IN THE SUPREME COURT OF FLORIDA

ANTHONY BERTOLOTTI,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 65,287

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court, Ninth Judicial Circuit, in and for Orange County, Florida. In the Brief the Appellee will be referred to as "the State" and the Appellant will be referred to as he appears before this Honorable Court of Appeal.

STATEMENT OF THE CASE

Appellant was indicted by a Grand Jury in Orange County, Florida, for premeditated murder. (R 1993) He was tried by a jury on March 26 through 31, 1984, and found guilty as charged. (R 1138, 2300) A trial on the penalty was held on April 9, 1984, and nine jurors recommended that he be sentenced to death. (R 1486, 2322) On April 12, 1984, the trial court sentenced Appellant to death by electrocution. (R 1493, 2350-2356)

Notice of Appeal was timely filed on May 9, 1984, and the Office of the Public Defender was appointed to represent Appellant on appeal to this Honorable Court. (R 2374, 2385)

STATEMENT OF THE FACTS

Carol Miller Ward died between nine and ten o'clock on the morning of September 27, 1983, in her home in the Rosemont area of Orlando, Florida. (R 809) The primary causes of her death which took five to eight minutes were internal bleeding from stab wounds of the lungs and heart, and manual strangulation. (R803, 809, 817) She also had blunt head injuries but, although intact spermatazoa were discovered in a vaginal smear, there was no evidence of traumatic sexual contact. (R 800, 980, 1004, 818, 820) When her husband, William Ward, found her body that afternoon, her car was gone; groceries were scattered over the kitchen floor; her pants and shoes were in the kitchen corner; and her costume jewelry was in a small pile on the kitchen counter. (R 741, 744, 742, 743, 746, 777) She was lying on the floor of the den with a knife protruding from her chest. (R 744, 745, 786) A moist, discolored rag was hung across the back of a chair, a broken beer stein lay near the body, and there were apparent blood stains in the dressing room sink. (R 745, 757, 748, 752) Her purse appeared to have been rifled, but there was no sign of forcible entry into the home, and there had been nothing of value contained in the scattered papers of the closet safe. (R 747, 778, 754)

Sharon Griest and Appellant had lived together for ten months. (R 902,928) Appellant left for work on September 27th about 6:30 A. M., but had returned to their apartment by 10:45 A. M. (R 903, 904) He had about thirty-five dollars, and told Ms. Griest that he had been

paid for three hours' work that morning, and had borrowed money from a man who lived behind the office of the agency that employed him on a temporary basis. (R 906, 924, 905)

During the following days, Ms. Griest observed Appellant becoming very withdrawn and that he changed "100%." (R 906, 909, 928, 929, 942) After it was reported that Mrs. Ward's car had been found about two to four blocks from their apartment, Ms. Griest went to the AAA Temporary Jobs office, questioned a partner and a bus driver, and learned that Appellant had walked off his job site about a mile and a half from Mrs. Ward's neighborhood on September 27th, and that he had not been paid. (R 823, 832, 833, 835, 840, 838, 843, 910, 911)

From the employment agency, Sharon Griest went directly to a pay telephone and called "Crime Watch," a program which eventually paid her one thousand dollars for her information. (R 911, 938, 939) The next day, one week after Mrs. Ward's death, Appellant told Ms. Griest that he had "killed the lady in Rosemont". (R 914, 915) He told her he had gone to the house asking for directions to a bus stop and, when Mrs. Ward invited him inside to draw him a map, he decided to take her money but, when Mrs. Ward grabbed a knife, he took it from her and stabbed her several times. (R 915, 913, 917, 931) In telling Ms. Griest what happened, Appellant was crying a lot, extremely upset and remorseful. (R 916, 929, 937, 939)

That night, Appellant and Ms. Griest called Appellant's mother in Atlanta. (R 913, 919, 932, 988, 989) They discussed surrendering the next day and, on the morning of October 5th, Ms. Griest called Detective Randy Scoggins who had responded to her first call to "Crime Watch." Appellant was arrested as he walked along a sidewalk and offered no struggle or resistance. (R 1013, 1032)

At the Orlando Police Station in the Municipal Justice Building in Orlando, Appellant told Detective Scoggins what had happened in a taped statement throughout which Appellant sobbed. (R 1013, 1023, 1020, 1021, 1030, 1032, 1237, 1238, 1239; Exhibit 42) Fifteen days later, Detective Scoggins taped another statement made by Appellant at the Orange County Jail. (R 1025, 1027; Exhibit 44) Appellant's motions to suppress the taped statements were denied at a pretrial hearing and when the objections were renewed at the trial. (R 1250, 1251, 1254, 1019, 1020, 1030, 1022, 2220-2221)

While Appellant was being interviewed at the police station on the date of his arrest, other Orlando policemen recovered Sharon Griest's blood stained pants, which she said Appellant had worn on September 27th, from behind a heater on the porch of Appellant's and Ms. Griest's apartment. (R9 952, 954, 963, 930, 988, 989) The pants were admitted into evidence pursuant to Ms. Griest's consent for the police to search, and over Appellant's pretrial motions and objections at trial. (R 962, 1223, 2187-2188) The human blood on the pants could not be typed, but a forensic serologist said it was inconsistent with Appellant's blood. (R 988, 989)

Mary Finchum, a woman who lives next door to the Rosemont subdivision, testified that between 8:20 and 8:30 on the morning of September 27th, Appellant approached her mobile home with a newspaper rolled up under his arm and asked for directions. R(847, 848, 850, 853, 857) The owner of a sporting goods shop also said that he saw Appellant in the general area about 8:55 that morning. (R 868, 869, 870, 874)

Appellant was convicted of first-degree murder. (R 1138) At the sentencing phase of his trial, the trial court permitted detectives from

Dade County to testify to the details of Appellant's prior convictions for aggravated battery, burglary, and attempted sexual battery. (R 1288, 1289, 1327, 1312, 1307, 1308) William Ward was permitted to testify that his wife would not open the door to strangers, who upset her. (R 1355, 1357) The evidence also showed that Appellant was a good, reliable worker and employee, that he had been no problem to authorities while in custody, and that he did not resist arrest when apprehended for this incident. (R 1376, 1377, 1381, 1378, 1379, 1386, 1387) He came from a stable family and his parents testified that as a child he had been very obedient but sensitive and withdrawn. (R 1391-1396, 1397-1399, 1394, 1398, 1399) While incarcerated at Lawtey Correctional Institute, Appellant had been a volunteer counselor to youthful inmates, very helpful to the clinical psychologist, and had in general been a model prisoner with minimum restrictions. (R 1434, 1435, 1437, 1438) His motions for a mistrial made in response to improper argument by the prosecutor at the close of the sentencing phase were denied, and nine members of the jury recommended the death sentence. (R 1448, 1449, 1452, 1453, 1458)

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO STRIKE DEATH AS A POSSIBLE PENALTY.

Prior to trial, Appellant moved to strike death as a possible penalty, because the indictment by which he was charged failed to allege the aggravating factors which might subject Appellant to the death penalty. (R 2125-2126, 1178) Appellant recognizes that this Honorable Court has held, in Sireci v. State, 399 So. 2d 964 (Fla. 1981), that where an indictment charges all the elements of murder in the first degree, the defendant has notice of the aggravating circumstances. Sireci dismissed analogies to the minimum three-year sentence pursuant to Section 775.087(2) of the Florida Statutes, which cannot be imposed unless an indictment alleges that the defendant carried a firearm, and to the burglary and robbery statutes where various aggravating circumstances elevate the degree of burglary or robbery. Appellant, however, urges this Honorable Court to review its position in Sireci, and consider the following argument.

Sireci distinguished substantive "degrees" of burlgary and robbery and "aggravating factors" that merely increase the penalties therefor, saying that it is not "aggravating factors" that determine a sentence for burglary but it is the "elements" which make a burglary a felony of a particular degree. The effect of classifying felonies by degrees, from third-degree to life, is simply to determine the number of years in prison to which a convicted person can be sentenced. §§ 775.08(1),

775.082(3), Fla. Stat. (1983). Death, however, is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

> The aggravating circumstances of Section 921.141(6), Florida Statutes, actually define those crimes--when read in conjunction with Florida Statutes 782.04(2) [and 794.01(1)]--to which the death penalty is applicable in the absence of mitigating circumstances. Id, 283 So. 2d at 9. (Emphasis supplied.)

The finding of aggravating factors which elevate a particular criminal act to one punishable by death is at least the equivalent of an additional "element" to increase a burglary or robbery to one of a higher degree felony.

In Lindsey v. State, 416 So. 2d 471 (Fla. 4th DCA 1982), the District Court found that the information charging burglary with an assault was deficient where the elements of the assault were not stated. §810.02, Fla. Stat. (1977). The omission was not fundamental error but the defendants in that case had requested a statement of particulars and had moved to dismiss the information that otherwise charged a first-degree felony. This is precisely what Appellant did in this case: he asked for a declaration that, since the indictment did not allege the aggravating factors (contending they were the equivalent of elements of a "capital" offense), a crime punishable by death had not been charged.

Appellant's contention that these factors are on a pair with "elements" of a crime punishable by death is supported by this Honorable Court's decision in Vaught v. State, 410 So. 2d 147 (Fla. 1982), in which a challenge to the capital felony sentencing law's constitutionality was

rebuffed by a finding that the aggravating factors were not merely procedural:

> In contending that the capital felony sentencing law regulates practice and procedure, appellant relies upon Dobbert v. Florida, 432 U.S. 282, 97 S.Ct 2290, 53 L.Ed.2d 344 (1977), and Lee v. State, 294 So. 2d 305 (Fla. 1974). The critical issue in those cases was the legality of applying Florida's new death penalty law to persons who had committed a murder before the law had taken effect. In holding that the law could be applied to such persons, the United States Supreme Court and this Court referred to the changes in the law as procedural. Those references concerned the manner in which defendants who had committed murder before the new law took effect should be sentenced. They were not meant to be used as shibboleths for deciding whether the new law violates article V, section 2(a) of the Florida Constitution by regulating the practice and procedure in the Florida Courts. By delineating the circumstances in which the death penalty may be imposed, the legislature has not invaded this Court's prerogative of adopting rules of practice and procedure. We find that the provisions of section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty. The appellant's contention that the statute improperly attempts to regulate practice and procedure is without merit. [Citations omitted.] Id., 410 So. 2d at 149. (Emphasis supplied.)

The State contended in Lindsey, supra, that the defendants were not prejudiced at their trial by the omission of assault's elements from the

information. Appellee may argue that Appellant was not prejudiced at his trial by the indictment's omission of elements that made the crime with which he was charged punishable by death. The District Court in Lindsey, however, recognized that the defendants were "certainly prejudiced" when they were sentenced to 99 years instead of a maximum of fifteen years in prison. Likewise, Appellant was severely prejudiced when the State proceeded, upon his conviction for a crime punishable by a minimum of twenty-five years to life in prison, to obtain a sentence of death. Since the indictment did not allege that the crime charged was aggravated by circumstances which subjected Appellant to the death penalty, the maximum sentence which should have been imposed was life in prison.

POINT II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS FOR A CHANGE OF VENUE WHERE THE FACTS OF HIS CASE HAD BEEN WIDELY PUBLICIZED.

Thirty-three members of the venire of prospective jurors for Appellant's trial had heard about the facts of the event and his arrest at the time they occurred. (R 36, 47, 47, 51, 62, 72, 83, 90, 98, 113, 124, 137, 153, 189, 193, 215, 216, 219, 240, 244, 284, 324, 344, 359, 374, 395, 408, 445, 452, 459, 481, 523, 549, 553, 563, 578, 583, 595, 612, 613) Seven of those who were asked recalled reports that Appellant had confessed. (R 47, 51, 52, 85, 86, 228, 234, 236, 259, 264, 363, 436, 496) Appellant's motion to move the trial to another venue, grounded primarily on the fact that Appellant's confession had been reported, was denied. (R 1268, 1155, 457, 469, 632, 633, 2265)

This Honorable Court, in Oliver v. State, 250 So. 2d 888 (Fla. 1981), announced that, as a general rule, when a "confession" is featured in news media coverage of a prosecution, a change of venue motion should be granted whenever requested. At the hearing on Appellant's motion, the prosecutor argued that the Oliver rule was not appropriate, stating that in Oliver the community's sole newspaper had reprinted a transcript of Oliver's confession, whereas in Hoy v. State, 353 So. 2d 826 (Fla. 1977), the newspaper's report was based on the statement of a detective summarizing the defendant's confession. (R 1151) In Hoy, however, the area in which the trial took place was not dependent on a sole daily newspaper, and the defendant's retraction of the confession was published with equal prominence. The prosecutor in this case acknowledged that the Orlando Sentinel was for

all practical purposes the area's only newspaper. (R 1151) Moreover, Appellant's confession, though taken from "arrest papers," was the feature of a sizeable front-page news story of his arrest. (R 2225-2226; Appendix.) It was not transcribed verbatim (neither was the confession in Oliver), but was prominently featured in the news story. See Oats v. State, 446 So. 2d 90, at 93 (Fla. 1984).

Since the events of this case received a great deal of newspaper and television publicity, and since Appellant's confession was essentially reprinted for the public at large, his motion for a change of venue should have been granted. Art. I §§ 9 and 16, Fla. Const.; Amends. V, VI, and XIV, U.S. Const.

POINT III

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION AT THE ORLANDO POLICE DEPARTMENT.

Appellant was arrested on October 5, 1983, on a city street in Orlando. (R 1385-1386) Officer Rick deTreville pointed a .38 Smith and Wesson firearm with a two-inch barrel at him and told him very clearly he would shoot him if he tried to run away. (R 1387) Detective Randy Scoggins approached him as he lay face down and handcuffed and, after other officers stood him up, told Appellant he would be talking to him at the police station soon. (R 1849-1850, 1236, 1013) In the interview room at the Municipal Justice Building where he was uncuffed, Appellant appeared to be "very burdered." (R 1852-1853) He was crying, telling Detective Scoggins he wanted to die, and sobbing. (R 1237-1239) He sobbed throughout the subsequent interrogation. (Exhibit 42)

Although Appellant was verbally advised of his constitutional right against self-incrimination and signed a waiver of rights form, the evidence showed that this waiver was, in fact, not voluntary. (R 1231, 1237, 1014; Exhibit 41) Although Appellant was not drugged as was the accused in DeConingh v. State, 433 So. 2d 501 (Fla. 1983), he was extremely distraught as was DeConingh. Even though the procedural requirements of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct 1602, 16 L.Ed.2d 694 (1966), were better met in this case than in DeConingh, this Honorable Court recognized in DeConingh that:

> Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible." Townsend v. Sain, 372 U.S. 293, 308, 83 S.Ct. 745, 754, 9 L.Ed.2d 770 (1963)(emphasis in original).

Defense counsel correctly argued at the hearing on the motion to suppress Appellant's October 5th confession that the trial court should consider the totality of the circumstances, and the fact that Appellant was too emotionally upset to clearly understand what was going on or to intelligently waive his rights. Cason v. State, 373 So. 2d 372 (Fla. 2d DCA 1979). The trial court, however, denied the motion to suprress, relying on the fact that there had been no evidence of police coercion or improper inducement, and found the statement to have been freely and voluntarily made because:

> THE COURT: You have alleged that he was emotionally upset to the point that the Miranda Warnings could not be effectively given, but I see no evidence that even emotional upset, other than the sobbing made reference to, which is insufficient for me to determine if these statements were not voluntarily made. (R 1250-1251)(emphasis supplied.)

In other words, Appellant's counsel had failed to prove that the statements were involuntary, and so the motion was denied. The law is, however, that the burden of proving that a confession has been freely and voluntarily given rests upon the State. State v. Dixon, 348 So. 2d 333 (Fla. 2d DCA 1977). Like DeConingh's, Appellant's statements were "blurted out," but the absence of coercive interrogation is not dispositive of the issue of whether the accused knew what he or she was

doing. DeConingh, supra, 433 So. 2d 501 at 504. Since the burden was placed on Appellant to prove that his statements were not voluntary, it was error for the trial court to presume that they were voluntary and admit them on that basis. Art. I §§9 and 16, Fla. Const.; Amends. V and XIV, U. S. Const.

POINT IV

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE FROM HIS DWELLING WHICH WAS SEIZED PURSUANT TO THE CONSENT OF A CO-TENANT WHO WAS ACTING AS A POLICE AGENT.

After Appellant had been arrested for murder, Orlando policemen searched the apartment where he lived. (R 952) Sharon Griest, with whom he had lived for ten months, signed a police department consent-to-search form; Appellant did not authorize a search. (R 919, 920, 922, 952, 1211, 1212, 1213, 1215, 1217, 1218, 1220; Exhibit 31) Behind the heater on the screened porch of the apartment the police found a pair of Sharon Griest's dungarees, which she said Appellant had worn on September 27th, and in a laundry hamper in the bedroom they found a black T-shirt. (R 918, 919, 930, 954, 963) Two blood stains of Carol Ward's type were found on the shirt; human blood on the pants was untyped but inconsistent with Appellant's. (R984, 986, 989) Sharon Griest had earlier turned over a pair of Appellant's shoes to Detective Scoggins. (R 919) Blood was found on the lace area of the right shoe. (R 992)

Appellant moved to suppress the pants and shirt that were seized pursuant to the search made while he was in custody. (R 2187-2188) Since Appellant was in police custody on the day the search was made, there were no exigent circumstances preventing the obtaining of a warrant. (R 1221) Appellant had not given his consent to a search. (R 1220) The trial court denied the motion, however, stating:

> THE COURT: It appears that the items of clothing that were removed were removed from a common area,

> not an area exclusively under the control of the defendant and from within a common residence, and also appears that Mrs. Griest did have standing to permit the consensual search. Accordingly, the motion to suppress evidence is denied. (R 1223)

Normally, the test for a valid third-party consent to a warrantless search is whether the third party has joint control of the premises. United States v. Matlock, 415 U.S. 164, 98 S.Ct. 218, 54 L.Ed.2d 152 (1974); Ferguson v. State, 417 So. 2d 631 (Fla. 1982). The apartment searched in this case had been leased in both Mrs. Griest's and Appellant's names, and they both paid the rent. (R 1212, 1217-1220)

Sharon Griest, however, was acting at police instructions in their apprehension of Appellant. She had telephoned "Crime Watch," which is a "very well known program that most persons in the area are aware of," which allows the caller to remain anonymous and which also offers a reward up to one thousand dollars for information "that is later proved to be correct and useful." (R 1830, 911) She did not remain anonymous in her report to the police but met with Detective Scoggins, who gave her instructions. (R 913) She later in fact did receive the one-thousand-dollar reward. (R 938, 939) Had Sharon Griest been acting purely as a private citizen, there might not have been a violation of Appellant's constitutional rights against unreasonable, warrantless searches and seizures. Art. I §§ 9, 12, 16, Fla. Const.; Amends. IV and XIV, U. S. Const. The constitutions of the United States and of Florida, however, offer protection against searches conducted by criminal law enforcement authorities or private persons acting as their agents. 2 ALR 4th 1177-1178, fn. 7. Appellant contends that it is the aspect of police

direction and payment in a case such as this that renders invalid what might otherwise have been the authorized consent of a co-tenant. In United States v. Henry, 447 U.S. 264, 65 L.Ed.2d 115, 100 S.Ct. 2183 (1980), for instance, it was a cellmate's capacity as a government informant that violated the defendant's Sixth Amendment right to counsel, where the cellmate was placed in proximity to Henry, with instructions to merely be alert to any statements by Henry, and not to initiate conversation or question Henry about his charges.

In this case Sharon Griest was acting not only as a police informant but on a contingent fee basis, the sort of a "payment to make cases" arrangement which the District Court in State v. Glosson, 441 So. 2d 1178 (Fla. 1st DCA 1983), found to deprive the defendants of due process. The fact that information "later proved to be useful and correct" could bring its provider a reward of up to one thousand dollars was "very well known" in the Orlando area, the subject of newspaper and television publicity. (R 1830)

Since there were no exigent circumstances excusing the requirement that a search of Appellant's home be made pursuant to a validly issued warrant, and since the "consent to search" was in effect that of a police agent, Appellant's motion to suppress the evidence thus seized should have been granted. Art. I §§ 9 and 12, Fla. Const.; Amends. IV, V and XIV, U. S. Const.

POINT V

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS FOR A MISTRIAL BASED UPON A STATE WITNESS' REFERENCE TO APPELLANT'S PREVIOUS INCARCERATION.

While testifying for the State, Sharon Griest said that on the night before he was arrested, she had "just about" talked Appellant into surrendering to the police, but he asked

> " ... if he could have one more day of freedom because he knew he was going to go to prison again, and I said -- (R 924-925)

Defense counsel immediately made a motion for mistrial, which was renewed at the close of the State's case and denied. (R 925, 926, 1049, 1052) The prosecutor said that the response was "inadvertent" and "in spite of our cautions" not to mention it. (R 925) The prosecutor also argued that the reference to prison was admissible because it was part of "what he said to her." (R 925-926)

Collateral evidence that tends to suggest the commission of an independent crime is inadmissible unless such evidence is relevant to a fact in issue. Jones v. State, 194 So. 2d 24 (Fla. 3d DCA 1967). If the logical effect of evidence relating to other offenses by an accused is to establish bad character or propensity to commit crimes, is is inadmissible. Williams v. State, 110 So. 2d 654 (Fla. 1959), cert. denied 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). The fact that the alleged statement was made by Appellant himself does not render it admissible or unobjectionable. The District Court in

Rodriguez v. State, 433 So. 2d 1273 (Fla. 3d DCA 1983), disagreed with a trial court's denial of a motion for mistrial made when a cellmate testified that Rodriguez told him he had been involved in another murder than the one for which he was on trial, finding that the reference was irrelevant to the crime for which Rodriguez was then on trial. It is error for a witness to testify concerning a defendant's arrest for unrelated crimes. Wilding v. State, 427 So. 2d 1069 (Fla. 2d DCA 1983). A prior conviction, which Sharon Griest's testimony clearly informed the jury of, would have been admissible as evidence against Appellant only if he had taken the stand at his trial, which he did not, and the State had sought to impeach his credibility by the prior conviction. § 90.610, Fla. Stat. (1983). (R 1079, 1080) The motion for mistrial should have been granted. Art. I § 9, Fla. Const.; Amends V and XIV, U. S. Const.

POINT VI

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS FOR A MISTRIAL BASED ON THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT AT THE SENTENCING PHASE OF THE TRIAL.

Three times during the prosecutor's closing argument to the jury at the penalty phase of Appellant's trial, defense counsel objected to improper remarks and moved for a mistrial. (R 1449, 1453, 1458) The prosecutor's remarks were inflammatory, calculated to prejudice the jury, and cumulatively they deprived Appellant of a fair trial on the penalty.

Appellant's version of the events of September 27, 1983, were provided through taped statements to Orlando police. (Exhibits 42, 44) Appellant did not testify at either phase of his trial, but in closing argument at the penalty trial, the prosecutor said:

> MR. SHARPE: And he says he didn't rape her . . . . But the evidence would show otherwise . . . . And what does he tell you? The man raped her. And yet he comes in here with the audacity to tell us, "I didn't have sex with her". (R 1448) (Emphasis supplied).

As defense counsel pointed out in his motion for mistrial, the prosecutor did not qualify his remarks to the jury by referring to Appellant's statements to the police. (R 1449) The argument that Appellant would "Come [ ] in here and tell us" anything only emphasized the fact that Appellant did not take the stand at his trial. Rule 3.250 of Florida Criminal Procedure prohibits a prosecutor from commenting to either the jury or the court on an accused's failure to testify in his own behalf, and if the comment is subject to an interpretation, as this one was, which would bring

it within the prohibition, the comment's susceptibility to a different, valid construction does not remove it from the operation of the Rule. Childers v. State, 277 So. 2d 594 (Fla. 4th DCA 1973). This Court held in David v. State, 369 So. 2d 943 (Fla. 1979), that any comment which is fairly susceptible of being interpreted by the jury as referring to a criminal defendant's failure to testify constitutes reversible error, without resort to the harmless error doctrine. This situation is similar in some respects to that in Brazil v. State, 429 So. 2d 1339 (Fla. 4th DCA 1983), wherein the defendant did not testify at the trial but the prosecutor in arguing to the jury made references to his confession. There, the prosecutor's call for an explanation for the inconsistencies in the defendant's confession was somewhat oblique and was directed to defense counsel; but the District Court found that, since the argument could have been interpreted as a comment on Brazil's failure to testify, the remark required reversal.

The comment on Appellant's failure to testify, however, was not the only instance of the prosecutor's overstepping the bounds of propriety. Later he argued:

> MR. SHARPE: And if that's not heinous, atrocious and cruel, can anyone imagine more pain and any more anguish than this woman must have gone through in the last few minutes of her life, fighting for her life, no lawyers to beg for her life. (R 1452)

Defense counsel's motion for a mistrial in response to this passage was also denied (R1453), but it was clearly improper. The call for the jurors to "imagine" the decedent's anguish and actions was an impermissible "Golden Rule" argument. Barnes v. State, 58 So. 2d 157 (Fla. 1952);

Bullard v. State, 436 So. 2d 962 (Fla. 3d DCA 1983). It was also the sort of remark made in Jennings v. State, ___ So. 2d ____ (Fla. Sup. Ct. Case No. 62,600) [9 FLW 297] in which the prosecutor compared Jennings' right to use a telephone to call an attorney during his interrogation and the victim's right to live. This Honorable Court did not find the remark to be so prejudicial that a mistrial was required, but agreed with Jennings that it was improper argument. In this case, the prosecutor's reference to Appellant's right to counsel was made in the same sarcastic, inflammatory vein, and was only one of several transgressions. It parallels one of the statements made by the prosecutor and condemned in Meade v. State, 431 So. 2d 1031 (Fla. 4th DCA 1983), that the victim, unlike the accused, had not had his day in court.

Finally, the prosecutor closed his argument with the assertion that death was the only appropriate sentence the jury could return:

> MR. SHARPE: Anything less in this case would only confirm what we see running around on the bumper stickers of these cars, and that is that only the victim gets the death penalty.
>
> Thank you. (R 1458)

The trial court overruled Appellant's immediate objection and denied his motion for mistrial. (R1458) In this instance, the prosecutor not only made an assertion of something that was not in evidence, but advanced the sort of "send 'em a message" argument that calls on the jury to not only decide the issue of life or death in a particular case but to "make a statement" about crime in general. Boatwright v. State, ___ So. 2d ____ Fla. 4th DCA Case No. 82-2033 (July 18, 1984) [9 FLW 1063]; Perdomo v. State, 439 So. 2d 315 (Fla. 3d DCA 1983); Hines v. State, 425 So. 2d 589 (Fla. 3d

DCA 1982).

The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law. Meade, supra; ABA Standards for Criminal Justice 3-5.8 (1980). Each of the prosecutor's improper remarks listed here were violative of Appellant's right to have a fair verdict, reached solely on the merits and without indulgence in appeals to sympathy, bias, passion or prejudice. Harper v. State, 411 So. 2d 235 (Fla. 3d DCA 1982). By denying Appellant's motions for a mistrial, the trial court failed to perform its duty to affirmatively rebuke the offending counsel and impress upon the jury the gross impropriety of being influenced by improper arguments. Deas v. State, 119 Fla. 839, 161 So. 729 (1935); Harper, supra.

Although a jury's sentencing recommendation is only advisory, it is an integral part of the death sentencing process and cannot properly be ignored, and prosecutorial overkill will mandate a retrial on the sentence. Teffeteller v. State, 439 So. 2d 840 (Fla. 1983).

By emphasizing Appellant's failure to testify in the courtroom; by asking the jurors to "imagine" the decedent's distress; by disparaging Appellant's right to be represented by counsel; and by asking the jury to make a political statement with their verdict, the prosecutor sought to prejudice Appellant's right to a fair penalty trial. Because the trial court failed to grant Appellant's motions for a mistrial or to rebuke the prosecutor, these efforts were successful. Art. I, §§9 and 16, Fla. Const.; Amends. V,VI, and XIV, U.S. Const.

POINT VII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUESTED JURY INSTRUCTION AT THE PENALTY PHASE OF HIS TRIAL.

For the sentencing protion of the proceedings in this case, Appellant requested that the following instruction be given to the jury:

> "The Death Penalty is warranted only for the most aggravated and unmitigated of crimes. The law does not require that death be imposed in every conviction in which a particular set of facts occur. Thus, even though the factual circumstances may justify the sentence of death by electrocution, this does not prevent you from exercising your reasoned judgment and recommending life imprisonment without eligibility for parole for twenty-five years",

citing Chenault v. Stynchcomb, 581 F. 2d 444, 448 (5th Circ. 1978); Downs v. State, 386 So. 2d 788 (Fla. 1980); and Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975). (R 2312)

The prosecutor argued against the instruction, saying:

> MR. SHARPE: . . . The Dixon decision says that if there are the presence of any aggravators, that death is presumed to be the correct sentence. (R 1408) (Emphasis supplied).

State v. Dixon, 283 So. 2d 1 (Fla. 1973) at 9.

The trial court preferred an instruction which told the jury that the weighing of aggravating versus mitigating factors is not a counting process but "a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment". (R 1409-1410) The trial court felt that the "Dixon requested instruction" clearly

indicated the jury's duty, and that the "one based on Chenault" invaded their province. (R 1410)

Although the prosecutor in this case disparaged Appellant's requested instruction as being "basically tailored to a jury pardon", there is nothing improper or inappropriate about telling the jury that that is within their power. (R 1408) The jury is an "actor in the criminal justice system" that makes a decision that may remove a defendant from consideration as a candidate for the death penalty. Gregg v. Georgia, 428 U.S. 153 at 199, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Since the jurors represent a stage at which pure discretion may be exercised, the trial court should inform them of that fact, if requested to do so by the defendant.

Moreover, the prosecutor's response that Dixon, supra, says that the presence of any aggravating circumstance dictates that death is the presumptively correct sentence - which proposition he subsequently argued to the jury (R 1455-1456) - may itself have been inappropriate, in light of Justice McDonald's separate opinion in Randolph v. State, ___ So. 2d ____, Fla. Sup. Ct. Case No. 54,869 (November 10, 1983)[8 FLW 446]:

> I would also like to comment on the reference in the majority opinion to State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied 416 U.S. 943 (1974). I do not embrace the language from that opinion recited in this majority opinion as "when one or more of the aggravating circumstances is found death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances". If that language is restricted to the role of this Court in reviewing death sentences imposed by the trial court, it is acceptable. But I fear that it is construed by the trial judges as a

> directive to impose the death penalty if an aggravating factor exists that is not clearly overridden by a statutory mitigating factor. The death sentence is proper in many cases. But it is the most severe and final penalty of all and should, in my judgment, be exercised with extreme care. I am unwilling to say that a trial judge should presume death to be the proper sentence simply because a statutory aggravating factor exists that has not been overcome by a mitigating factor. Such a death sentence would be legally sufficient, but not necessarily the proper sentence to be imposed by the trial judge. (First emphasis supplied).

Appellant's requested instruction was a correct statement of the law, and should have been read to his jury. Art. I, §§9, 16, and 17, Fla. Const.; Amends. V,VI, VIII, and XIV, U.S. Const.

POINT VIII

APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN EVIDENCE WAS ADMITTED AT THE PENALTY PHASE OF HIS TRIAL THAT THE DECEDENT WAS AFRAID OF STRANGERS, AND HEARSAY TESTIMONY AS TO AN AGGRAVATING FACTOR BECAME A FEATURE OF THE PROCEEDINGS.

Appellant told Detective Randy Scoggins of the Orlando Police Department that he had asked Mrs. Ward directions out of the neighborhood and it was after they had gone inside the house for her to draw a map for him that he decided to rob her. (Exhibit 42) During the guilt phase of the trial, the prosecution offered but the trial court excluded William Ward's testimony that Mrs. Ward "frequently spoke of her fear of strangers," and that she would not admit strangers into the house unless her husband was present. (R 1045-1048) At the penalty phase of the trial, however, the trial court allowed Mr. Ward to testify that strangers upset his wife and that she would not open the door to them. (R 1355, 1357) The trial court agreed with the prosecutor's assertion that the "evidentiary standard is considerably more relaxed" at the penalty phase of a capital trial. (R 1282)

Evidence of one's character which is offered only as tending to prove the probability that he acted in a manner consistent with that character on a particular occasion is generally inadmissible. Pino v. Koelber, 389 So. 2d 1191 (Fla. 4th DCA 1980); §90.404(1), Fla. Stat. (1983). For any such evidence of a victim's character traits to be admissible, the accused must first offer this evidence. §404.4, Ehrhardt on Evidence; §90.404(1)(b)(2), Fla. Stat. (1983). Such speculative testimony, moreover, from a husband as to what his wife did "to his knowledge" is looked on with disfavor. Williams

v. State, 308 So. 2d 595 (Fla. 1st DCA 1975).

In the penalty phase of a capital trial, certain types of evidence which may be inadmissible in a trial on guilt may be admissible and relevant to enable the jury to make an informed recommendation based on the aggravating and mitigating circumstances concerning the acts committed. Alvord v. State, 322 So. 2d 533 (Fla. 1975). There should not be a narrow application or interpretation of the rules of evidence in the penalty hearing. Id., 322 So. 2d at 539. To some extent, then, the prosecutor and trial court were correct in basing the admissibility of William Ward's testimony about his wife's traits and habits on the idea that the penalty trial "evidentiary standard is considerably more relaxed." Appellant's confession to Detective Scoggins, however, which the evidence was supposedly offered to rebut, has been challenged in Point III hereof as improperly admitted, and the "relaxed" rules of evidence notion does not extend to illegally seized evidence. Id.; §921.141(1), Fla. Stat. (1983).

The trial court also admitted testimony by two Dade County detectives about the details of two prior incidents being offered as proof of Appellant's previous conviction of felonies involving violence. §921.141(5)(b), Fla. Stat. (1983). Defense counsel objected to the testimony of Detectives Delancey and Lengel on the basis of its hearsay nature. (R 1288, 1289, 1307, 1327) Section 921.141(1) of the Florida Statutes (1983) authorizes the admission of hearsay testimony, "provided the defendant is accorded a fair opportunity to rebut any hearsay statements." Surely the authorization to bend the rules of evidence was exceeded in this case, however.

As defense counsel pointed out, there was no showing that the declarants

whose complaints were reported by the detectives were unavailable for the penalty trial. §§90.801, 90.802, Fla. Stat. (1983). (R 1308) Their "testimony," however, was a major feature of the State's presentation on an aggravating factor. Hearsay is generally inadmissible because it is unreliable. §801.1, Ehrhardt on Evidence. Even assuming that the Legislature properly enacted an exception to this rule, saying that "unreliable evidence shall be admissible so long as the defendant is afforded an opportunity to rebut it," it should not be justified to the extent that it becomes, as it did here, a major feature of the trial. See, Williams v. State, 117 So. 2d 473 (Fla. 1960), holding that otherwise inadmissible evidence of other crimes being presented as an "incident" to prove a relevant fact or issue may not be made a "feature" of the trial. Appellant should be afforded a new sentencing trial. Art. I §9, Fla. Const.; Amends. V and XIV, U. S. Const.

POINT IX

APPELLANT WAS IMPROPERLY SENTENCED TO DEATH.

The trial court improperly found that the aggravating factor that the killing in this case was heinous, atrocious and cruel had been established. (R 2350-2354) §921.141(5)(h), Fla. Stat. (1983). The evidence, including Appellant's statements, indicated that he used several different means to kill Carol Ward who died within five to eight minutes of being stabbed in the heart and lungs, but the fact that his efforts were "clumsy" and "protracted" does not reduce his actions to the cruelty that this Honorable Court has said distinguishes a particular killing as one deserving of the death penalty:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). (Emphasis supplied).

A review of this case in comparison with other capital cases in which this Honorable Court has reduced death sentences to life imprisonment shows that this crime was no more shocking than the norm of capital felonies. For instance, in the continued beating of the victim by the defendant with a 19-

inch breaker bar in Halliwell v. State, 323 So. 2d 557 (Fla. 1975), the Court found "nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court". Id., 323 So. 2d at 561. The death sentence in the following cases involving more gruesome killings were vacated by this Honorable Court: Chambers v. State, 339 So. 2d 204 (Fla. 1976)(severely beating and bruising girl friend murder victim over entire head and legs, inflicting a deep gash under her left ear and internal injuries, and rendering her face unrecognizable); Burch v. State, 343 So. 2d 831 (Fla. 1977)(36 stab wounds during frenzied attack); and Jones v. State, 332 So. 2d 615 (Fla. 1976)(38 "significant" lacerations on rape victim).

Were Appellant to be executed when death sentences in cases like these have been vacated, Florida's death penalty statute would violate the requirements of Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972), including that similar results are reached in similar cases. 428 U.S. at 258.

Sharon Griest testified at the guilt phase of Appellant's trial that when he told her what had happened on September 27th, he was crying a lot and remorseful. (R 916, 929, 937, 939) At the sentencing phase, it was shown that Appellant was very helpful to a clinical psychologist at Lawtey Correctional Institute where Appellant was a model prisoner in minimum custody who volunteered to counsel youthful offenders. (R 1434-1438) In considering this last fact, the trial court said in its sentencing order:

> "The only factor in the evidence which approaches a mitigating consideration is the good conduct of the Defendant during his periods of incarceration. The fact that the Defendant adjusts well to an

institutional setting is not found
to be particularly noteworthy,"

and found that the aggravating factors found in the case outweighed any mitigating factor. (R 2254) The fact that the trial court found a mitigating factor "not . . . particularly noteworthy," indicates that mitigating circumstances were nevertheless found. In this event, the unwarranted finding that the killing was heinous, atrocious and cruel renders the sentence in this case illegal. Where there are any mitigating circumstances, no unauthorized aggravating factor may enter the equation which determines life or death. Elledge v. State, 346 So. 2d 998 (Fla. 1977). In Elledge, the jury recommended the death penalty, eleven-to-one, for a man who had choked his victim to death while raping her. Since the Supreme Court had no way of knowing whether the unauthorized aggravating circumstance which was considered changed the result of the judge and jury's weighing process, and since a man's life was at stake as it is here, the Court was compelled to return the case to the trial court for a new sentencing trial. Moreover, one of the mitigating factors that exists in this case is indeed noteworthy: Appellant has shown himself to be helpful to Florida's Department of Corrections personnel. Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. Dixon, supra, 283 So. 2d at 7. Although Appellant may, and probably will, not gain parole even when he becomes eligible for it in 2008 A.D., he can nevertheless, in prison and among the living, perform valuable and worthwhile services for his supervisors and fellow inmates. § 775.082(1), Fla. Stat. (1983).

The sentence in this case should be reduced to life in prison.

POINT X

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form, recognizing that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statute and that detailed briefing would thus be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors. Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." The statute, further, does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, 446 U.S. 420 (1980); Witt v. State, 387 So. 2d 922, 931-932 (Fla. 1980)(England, J. concurring).

The Florida capital sentencing process at both the trial and appellate levels fails to provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So. 2d

1133, 1139 (Fla. 1976) with Songer v. State, 365 So. 2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the Defendant with notice of the aggravating circumstances which make the offense a capital crime and upon which the State will seek the death penalty deprives the Defendant of due process of law. See Gardner v. Florida, 430 U.S. 349, 358 (1977); Argersinger v. Hamlin, 407 U.S. 25, 27-28 (1972); Amend. VI and XIV, U.S. Const.; Art. I, §§ 9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore a cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require the sentencing recommendation of a unanimous jury or by a substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law. Art. I, § 16, Fla. Const.; Amends. V, VI, and XIV, U.S. Const.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968). The trial court in this regard erred when it failed to grant Appellant's motion to preclude challenges for cause. (R 1171-1173, 2202-2203)

The Amendment of Section 921.141, Florida Statutes (1979), by adding aggravating factor 921.141(5)(i) (cold and calculated) renders the statute in violation of the 8th and 14th Amendments to the United States Constitution because it results in death being automatic unless the jury or trial

court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

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

This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 414 So. 2d 185 (Fla. 1982), cert. denied, ___ U.S. ____, ___ S.Ct. ____, 74 L.Ed.2d 155 (1982) (Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So. 2d 1327 (1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases". Proffitt, supra, at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate". Harvard v. State, 375 So. 2d 833, 834 (1978) cert. denied, 414 U.S. 956 (1979) (emphasis added).

In view of this Court's departure from its duty to make an independent determination of whether or not a death sentence is warranted, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons expressed in Points II through V herein, Appellant respectfully requests that this Honorable Court reverse his conviction and remand this cause to the trial court for a new trial. In the alternative and for the reasons expressed in Points I and VI through X herein, Appellant respectfully requests that this Honorable Court vacate his sentence of death and remand this cause to the trial court for imposition of life imprisonment.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, and to Mr. Anthony Bertolotti, P. O. Box 747, Starke, Florida 32091, this 10th day of September, 1984.

Brynn Newton

ATTORNEY