IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
NOV 19 1984
CLERK, SUPREME COURT
By_____________
Chief Deputy Clerk

DAVID ALLEN GORE

APPELLANT

VS

STATE OF FLORIDA

APPELLEE

CASE NO: 65,201

APPELLANT'S INITIAL BRIEF

On Appeal from the Circuit Court of the Sixth Judicial Circuit In and For Pinellas County, State of Florida.

Richard Saliba
Saliba & McDonough PA
2121 14th Avenue
Box 1690
Vero Beach, Florida 32961
(305)567-6111

TABLE OF CONTENTS

TABLE OF CONTENTS i

AUTHORITIES CITED iv

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

ARGUMENT

I. IT WAS ERROR FOR THE TRIAL COURT TO PRECLUDE THE INQUIRY OF APPELLANT'S COUNSEL DURING VOIR DIRE RELATIVE TO THE FEELINGS, ATTITUDES OR PREJUDICES OF PROSPECTIVE JURORS REGARDING THE ISSUE OF RECOMMENDATION OF MERCY---Pg 5

II. IT WAS ERROR FOR THE LOWER COURT TO ADMIT THE CONFESSION INTO EVIDENCE AS THE ADMISSION OF THE CONFESSION VIOLATED HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO HAVE COUNSEL PRESENT DURING CUSTODIAL INTERROGATION.---Pg 8

III. IT WAS ERROR FOR THE LOWER COURT TO DENY VARIOUS REQUESTED INSTRUCTIONS AND MOTIONS DIRECTED TO INSTRUCTIONS SUBMITTED BY APPELLANT IN TIMELY FASHION.---Pg 14

IV. IT WAS ERROR FOR THE LOWER COURT TO PROHIBIT AND TO RESTRICT THE CLOSING ARGUMENT OF THE APPELLANT.---Pg 18

V. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO PRECLUDE DEATH AS A PENALTY DURING THE PENALTY PHASE OF THE INSTANT MATTER.---Pg 20

VI. THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL, MOTION FOR A NEW TRIAL AND A MOTION TO PRECLUDE THE IMPOSITION OF THE DEATH PENALTY.---Pg 22

VII. IT WAS ERROR FOR THE COURT TO DENY APPELLANT'S MOTION FOR A STATEMENT OF AGGRAVATING CIRCUMSTANCES. ---Pg 23

VIII. IT WAS ERROR FOR THE LOWER COURT TO FAIL TO MODIFY THE APPELLANT'S SENTENCE.---Pg 24

IX. THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED TO AVOID OR TO PREVENT A LAWFUL ARREST OR TO EFFECT ESCAPE IN VIOLATION OF SECTION 921.141(5)(E) FLORIDA STATUTES.---Pg 25

X. THE TRIAL COURT ERRED BY NOT GRANTING A MISTRIAL RELATIVE

TO THE ADMISSION INTO EVIDENCE OF GRUESOME PICTURES, THE RELEVANCY OF WHICH THE STATE FAILED TO ESTABLISH.---Pg 27

XI. THE COURT ERRED BY NOT DIRECTING A VERDICT RELATIVE TO A LIFE SENTENCE AS THE STATE DID NOT ESTABLISH A PRIMA FACIE CASE JUSTIFYING THE IMPOSITION OF THE DEATH PENALTY.---Pg 28

XII. IT WAS ERROR FOR THE LOWER COURT TO PRECLUDE THE TESTIMONY OF PERRY PISANI RELATIVE TO INCONSISTENT STATEMENTS OF THE STATE'S WITNESS MICHAEL ROCK. THE ACTIONS OF THE LOWER COURT CONSTITUTED A DENIAL TO THE APPELLANT OF HIS CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESS.---Pg 29

XIII. IT WAS ERROR FOR THE LOWER COURT TO DENY THE APPELLANT'S REQUEST FOR A DEMONSTRATION OF THE DISTANCE TO THE JURY FROM WHERE THE ONLY WITNESS APPARENTLY STOOD WHEN HE SAW THE MURDER.---Pg 31

XIV. IT WAS ERROR FOR THE LOWER COURT TO ENTER FINDINGS IN SUPPORT OF THE DEATH SENTENCE THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY WICKED, EVIL, ATROCIOUS OR CRUEL.---34

XV. IT WAS ERROR FOR THE COURT TO ALLOW THE JURY TO CONSIDER THE VARIOUS AGGRAVATING CIRCUMSTANCES HEREIN AND FURTHER IT WAS ERROR FOR THE COURT TO DETERMINE BEYOND A REASONABLE DOUBT THAT SUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO FIND THE EXISTENCE OF AGGRAVATING CIRCUMSTANCES.---Pg 36

XVI. IT WAS ERROR FOR THE TRIAL COURT TO FIND THAT THE CRIME WAS COMMITTED IN A COLD, CALCULATED AND/OR PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL LEGAL JUSTIFICATION.---Pg 36

XVII. IT WAS ERROR FOR THE COURT TO FAIL TO FIND AS A MITIGATING CIRCUMSTANCE THAT THE DEFENDANT HAD NO SIGNIFICANT HISTORY OF PRIOR ACTIVITY.---Pg 38

XVIII. IT WAS ERROR FOR THE LOWER COURT TO FAIL TO FIND THAT THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.---Pg 39

XIX. IT WAS ERROR FOR THE TRIAL COURT TO DENY A MISTRIAL DUE TO THE INTENTIONAL PROSECUTORIAL MISCONDUCT WHICH OCCURED THROUGHOUT THE TRIAL.---PG 40

XX. THE TRIAL COURT ERRED BY REFUSING TO GRANT FUNDS TO APPELLANT, AN INDIGENT, FOR VARIOUS EXPERTS.---PG. 42

XXI. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE DURING THE "DEATH QUALIFICATION" AND OTHER MOTIONS TO PREVENT A "PROSECUTION-PRONE" JURY.---PG. 44

XXII THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT AND/OR TO DECLARE THE FLORIDA DEATH PENALTY TO BE UNCONSTITUTIONAL---PG 47

XXIII. IT WAS ERROR FOR THE LOWER COURT TO FAIL TO GRANT A MISTRIAL UPON THE MISCONDUCT OF ONE OF THE JURORS WHICH WAS BROUGHT TO THE COURT'S ATTENTION IN TIMELY AND PROPER FASHION.---PG 53

XXIV. THE TRIAL COURT COMMITTED ERROR BY FAILING TO REQUIRE THE STATE TO INDICATE IF THE STATE WAS PROCEEDING UPON FELONY MURDER THEORY IN CONTRAVENTION OF ENMUND V FLORIDA---PG.56

XXV. IT WAS ERROR FOR THE LOWER COURT TO RESTRICT THE APPELLANT'S VOIR DIRE RELATIVE TO THE INVOLVEMENT OF THE CO-DEFENDANT.---PG.57

XXVI. IT WAS ERROR FOR THE TRIAL COURT TO DENY A MISTRIAL UPON APPELLANT'S MOTION RELATIVE TO DETECTIVE KHEUN'S TESTIMONY IN CONTRAVENTION OF THE COURT'S PRETRIAL ORDER.---PG.59

CONCLUSION---PG 62

CERTIFICATE OF SERVICE---PG 63

CITATION OF AUTHORITIES

Alford v State, 307 So.2d 433 (Fla.1975) Pg. 15, 18, 35

Anderson v State, 420 So.2d 57 (Fla.1982) Pg. 12

Barclay v State, 362 So.2d 657 (Fla.1979). Pg. 23

Bell v Ohio, 438 U.S. 637 (1978)Pg. 48, 50, 51

Blanco v State, 9 FLW 215 (Fla.1984). Pg. 15

Bottoson v State, 8 FLW 505 (Fla.1983). Pg. 14

Brumley v State, 9 FLW239 (Fla 1984) Pg. 56,57

Buckrem v State, 355 So.2d 111 (Fla.1974) PG. 28

Cannady v. State, 427 So.2d 723 (Fla.1983) Pg. 9, 10, 11, 13

Chenault v Stynchombe, 581 F.2d 444 (5thCir.-1978) Pg.15

Coker v Georgia, 433 U.S. 584 (1977) Pg. 51

Combs v State, 403 So.2d 418 (Fla.1981), cert denied 456 U.S. 984(1982)pg 37

Coxell v State, 368 So.2d 148(Fla.1978). Pg. 30

Davis v State, 9 FLW 430 Fla.1984). Pg. 27

Dixon v State, 283 So.2d 1 (Fla.1973) Pg. 14, 16, 18, 34, 35, 38

Downs v State, 386 So.2d 788 (Fla.1980). Pg. 15

Doyle v State, 9 FLW 453 (1984) Pg. 55

Drake v State, 8 F.L.W. 427(Fla.1983) Pg.9, 12

Duncan v Louisiana, 391 U.S. 145 (1968) Pg. 54

Dyken v State, 89 So.2d 866 (Fla.1956) Pg. 28

Eddings v Oklahoma, 455 U.S. 104(1982) Pg. 36

Edwards v Arizona, 51U.S.477 (1981). Pg. 11, 12

Elledge v State, 346 So.2d 998 (Fla.1977) Pg. 14

Enmund v Florida, 102 S.Ct. 3368 (1982). Pg. 20, 21, 56

Fleming v State, 374 So.2d 954(FLa.1979) Pg. 36

Flowers v State, 351 So.2d 764 (3DCA-1977) Pg. 61

Foster v State, 255 So.2d 533 (1DCA-1971) Pg. 47

Furman v Georgia, 408 U.S. 241 (1972). Pg. 51

Garcia v State, 351 So.2d 1098 (Fla.1982). Pg.12

Gardner v Florida, 97 S.Ct. 1107(1977). Pg. 23, 24

Glatstein v Grund, 51 N.W.2d 145 (1968) Pg. 54

Godfrey v Georgia, 100 S.Ct. 1759 (1980). Pg. 18

Gonzalez v State, 9FLW 1121 (3DCA-1984) Pg. 41

Grant v State, 171 S6.2d 361(Fla.1965) Pg. 41

Gregg v Georgia, 96 S.Ct. 2909 (1976) Pg. 23,52

Halliwell v State, 323 So.2d 557 (Fla.1975). Pg. 18, 28, 34, 35

Harper v State, 411 So.2d 235 (3DCA-1982) Pg. 42

Harris v State, 414 So.2d 557 (3DCA-1982) Pg. 42

Hill v State, 422 So.2d 816 (Fla. 1982). Pg. 15,17

Hisler v State, 42 So. 692(Fla.1906). Pg. 32

Hovey v Superior Court of Alameda County., 616 P.2d 1301 (Cal.1980)
Pg. 45, 46

In Re Davis, 83 A.2d 590(1951) Pg. 54

Jacobs v State, 396 So.2d 696 (Fla.1978) Pg. 16

Jent v State, 408 So.2d 1024 (Fla.1981) Pg. 15, 37

Johnson v State, 8 FLW 460 (Fla.1983) Pg. 33

Kampff v State, 371 So.2d 1007(Fla.1979) Pg. 28

Land v State, 293 So.2d 704 (Fla.1974). Pg. 49

Langton v State, 9 FLW 639 (2DCa-1984) Pg. 60

Lewis v State, 377 So.2d 640 (Fla.1980). Pg. 18, 28, 35

Lockett v Ohio, 98 S.Ct. 295 (1978) Pg 16, 36, 48, 50, 51

Lucas v State, 376 So.2d 1149(Fla.1979) Pg. 35

Mallaney v Wilbur, 21 U.S. 68 (1975) Pg. 14, 16, 49

Malloy v Hogan, 378 U.S. 1 (1964) Pg. 54

McClendon v State, 105 So. 406 (Fla.1925) Pg. 33

McKahan v Baltimore & O.R. Railroad, 72 A. 251(1909) Pg.54

McMillian v State, 409 So.2d 197 (3DCA-1982) Pg. 42

Meeks v State, 339 So.2d 186 (Fla.1976) Pg. 17

Menard v State, 8 FLW 2655 (4DCA-1983) Pg. 60

Menendez v State, 368 So.2d 1278 (Fla.1979) Pg. 25, 26

Morgan v State, 9 FLW 293 (Fla.1984) Pg. 19, 58

Nash v Estelle, 597 F.2d 513 (5Cir-1979) Pg 10

Oats v State, 446 So.2d 90(Fla.1984) Pg. 26, 35

Pait v State, 112 So.2d 380 (Fla.1950) Pg. 41

Peek v State, 395 So.2d 492 (Fla.1980). Pg. 40

People v Brown, 132 Cal.Rptr. 217 (1976) Pg. 54

Peterson v. State, 372 So.2d 1017 (aff'd 382 So.2d 701) (Fla.1980) Pg. 9

Phillips v State, 59 N.W.2d 598(1953) Pg. 54

Poole v State, 19 So.2d 903 (Fla.-1967) Pg.6, 58

Porter v State, 410 So.2d 164 (3DCA-1981) Pg. 24

Proffit v Florida, 428 U.S. 242 (Fla.1976) Pg. 52

Provence v State, 337 So.2d 783 (Fla.1976) Pg. 15

Reddish v State, 167 So.2d 858 (Fla.1964) Pg. 27

Rembert v State, 9 FLW 58 (Fla.1984). Pg. 15, 37

Rice v State, 9 FLW 1374 (2DCA-1984). Pg. 9

Riley v State, 366 So.2d 19 (Fla.1979). Pg. 18, 25, 26, 35

Rolle v State, 449 So.2d 1297 (4DCA-1984). Pg. 54

Russ v State, 95 So.2d 59 (Fla.1957) Pg.55

Salvatore v State, 366 So.2d 745 (Fla.1978) Pg. 28

Silling v State, 414 So.2d 1182 (1DCA-1982) Pg. 13

Snyder v Massachusetts, 291 U.S. 97 (1958) Pg. 54

Songer v State, 365 So.2d 696 (Fla.1978) Pg. 16

Specht v Patterson, 386 U.S. 605 (1967) Pg. 30

State v Pinder, 375 So.2d 836 (Fla.1979). Pg. 25

State v Reynolds, 238 So.2d 598 (Fla.1970) Pg. 47

State v. Hegstrom, 401 So.2d 1343 (Fla.1983) Pg. 24

Sullivan v State, 303 So.2d 632 (Fla.1974) Pg. 28

Tedder v State, 322 So.2d 908 (FLa.1975) Pg. 28

Thomas v State, 403 So.2d 372 (Fla.1981) Pg. 6,7

Trafficante v State, 92 So.2d 811 (Fla.1957) Pg. 60

United States v Modica, 663 F.2d. 1173 (2dCir.1981). Pg. 42

United States v Wade, 388 U.S. 218 (1967) Pg. 30

Washington v State, 432 So.2d 44(Fla.1983) Pg. 37

White v. State, 403 So.2d 331 (Fla. 1981). Pg. 14

Young v State, 234 So.2d 341 (Fla.1970). Pg. 27

Zant v State, 103 S.Ct. 2733(1983) Pg. 17, 18

Florida Rules of Criminal Procedure 3.220(a)(1)(vi) Pg.40

s. 755.082 Florida Statutes Pg. 48, 51

s. 782.04 Florida Statues Pg. 48, 51

s.922.10 Florida Statutes, Pg. 50

s. 921.141 Florida Statutes, Pg.48, 51

s. 921.141(5)(b) Florida Statutes, Pg. 16

s. 921.141(5)(e) Florida Statutes Pg. 23

s. 921.141(5)(h) Florida Statutes, Pg. 17

s. 921.141(5)(i) Florida Statutes, Pg. 17

s. 921.141(6) Florida Statutes, Pg 17

s.921.141(1) Florida Statutes, Pg. 40, 51

PRELIMINARY STATEMENT

Appellant, DAVID ALLEN GORE, was the Defendant in the Lower Court and Appellee, the State of Florida, was the prosecutor in the Nineteenth Judicial Circuit, Indian River County, Florida in this cause. Appellant will be referred to in this brief as the "Defendant" or as "Appellant". The Appellee will be referred to as the "State" or as the "Prosecutor". The symbol "R" followed by the page number will be used in this brief to designate the reference to the record on appeal.

STATEMENT OF THE CASE

Appellant was indicated by the Grand Jury of Indian River County, Florida. The Grand Jury charged him with a six count indictment including first degree murder.

Various motions were filed and entertained by the Lower Court. One of the motions granted was a change in venue and the trial was held in Pinellas County, Florida. Motions for Judgment of Acquittal were timely made and ultimately denied. Various motions for mistrial were also submitted to the Court and denied. The jury returned verdicts of guilty and the Court proceeded with the penalty phase. The jury returned an advisory verdict recommending the death penalty and the trial court sentenced the Appellant to death and filed findings in support of the death sentence.

Notice of Appeal was timely filed. The Public Defender for the Nineteenth Judicial Circuit filed a motion to withdraw from representing the Appellant on appeal pursuant to order of this Court. Private counsel was appointed by the Lower Court to represent the Appellant on this appeal.

STATEMENT OF THE FACTS

On July 26, 1983, the Defendant and his cousin observed two (2) hitchikers on A1A in Indian River County, Florida. They stopped and picked them up. (R-1780). The driver, Appellant's cousin, Frederick Waterfield, introduced both of them to the girls. (R-1780). While they were driving the glove compartment opened and a gun was observed. (R-1782). Appellant then took the gun and pointed it at one of the girls. (R-1782). The girls' wrists were handcuffed by the Appellant. (R-1785). The girls were then driven to the home where Appellant was residing and the girls were taken into the home. (R-1786).87). It was then that Appellant allegedly committed sexual battery upon the two girls. (R-1799). One of the girls, Lynn Elliott, escaped and ran out the door. A young boy, Michael Rock, testified he heard screaming and saw the girl shot under the palm tree. (R-1962). This young man testified that the person who shot the girl had a mustache. (R-1991). However, when he first spoke with the police this young man stated that he could not see the assailaint's face. (R537). The girl's body into the trunk of the car in the driveway. Soon the police arrived and surrounded the home. Appellant surrendered and was immediately taken into custody. A statement was elicited from Appellant while he was in custody and after he had requested an attorney, but before counsel was provided. (R-1222).

The Grand Jury of Indian River County returned a six count indictment and trial was held before the Honorable L.B. Vocelle presiding. The jury returned a verdict of guilty as to all counts and then rendered an advisory sentence eleven to one that the death sentence be imposed.

It is from the verdicts of guilt as to each count of the indictment and it is as to the advisory sentence rendered by the jury form which the Appellant appeals to this Court.

POINT ONE

IT WAS ERROR FOR THE TRIAL COURT TO PRECLUDE THE INQUIRY OF APPELLANT'S COUNSEL DURING VOIR DIRE RELATIVE TO THE FEELINGS, ATTITUDES OR PREJUDICES OF PROSPECTIVE JURORS REGARDING THE ISSUE OF RECOMMENDATION OF MERCY.

The Trial Court committed reversible error by refusing to allow the Appellant's counsel to inquire of the various jurors relative to their feelings, attitudes, or prejudices regarding the issue of recommendation of mercy. The specific question the Appellant's counsel directed to the jurors was as follows:

> "...Concerning the death penalty, is there someone here that feels so strongly in favor of the death penalty that you would never under any circumstances be able to recommend mercy in a case in which the defendant was convicted of first degree murder?..."
> ..Mr Stone: Your Honor, I will enter an objection and ask to approach the bench, please.(R1594 L5-14)

The Court stated relative to this question:

> "...Of course, what we're doing here, gentlemen, with all due respect, we're getting into the lawyers making comments on what the law is..."(R1595 L17-19).
> "...Mr Long: Your Honor, I would cite Poole versus State,... 194 So.2d 903, which says examination as to whether any of them felt that they would under no circumstances consider the possibility of a mercy recommendation..."(R1595 L9-17).
> "...The Court: If they're so strong in their belief at this point. Mercy is not involved...The objection is sustained as not a valid instruction to the law..."(R1596 L12,13,15,16).

The Lower Court erred by refusing to allow the Appellant's Attorney to inquire of the Jurors. By refusing to allow the

Appellant's counsel to raise this inquiry the Trial Court commited reversible error.

Such is the holding of this Court in the case of Poole v State, 194 So.2d 903 (Fla.-1967). Therein this court specifically stated:

> "..The transcript of record on appeal reveals that in the present case defense counsel was not seeking to determine the specific question of whether the prospective jurors would or wuld not grant mercy but, rather whether any of them felt that they would "under no circumstances" consider the possibility of mercy. We believe this to be a valid and proper inquiry concerning an issue which our State has recognized by statutes..."(Poole v State, supra at page 904)
>
> "....We do feel however that the trial judge erred in refusing to allow defense counsel to propound any inquiry as to the issue of mercy. Such inquiry in the context of the instant case,could conceivably be determinative of whether the defense should challenge a juror either for cause or premptorily. We have never held, nor do we hold now, that to be qualifed a juror must state that he will, or even that he could grant mercy to one shown to be guilty of a capital crime. But neither should it be held improper to question a prospective juror as to whether he wouldnever under any circumstances be able to recommend mercy in such a case. Because of the unrestricted discretion available to a juror in recommending mercy, we think it extremely important to an accused to know whether a juror would dogmatically refuse to consider the possibility of mercy. While Rollins, supra, holds that a juror's position against recommending mercy will not support a challenge for cause, it does not in any way affect the exercise of a peremptory challenge. We are of the opinion that inquiry should be permitted to enable the accused to ascertain the attitude of a prospective juror on the subject of mercy, and certainly a juror completely adverse to a mercy recommendation might well be a fitting subject of a peremptory challenge..."(Poole v State, supra at page 905).

In Thomas v State, 403 So.2d 372 (Fla.-1981) this issue

of mercy was analyzed by this Court from a different legal perspective. In essence this Court specifically stated that:

> "...We have previously held that it was <u>error</u> for a trial judge to refuse to allow defense counsel to propound any voir dire inquiry as to the issue of mercy, since such inquiry...could conceivably be determinative of whether the defense should challenge a juror-either or cause or peremptorily..."(<u>Thomas v State</u>, supra at page 376)(emphasis supplied.)
>
> "...Federal Courts have considered this precise question at least twice, and on both occasions have found that jurors with pre-dispositions concerning sentencing in capital cases should have been excused. See Stroud v United States, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919),reh. denied, 251 U.S. 380, 40 S.Ct. 176, 64 L.Ed. 317 (1920); Crawford v Bounds, 395 F.2d. 297, 304 (4th Cir. 1968), cert. denied, 397 U>S> 936, 90 S.Ct. 941, 25 L.Ed.2d 117(1970).

The <u>Thomas</u> Court determined that the convictions must be reversed and that cause be remanded for a new trial. In the <u>Thomas</u> case the Appellant's attorney was allowed to inquire relative to the issue of mercy. Subsequent to the inquiry it was then determined that the Trial Court erred for refusing to excuse a juror for cause. In the instant case the Trial Court even precluded the Appellant the opportunity to ascertain whether or not there was any possibility of such prejudice on behalf of any of the jurors.

As a result of the above the Appellant was denied his right to a fair and impartial trial in violation of the Sixth Amendment of the Constitution of the United States and in violation of Constitution of the State of Florida. Such violation warranted reversal in each of the cases cited above and such violation mandates reversal in the instant case.

POINT TWO

IT WAS ERROR FOR THE LOWER COURT TO ADMIT THE CONFESSION INTO EVIDENCE AS THE ADMISSION OF THE CONFESSION VIOLATED HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO HAVE COUNSEL PRESENT DURING CUSTODIAL INTERROGATION.

The trial Court admitted into evidence the taped case of the defendant. The facts of this confession indicated that the accused had invoked his right to have counsel present during the custodial interrogation. The officer at the motion to suppress testified that he read him his rights and that he made the statement that he wanted to get something off his chest and then he wanted to see a lawyer, talk to a lawyer. (R1222 L15-20). Another deputy sheriff, C C Walker, testified that the Appelant had said he wanted to talk with a lawyer while he was being transported to the jail.(R1228 L20)(R1250 L1-14) He then later was interrogated at the police station. While there the police tape recorded the alleged statement and then went off the record. (R1260 L13-16). The Court, after entertaining the evidence and the argument of counsel stated:

> What I'm saying is we've got two Mirandas..one was apparently given at the residence and as I understand Mr. Longs' position was, that there was a statement that might be that he wanted an attorney, that the police had a further obligation to make further inquiry. Then we have another waiver or a Miranda at the Indian River County Jail. Is that..second Miranda sufficient under Kennedy (phonetic)v. State, to--sufficient evidence to support the finding that the defendant knowingly and intelligently waived his right to have counsel present--during his statement.."(R1362 L9-18).

In the instant case the deputy did initiate communication with the Appellant. Of equal importance there was no written waiver

executed in this case by the Appellant.

Of specific consideration is the Court's lack of specificity in it's order authorizing the admission of the confession. In Rice v State, 9 FLW 1374, (2DCA-1984) the issue of the voluntariness of the defendant's confession was addressed by the trial court. The procedure to be followed was previously delineated in Peterson v State, 372 So.2d 1017, (aff'd, 382 So.2d 701 Fla 1980) when this Court in Rice stated:

> "...It is the responsibility of the trial judge to first find that it was voluntary before submitting it to the jury...When the trial judge admits nto evidence a statement or confession to which there has been an objection, on review the record must reflect with unmistakable clarity that he found that the statement or confession was,by the preponderance of the evidence, voluntary....If an independent review of the record fails to disclose with unmistakable clarity that the trial judge found that the statement was voluntary...or if it appears that he imposed upon the state a lesser burden of proof than preponderance of the evidence in weighing the question of voluntariness, it is reversible error. ...(Rice v State, 9 FLW 1374 (2DCA-1984), at page 1374); Drake v State, 8FLW 427 (1983).

This court in Cannady v State, 427 So.2d 723 (Fla.1983, required that upon determining whether a defendant's statement that he thought he should call his lawyer constituted a request for an attorney created an issue not whether the statement itself constituted such a request but if the statement given the context in which it was spoken indicated a desire to see an attorney. Further, this Court specifically stated that:

> "...When a person expresses both a desire for

counsel and a desire to continue the interview without counsel, further inquiry is limited to clarifying the suspect's wishes..."(Cannady v State, supra).

It is important to note that in the Cannady case the facts indicated that the Defendant therein signed a written waiver after he was given an opportunity to call his attorney. In the instant case, despite the fact that the Appellant had expressed a desire to consult with counsel he was denied that opportunity. Further, he never executed any waiver form. Of equal significance is the fact that in the instant case the endeavor of the interrogating officers was to elicit incriminating responses. The attendant circumstances surrounding the taped confession lead to this inescapable conclusion. (Tape interrupted for off the record conference. R1260). Thus, unlike Cannady because the officers were clearly seeking incriminating responses Appellant's whole complete statement should have been suppressed. The failure of the court to suppress the statement by applying the Cannady standard violated the rights of Appellant guaranteed to him by the Fifth Amendment as well as the Fourteenth Amendment of the United States Constitution and the guarantees afforded Appellant by the Florida Constitution.

The Federal Courts have also addressed this particular issue. The United States Court of Appeals for the Fifth Circuit in the case of Nash v Estelle, , 597 F.2d. 513 (5Cir-1979), dealt directly with this issue as to that situation when a suspect has been informed of his rights and contemporaneously expresses both a desire for counsel and a desire to continue the interview without counsel. This Court held that it is permissible

to make further inquiry to clarify the suspect's wishes but the interrogating officer may not utilize the guise of clarification as a subterfuge for coercion or intimidation.

In the instant case it is submitted that the officers did not pursue further inquiry as to clarification but rather proceeded to elicit incriminating statements from the accused. It is further submitted that such actions were calculated by the deputies and that at no time did these interrogators endeavor to ascertain, in contravention of Cannady and in contravention of Nash, the Appellant's wishes. The failure to ascertain the Appellant's wishes by the deputies and the Court's subsequent failure to apply the Cannady standard to the instant facts warrants reversal of the conviction. This follows because the introduction of the statement was so prejudicial to justify a new trial.

This Court, in Cannady enunciated and adopted the United States Supreme Court standard relative to this issue in the Edwards v Arizona, 51 U.S.477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) reiterating the pertinent portion of that opinion:

> ".....and we now hold that when the accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.."Edwards v Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981),Cannady v State at page 729 -emphasis supplied).

This Supreme Court case of Edwards v Arizona, supra, adopted by this Court in Cannady sets forth the specific standard dealing with this factual situation. Basically, the Supreme Court stated in the Edwards case that upon the

accused's invocation of his right to counsel during custodial interrogation a valid waiver cannot be established by showing only that he responded after being again advised of his rights. If the accused has expressed his desire to deal with the police only through counsel he shall not be subject to further interrogation until the attorney has been made available to him unless the accused has initiated further communication, exchanges or conversations with the police. (Edwards v Arizona, supra at S.Ct. 1185.

In the instant case it is clear that the Appellant asked for counsel upon being arrested. (R1222 R1228). He did not initiate any further conversation with the police. Thus, in the context of Edwards v Arizona he did not waive his right to counsel. At no time did he execute a waiver. Under Florida law once a defendant requests counsel the only permissible inquiry would have been to clarify the equivocal request. Drake v State, 8 F.L.W. 427 (Fla.1983). The record herein establishes that there was no intentional relinquishment or abandonment of the right of or privilege to counsel. Absent such evidence the statement is inadmissible. Anderson v. State, 420 So.2d 57 (Fla.1982). In this case the arresting officer specifically testified that the Appellant wanted an attorney. Where the arresting officer's testimony, as in this case, is that the defendant, after being warned of his Miranda rights expressed a desire for legal counsel it was a violation of his Fifth Amendment right under the Constitution for the statement to be used in evidence. This Supreme Court has construed such a violation to constitute fundamental error. Garcia v State,

351 So.2d 1098 (Fla.1977).

A case which parallels the attendant facts of this matter is that of Silling v State, 414 So.2d 1182 (1DCA-1982). In Silling, the defendant made incriminating statements as a result of the officer's questioning after he had previously invoked his right to counsel. The Court held that where the defendant had previously invoked the right to counsel before another deputy and where there was no showing of voluntary, knowing and intelligent waiver of right to counsel and where the statement was not volunteered but such statement resulted from the deputy's questioning then such admission of the statement was reversible error.. Again, in the instant case the Appellant, upon arrest, requested counsel. There was no showing of a voluntary, knowing and intelligent wavier of the right to counsel. Also there was no showing that the Appellant's statements volunteered. Further, Edwards dictates analysis in the context of the surrounding circumstances. What must be taken into consideration then is the admitted gap in the tape which constitutes intentional misconduct.

Since the State failed to establish that the Defendant knowingly and voluntarily wavied his right to counsel and since no determination was made as required by Cannady as to a clarification of the Appellant's wishes it was incumbent upon the Court to suppress the taped statement. The failure of the Court to do so constituted reversible error and the introduction of this confession into evidence further constituted a violation of the Appellant's right to counsel in contravention of the Fifth and Fourteenth Amendments to the United States Constitution and of those guarantees afforded by the Florida Constitution.

POINT THREE
IT WAS ERROR FOR THE LOWER COURT TO DENY VARIOUS REQUESTED INSTRUCTIONS
AND MOTIONS DIRECTED TO INSTRUCTIONS SUBMITTED BY APPELLANT IN TIMELY FASHION.

The Lower Court erred by refusing to instruct the Jury as requested by the Appellant in the following matters:

a)The request for a special jury instruction concerning clarification of the burden of proof during the sentencing stage so as to avoid confusion when weighing the aggravating and mitigting circumstances. (Malloney v Wilbur, 21 U.S. 68, 95 S.Ct. 1881 (1975); Dixon v State, 283 So.2d 1 (FLa.1973).

b)The request for a special jury instruction relative to the purpose for considering the aggravating and mitigating circumstances is to engage in character analysis of the defendant to ascertain whether the ultimate penalty of death is justified in this particular case. (Elledge v State, 346 So.2d 998 (Fla.1977).

c)The request for a special jury instruction that the mere existence of aggravating circumstances does not mandate imposition of the death sentence and that the death penalty statute does not contemplate a mere tabulation of aggravating and mitigating circumstances but rather contemplates a reasoned weighing of those circumstances to determine whether the death sentence is appropriate. (White v State, 403 So.2d 331 (Fla.1981); Bottoson v State, 8 FLW 505 (Fla.1983).
(Bottoson involved a jury instruction that jury can recommend life even if it found aggravting circumstances but no mitigating circumstances.

d)The request relative to the proposition of law that the State may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance and that if the jurors were to find two or more of the aggravating circumstances are supported by a single aspect of the offense, then they may only consider such as supporting a single aggravating circumstance. (Provence v State, 337 So.2d 783 (Fla.1976).

e)The request for a jury instruction relative to the proposition of law that the death penalty is warranted only for the most aggravated and unmitigated of crimes and that the law does not require that death be imposed in every conviction in which a particular set of facts occur and that the Juror can exercise reasoned judgment and can recommend life imprisonment without eligibility for parole for twenty five years. (Chenault v Stynchombe, 581 F.2d. 444 (5th Cir-1978); Downs v State, 386 So.2d 788 (Fla.1980); Alford v State, 322 So.2d. 533 (Fla.1975).

f)A requst for a jury instruction relative to the proposition of law that the crime was not committed in a cold, calculated and premeditated manner unless the evidence shows that the defendant made the decision to murder the victim substantially before the time that he picked her up. (Hill v State, 422 So.2d. 816 (Fla. 1982); Blanco v. State, 9 FLW 215 (Fla.1984); Rembert v State, 9 FLW 58 (Fla-1984); Jent v State, 408 So.2d 1024 (Fla.1981).

g)A request for a jury instructions seeking a general instruction to avoid a violation of the principle of law set

forth in 'Mullaney v Wilbur,,supra and in State v Dixon, supra. Further, the requst relative to the special jury instruction seeking substitution of the standard jury instruction (page 80) to avoid violating the principle of law set forth in Mulloney v Wilbur, supra and in State v Dixon, supra. These cases stand for the proposition that placing on the defendant the burden of proof that mitigating circumstances outweigh the aggravating circumstances violates Due Process of Law.

h)It was error for the Lower Court to fail to grant the Motion to Strike Adjectives from the Mitigating Circumstances contained in Section 921.141(6) Florida Statutes. The subsections (b), (e) and (f) all contain various adjectives which raise the level of proof of the mitigating circumstances beyond the standards set forth in Lockett v Ohio, 98 S.Ct. 2954 (1978); Songer v State, 365 So.2d 696 (Fla.1978); Jacobs v. State, 396 So.2d 713 (FLa.1981). Specifically Appellant requested the Court to strike the following adjectives as they place too great a burden upon the defendant:

> "...That section (b) contains the use of the word "extreme" in describing the mental or emotional disturbance of the defendant..."
> "...That section (e) contains the use of the word "extreme" in describing the duress of the defendant in committing the offense..."
> "...That section (f) contains the use of the word "substantially" in describing the ability of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law..."

h)It was error for the Court to deny the Appellant's motion to prelcude argument by the State relative to Section

921.141(5)(b) Florida Statutes as such Section is in direct contravention of this Court's ruling in Meeks v State, 339 So.2d 186 (Fla.1976). In that opinion this Court stated that "...contemporaneous convictions do not qualify as an aggravating circumstance vel non under Section 921.141(5)(b) Florida Statutes (1975). The consideration of a contemporaneous conviction as an aggravating circumstance under this section creates a situation in which the death sentence is presumed to be the proper result anytime a defendant is convicted of another violent felony at the same time he is convicted of First Degree Murder. The result is that this section is in effect being used to expand the number of capital defendants subject to the death penalty and violates the rule set forth by the United States Supreme Court in Zant v Stephens, 103 S.Ct. 2733 (1983).

j)The Court erred relative to it's failure to grant the motion filed in timely fashion by Appellant seeking to preclude instruction upon Section 921.141(5)(i) Florida Statutes. Initially Appellant submits that the evidence presented in the guilt-innocence phase of the trial was insufficient to support a finding that the murder was committed in a cold, calculated premeditated manner without pretense of moral or legal justification. This Court specfically delineated in Hill v State, 422 So.2d 816 (Fla.1982), the standard upon which Section (1) applies:

> "..The record shows that appellant's state of mind was such that he intended to rape and then murder the victim and that he made this decision substantially before that time that he picked her up. (Hill v State, supra at page 819).

In the instant case the State presented no evidence that the Appellant had made any decision substantially before the actual shooting to kill.

k) The Court erred by denying the Appellant's motion to preclude the Court and jury from considering Section 921.141(5)(h) Florida Statutes as an aggravating circumstance since that evidence presented by the State did not justify the instruction being rendered to the jury. State v Dixon, 283 So.2d 1 (Fla.1973); Godfrey v Georgia, 100 S.Ct. 1759 (1980); Zant v Stephens, 103 S.Ct. 2733 (1983); Lewis v State, 377 So.2d 640 (Fla. 1980); Riley v State, 366 So.2d 19 (Fla.1979); and Halliwell v State, 323 So.2d 557 (Fla.1975). Consequently, it was error for the Court to instruct the Jury on this point in light of the inadequate evidence presented.

POINT FOUR
IT WAS ERROR FOR THE LOWER COURT TO PROHIBIT AND TO RESTRICT THE CLOSING ARGUMENT OF THE APPELLANT

The Lower Court erred by refusing to allow the Appellant to present argument during the penalty phase that the felony murder verdict based upon a killing by a co-defendant would preclude the applicability of Section 921.141(5)(h) and Section 921.141(5)(i) Florida Statutes. The Court dictated to Appellant's attorney what he could argue to the jury. (R3225). The actions of the Court upon precluding the Appellant from arguing the felony murder theory (R3223) were so prejudicial as to warrant a reversal as such denied to Appellant due process and equal protection

guaranteed by the Constitution of the United States and by the Florida Constitution. It constitutes a violation of Due Process to preclude the Appellant from presenting his defenses, with proper arguments, to the jury. Morgan v State, 9 FLW 293 (Fla.1984).

POINT FIVE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO PRECLUDE DEATH AS A PENALTY DURING THE PENALTY PHASE OF THE INSTANT MATTER.

Appellant's defense throughout the course of the trial was clearly that the State failed to prove beyond a reasonable doubt that the Appellant and not the co-defendant was the individual who shot Lynn Elliott.

Initially, Appellant had requested a statement of particulars to ascertain whether the theory of the State was predicated upon premeditated murder or felony murder. The Trial Court denied this motion. Further, Appellant had requested a special verdict specifying whether it was premeditated murder or felony murder upon which the verdict was based. This motion was also denied.

As a result of the Court's denial of these respective motions, neither the Trial Court or the Appellant Court can determine upon which basis the Jury found Appellant guilty of murder. Under Enmund v Florida, 102 S.Ct. 3368 (1982), it is improper to impose the death penalty absent a finding that the Appellant killed or intended to kill the victim. There was sufficient evidence presented in this case for the Jury to base its verdict upon the felony murder doctrine. If the jury verdict was based solely under the felony murder doctrine then, under Enmund, the imposition of the death penalty would be improper because the State presented no evidence to satisfy the Enmund requirements. Under the circumstances the facts upon which the jury's verdict is based cannot be determined unless this Court

engaged in speculation. Under the circumstances the death penalty was improperly imposed. Enmund v Florida, 102 S.Ct. 3368(1982).

Appellant's motion to preclude death as a potential penalty was primarily based on the decision ofEnmund v Florida, 102 S.CT 3368 (1982). As emphasized previously the Enmund decision stands for the proposition that death is an improper penalty against a Defendant who neither killed, attempted to kill nor intended the death of a victim. As announced in the Enmund decision, the death penalty which is "...unique in its severity and irrevocability..." is an excessive penalty for the 'defendant', who, as such, does not take human life. The Enmund court stresses that the focus must be on the Defendant's culpability, not on those who committed the felony and killings.

Consequently, Appellant maintains that it is constitutionally impermissible for the State to impose the death sentence in this matter and ultimately treat Appellant in the same fashion and equate his culpability with that of an individual who actually committed the murder with premeditation.

The trial court allowed the jury to consider various aggravating circumstances in its deliberation relative to the sentencing phase. None of the aggravating circumstances required the jury to focus specifically on the Appellant's culpability in determining whether or not he intended or attempted or did in fact kill the victim. Consequently, Appellant was convicted of murder and was sentenced to death based on the Court's findings which were unfounded in light of the fact that it was based on

the Lower Court's speculation that the Jury's verdict was based upon premeditation.

The Court's instructions and refusal to preclude the jury from entertaining the death penalty allowed the jury to impose the death sentence upon Appellant without regards to the Appellant's intent, or proof of attempt to kill the victim. Consequently, Appellant maintains that the imposition of the death sentence without a specific finding of intent or attempt to kill violates the Eight and Fourteenth Amendment of the United States Constitution thereby mandating a reversal and new trial in this matter.

POINT SIX

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL, MOTION FOR A NEW TRIAL AND A MOTION TO PRECLUDE THE IMPOSITION OF THE DEATH PENALTY.

Appellant timely filed the above referenced motions during the course of the lower proceedings however the trial court denied same. Appellant submits that the Court erred in denying each and every motion and the various allegations set forth in each.

POINT SEVEN

IT WAS ERROR FOR THE COURT TO DENY APPELLANT'S MOTION FOR A STATEMENT OF AGGRAVATING CIRCUMSTANCES.

The indictment as filed failed to provide adequate notice as to the particular statutory aggravating circumstances which the State sought to establish. The failure of the Court to give and provide adequate and timely notice of the precise grounds upon which the State seeks the death penalty deprived the Appellant of a fair sentencing hearing and deprived him of a meaningful opportunity to rebut the aggravating circumstances.

This Court in Barclay v State, 362 So.2d 657 (Fla.-1979) vacated the death penalty and remanded the cause for a new sentencing hearing upon predicate that the failure to provide access to all information in a presentence investigation constituted a denial of Due Process. In fact the United States Supreme Court in Gardner v Florida, 97 S.Ct. 1107 (1977) stated that:

> "..It is now clear that the sentencing process as well as the trial itself must satisfy the requirements of the due process clause.."(Gardner v Florida, supra at page 1205).

In the United States Supreme Court case of Gregg v Georgia, 96 S.Ct. 2909 (1976), the Court stated:

> "The Judge (or jury) shall hear additional evidence in extenuation, mitigation and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendre of the defendant, or the absence of any prior

> convictions and pleas; provided however, that only such evidence in aggravation as to the state has made known to the defendant prior to his trial shall be admissible. (Gregg v Georgia, supra at page 2920.

This failure of the Court to order the State to furnish the statement requested violated Appellant's rights to Due Process under the United States and Florida Constitutions in light of Gardner v Florida. supra. Without the statement of aggravating circumstances the Appellant's ability to prepare was severely hampered.

POINT EIGHT
IT WAS ERROR FOR THE LOWER COURT TO FAIL TO MODIFY THE APPELLANT'S SENTENCE

The Appellant filed a timely motion to modify the sentence imposed by the Court. The basis of this motion was that there was evidence presented which could have led to the permissible inference that the co-defendant committed the murder. The Appellant submitted a verdict form differentiating between premeditated felony murder in which a killing was actually committed by the Appellant and between felony murder committed by another person. The Court denied such request for this verdict form.

The Florida Appellate Courts have ruled in various cases that the person who actually killed the victim may also be sentenced for the underlying felony as well as the murder if there is evidence of premeditation. Porter v State, 410 So.2d 164 (3DCA-1981); State v. Hegstrom, 401 So.12d 1343

(Fla.-1981); State v Pinder, 375 So.2d 836 (Fla.-1979).

By reason of the fact that the Court denied the request for a verdict form there would only be speculation as to the basis for the jury's determination. Thus, the court's imposition of the sentences of kidnapping constitutes a presumption that the jury predicated its' decision to find the Appellant guilty solely upon the finding that Appellant committed the murder and thus precluded the possibility that the jury believed murder was committed by another co-defendant. The defendant's right to a fair trial and to an impartial jury has been denied as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and as guaranteed by Article 1, Section 16 & 22 of the Constitution of the State of Florida.

POINT NINE

> THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED TO AVOID OR TO PREVENT A LAWFUL ARREST OR TO EFFECT ESCAPE IN VIOLATION OF SECTION 921.141(5)(E) FLORIDA STATUTES.

In Riley v State, 366 So.2d 19 (Fla.-1979), the Florida Supreme Court discussed Section 921.141(5)(e) Florida Statutes and stated in pertinent part:

> "..the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of requisite intent to avoid arrest and detection must be very strong in these cases..." (Riley v State, supra at page 22.)

The Court reiterated this holding in Menendez v State,

368 So.2d 1278, (Fla-1979), when it noted that:

> "...that an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses. Menendez v State, supra at page 1282.

The Court indicated in Menendez that the events preceeding the killing were unknown and that the Defendant's motive cannot be assumed for the burden of proof is upon the State.

The Trial Court in its sentencing order speculates that the only possible reason for the killing was to prevent arrest. This logic is not appropriate since these findings are to be based upon the evidence adduced at trial and not upon speculation.

Appellant maintains that the Trial Court improperly found this aggravating circumstance to exist. As indicated in a legion of case law, the mere fact of a murder committed for the purpose of avoiding unlawful arrest is not enough to constitute an aggravating factor when the victim is not a law enforcement official. See Oats v State, 446 So.2d 90 (Fla.-1984). Furthermore, to support this agravating circumstance it must be proved beyond a reasonable doubt that it was an intent to avoid arrest and detection. Further it must be shown that the dominant and/or only motive for the murder was the elimination of the witness. (Riley v State, supra and Menendez v State, supra).

In the instant case it is clear that this aggravating circumstance did not exist and the Court's finding was not supported by tangible evidence. Consequently, a reversal for a

new hearing is mandated. Davis v State, 9 FLW 430 (Fla.1984).

POINT TEN

THE TRIAL COURT ERRED BY NOT GRANTING A MISTRIAL RELATIVE TO THE ADMISSION INTO EVIDENCE OF GRUESOME PICTURES, THE RELEVANCY OF WHICH THE STATE FAILED TO ESTABLISH.

In the instant case the Court entered into evidence various pictures reflecting the deceased individual. These pictures, as introduced, were not relevant and a close review of the record clearly establishes that the relevance of these various pictures was never established. (Exhixbits #5 & #10).

The pictures to which Appellant alludes were introduced into evidence. The primary purpose of introducing these pictures was to prejudice the Jury with the shocking effect of exposing the members of the jury to these gruesome pictures. The introduction of these pictures had no probative value.

Relative to the admission into evidence of gruesome pictures the Supreme Court has previously held in Reddish v State, 167 So.2d 858 (Fla.-1964), that photographs taken of a body must have relevancy either independently or as corrobative of other evidence. Young v State, 234 So.2d 341 (Fla.-1970). If photographs have no relevance then they can not be admitted due to possible prejudicial effect upon the jury. Young v State, supra. Further photographs which are too far in time and in space to have any probative value should not be admitted into

evidence. Dyken v State, 89 So.2d 866 (Fla.-1956).

A review of the record in the instant matter clearly does establish that the admission of these particular pictures into evidence had no probative value by reason of the fact that they were too removed in time and space to possess any independent probative value and by reason of the fact that the Prosecutor never established the relevancy of these particular pictures. Consequently, these pictures were admitted by the prosecution as calculated to inflame the jury. By reason of the above the Appellant was denied due process as guaranteed to him the the United States Constitution and by the Constitution of the State of Florida.

POINT ELEVEN

THE COURT ERRED BY NOT DIRECTING A VERDICT RELATIVE TO A LIFE SENTENCE AS THE STATE DID NOT ESTABLISH A PRIMA FACIE CASE JUSTIFYING THE IMPOSITION OF THE DEATH PENALTY.

The evidence presented by the State did not justify the imposition of the death penalty and the Court should have directed a verdict of life upon motion of the Appellant. Halliwell V State, 323 So.2d 557 (Fla-1975); Tedder v State, 322 So.2d 908 (Fla.-1975); Lewis v State, 377 So.2d 640 (Fla.-1979); Alford v State, 307 So.2d 433 (Fla.-1975);Salvatore v State, 366 So.2d 745 (Fla.-1978); Sullivan v State, 303 So.2d 632 (Fla.-1974); Kampffv v State,, 371 So.2d 1007 (Fla.-1979); Buckrem v State, 355 So.2d 111 (Fla.-1974).

POINT TWELVE

IT WAS ERROR FOR THE LOWER COURT TO PRECLUDE THE TESTIMONY OF PERRY PISANI RELATIVE TO INCONSISTENT STATEMENTS OF THE STATE'S WITNESS MICHAEL ROCK. THE ACTIONS OF THE LOWER COURT CONSTITUTED A DENIAL TO THE APPELLANT OF HIS CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESS.

One of the state's key witnesses, Michael Rock, who witnessed the murder, stated that he was certain the Appellant shot the victim. (R533 L5-8). During the trial on cross examination this witness testified when asked for a physical description:

> "..Curly hair. Well,not all curly, but you know, little wavy curls in it, and mustache. (R1991 L21-22-emphasis supplied).

The Appellant's main defense throughout the course of this trial was to specifically establish that the co-defendant committed the crime of murder and not the Appellant. The child witness was apparently the only eye witness to observe the shooting. He was approximately three hundred and fifty six feet away from the shooting as evidenced by the testimony of the expert Morris Smith (R1218) and as stipulated to by the State (R2677). Mr. Rock admitted talking to a Detective Perry Pisani. (R537 L8-9). The defense proffered the testimony of Detective Pisani. (R~~1206~~ 2664 L5-9). In that proffer the Detective stated he had a transcript of his taped interview of Michael Rock and he read from it as follows:

> "...The Witness: I see from a transcript of my taped interview, which I have no reason to believe is inaccurate, that I asked did he have a mustache and I said, "Do you know?" Rock

responds, "I really couldn't see his face 'cause he kind of held it down."(R1206 L5-9).

The Court refused to allow this proffer. (R1206 L 21-25).

The intent of the defense was obvious. In the State's case in chief the witness, Michael Rock, testified that he observed a man with a mustache. In the previous statement he told detective Pisani he could not see the face when asked if he had a mustache by the Detective. (R~~1206~~ 2664 L5-9). However, as previously emphasized, at trial he testified he saw a man with a mustache. (R1991 L21-25). The failure of the Court to allow the defense to elicit the statement of Mr. Rock from the detective, Mr. Pisani, was procedurally incorrect and was violative of Due Process.

The Court, by precluding this testimony, denied to the Appellant the right to confront the witness. This is a constitutional right. Specht v Patterson, 386 U.S. 605, 18 L.Ed.2d 326, 87 S.Ct. 1209 (1967). Coxell v State, 368 So.2d 148 (Fla.1978). Further, the United States Supreme Court has held that an accused's right to confrontation may be violated in connection with a witness' identification of the accused as the person who committed the alleged crime. United States v Wade, 388 U.S. 218, 18 L.Ed.2d 119, 87 S.Ct.1926 (1967). In Wade the Supreme Court recognized that the defendant's conviction might rest on a courtroom identification which was the fruit of a suspect pretrial identification. In the instant case the Court's preclusion of the detective's testimony constituted a denial of the right to confront the witness by delineating to the jury his inconsistent statements. (At trial he stated the murderer had a mustache where at the time he gave his statement to Detective Pisani he stated he could not see the murderer's face.). This

testimony for the defense was extremely important as it related to the exact identification of the murderer and the credibility of the witnesses' statement that he could see the assailant and identify him more three hundred and fifty feet away! The Court's preclusion of this evidence denied the Appellant his right to confront the witness and the evidence and constituted an eggregious violation of Due Process and Equal Protection afforded to him by the Florida Constitution and the United States Constitution.

POINT THIRTEEN

IT WAS ERROR FOR THE LOWER COURT TO DENY THE APPELLANT'S REQUEST FOR A DEMONSTRATION OF THE DISTANCE TO THE JURY FROM WHERE THE ONLY WITNESS APPARENTLY STOOD WHEN HE SAW THE MURDER.

The only eyewitness to the murder, Michael Rock, testified that when he observed the murder he was fifty to one-hundred yards from the murder scene. (R1991 L5-6). The defense called Mr. James Morris Smith, Jr., a Civil Engineer. (R2669). He testified that he ascertained the distance from where the eyewitness, Michael Rock was standing, when the murder occured to be three hundred and fifty six feet. (R-1218 L21-23). The State did not contest the distance:

> "...Mr. Stone: Your Honor, we arenot contesting 356 feet...."(R2677 L21-22).

Mr Long, the defense attorney, then requested the Court permit the demonstration of the distance:

> "..Mr. Long:Our request is that since both Michael Rock and this witness, this expert witness, had testified that the photograph of the palm tree makes the palm tree look considerably

closer, because of this distortion and the jury's you know, misrepresentation of the distance, we would like to demonstrate to the jury what 356 feet actually is...."(R1222 L22-25; R1223 L1-3).

The request of defense counsel was to have the jury view the actual distance by having the jury view a parking lot immediately outside of the Courthouse which the expert civil engineer witness had determined to be three hundred and fifty-six feet in length.:

> "...The Court: You're asking the jury to go out there?
> ...Mr Long: Yes, Your Honor.(R2681 L14-15)
> ...The Court: Let me see if I understand your request. You're requesting me to permit the jury to go outside and from an outside visible point for this jury to determine what 356 feet is? eet for this jury."(R2682 L20-15)
> "...Mr. Long:Your Honor, there was a clear view according to the testimony of their own witness, a clear view between where Michael Rock was standing and the palm tree..."(R2684 L14-17).
> "...The Court:" Gentlemen, I'm going to deny the request..."(R2685 L2-3)

Three hundred and fifty six feet is equivalent to approximatgely one and one-half of a football field. This is where the State agreed the witness stood when viewing the murder:

> "...He's told how he did it. He's told us 356 feet..." (R2682 L18-19).

The issue of identity was always a crucial issue in this prosecution. There was no question as to the exact distance as the State in essence agreed as to the where the boy was standing. The effect of allowing the jury to view the distance with the expert's testimony would have been to enlighten the jury. Hisler v State, 52 Fla. 30, 42 So. 692 (Fla.1906).

In Johnson v State, 8 FLW 460 (Fla.1983), the issue of the propriety of a demonstration was considered by this Court. The Lower Court allowed evidence to be presented to determine

the distance from which the firearm was fired. This Court held that such action upon allowng the evidence was proper and upon doing so this court announced that it was receding from the decision of McClendon v State 105 So. 406 (Fla.1925). The demonstration, which was simple but crucial to the defendant's case, was improperly disallowed by the Lower Court.

Further, the State had presented various photographs of the distance which were distorted and which did not accurately reflect the exact distance from where the boy was standing when he observed the murder. The distance was crucial and the jury's perception of the distance was crucial because the very distance itself served to question the credibility of the young boy's statement. It constituted an abuse of the Court's discretion to preclude the engineer's demonstration of the distance especially in light of the fact that the Court allowed into evidence various photographs which depicted the distance in a distorted light. This abuse of discretion materially affected the Appellant's defense, precluded him from confronting the evidence and denied to him due process and equal protection afforded to him by the United States and by the Constitution of the State of Florida.

POINT FOURTEEN

IT WAS ERROR FOR THE LOWER COURT TO ENTER FINDINGS IN SUPPORT OF THE DEATH SENTENCE THAT THE THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENED WAS ESPECIALLY WICKED, EVIL, ATROCIOUS OR CRUEL.

The court found that the aggravating factor that the crime was especially wicked, evil, atrocious or cruel, was existant in this case. The Court erred in making this particular finding of fact as there is insufficient evidence to show beyond a reasonble doubt that this particular aggravating circumstance existed in the instant matter certainly as applied to Appellant. As defined in State v Dixon, 283 So.2d 1 (Fla-1973), the Court has defined this particular aggravating circumstance as follows:

> "...It is our interpretation that heinous means extremely wicked or shockingly evil. That atrocious means outrageously wicked and vile; and that cruel means desiring 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 permission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the consciousless or pitiless crime which is unnecessarily tortuous to the victim..". (State v Dixon, supra).

The facts in the instant matter do not include such additional facts as to set the crime apart from the norm of capital felonies. The facts simply do not constitute a '...consciousless or pitiless crime which is unnecessarily tortuous to the victim'...as contemplated by this particular aggravating circumstance. In Halliwell v. State, 322 So.2d 557 (Fla. 1975) the death sentence was reversed because of the erroneous finding as to this particular aggravating circumstance. In Haliwell v State, supra the defendant bludgeoned the

victim to death by repeatedly beating him about the skull and about the body with a nineteen (19) inch bar. Several hours later the defendant dismembered the body of the victim with a saw, machete and fishing knife and disposed of the corpse in a creek. In discussing the 'heinousness' aspect of this aggravating circumstance, the Florida Supreme Court concluded that '....we see nothing more shocking in the actual killing than in the majority of murder cases reviewed by this Court...'(Haliwell v State, supra at page 561). In Riley v State, 366 So.2d 19 (Fla-1979) the facts revealed the execution style shooting of two (2) bound and gagged victims for the purpose of eliminating them as witnesses. In that case the Court approved the Court stated that the facts do not justify an especially heinous, atrocious or a cruel murder. (Lucas v State, 376 So.2d. 1149 (Fla-1979); Alvord v State, 32 So.2d. 553 (Fla-1975).

In Lewis v State, 377 So.2d. 640 (Fla.-1980), the court stated that it is apparent that all killings are heinous, to members of our society and deem the intentional unjustifiable taking of human life to be nothing less. However, the legislature intended to authorize the death penalty for the crime which is 'especially heinous', when it is consciousless or pitiless which is unnecessarily totruous to the victim. The facts in this case simply do not constitute an especially heinous crime as contemplated in the statutory aggravating cirucmstance as compared to the various authorities cited herein. Oats v. State, 9 FLW 67 (Fla.1984); State v Dixon, 9 FLW 349 (Fla.1984).

POINT FIFTEEN

IT WAS ERROR FOR THE COURT TO ALLOW THE JURY TO CONSIDER THE VARIOUS AGGRAVATING CIRCUMSTANCES HEREIN AND FURTHER IT WAS ERROR FOR THE COURT TO DETERMINE BEYOND A REASONABLE DOUBT THAT SUFFICENT EVIDENCE WAS ADDUCED AT TRIAL TO FIND THE EXISTENCE OF AGGRAVATING CIRCUMSTANCES.

Appellant maintains that the erroneous application of one or more of the aggravating circumstances entitles Appellant to a new trial as such error requires a reversal and a new sentencing hearing especially in light of the fact that the Court failed to allow evidence of some of the mitigating circumstances to be introduced. These mitigating circumstances included the failure of the Lower Court to allow the introduction of the scrapbook (R3037), various pictures (R3062) and testimony relative to the vodka and pills in Appellant's room (R3056).

Thus, a reversal is mandated if any of the three (3) aggravating circumstances were erroneously applied. Resentencing is required since this court is unable to determine what significance any given aggravating factor was given in the weighing process. (Fleming v State, 374 So.2d 954 (Fla.-1979). Also, the failure to require a full sentencing after invalidating any of the aggravating circumstances requires a new hearing. Lockett v Ohio, 438 U.S. 586 (1978); Eddings v Oklahoma, 455 U.S. 104 (1982).

POINT SIXTEEN

IT WAS ERROR FOR THE TRIAL COURT TO FIND THAT THE CRIME WAS COMMITTED IN A COLD, CALCULATED AND/OR PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL

OR LEGAL JUSTIFICATION.

The Court's finding that the crime for which the Defendant is sentenced was commited in a cold, calculated and premeditated manner without any pretense of moral or legal justification was in error. In order for this aggravating circumstance to be supported there must be sufficent evidence of premeditation and the evidence must additionally prove that the murder was committed in a cold or calculated manner so as to support this aggravated circumstance. (Washington v State, 432 So.2d 44 (Fla-1983). This Court has specifically held that the fact that the murder was committed in a cold, calculated and premeditated manner inures to the benefit of the defendant insofar as it requires proof beyond that necessary to prove premeditation. (Washington v State, supra). In the instant case there is insufficent evidence to establish premeditation or that the murder was committed in a cold, calculated and premeditated manner.

This Court specifically stated:

> "...Although there was sufficent proof of premeditation, we find there is a lack of any additional proof that the murder was committed in a cold or calculated manner, such as a prior plan to kill Edwards..."(Washington v State, supra at page 48.

Absent sufficent evidence adduced at the trial this finding of fact by the Court cannot exist. (Combs v. State, 403 So.2d. 418 (Fla.-1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982); Rembert v. State, 9 FLW 58 (Fla.1984); Jent v State, 408 So.2d 1024 (Fla.1981).

The evidence introduced by he State actually established

that the person who shot Lynn Elliott did not act in a cold, calculated manner. Both persons involved in the slaying, the victim and the assailant ran naked down the driveway with a witness present. A struggle ensued during which the victim was shot. No significant period elapsed between the chase and the struggle. These facts are far removed from those circumstances involving a cold, calculated murder. Thus, this finding of the Circuit Court Judge cannot be affirmed as the case law and the facts do not substantiate the Court's finding.

POINT SEVENTEEN

IT WAS ERROR FOR THE COURT TO FAIL TO FIND AS A MITIGATING CIRCUMSTANCE THAT THE DEFENDANT HAD NO SIGNIFICANT HISTORY OF PRIOR ACTIVITY.

The Court indicated that this mitigating circumstance did not apply in this case and was not considered because there was no evidence presented whatsoever that would warrant the Court finding this mitigating circumstance to be present. The Court was cognizant of the defendant's criminal record and consequently was aware that the Appellant did not have a significant history of prior activity. Consequently this should have been a proper mitigating circumstance and the Court should have considered this as such. The failure of the Court to so find constitutes a denial of due process and certainly warrants a reversal of the matter.

In determining significant criminal activity this Court has stated that a Trial Judge may consider the severity as well as the number of prior offenses. (State v Dixon, 283 So.2d 1

(Fla.1973),cert. denied, 416 U.S. 943 (1974). In this instant case the prior offense cannot be considered as severe in light of the attendant facts surrounding that incident. Further, there was only one prior offense. Thus, the Court abused it's discretion in making this particular determination in light of the Dixon holding.

POINT EIGHTEEN

IT WAS ERROR FOR THE LOWER COURT TO FAIL TO FIND THAT THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

The Appellant, during the sentencing state, sought to introduce evidence establishing that there was in his room alcohol and drugs. The record reflects the colloquy between the Court and Appellant's counsel as follows:

> "...Mr. Long: These are the things that the police ignored within the bedroom. They seized all the other stuff. There was a half-empty bottle of vodka and a bunch of pills strewn around and a receipt for the bottle of vodka dated two days before.(R3048 L5-9)
> "...It showed they'll testify because of the way he was acting, they believe that he was drinking."(R3048 L13-14)
> "...Mr. Long...and the way the witnesses will testify that he was acting matched how he acted when he was under the influence..."(R3052 L15-17).
> "...Mr. Long...Because these witnesses know how he acts when he drinks. They know he was acting very, very strange that morning. Very, very strange that weekend, that previous weekend. That's how he acted when he drank. Plus, you know, the pills.(R3052 L22-25: R3053 L1-2).
> "...The Court: I think so. I'll deny the admission of that type of evidence."(R3056 L18-19).

This Court has indicated that the Florida death penalty statute does not limit consideration of mitigating circumstances to those stautorily enumerated. Peek v State, 395 So.2d 492 (Fla-1980). Section 921.141(1)Florida Statutes provides in pertinent part that any evidence may be presented as to any matter that the Court deems relevant as to the nature of the crime and the character of the defendant. It is submitted that the Court's preclusion of the evidence relative to the possible mitigating circumstances constitute reversible error and warrants a new trial.

POINT NINETEEN

IT WAS ERROR FOR THE TRIAL COURT TO DENY A MISTRIAL DUE TO THE INTENTIONAL PROSECUTORIAL MISCONDUCT WHICH OCCURED THROUGHOUT THE TRIAL

The Prosecutor engaged in misconduct on two (2) distinct occasions. The first occasion involved a situation during voir dire wherein the prosecutor appealed to the sympathy of the Jury. (1714 1716):

> "...Certainly, the defendant's mother, a loving mother, in the event you find him guilty of murder in the first degree, will more than likely take the witness stand and testify on behalf of her son as a mitigating circumstance..."(R1715 L7-11)
> "...As I said, you understand, we cannot call in the penalty phase Mr. and Mrs. Elliott. We're prohibited from doing that.(R1715 L19-21).
> "...Mr. Long: Your Honor, I would strenuously object to Mr. Stone's totally improper statements to the jury at this time and move for a mistrial because...He is invoking the sympathy of this jury. He keeps on repeating that Mr. and Mrs. Elliott are in the courtroom, that they can't

testify. He's doing this to invoke sympathy....He's doing it deliberately and I think it's affected this jury and I move this Court for a mistrial because I don't think that there is any instruction that this court can give the jury--.."(R1716 L19-25) (R1717 L1).

This comment was improper because it was made at the outset of voir dire and was so prejudicial as to have influenced the jury to empathize with the victim's famiy and deny a fair and impartial trial to appellant. Also please see Gonzalez v State, 9 FLW 1121(3DCA-1984). During his arguments (voir dire) a prosecuting attorney should not attempt to elicit the jury's sympathy by referring to the victim's family. Grant v State, 171 So.2d 361 (Fla.1965), cert. denied 384 U>S> 1014 (1966); Pait v State, 112 So.2d 380 (Fla.1950).

The second instance of prosecutorial misconduct involved the presentation into evidence of three bullets. The State implied tht these bullets were present in the Appellant's pants pocket at the time of his arrest. However, thre was never any testimony by any officer or deputy who searched theAppellant at the sceneof the crime that there were such bullets in his pants pocket. The State never listed these bullets as evidence and did not mark the bullets as exhibits as wre all theother items introduced. Instead during the testimony of the criminologist concerning blood stains on the pants in question the State elicited testimony that during the examination he discovered the bullets. (R2463-2475)

The introduction of the bullets constituted a violation of Florida Rules of Criminal Procedure Rule 3.220(a)(1)(vi). Because these bullets were not listed as evidence they should not have been introduced. The defense attorneys were surprised by

the introduction of these bullets not relative to their existence but rather as to their introduction into evidence as they were not listed on the exhibit list. Yet, it was the intent of the prosecutor to introduce these items into evidence.

In circumstances such as those surrounding this instant matter the actions of the prosecutor be construed by the Appellate Court as so egregious to compel reversal. United States v Modica, 663 F.2d 1173 (2dCir. 1981); Harris v State, 414 So.2d 557 (3DCA-1982); Harper v State, 411 So.2d. 235 (3DCa-1982); McMillian v. State, 409 So.2d 197(3DCA-1982).

POINT TWENTY
THE TRIAL COURT ERRED BY REFUSING TO GRANT FUNDS TO APPELLANT, AN INDIGENT, FOR VARIOUS EXPERTS

The trial Court denied various motions timely filed by the Appellant. One of these motions constituted a motin for funds to supplement record in support of the Motion to Allow Death Qualification of Jurors for the Penalty Phase Only filed on date of November 4, 1983. An expert was needed in this area in light of the critical nature of a capital case and the possibility, nad in the instant matter, the actuality of the death sentence. As Appellant was an indigent and was financially unable to retain the service of the above referenced expert he was denied the ability to prepare an adequate defense and effectively he was denied due process guaranteed to him by the Florida Constitution

and by the Constitution of the United States. Further, Appellant was denied access to the Courts and equal protection and other constitutional rights embodied in the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

POINT TWENTY ONE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE DURING THE "DEATH QUALIFICATION" AND OTHER MOTIONS TO PREVENT A "PROSECUTION-PRONE" JURY.

Appellant filed various motions directed to insure that a "prosecution-prone" jury would not be impaneled at trial. The various motions included a Motion to Preclude Death Qualification of Jurors; a Motion to Allow Death Qualification of Jurors for the Penatly Phase Only and a Motion for Individual Sequestered Voir Dire of Jurors During Death Qualification. During a typical "death qualifying" voir dire, the Court and respective counsel repeatedly discuss the procedures leading to the penalty phase of the trial and intensely question each prospective juror concerning his or her attitudes about capital punishment. Jurors undergoing the "death qualification" process can reasonably infer that the Court and respective counsel personally believe that the accused is guilty and consequently anticipate that the jury will reach a guilty verdict. Only such an inference can serve to explain to the prospective jurors not familiar with courtroom procedures why so much time and energy is expended on the discussion of the death penalty before the trial has commenced. It is reasonable to conclude that the jurors themselves subconsciously or otherwise become more inclined to believe that the accused is guilty as charged. Jurors who have been tainted by the "death qualification" process will subconsciously consider the testimony, evidence and credibility of witnesses in favor of the state and to the detriment of the accused. Appellant raised the arguments contained herein in a "memo of law" which elaborated on the adverse consequences to an accused resulting

from the "death qualification" process. Appellant referred the trial court to a relevant and enlightening experiment conducted by Dr. Craig Haney, Assistant Professor of Psychology at the University of California at Santa Cruz, wherein he devised a control study to determine whether the process of "death qualification" results in juror predisposition to believe that the accused is guilty as charged. In Hovey v Superior Court of Alameda County, 616 P.2nd 1301 (Cal. 1980), the California Supreme Court recognized the validity of the Haney study and stated:

> "Haney's findings indicate that the current process for selecting capital jurors creates certain side effects which shapes the jury's attitudes towards the death sentence. The courts are appropriately concerned if procedures incur "tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group." Glasser v United States, 315 U.S. 60, 62, 62 S.Ct. 457, 86 L.Ed2d 680 (1942). It has always been the judiciary's duty to counteract processes which generates in jurors "a bias in favor of the prosecution" (Ibid). The high court has been diligent in its review of the procedures which "undermine and weaken the institution of jury trial" (Ibid). These undermining processes...should be sturdily resisted...steps innocently taken may one by one lead to the irretrievalbe impairment of substantial liberties."Hovey v Superior Court of Alameda County, supra)
>
> "...Haney's studies serve to alert this court to some of the pernicious consequences of our current voir dire procedures in capital cases. This court must be concerned about the threat these procedures present to an accused's constitutionally protected interests in fair trial.
>
> Haney testified that the prejudicial alteration and attitudes which resulted from a juror's observations of death qualification of his or her fellow venire persons is a "function of exactly how extensive the questioning becomes. The more extensive the questioning, the more you would expect to find important differences

> between the state of mind of jurors who have been through the one process compared to those who have been through the other." This proposition implies a corollary which is "the extent to which (these effects) are minimal would be a function to the extent to which questioning is minimized."
>
> The most practical and effective procedure available to minimize untowards effects of death qualification is individualized sequestered voir dire because jurors would then witness only a single death qualifying voir dire - their own dire - each individual juror would be exposed to considerably less discussion in the questioning of the various aspects of the penalty phase before hearing any evidence of guilt. Such a reduction in the pretrial emphasis on penalty should minimize the tendency of a death qualify jury to presume guilt and expect conviction. (Hovey, supra at 1353-(Emphasis added).

The California Supreme Court in Hovey, supra, entertained the testimony of Dr. Haney relative to his study in connection with the "death qualification" process. The Court was so impressed with the testimony elicited from Dr. Haney and the results of his study that the Court ruled that individualized sequestered voir dire is a process which must be utilized in order to minimize the "pernicious consequences" of that states theretofore voir dire procedures in capital cases.

In conjunction with Appellant's various motions referred to herein, Appellant filed a companion motion for funds to retain the expert testimony of Dr. Craig Haney so that the trial court could be fully apprised of the significant legal consequences resulting from his study on the death qualification process. The trial court denied Appellant's motion for funds to retain Dr. Haney's services and therefore effectively denied Appellant a meaningful hearing on siad motion in violation of his constitutional right to access to the court on a legitimate justiciable issue in violation of Article I, Section 27 of the

Florida Constitution. It is error to deny a hearing unless the issue before the court is frivolous on its face as a matter of law. See tate v Weeks, 166 So2nd 892 (Fla. 1964); State v Reynolds, 238 So2nd 598 (Fla. 1970); Land v State, 293 So2nd 704 (Fla. 1974); Foster v State, 255 So2nd 533 (Fla. 1st DCA 1971). The trial court's denial to grant Appellant, an indigent, the necessary funds to retain the expert testimony in connection with this motion further violated Defendant's constitutional rights embodied in the Fifth, Sixth, Eight and Fourteeth Amendments to the United States Constitution and Article I, ss 2, 9, 16 and 17 of the Florida Constitution.

POINT TWENTY TWO

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT AND/OR TO DECLARE THE FLORIDA DEATH PENALTY TO BE UNCONSTITUTIONAL.

Appellant timely filed various motions directed to the propriety of the death penalty which were improperly denied by the trial court for the following reasons:

1. The indictment was legally insufficient in that it did not properly charge a capital offenses by failing to list the statutory aggravating circumstances upon which the State would rely in order to seek the death penalty and therefore does not properly apprise Defendant as to the nature of the offense upon which he must defend, in violation of the due process clause of the Fourteenth Amendment of the United States Constitution and Article I, Sections 15 and 16 of the Florida Constitution.

2. Section 782.04 and 921.141, Florida Statutes, are unconstitutionally vague in violation of the due process and equal protection clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 16 of the Florida Constitution because the Grand Jury may not have been able to distinguish between murder in the first degree and murder in the second degree. Therefore, the charging document may have been issued in an unconstitutionally discretionary and arbitrary fashion.

3. Section 782.04, 755.082 and 921.141, Florida Statutes, provide for insufficient and arbitrary standards relative to the imposition of death which are vague, indefinite and uncertain which deprives an accused of his right to know the nature of the charges against him, the differentiation between the degrees of homicide, all of which results in his inability to adequately prepare for trial; furthermore, trial court cannot determine what specific crimes are embodied within the division of murder in the first degree, and murder in the second degree, in order to properly instruct the jury and to conduct the course of trial. Said statutory provisions deprive the Defendant of life and liberty without due process of law, and violates his constitutional rights contained in the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 and 16 of the Florida Constitution.

4. Section 921.141, violates due process clause of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sectons 2 and 9 of the Florida Constitution in that the fundamental right to life is violated by the imposition

of the death penalty without requiring the State to prove beyond a reasonable doubt that there exists a compelling State interest for the deprivation of that fundamental right. Further, said statutory provision provides for a procedure pertaining to the imposition of the death penalty which violates the separation of powers between the Legislature and Judiciary in violation of Article V, Section 2 of the Florida Constitution.

5. Section 921.141, Florida Statutes, is constitutionally infirm in that it impermissibly shifts the burden to the Defendant having to prove a certain mitigating circumstances in order to be spared of the death penalty. The impermissible burden created in said statutory section violates the Fifth, Sixth, Eight and Fourteenth Amendments of the United States Constitution and Article I, Sections 2 and 9 of the Florida Constitution and further contravenes the case of Mullaney v Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed2d 508 (1975).

6. Section 921.141,. Florida Statute, does not mandate that the State prove beyond a reasonable doubt the existence of certain statutory aggravating circumstances and further fails to create a burden of proof relative to the existence of mitigating circumstances, said statutory deficiencies violate the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2 and 9 of the Florida Constitution. Further, said statute is unconstitutional in that the mitigating circumstances contained therein are unnecessarily restrictive in scope contrary to Lockett v Ohio, 438 U.S. 586 (1978), in Bell v Ohio, 438 U.S. 637 (1978).

7. Section 922.10, Florida Statute, is per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 17 of the Florida constitution.

8. The Florida Murder Statute, Section 782.04 and 921.141 are unconstitutional as applied in that Florida adheres to the Felony-Murder Doctrine which allows premeditation be established through proof of an underlying felony. In the absence of adequate notice as to whether or not the accused is required to defend against either the felony-murder or premeditated murder, the statute is unconstitutional in violation of the Fifth, Sioxth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2 and 9 of the Florida Constitution; and further undermines the court holdings in Lockett v Ohio and Bell v Ohio, supra.

9. Section 782.04 and 921.141 of the Florida Statutes are unconstitutional in that the death penalty may be imposed under the theory of felony-murder without finding that the Defendant intentionally caused the death of the victim. This lack of the requirement of a criminal mens rea violates the basic fairness concepts contained in the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution. Whether a death results in the course of a felony giving rise to the Felony-Murder Doctrine turns on fortuitous events that do not distinguish the intent or culpability of the accused. Furthermore, the statutory scheme as applied allows a verdict of guilty in the imposition of the death sentence without distinquishing on what theory the jury based its verdict.

Consequently, said statutory sections are unconstitutional and contrary to the holdings in Coker v Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2nd 982 (1977); Furman v Georgia, supra, Lockett v Ohio, supra, Bell v Ohio, supra. In Lockett v Ohio, supra, the Appellant argued that the Eighth Amendment of the United States Constitution barred the death penalty in cases where there was not a finding that the accused possessed a purpose to cause the death of the victim. Justice White, in a concurring opinion, stated that "...the conclusion is unavoidable that the infliction of death upon those who had no intention to bring about the victim is not only grossly out of proportion to the severity of the crime but also fails to significantly contribute to acceptable or, indeed, any perceptible goals of punishment...". In light of the above, the Florida Death Statute is violative of due process in that an accused in Florida can be sentenced to death two separate ways under the said Death Penalty Statute without the requirement that he possessed the criminal intent and purpose to take the life of another person.

10. Section 782.04, 775.082 and 921.141, Florida Statutes, provide for the arbitrary and capricious imposition of the death sentence because Florida Appellate Courts have no knowledge of the standards applied at the trial court level. Although the Florida Supreme Court reviews all cases in which the death sentence has been imposed, the Court does not review the records of the cases where the life sentence has been imposed. Accordingly, the Supreme Court has no rational basis for the comparison of various aggravating and mitigating circumstances as set forth in the Florida Statutes. In the absence of a

meaningful review of the cases which resulted in life sentences, the Florida Supreme Court lacks the ability to enter into a rational, reasoned comparison of cases so as to create a valid standard pertaining to the imposition of the death sentence. Consequently, the Supreme Court decisions are inconsistent in their review and unconstitutional as applied thereby violating the strict review requirements of Proffit v Florida, 428 U.S. 242, 96 S.Ct. 2690, 49 L.Ed.2d 913 (1976); Gregg v Georgia, 428 U.S. 153 (1976). In sum, there is no way for the Florida Courts to establish a standard for death as they have no knowledge of the standards being employed at the trial court level for life sentences.

Appellant maintains that the trial court erred by denying his Motion To Dismiss The Indictment and/or declare the Florida Death Statute unconstitutional for the legal arguments expressed above.

<u>POINT TWENTY THREE</u>

IT WAS ERROR FOR THE LOWER COURT TO FAIL TO GRANT A MISTRIAL UPON THE MISCONDUCT OF ONE OF THE JURORS WHICH WAS BROUGHT TO THE COURT'S ATTENTION IN TIMELY AND PROPER FASHION.

During the course of the closing statement of the defendant the counsel for the defendant was abruptly interrupted by a juror. The following occurred as defense counsel presented his closing argument to the court:

> "...(Mr Phillips-defense counsel) Recall, if you will, when Dr. Rodgers testified. Dr. Rodgers testified that he waited some eighteen hours before performing his autopsy. What was the reason?
> JUROR NO. 11: Goddamn him. Goddamn him. (Laughing).
> MR PHILLIPS; Your Honor, we've got a problem here.
> ALTERNATE JUROR NO. 2: He'll be all right.
> MR STONE; May we approach the bench, please?
> .....
> (The following bench conference was held:)
> THE COURT: He's the one that has epilepsy....
> MR. PHILLIPS: I'd like to make the record clear. As I was making my closing argument, I heard that juror say on two or three occasions during the course of whatever he was in, him saying, "Goddamn you. Goddamn you. Goddamn you."
> MR STONE: I didn't hear that.
> ...MR PHILLIPS I'm going to move for a mistrial.
> ..MR LONG: We think it's a prejudice to the rest of the jurors.
> ..THE COURT; Gentlemen, the motion for mistrial is going to be denied. We have the alternates...."(R~~1397 R 1398 R1399~~).
> 2855-2866

The Court immediately denied the motion for mistrial without assessing the impact of any prejudice. The failure of the Court to instruct the jury or to assess the prejudice warrants a reversal. This situation constituted a unique circumstance for which minimal due process required an instruction. The problem was not a lack of jurors as the Court seemed to indicate but

rather the prejudicial assessment of one juror casting aspersions and obscenities upon Appellant's counsel. The Court should have granted a mistrial in the instant case as the misconduct was of such a character that it affected the impartiality of the jury and prevented the exercise of reason and judgment on the part of the jury. Snyder v Massachusetts, 291 U.S. 97, 78 L.Ed. 67, 54 S.Ct. 330 (1958); Malloy v Hogan, 378 U.S. 1, 12 L.Ed. 67,, 54 S.Ct. 1489 (1964); Duncan v Louisiana, 391 U.S. 145, 20 L.Ed. 2d 1412, 88 S.Ct. 1444 (1968); Glatstein v Grund, 51 N.W.2d 162 91952); Phillips v State, 59 N.W.2d 598 (1953).

This partricular juror, by virtue of his conduct, expressed his opinion and prejudice during the course of the trial. What is so egregious about this expression of prejudice is the fact that such conduct occured in the presence of the whole jury during the guilt-innocence phase of the trial. This juror in actuality revealed his antagonism toward the defendant. In Re Davis, 83 A.2d 590 (1951). Further, even if the Court had instructed the juror, this particular outburst could not have been cured ;by the instruction of the trial judge to disregard the incident. McKahan v Baltimore & O. R. Co., 72 A.251 (1909). This juror's actions, in essence, constituted a prejudgment of the case and a clear expression of guilt before having heard the closing argument of Appellant and before having entertained the Court's instructions. This constitutes justification for reversal of the conviction. People v Brown, 132 Cal.Rptr. 217 (1976).

In Rolle v State, 9 FLW 90 (4DCA-1984) a juror recognized a prosecution witness and made remarks about that witness in the presence of other jurors. The Court in Rolle

did conduct an evidentiary hearing on the issue of probable influence of the juror's remarks. There was no evidentiary hearing conducted in the instant case. The record only reflects a mere denial of a mistrial.

In Russ v State, 95 So.2d 59 (Fla.1957), this Court stated:

> "...If the statements by the juror are such that they would probably influence the jury and the evidence in the cause is conflicting the onus is not on the accused to show he was prejudiced for the law presumes he was..."Russ v State, supra at pages 600,601)

In a very recent case, Doyle v State, 9 FLW 453 (Fla.1984) decided by this Court, a juror apparently, during a court recess, after the State had presented its evidence, stated "Good Luck, You're going to need it ". The Court denied the motion for a mistrial but the Court did give a curative instruction to the jury. In the instant case no curative instruction was given.

Thus, the failure of the Court to grant a mistrial constitutes reversal error. At the minimum due process required that the Court to inquire into the resultant prejudice from the actions of the Juror and from his statements. A new trial is required because the Appellant's rights to a fair and impartial trial, to due process and to equal protection as guaranteed by the Florida and United States Constitutions were denied to him.

POINT TWENTY FOUR

THE TRIAL COURT COMMITTED ERROR BY FAILING TO REQUIRE THE STATE TO INDICATE IF THE STATE WAS PROCEEDING UPON FELONY MURDER THEORY IN CONTRAVENTION OF ENMUND V FLORIDA.

The Trial Court refused to direct the State to indicate if the State was proceeding upon the theory of felony murder. As previously indicated the defense theory presented at trial indicated that the co-defendant, Waterfield, committed the murder. In Enmund v Florida, 102 S.Ct. 3368 (1982), the United States Supreme Court held that the Eighth and the Fourteenth Amendments to the United States Constitution precludes the imposition of the death penalty upon a defendant who did not kill, attempt to kill or intend to kill the deceased. The Enmund v Florida decision clearly emphasize that before the ultimate sentence of death can be imposed the focus must be upon the Appellant's culpability not on the actions and/or intent of his accomplices. Since the Appellant's verdict form was denied, requesting distinction as to felony murder, the Appellant and this Court can not ascertain upon which basis the Appellant was convicted. If the jurors believed he did not commit the killing yet held him responsible for the murder because of his complicity then Enmund would certainly apply in the instant matter.

This Court has specifically stated that a remand is now required when it is necessary to determine whether the defendant's participation was such to justify the death penalty for felony murder. Brumley v State, 9 FLW 239 (6//22/84) This Court specifically stated:

> "...We have already concluded that Appellant's conviction for first degree murder rests upon the felony murder rule because the evidence was not

sufficent to show that appellant joined in the intent of Smith to kill Rogers. In Enmund v Florida the United States Supreme Court held that the Eighth Amendment does not permit imposition of the death penalty on a person participating in a felony during which a murder is committed but who does not himself kill, attempt to kill, intend that a killing take place, or intend or contemplate that lethal force will be used. 458 U.S. at 797...."(Brumbley v State, supra at page 241).

In this case the Trial Court's findings of fact do not, because they cannot, distinguish as to whether or not the jury predicated its findings upon actual participation or upon felony-murder. Such distinction was requested by the Appellant when he requested a specific verdict form and specific instructions which were denied.

The complexity herein is that this Court and Appellant can never ascertain upon what predicate the jurors returned the verdict and consequently a new trial is warranted as there was fundamental error created as Appellant's constitutional rights contained in the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Articles I, Section 2, 9, 16 and 17 of the Florida Constitution were violated.

POINT TWENTY FIVE

IT WAS ERROR FOR THE LOWER COURT TO RESTRICT THE APPELLANT'S VOIR DIRE AND EXAMINATION OF WITNESSES RELATIVE TO THE INVOLVEMENT OF THE CO-DEFENDANT.

The Lower Court allowed the State to introduce into

evidence the clothing of the co-defendant, Waterfield. (R2463) Further, the Lower Court allowed other testimony relative to his actions in the case.

A crucial error in this trial was the Lower Court's refusal to allow the Appellant to voir dire the jury and to question the officer as to the co-defendant's actions in this case. This was such a crucial error because the Appellant's main defense was that the co-defendant had committed the murder. During voir dire the Appellant's attorney posed the following inquiry to the jurors:

> "...Mr Long:...Has Mr. Stone convinced you by what he said before I got up here that you can in no way consider what the co-defendant did in the incident that resulted in us being in court today? Has he convinced you that you can't consider what Fred Waterfield did?
> Mr. Stone: Your Honor, I'm going to object because that's not what I said and I think that's improper.(R1675 L12-18).
> "...The Court:...Let's proceed. Objection sustained.(R1676 L12).

The court erred by restricting this voir dire. This is especially true because the State first inquired as to Mr. Waterfield. If Mr. Waterfield was involved in the shooting the Appellant has a right to inquire into the juror's attitudes toward the co-defendant's actions. The Court's sustaining this objection constituted an abuse of discretion and severely hampered the Appellant's right to secure a fair and impartial jury. Poole v State, supra.

In the Supreme Court case of Morgan v State, 9 FLW 293 (Fla.198) the Court had refused to allow the Defendant to raise certain defenses. This amounted to a denial of due process and

warranted this Court remanded the cause for a new trial. In this case also the preclusion and restriction of the voir dire and the various questions interposed during the course of the trial constituted a violation of Due Process.

As briefly mentioned previously the State elicited testimony as to Waterfield in its' case in chief. Questions were posed to the Mr. Nippes, the criminologist, as to Mr. Waterfield's trousers and his examination of them. (R2463 L3-7). It then appears that the State, who objected to voir dire as to Mr. Waterfield's involvement, introduced testimony as to his non-involvement. By precluding this crucial voir-dire inquiry the Appellant was denied his right to a fair and impartial trial and his right to due process and equal protections, guarantees afforded by the United States and Florida Constitutions.

POINT TWENTY SIX

IT WAS ERROR FOR THE TRIAL COURT TO DENY A MISTRIAL UPON APPELLANT'S MOTION RELATIVE TO DETECTIVE KHEUN'S TESTIMONY IN CONTRAVENTION OF THE COURT'S PRETRIAL ORDER.

The Lower Court's pretrial order precluded any testimony concerning a statement by the Appellant that he had a few things to get off his chest. At trial and in violation of the Court's pretrial order Deputy Sheriff Kuehn stated during direct examination by the State:

> "...Mr. Midelis..."What did he say?
> A. He said that he wanted to get something off his chest, to make a statement, and then he wanted to see a lawyer.

Mr Phillips: Your Honor, I'll object at this point in time. May we approach the bench?.. .Mr. Long:Your Honor, the State Attorney stipulated that all statements made by David Gore at the carport were not admissible and this Court entered such an order and "I want to get this stuff off my chest" or something off my chest makes it appear like he's going to confess to something, and it's highly damaging. The State Attorney stipulated --.."(R2268 L11-25)
"...Mr. Long: Yes. We objected to the testimony, your Honor, and we move for a mistrial. (R2277 L12-13).
"...The Court: All right. The motion for mistrial is denied...."(R2277 L14-15).

The violation of the pretrial order was extremely prejudicial. The State had already concede and stipulated that the statement was made after Appellant requested counsel. The State had a duty to insure that the State's witness not violate that order. This was especially so crucial as the statement that I want to get something off my chest which was precluded by the Court, led to the jury's drawing such impermissible inferences which prejudiced the Appellant's rights to a fair trial. This severe violation of the Court's order could not be rendered moot nor could the prejudice be minimized by the Court's instruction. The very statement, that he wants to get something off his chest, more than implies a confession.

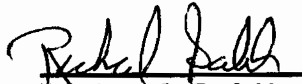
Of course, those statements elicited during questioning after the Appellant expressed an uncertainty about continuing interrogation are inadmissible. Menard v State, 8 FLW 2655 (4DCA-1983), Langton v. State, 9 FLW 639 (2DCA-1984). Since the State had stipulated that no mention should be made about the statement delineated above then there is no issue as to the impropriety of this comment.In Trafficante v State, 92 So.2d 811 (Fla.1957), the Supreme Court prohibited any such comment,

without regard to the character of the comment, or the motive or intent with which it is made. If such a comment is subject to an interpretation which would bring it within the constitutional prohibition, regardless of its susceptibility to a different construction, it constitutes reversible error. Trafficante v State, supra.

A mistrial was warranted in this matter. The failure of the Court to grant a mistrial for the violation of the pretrial order constitued error. The Appellant's rights to a fair and impartial trial, his right to due process and his right to equal protection afforded to him by the United States and by the Florida Constitutions was abrogated. Here there was an absolute legal necessity for the granting of a mistrial. Flowers v State, 351 So.2d 764 (3DCA-1977). The circumstances of this case supported a mistrial and the Court's failure to grant the same warrants a reversal of the conviction and the granting of a new trial.

CONCLUSION

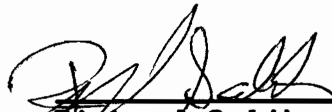
For each reason or for any reason set forth herein Appellant requests this Court enter order reversing the conviction and directing that this Court award to Appellant a new trial.



Richard Saliba
Saliba & McDonough PA
2121 14th Avenue
Box 1690
Vero Beach, Florids 32960
3055676111

<u>CERTIFICATE OF SERVICE</u>

I certify that true and correct copy of Appellant's initial brief has been forwarded by United States Mail to Office of the Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401-5295 this 17th day of November 1984.



Richard Saliba
Saliba & McDonough PA
2121 14th Avenue
Box 1690
Vero Beach, Florida 32961-1690
(305)567-6111