATING CIRCUMSTANCES IN SENTENCING THE APPELLANT TO DEATH.

Procedurally, after a defendant has been adjudicated guilty of a capital felony, the court must determine whether he should be sentenced to death or life imprisonment. Florida Statute Section 921.141 addresses the proper procedure at this critical stage and outlines the aggravating and mitigating circumstances to be considered in resolving the sentencing question. One of the aggravating circumstances listed involves whether "the capital felony was especially heinous, atrocious, or cruel." Fla. Stat. §921.141(5)(h)(1983), formerly Fla. Stat. §919.23 (1976).

In the case State v. Dixon, 283 So.2d 1,9 (1973), the Supreme Court of Florida in addressing this issue stated:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

This interpretation of the language, "heinous, atrocious, or cruel", has been accepted and consistenly followed by the Florida Supreme Court. Alford v. State, 307 So.2d 433, 444 (Fla. 1975), Cooper v. State, 336 So.2d 1133 (Fla. 1976), Fleming v. State, 374 So.2d 954 (Fla. 1979), Maggard v. State, 399 So.2d 973, 977 (Fla. 1981), Magill v. State, 428 So.2d 649, 651 (Fla.1983), Certiorari denied 104 S.Ct. 198.

The intent of the legislators was further explained by this Ct. in Simmons v. State, 419 So.2d 316 (Fla. 1982) where the victim was struck with a hatchet and the defendant later attempted to burn victims body. The Court held that the aggravating circumstances did not apply because "there was no proof that the victim was aware that he was going to be struck with a hatchet and no evidence that he was subjected to repeated blows while living and death was most likely instantaneous or nearly so...." Simmon v. State, at 316.

The trial court erred in finding this crime "especially heinous, atrocious, or cruel" (R.572). The Court based this finding on the fact that ..."defendant first crushed the victim's skull with an iron pipe and as she lay moaning and dying in a pool or her own blood...he spread her legs and proceeded to engage in sexual intercourse with her." (R.572). The instant case is not within the meaning of the aggravating capital penalty circumstances as intended by the legislature in Fla. Stat. 921.141(h)(1983) as are the following:

> Waterhouse v. State, 429 So.2d 301 (Fla. 1983) ("especially heinous, atrocious or cruel found where the victim suffered numerous bruises and lacerations inflicted with a hard, sharp weapon, defense wounds showed that the victim was alive and conscious when attacked and the victim was left in water to drown.); Smith v. State, 424 So.2d 726 (Fla. 1982) certiorari denied 103 S.Ct. 3129 ("especially heinous, atrociouse, or cruel" found where the victim was abducted, confined, sexually abused, and finally murdered in an execution-style fashion.); Quince v. State, 414 So.2d 185 (Fla. 1982), certiorari denied 103 S.Ct 192. ("especially heinous, atrocious, and cruel found to apply where an 82-year-old, frail woman was severely beaten, raped and manually strangled.); Adams v. State, 412 So.2d 850 (Fla. 1982) ("especially heinous, atrocious, and cruel" found where the defendant stated that the eight-year-old victim was screaming before he strangled her.); White v. State, 403 So.2d 331 (Fla. 1981) certiorari denied 103 S.Ct. 3571 ("especially heinous, atrocious, or cruel" found where victims were tied up and systematically shot in the back of the head one by one.); Weltz v. State, 402 So.2d 1159 (Fla. 1981) (especially heinous, atrocious and crueal found where defendant took victim stereo and automobile, set it up at defendant's

> residence and returned with the intent to steal other items, struck sleeping victim several time in the neck and set fire to his bed.); Alford v. State, 307 So.2d 433 ("especially heinous, atrocious, or cruel" found where a 13-year-old female child was raped, both vaginally and rectally, and while blindfolded, she was shot five or six times by a 27-year-old male.)

Summarizing the law then we find that a murder is "especially heinous, atrocious, or cruel" where a victim is conscious and aware of what torturous or extremely painful acts are being performed against them (i.e. Execution style murders, strangulations, continuous, severe beating) where the defendant performs additional acts which worsen or shock the conscience of the courts (i.e. Sexual acts against children or the elderly).

In the present case, the victim was hit in the head with an iron pipe while she was asleep. A medical expert stated that the victim was more likely than not, rendered unconscious immediatlely by either of the two blows and could not have been aware of the acts which followed. According to the Medical Examiner's Report, there was no evidence of defense marks. Thus, she was not subjected to extreme or intense pain by either the blows to the head or the sexual intercourse.

Furthermore, Appellant's acts were not planned, calculated, or conscienceless. Appellant stated in his confession that the purpose of going into her apartment was to Rape her, and that he only hit her to keep her quiet. (R.459). Appellant did not intent to kill her.

Thus, Fla. Stat. §921.141(h) was improperly applied to the instant case, and the sentence of death is inappropriate in view of all the properly considered circumstances.

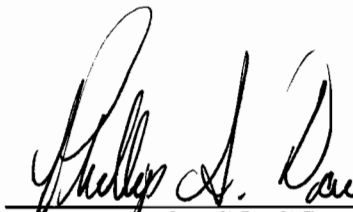
CONCLUSION

Appellant was denied his constitutional right to the effective assistance of counsel due to the acts or omissions of both his attorney and the court. It is axiomatic that an attorney must make a diligent and conscious effort to effectively prepare his client's case, and that the court must assure that one is afforded such assistance. However, while appellant's counsel openly admitted that he was totally unprepared to proceed to the sentencing phase, counsel's request for more time was sternly denied. Counsel was forced to go forward without any preparation, and thus made a farce of Appellant's fundamental right to effective assistance of counsel, as warranted by the Constitution of the United States.

As to the violation of Appellants rights under the provisions Rule 3.213 Appellant contends that this court should reverse the conviction. In the alternative Appellant contends that this court should vacate the sentence of the trial court and remand this case to the the trial court with directions to sentence Appellant to life imprisonment without eligibility for parole for 25 years. In the alternative, since there is no way to determine what significance Fla. Stat. 921.141(h) was given in the weighing process (agg. v. mitig.), appellant asks that this Court reverse the sentence and remand this cause for a completely new sentencing hearing before a newly impaneled jury.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this brief was hand delivered/mailed this 22nd day of October, 1984 to trhe Attorney Generals Office, 401 Northwest 2nd Avenue, Suite #820, Miami, Florida.



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