IN THE SUPREME COURT OF FLORIDA

ROBERT IRA PEEDE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 65,318

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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

MR. ROBERT IRA PEEDE (hereafter Appellant) was charged by Indictment with First Degree Murder (R 1008).[1/] The Office of the Public Defender was appointed to represent Appellant pursuant to a finding of indigency (R 1012), and the matter proceeded to a jury trial in the Circuit Court for Orange County, Florida, the Honorable Judge Michael F. Cycmanick presiding.

The pre-trial motions included a Motion to Continue and a Motion to Withdraw filed on August 22, 1983 by the Office of the Public Defender (R 1038-1040). The Motion to Withdraw averred, among other things, that Appellant did not want the matter continued and that he was desirous of representing himself (R 1039). In this regard, Appellant filed on October 21, 1983 a

[1/] (R) Refers to the Record on Appeal of the instant cause, Supreme Court Case No. 65,318.

Pro Se Motion [sic] For Fast and Speedy Trial, which motion asserted that any continuance was against his wishes (R 1061, 1062). The Motion was struck at the instance of the State (R 1083-1084, 1086).

A psychiatric examination of Appellant was conducted (R 1054), and the Court denied Appellant's Alternative Motion to Vacate Death Penalty (R 1108-1109, 1192), the Motion for Statement of Aggravating Circumstances (R 1110-1113, 1191), the Motion to Declare Florida Statute Section 921.141 Unconstitutional (R 1118-1122, 1194) and the Motion to Preclude Challenge for Cause (R 1116-1117, 1193). Similarly the Court denied Appellant's Motion for Evidentiary Hearing concerning the factors going to the constitutionality vel non of Section 921.141 Fla.Stat. (R 1123-1124, 1190).

The State filed a Notice of Intent to Use Similar Fact Evidence concerning testimony of an alleged common scheme or plan to murder Darla Peede [the victim], Geraldine Peede [Appellant's ex-wife] and Calvin Wagner (R 1196), which testimony was sought to be excluded in Appellant's Motion In Limine No. 1 (R 1102).

During jury selection, a previously filed Motion to Suppress Confessions was withdrawn, and the Court indicated that the motion would have been denied in any event based upon Appellant's representations to the Court (R 323-327). During voir dire of the prospective jurors, Appellant became aware that his attorneys were not presenting to the jury the issue of his insanity (R 212-216). Defense counsel affirmed that Appellant had requested that an insanity defense be asserted, but counsel declined (R 213).

During the trial, over hearsay objection, the victim's daughter testified concerning what her mother had said prior to picking the defendant up at the airport (R 598-600). Appellant objected to the defense attorney's cross-examination of certain witnesses (R 605-606, 632-633). In this regard, he was escorted from the courtroom without warning for objecting to the cross-examination of his ex-wife by stating, "Your Honor, excuse me. Ladies and gentlemen of the jury, I apologize. I apologize for what I'm saying or interrupting the Court. I don't want the witness cross-examined. Going against my, what I need or what I want. And the people are not representing, they're not doing anything I want them to do. They're going against everything that I want done. I don't want this woman cross-examined." (R 632-633). Appellant was returned to the courtroom after cross-examination of his ex-wife (R 638). However, when the Court thereafter adjourned for lunch, Appellant sought to be excused from the proceedings for the rest of the afternoon (R 662-663). After the lunch recess the trial Judge, accompanied by the attorneys and court reporter, visited Appellant in jail and, upon request, excused the defendant from further attending the trial (R 663-673).

At the conclusion of the State's case defense counsel moved for a judgment of acquittal as to the charge of first degree murder, asserting that there had been insufficient proof of premeditation or of an underlying felony to justify jury consideration of the charge, which motion was denied (R 842-846).

The defense rested without presenting any testimony (R 858), and following objection-free closing arguments (R 859-892), the jury was instructed upon the law of the case without objection (R 846-857, 892-910). Over objection, a special verdict form was provided the jury for determination of whether a weapon was used in the commission of the offense (R 857).

The jury, less alternates, retired for deliberation at 4:15 o'clock p.m. and returned at 5:30 o'clock p.m. with a verdict of guilty of first degree murder (R 912-914, 1235). The jury also found that Appellant had used a weapon in the commission of the offense (R 912, 1234).

The sentencing phase of trial, with Appellant present, was conducted on March 5, 1984. The State presented the testimony of two person and introduced into evidence certified copies of a judgment and sentence indicating that Appellant was previously convicted of the crime of second degree murder and assault with a deadly weapon in California (R 927-947). Appellant presented the testimony of a psychiatrist and introduced into evidence eleven letters of Appellant's acquaintances (R 948-958).

Following objection-free arguments (R 959-968), the jury was instructed as to three aggravating circumstances, to wit: 1) previous conviction of a felony; 2) murder committed while engaged in a kidnapping, and; 3) murder committed in cold, calculated and premeditated manner (R 968-971). Appellant objected to instructing upon both 2) and 3) above, arguing that said circumstances constituted impermissible doubling of the same conduct (R 923). The jury was only instructed upon two

mitigating circumstances, to wit: 1) crime was committed while Appellant was under the influence of extreme mental or emotional disturbance, and; 2) any other aspect of Appellant's character or record, and any other circumstances of the offense (R 970, 1248-1250)

Following 40 minutes of deliberation the jury by an 11-1 margin recommended the imposition of death (R 974-976, 1247). Judge Cycmanick proceeded at that time to sentence Appellant to death (R 978, 1251-1252). The judge thereafter entered written findings of fact to support the death sentence, specifically finding that Appellant had been previously convicted of committing two felony crimes involving the use of force or threat to some other person, that the instant murder had been committed while Appellant was committing a kidnapping, and further that the murder had been committed in a cold, calculated and premeditated manner (R 1263-1264). The Court also found as a mitigating circumstance that Appellant was under the influence of extreme emotional or mental disturbance, but the court attributed little weight to this circumstance, stating that "...it is outweighed by the single aggravating circumstance, standing alone, of the Defendant's prior crime of Murder in the Second Degree and Assault with a Deadly Weapon." (R 1265).

A Motion for New Trial was timely filed, which motion was denied (R 1253-1254, 1259). The Office of the Public Defender was appointed to represent Appellant for the purpose of an appeal (R 1246), and a timely notice of appeal was filed April 2, 1984 (R 1417). This brief follows.

STATEMENT OF THE FACTS

Appellant left Hillsboro, North Carolina around 5:30 o'clock p.m. on March 30, 1983 [a Wednesday] on his motorcycle enroute to Miami, Florida (R 715). He arrived in Jacksonville, Florida early the next [Thursday] morning. It was raining, and after Appellant ate breakfast he endeavored to sell his motorcycle (R 716). Though at first unsuccessful, he eventually sold it for $500.00 to a motorcycle shop near Ormond Beach, Florida (R 716). He took a cab from there to the airport and flew on to Miami, arriving in the mid-afternoon (R 716).

Appellant telephoned his wife [Darla Peede, hereafter Darla] several times before finally reaching her at her daughter's house around 5:15 p.m. (R 716), and Darla agreed to come pick him up at the airport (R 716). She left in her car, taking nothing along but her purse (R 594-597). However, before leaving she gave her daughter some telephone numbers to call if she failed to return by midnight (R 599, 610-611).

Darla picked Appellant up at the airport and stated that she had planned on going back to her apartment that day, and possibly to the beach the next day (R 716-717). Appellant instructed that they head north on I-95 but, after gassing up Darla's car, they mistakenly got on the turnpike instead (R 717). As they were leaving the Miami area, Appellant, using a pocket-knife, inflicted a superficial cut in Darla's side when the song "Swinging" came on the radio (R 562, 722, 744-746).

In this regard, Appellant was obsessed with the belief that Darla and his ex-wife [Geraldine] had mutually advertised

for sexual partners in a nationally publicized, pictoral "Swinger" magazine viewed by Appellant when he was in prison in California (R 626-631, 721). Geraldine was afraid of Appellant because of his obsession (R 624-626, 722).

After leaving Miami, Appellant and Darla picked up a female hitchhiker named Joanne (R 717, 829-830). Shortly thereafter the hitchhiker drove the car while Appellant and Darla had intercourse in the back (R 730). In this regard, Darla had two "hickies" on her right breast (R 559), and a vaginal examination disclosed evidence of recent sexual intercourse (R 572-573). The hitchhiker was dropped off in Orlando, Florida, and Appellant, driving Darla's car, exited on either the Princeton or Ivanhoe ramp of I-4 in Orlando to gas up and get something to drink (R 717-718, 830). He got Darla some water in a Coke can because she disliked caffeine (R 718) and they then proceeded east on I-4 toward Daytona Beach (R 718).

The conversation turned to the subject of Geraldine, Calvin Wagner and the advertisements (R 718, 723-725, 832). "[T]he next thing he knew" he had stopped the car, jumped into the back and stabbed Darla in the throat (R 718, 730-731), thereby cutting her superior venacavae, resulting in her bleeding to death in between five and fifteen minutes (R 559-560, 564).

Appellant recalled seeing a hospital sign back where he had gassed up, but was unable to cross over the interstate prior to hearing Darla die (R 732-733, 833). He drove on to Hillsboro, North Carolina in Darla's car, leaving her body in a wooded area near Woodbine, Georgia (R 517-518, 524-527, 724).

Appellant was arrested around 7:15 p.m. on April 1, 1983 [Friday] by police officers of the Hillsboro Police Department pursuant to trespass and threat warrants (R 638-641, 651-655). The police observed Darla's automobile with blood-stained interior in Appellant's yard (R 655-656), and the next day, [Saturday] April 2, 1983, the body was discovered in Woodbine, Georgia by a hunter (R 516-517, 524-527).

Following his arrest, Appellant admitted killing Darla in Orlando (R 715-730, 742, 830-832), and was described by various police agencies as being polite and cooperative (R 661, 700). Mr. Peede stated that he never intended to kill Darla (R 730-731, 836).

ARGUMENT

POINT I

REVERSIBLE ERROR OCCURRED WHERE A DEFENDANT, UPON REQUEST, WAS EXCUSED BY THE TRIAL JUDGE FROM ATTENDING CRITICAL STAGES OF HIS CAPITAL TRIAL AND WAS SUBSEQUENTLY SENTENCED TO DEATH, IN THAT HIS ABSENCE DENIED DUE PROCESS OF LAW REQUIRED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

This Court has previously alluded to the above error[2/], but until now the matter has avoided resolution. Appellant now respectfully calls upon this Court to determine whether a defendant in a capital trial can, with the trial court's permission, waive his presence at trial.

"Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748, 25 L.Ed.2d 747, 756, 90 S.Ct. 1463 (1970).

> The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights (citations omitted), and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." (citation omitted).

2/ cf., Herzog v. State, 439 So.2d 1372, 1376 (Fla. 1983); Francis v. State, 413 So.2d 1175 (Fla. 1982); Mulvey v. State, 41 So.2d 150 (Fla. 1949) compare Lowman v. State, 80 Fla. 18, 85 So. 166 (1920) to Holton v. State, 2 Fla. 476.

Brookhart v. Janis, 384 U.S. 1, 4, 16 L.Ed.2d 314, 317, 86 S.Ct. 1245 (1966).

Involved sub judice is not only the waiver of the fundamental rights to be present, to confront witnesses, and to present evidence in one's behalf, but the waiver of such rights in the context of a capital trial resulting in the imposition of the death penalty. It is respectfully suggested that a heightened scrutiny of an alleged waiver of any constitutional right is applied in death cases. As stated by the United States Supreme Court,

> ..., five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. (citations omitted). From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 357, 51 L.Ed.2d 393, 401, 97 S.Ct. 1197 (1977).

An example of the application of this heightened scrutiny of purported waivers is found in Harris v. State, 438 So.2d 787 (Fla. 1983) wherein this Court addressed whether and how a defendant in a capital trial could waive jury instructions on necessarily lesser-included offenses. This Court held that a defendant may waive his right to such instructions "But, for an

effective waiver, there must be more than just a request from counsel that these instructions not be given. We conclude that there must be an express waiver of the right to these instructions by the defendant, and the record must reflect that it was knowingly and intelligently made." id. at 797 (emphasis supplied).

In the instant case the record fails to disclose knowing and intelligent waivers of the rights to be present, to confront witnesses, to be heard, or to participate in his own defense. Specifically, at the conclusion of direct examination by the State of the victim's daughter [Mr. Peede's step-daughter], a bench conference occurred where the defense attorneys informed the judge that Mr. Peede did not want his step-daughter cross-examined (R605). The defense attorneys concurred in the tactical decision not to cross-examine the witness, but the attorneys "told Mr. Peede as a matter of tactics, [that they would be] handling his defense, and [that they were] not going to be bound by his [Mr. Peede's] directions in all cases." (R605-606).

The State next called and examined the victim's other daughter (R607-618), and the defense again declined cross-examination (R618). The State thereafter called Mr. Peede's ex-wife and examined her (R620-631). When cross-examination commenced, Mr. Peede respectfully objected, stating "Your Honor, I want it to be in the record I do not want this witness cross-examined." (R631). After eight questions had been asked on cross-examination by the defense attorney, the following occurred:

> Mr. Peede: Your Honor, excuse me. Ladies and gentlemen of the jury, I apologize. I apologize for what I'm saying or interrupting the Court. I don't want the witness cross-examined. Going against my, what I need or what I want. And the people are not representing, they're not doing anything I want them to do. They're going against everything that I want done. I don't want this woman cross-examined.
>
> (Whereupon, the defendant, Robert Ira Peede, was escorted out of the courtroom, and the following proceedings were had out of his presence).
>
> The Court: Wish to proceed?
>
> Ms. Sedgwick [the prosecutor]: Your Honor, could we approach the bench?
>
> The Court: Later.
>
> Mr. Durocher [defense counsel]: We'd probably like the record to reflect Mr. Peede is no longer present in the courtroom.
>
> The Court: Record should reflect because of his disruptions or interruptions of the procedures, he has been taken out of the courtroom.

(R632-633).

Thus, without warning, admonition or inquiry of the defendant, Mr. Peede was "escorted out of the courtroom" while examination of his ex-wife continued in his absence. Clearly no knowing, voluntary, or intelligent waiver of the right to be present transpired because of Mr. Peede's vocal but respectful dissention about the course of representation by his attorneys. Rather than proceed with the reception of evidence, the judge should have excused the jury and inquired whether Mr. Peede was so dissatisfied with the tactics of his appointed

counsel that he would rather represent himself. A defendant must be entitled to some say-so in his own defense. cf. Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 462, 95 S.Ct. 2525 (1975). See Point II, infra. Mr. Peede, if he continued to desire representation, could have then been admonished to conduct himself properly or suffer the consequences. cf. Jones v. State, ___So.2d ___ (Fla. March 29, 1984)[9 FLW 113].

Assuming but not conceding that a defendant's attendance in a capital trial can ever be excused by the trial judge, the court could then either have obtained a waiver of Mr. Peede's presence after an adequate inquiry or have required his attendance at trial, bound and gagged if necessary to avoid interference with the presentation of evidence. cf. Illinois v. Allen, 397 U.S. 337, 25 L.Ed.2d 353, 90 S.Ct. 1057 (1970). Simply said, the Court did not have the discretion to evict the defendant without warning from his own capital trial for such a trivial and respectful violation of courtroom decorum.

The error thereafter compounded. Mr. Peede was returned to the courtroom at the beginning of the next witness' testimony and Mr. Peede attended without incident. When the Court recessed for lunch, Mr. Peede informed the Court that he felt ill (R 662-663). When Court reconvened at 1:35 p.m., the defense attorneys notified the Judge that Mr. Peede did not wish to attend the trial further that afternoon based partially upon illness and partially because the defense attorneys were not conducting his defense as desired (R 663-665).

The Assistant State Attorneys, the defense attorneys, the trial judge and the court reporter then went to the jail to talk to Mr. Peede (R 669). The proceedings were conducted in Warden Brookfield's office, which is a part of the jail (R 673), and the entire colloquy is set forth in pages 1-19 of the appendix to this brief for the convenience of this court. Significantly, Judge Cycmanick did not inform Mr. Peede of the specific rights that were being relinquished. Rather, Mr. Peede merely acknowledged that he understood that the trial would continue in his absence (R 669-670, 672; A 9-10, 12), and stated that "they've [the defense attorneys] started the trial, they should finish it." (R 673; A 13). No further personal inquiry of the defendant was made by the Court. Defense counsel stated that he would check with Mr. Peede that evening after court adjourned (R 757). The next morning the defense attorney informed the Court that Mr. Peede's position remained the same (R 765).

The State presented the testimony of five more witnesses, and the State rested. After the Motion for Judgment of Acquittal had been denied, defense counsel stated that he had recently conferred with Mr. Peede and that Mr. Peede renewed his previous statements about not being interested in hearing about the case or participating in the proceedings. (R 846). Thereafter, closing arguments [limited to thirty minutes] and jury instructions occurred, all in the absence of Mr. Peede (R 859-892, 892-910), and the jury returned a verdict of guilty of first degree murder, also in the absence of Mr. Peede

(R912-916). The undersigned counsel strongly submits that there exists in the instant case no knowing, voluntary, or intelligent waivers of the right to be present, to confront witnesses, to present evidence in one's own behalf, to be present when the verdict is delivered and to observe the polling of the jury, or to participate in your own defense.[3/] The State is sincerely challenged to direct this Court's attention to anything that would constitute an adequate waiver of these constitutional rights in the context of a death case.

Moreover, the undersigned counsel categorically disputes the ability of a trial judge to excuse a defendant from attending his felony or capital trial in Florida. There are no provisions for such an excusal contained in the Florida Rules of Criminal Procedure.[4/] Quite the contrary, Fla.R.Crim.P. 3.180 clearly provides, "In all prosecutions for crime the defendant shall be present; (5) at all proceedings before the court when the jury is present, (and); (8) at the rendition of the verdict." (emphasis added).

3/ cf. Griffin v. State, 414 So.2d 1025 (Fla. 1982); Brewer v. State, 53 Fla. 1, 43 So. 422 (1907); Summerals v. State, 37 Fla. 162, 20 So. 242 (1896).

4/ Significantly, Fla.R.Crim.P. 3.180(c) provides: "Persons prosecuted for misdemeanors may, at their own request, by leave of court, be excused from attendance at any or all of the proceedings aforesaid. The maxim "Expressio unius est exclusio alterius" applies here.

In Hopt v. Utah, 110 U.S. 574, 28 L.Ed.2d 262, 4 S.Ct. 202 (1884) the United States Supreme Court held that the failure to insure the presence of the accused at every stage of the trial when his substantial rights may be affected by the proceedings against him would amount to a denial of due process. Such a denial of due process has occurred here when a jury received the evidence in the defendant's absence, failed to hear what [if anything] Mr. Peede wished to say in his own behalf, and returned a verdict of guilty in Mr. Peede's absence.

This is not a case where knowing, voluntary and intelligent waivers of known rights exist. This is not a case where the trial judge obtained personal waivers at each crucial stage of the trial and made repeated efforts to obtain the defendant's attendance. And Florida is not a State that empowers a trial judge to excuse a defendant from attending a felony trial or a capital trial upon request. Further, assuming that a waiver could occur, it is respectfully submitted that the inability of Mr. Peede to control his attorneys, as affirmatively demonstrated by the record, renders any purported waiver on his part void. Any waiver of the right to be present, under the instant circumstances, was the product of not being able to meaningfully participate in his own defense in any way, as set forth in Point II infra. The convictions must be reversed and the matter remanded for retrial.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BY FORCING COURT APPOINTED COUNSEL UPON A DEFENDANT WHO DESIRED TO REPRESENT HIMSELF.

This issue is closely associated with the argument presented in Point I, supra, concerning the right/duty of a defendant to be present during the critical stages of a capital trial. This right to "presence" was based upon the premise that the "defense may be made easier if the accused is permitted to be present at the examination of jurors on the summing up of counsel, for it will be in his power, if present, to give advice or supervision or even to supercede his lawyers altogether and conduct the trial himself." Snyder v. Massachusetts, 291 U.S. 97, 106, 78 L.Ed. 674, 54 S.Ct. 330.

> To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the life-blood of the law. (citation omitted)

Faretta v. California, 422 U.S. 806, 834, 45 L.Ed.2d 562, 581, 95 S.Ct. 2525 (1975) (emphasis added). In Faretta the United States Supreme Court held that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. The Court stated:

> The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant -- not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. (citations omitted).
>
> This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.

Id. at 820, 45 L.Ed.2d at 573. (emphasis supplied)(footnote omitted).

Prior to trial, court appointed counsel filed on the same day a motion to continue and a motion to withdraw (R1038-1040). The motion to continue purported to waive Mr. Peede's right to a speedy trial (R1038), whereas the motion to withdraw stated that Mr. Peede "does not want this matter continued" and "desires to represent himself at trial." (R1039).

A hearing upon these motions was had on August 1, 1983. (R1429-1442). After a general colloquy between the trial judge and Mr. Peede (where all questions were intelligently and rationally answered) Mr. Peede represented to the Court that his main dissatisfaction with representation was his attorney's decision to get a continuance and waive his right to a speedy trial (R1437-1438). When Mr. Peede began to explain a further basis for self-representation, he was cut-off by the Court and instructed by his counsel "that he should communicate to the court through myself, and that the statement he was about to make, I think, would have some bearing on the facts. And I advised him not to talk about this." (R1437). Counsel later pointed out that there was indeed another "area of disagreement which concerns the Defense in this case." (R 1438). The Court denied the motion to withdraw, stating as a basis, "I don't feel that Mr. Peede would have the ability to act as his own Counsel in this cause, and that any conviction obtained under these circumstances would be voidable." (R1439).

Thus, Mr. Peede was unable to exert his right to discharge his counsel and obtain a speedy trial. Pro se demands for a speedy trial were struck (R1061-1062, 1083-1084, 1086). At

trial Mr. Peede was unable to exert his right to present his own defense, in that he could not prevent his attorneys from cross-examining certain witnesses (R605-606, 631-633). Mr. Peede was ejected from the courtroom for stating, "Your Honor, excuse me. Ladies and gentlemen of the jury, I apologize. I apologize for what I'm saying or interrupting the Court. I don't want the witness cross-examined. Going against my, what I need or what I want. And the people are not representing, they're not doing anything I want them to do. They're going against everything that I want done. I don't want this woman cross-examined." (R632-633). Clearly, if the attorney representing Mr. Peede had been privately retained, he would have been able to intercede and conduct his case as he saw fit. A different result should not obtain solely because the counsel is court appointed.

As stated previously, "To force a lawyer on a defendant can only lead him to believe that the law contrives against him." Faretta, supra, at 834. It is not surprising that Mr. Peede did not want to stay in the courtroom and felt ill (R 662). The situation was hopeless. A "fair" trial cannot be said to have occurred in a case with such an atmosphere of despair.

POINT III

THE TRIAL COURT DENIED APPELLANT DUE PROCESS OF LAW AND THE RIGHT TO A JURY TRIAL GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BY UNREASONABLY LIMITING THE TIME ALLOWED FOR CLOSING ARGUMENT TO 30 MINUTES PER SIDE IN A CAPITAL TRIAL.

At the conclusion of the charge conference defense counsel specifically requested on the record that he be allowed more than the allotted 30 minutes for closing argument (R857-858).[5/] The following then transpired:

> The Court: Like for you to think in terms of using 20 to 30 minutes to present your arguments. I've never cut anyone off.
>
> Mr. Durocher [defense counsel]: Certainly don't have any thought of going on for an hour or anything like that, but ...
>
> The Court: If you exceed 30 minutes, I'll, you'll hear that, I'll bump into the mike accidentally to let you know.

(R858).

Appellant respectfully submits that the severe time limitation on closing argument in the context of a complex, capital trial constituted an abuse of discretion on the part of the trial judge resulting in a denial of Appellant's constitutional right to a fair trial by jury. This issue was addressed in May v. State, 89 Fla. 78, 103 So. 115, 116 (1925) as follows:

5/ The trial court had previously responded to a juror's inquiry that the arguments of the attorneys "[s]hould not take more than an hour." (R 759)

> But the limitation of the time for argument must of necessity, within reasonable bounds, rest in the discretion of the trial court. This is the general rule. The right may be waived, but, when requested, reasonable time must be allowed. The question to be determined is what is reasonable time, and this depends upon the facts and circumstances of each case. No hard and fast rule can be prescribed. But, if it appears that the time for argument is unreasonably limited, such action will be held an abuse of discretion, requiring reversal of the judgment for new trial.

In May, supra, the Court held that a twenty minute limitation of closing argument deprived the defendant of a fair trial where he faced a possible twenty years imprisonment upon conviction. The Court also pointed out that although the facts at trial were not complicated, there were sharp conflicts in the evidence on material issues. Both the state and the defendant called several witnesses and the testimony at trial consumed "several hours".

In Cooper v. State, 106 Fla. 254, 124 So. 217 (1932) this Court held that a five minute limitation on argument was a per se abuse of discretion. Recently, the Fifth District Court of Appeal held that a trial judge had abused his discretion in unreasonably limiting closing argument to twenty-five minutes per side. Neal v. State, ___ So.2d ___ (Fla. 5th DCA June 28, 1984)[9 FLW 1412]. The defendant in Neal had been charged with first degree murder, and the Fifth District Court of Appeal correctly recognized that a fair trial was not had where defense counsel did not have time to fully address the issues of the case. The Court stated, "While the facts as to what occurred at the scene of the crime were fairly simple, there was sharp

disagreement concerning the question of premeditation, and this case raised the novel and complex spouse abuse defense, combining theories of self-defense and temporary insanity." id. at 1413.

Appellant submits that the aforementioned rationale pertains all the more here. The State sub judice was proceeding upon dual theories of premeditated and/or felony murder (R874). The testimony concerning premeditated murder was extremely weak and illogical. The State contended that Appellant planned to kill his wife and ex-wife in North Carolina after using her as a lure to get near his ex-wife. The fallacy is that Appellant killed his wife in Orlando, Florida. The felony murder theory relied upon the felony of kidnapping, yet it is uncontroverted that a hitchhiker was picked up and later dropped off after she had driven the car while Appellant and his wife engaged in sex in the rear of the car. This evidence flies in the face of a kidnapping and a cogent argument in this regard was prevented from being fully developed at trial due to the time constraints imposed by the judge.

The trial consumed five days and encompassed the testimony of twenty state witnesses. The legal issues were complex, and Appellant faced (and ultimately received) the death sentence. Moreover, the defense presented no testimony or evidence, and instead relied upon the closing argument to develop the theory of defense. It is respectfully submitted that an abuse of discretion occurred where the trial judge unreasonably restricted the closing argument to a half hour per side, in that Appellant was thereby deprived of his constitutional right to a fair trial. The matter must be reversed and remanded for a new trial.

POINT IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS NINE AND SIXTEEN OF THE FLORIDA CONSTITUTION, BY PERMITTING HEARSAY TESTIMONY OVER OBJECTION TO THE PREJUDICE OF THE DEFENDANT.

Over objection, the victim's daughter was permitted to testify that her mother stated that she was going to the airport to pick up the defendant, and that she [the victim] had stated she was nervous and scared that she might be in danger. (R 598-599). The daughter testified that her mother told her to call the police if she had not returned by midnight, and that the mother related that the defendant had threatened to kill the other people up in North Carolina on Easter (R 600).

The testimony is pure hearsay. §§90.801, .802, Fla.Stat. (1983). Therefore the testimony should have been excluded because of its extremely prejudicial effect. Pursuant to Hunt v. State, 429 So.2d 811 (Fla. 2d DCA 1983), Bailey v. State, 419 So.2d 721 (Fla. 1st DCA 1982), and Kennedy v. State, 305 So.2d 1020 (Fla. 5th DCA 1980), reversible error has occurred.

Recently, the Second District Court of Appeal explained as follows:

> It is well settled that the state of mind exception codified in section 90.803(3)(a) admits qualifying extrajudicial statements only if the declarant's state of mind or performance of an intended act is at issue in the particular case. (Citations omitted). It is equally clear that a homicide victim's state of mind prior to the fatal

> incident generally is neither at issue nor probative of any material issue raised in a murder prosecution. (Citations omitted). Moreover, even if the victim's state of mind is relevant under the particular facts of the case, the prejudice inherent in developing such evidence frequently outweighs the need for its introduction. (Citations omitted).

Fleming v. State, ___ So.2d ___, (Fla. 2d DCA, August 24, 1984)[9 FLW 1849].

It is clear from the above cases that such hearsay testimony cannot be admitted under the state of mind exception to prove the state of mind or motive of someone other than the declarant, yet this is precisely what happened here. The victim's daughter was permitted to testify that her mother, [the victim] was nervous and scared prior to picking up Mr. Peede, and that he had previously told her mother that he would kill the other people in North Carolina on Easter (R 598-600). Such testimony had no relevance. Darla Peede's state of mind at the time she went to pick up her husband hours before she was kill is irrelevant. Extreme prejudice accrues to Mr. Peede because this hearsay interjects a motive into the case that cannot be effectively challenged through cross-examination of the declarant.

It is respectfully submitted that the introduction of this testimony constituted reversible error.

POINT V

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO GRANT THE MOTION FOR JUDGMENT OF ACQUITTAL PERTAINING TO FIRST DEGREE MURDER BASED ON FELONY MURDER (KIDNAPPING) BECAUSE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO ESTABLISH THAT A KIDNAPPING OCCURRED, THEREBY DEPRIVING THE DEFENDANT OF HIS RIGHT TO DUE PROCESS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS SIX AND SIXTEEN OF THE FLORIDA CONSTITUTION.

Mr. Peede was charged by Indictment solely with the offense of first degree murder, to wit: [F]rom a premeditated design to effect the death of Darla Dee Peede, murder Darla Dee Peede... by stabbing her with a knife." (R 1008). During jury selection defense counsel requested a proffer by the prosecutor as to the evidence that would be produced concerning felony murder prior to the jury being educated upon that theory (R 309-310). The prosecutor alluded to hearsay statements allegedly made by the victim prior to her picking up Mr. Peede at the airport, as well as some physical evidence consistent with the occurrence of a kidnapping (R 310-312).

At the conclusion of the State's case, defense counsel moved for a judgment of acquittal specifically as to felony murder, arguing that insufficient proof of the underlying kidnapping had been adduced (R 842-845). The motion was denied (R 846). Appellant submits that the ruling was error, in that, viewing the evidence in a light most favorable to the State, there was not competent, substantial proof that a kidnapping had been committed.

Specifically, "[t]he concern on appeal [is] whether, after all of the conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal." Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981). The proof of the occurrence of a kidnapping here is entirely circumstantial. Accordingly, a particular rule applies to determine whether competent, substantial [legally sufficient] evidence of a kidnapping exists. Simply stated, if the proof and reasonable inferences drawn therefrom, viewed in a light most favorable to the State, fail to exclude a reasonable hypothesis of innocence, the proof is legally insufficient to sustain a verdict. Jaramillo v. State, 417 So.2d 257 (Fla. 1982).

Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. Williams v. State, 437 So.2d 133, 135 (Fla. 1983); McArthur v. State, 351 So.2d 972, 976 (Fla. 1977).

The proof presented in the instant trial does not exclude reasonable hypotheses of innocence, even when viewed in a light most favorable to the verdict. The hearsay statements allegedly made by Darla Peede, if considered, indicate that she was concerned, but not to the extent that she did not voluntarily go alone to pick up her husband (R 595-601). The fact that she

did not take belongings in anticipation of spending the night somewhere does not foreclose the reasonable possibility that she decided to do so after meeting her husband. The superficial knife wound in Darla's side was explained as being the result of her husband's obsession and reaction to a particular song (R 562, 722, 744-746), and clearly if a kidnapping was occurring a hitchhiker would not thereafter be picked up, allowed to drive the car while Mr. Peede and his wife engaged in sex in the back seat, and then allowed to leave (R 717, 730, 829-830).

The evidence of felony murder is legally insufficient to sustain a conviction of murder. In Franklin v. State, 403 So.2d 975 (Fla. 1981), this Court reversed a murder conviction where the State achieved a first degree murder conviction while proceeding upon dual theories of premeditated murder and felony murder because the trial judge failed to adequately instruct upon the underlying felony, and it could not be determined beyond a reasonable doubt that the jury had not based its verdict on felony murder. The same principle of law controls sub judice. It cannot be determined beyond a reasonable doubt that the jury did not base its verdict on felony murder [kidnapping] where there was insufficient and/or improper proof of the kidnapping. [See Point IV, supra.]

Accordingly, the conviction must be reversed and remanded for retrial.

POINT VI

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

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

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 685 (1975), and does not define "sufficient aggravating circumstances." The statute, further, does not sufficiently define for the jury's consideration each of the aggravating circumstance listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

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 level does not 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 on 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 cruel and unusual punishment. Amend. VIII, U.S. Const.

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

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

The Elledge Rule (Elledge v. State, 346 So.2d 998 (Fla. 1977)), if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the 8th and 14th Amendments to the United States Constitution.

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 arbitrary application of this circumstance and 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. The conclusory finding by the Court of a cold, calculated and premeditated killing demonstrates the arbitrary application of this aggravating circumstance.

Additionally, a disturbing trend has become apparent in this Court's recent decisions and its review of capital cases. 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, ___ U.S. ___, 32 C.L. 4016 (U.S. Sup.Ct. Case No. 82-5096, Oct. 4, 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 review was subsequently confirmed by this Court when it states 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 abandonment of its duty to make and 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 states arguments, Appellant contends that the Florida death penalty statute as it exists and as applied in unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

POINT VII

AS APPLIED, SECTION 921.141, FLORIDA STATUTES VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY DENYING A DEFENDANT DUE PROCESS OF LAW, IN THAT THE EXISTENCE OF AGGRAVATING AND/OR MITIGATING CIRCUMSTANCES, AS QUESTIONS OF FACT, ARE FOUND BY THE TRIAL JUDGE AS OPPOSED TO A JURY OF THE DEFENDANT'S PEERS.

Appellant does not quarrel with a process whereby the court applies the facts established by the jury to impose a death sentence. Rather, Appellant takes issue with having the court determine the facts used to impose the death sentence. Specifically, Section 921.141, Fla.Stat. requires that a weighing process occur whereby the jury and the trial court weigh statutory aggravating circumstances against mitigating circumstances. The jury then recommends a sentence, and the trial court considers this recommendation in imposing the sentence. However, as presently applied, there are no written findings of aggravating or mitigating circumstances made by the jury, nor of the facts found by the jury in consideration of the question of whether such circumstances exist. Instead, the trial court determines the facts anew after the jury issues its recommendation. Thus, the facts determined by the jury are not necessarily the same facts determined or used by the judge.

The Sixth Amendment to the United States Constitution guarantees the defendant the right to a jury trial by his peers. This right is applied to the states by the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). It is manifest that the facts of a case are determined

by the jury during the guilt phase. Notwithstanding that the bifurcated penalty phase is a separate proceeding, it remains a part of the trial. Principles of collateral estoppel and res judicata apply to those facts previously determined by the jury during the guilt phase, and those facts control.

Aggravating circumstances and mitigating circumstances are comprised of facts. Aggravating circumstances must be proved beyond and to the exclusion of a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). Although mitigating circumstances must be proved to a somewhat lesser standard, it remains that a burden of proof exists for both categories. The determination of whether a party has met a burden of proof falls exclusively within the province of the jury, and it is therefore unconstitutional for the judge to step in and redetermine the facts at sentencing.

An example is in order. This Court's attention is respectfully drawn to the findings made by the trial court concerning the presence of the aggravating and mitigating circumstances, where the Court found that the murder was committed during a kidnapping, in that "[t]he evidence at trial showed the Defendant abducted by threat or force, against her will the victim, Darla Dee Peede, with the intent to facilitate and to commit the felony crimes of murder... The evidence showed that the Defendant also intended the murder of Darla Dee Peede during the course of this plan." (R 1264). The jury did not return a verdict of guilty as to a kidnapping offense.

The existence of most if not all of these facts was necessarily previously determined by the jury. The jury was

provided a special verdict form whereby it was factually determined that a weapon had been used in the commission of the crime (R 1234). It is respectfully submitted that a similar special verdict form should have been provided the jury by the State in order to establish the facts that compose the aggravating or mitigating factors used to enhance the penalty to death. At a minimum, the jury should have returned a separate verdict as to the underlying felony of kidnapping.

The jury is the proper body to determine the occurrence of a kidnapping, not the trial judge. It was incumbent upon the State to pursue a charge upon the underlying felony and obtain a conviction prior to the judge being able to consider it as an aggravating circumstance.

Due to this unconstitutional procedure, the death sentence must be vacated.

POINT VIII

THE TRIAL COURT'S FINDING OF A COLD, CALCULATED AND PREMEDITATED MURDER AS AN AGGRAVATING CIRCUMSTANCE IS INVALID, IN THAT THE FINDING IS TOO INSPECIFIC, CONCLUSORY, AND WHOLLY UNSUPPORTED BY THE EVIDENCE.

The written findings justifying imposition of the death penalty state: "The crime for which the Defendant is to be sentenced was committed in a cold, calculating [sic] and premeditated manner without any pretense of moral or legal justification. The evidence throughout the trial supports this finding." (R 1264). The written order did not elaborate further upon the applicability of this aggravating circumstance. Appellant submits that the trial court cannot merely make the conclusory finding that an aggravating circumstance exists, but must specify the particular facts that comprise the circumstance. Hall v. State, 381 So.2d 683 (Fla. 1980).

Initially, Appellant submits that these facts must be determined by the jury through the use of special verdict forms, and that those findings are thereafter to be reviewed by the trial court, and ultimately this court , to determine the sufficiency of proof for such findings. [See Point VII, supra]. Alternatively, Appellant submits that the bare conclusory statement of the presence of an aggravating circumstance made by the trial judge, without more, is insufficient. "The fourth step required by Fla.Stat. §921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this

is an important element added for the protection of the defendant." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).

The inspecific and conclusory finding of a cold, calculated and premeditated murder made by the trial judge here does not provide for meaningful review. If the judge considered the killing to have been planned as part of a kidnapping, the circumstance is already contained in the second finding of the court, to wit: crime committed while engaged in commission of kidnapping (R 1264). If the judge felt that Mr. Peede planned to use his wife as a lure to get near his ex-wife, it is then illogical to assume that Mr. Peede intended to kill his wife in Orlando, as occurred. If Mr. Peede did not intend to kill his wife in Orlando, how can the actual killing be cold, calculated and premeditated?

A plethora of questions exist, none of which are even partially answered by the inadequate finding made by the trial judge. Accordingly, the finding is improper and wholly unsupported by the evidence.

POINT IX

THE DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, IN THAT IMPROPER AGGRAVATING CIRCUMSTANCES WERE CONSIDERED BY THE SENTENCING JUDGE AND JURY, WHEREAS PROPER MITIGATING CIRCUMSTANCES WERE NOT CONSIDERED IN IMPOSING THE DEATH SENTENCE.

The trial court found three aggravating circumstances to exist beyond a reasonable doubt, to wit: (1) prior conviction involving the use of force; (2) the crime committed during the commission of a felony [kidnapping], and; (3) cold, calculated and premeditated murder without any pretense of moral justification (R 1263-1265). The first finding is supported by competent evidence and is viable if the judge can make the finding initially [See Point VII].

The finding that the murder was committed during the commission of a felony is erroneous. Not only was the underlying felony not found to exist by the jury through rendition of a verdict, the trial judge's finding is unsupported by the evidence. Specifically, the judge relies upon an unrecorded statement allegedly made by the defendant that was testified to in summary form by a police officer during the absence of the defendant at trial (R 1264, 714-720). That statement is insufficient to establish the occurrence of a kidnapping. Assuming but not conceding that Mr. Peede was in fact trying to use Darla to get near his ex-wife and Calvin Wagner in North Carolina, it does not necessarily follow that he was forcing Darla to go with him. She could reasonably have decided to

voluntarily accompany her husband to her old home in North Carolina for the weekend for any of a number of reasons. [The prejudice attendant the hearsay testimony set forth in Point IV pertains here.] Moreover, this finding alludes to the presence of a shotgun in Mr. Peede's residence and to conduct contemplated to perhaps occur in the future. It is wholly improper for the Court to consider a plan formulated after the killing occurred.

The finding of a cold, calculated and premeditated murder without any pretense of moral justification is also erroneous. It is firmly established that the aggravating circumstance of cold, calculated and premeditated murder applies to those murder which are characterized as executions or contract murders, or to where a pre-existing plan to murder was present. White v. State, ___ So.2d ___, (Fla. 1984)[9 FLW 29]. Though affirming the death sentence, this Court in White reversed a finding that a killing was cold, calculated and premeditated where the evidence established that the killing of a store clerk occurred incidentally to a robbery as opposed to part of a preconceived plan. An example of a valid finding of the aggravating circumstance is found in the case of Hill v. State, 422 So.2d 816 (Fla. 1982). In Hill, a defendant asked a friend earlier on the evening of the murder and prior to the abduction if he wanted to help rape a twelve year old victim. The girl's body was found two days later. Here the conclusory finding of the Court is unsupported by the evidence, in that the evidence establishes conclusively that Darla was stabbed in the neck in an

act of rage, and not through any preconceived plan to take her life in Orlando, Florida. Further, there is no evidence to show that Darla Peede was ever an intended victim.

The judge considered and found the presence of only one statutory mitigating circumstance, that being that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance (R 1264, 980). At the sentencing hearing, the trial judge failed to announce the presence of <u>any</u> mitigating circumstances (R 980). The written findings of fact, however, show that the trial court considered only the statutory mitigating circumstance of a murder committed while the defendant was under the influence of extreme mental or emotional disturbance (R 1264-1265). Indeed, the jury was inexplicably only instructed that "[a]mong the mitigating circumstances that you may consider, if established by the evidence, are, (1) the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance; any other aspect of the defendant's character or record, and any other circumstance of the offense." (R 970).

Clearly there was evidence 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. <u>cf</u>. §921.141(6)(f). The expert forensic psychiatrist testified at the sentencing proceeding that the defendant was suffering from a paranoia concerning his wives posing in magazines to solicit sexual partners (R 950, 955). The doctor also testified that Mr. Peede was subject to severe emotional

outbursts (R 955), and that the defendant had been deprived of sleep for a long period of time prior to the killing of his wife (R 951). The doctor described sleep as being very important to the mental state of health, and that the result of a loss of sleep is a snowballing effect making certain emotional problems worse. The loss of sleep increases edginess, anxiety, tension, and frequently increases depression as well, so that it has a compounding effect (R 951). Clearly this is evidence to support a finding that the capacity of the defendant to appreciate the criminality of his conduct is substantially impaired due to his own particular mental problems aggravated by the loss of sleep that occurred when Mr. Peede drove his motorcycle from Hillsboro, North Carolina to Florida, and then immediately began the drive back to Hillsboro in his wife's Buick.

In Mines v. State, 390 So.2d 332 (Fla. 1980), this Court vacated a death sentence that had been imposed after consideration of an improper aggravating circumstance, and no consideration of the two mitigating circumstances relating to a defendant's mental condition. This Court stated:

> Under the provisions of Section 921.141(6), Florida Statutes (1975), there are two mitigating circumstances relating to a defendant's mental condition which should be considered before the imposition of a death sentence: "(b) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance"; "(f) 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." From the record it is clear that the trial court properly

> concluded that the appellant was sane, and the defense of not guilty by reason of insanity was inappropriate. The finding of sanity, however, does not eliminate consideration of the statutory mitigating factors concerning mental condition. The evidence clearly establishes that appellant had a substantial mental condition at the time of the offense... The trial court erred in not considering the mitigating circumstances of extreme mental or emotional disturbance under Section 921.141(6)(b) in the substantial impairment of the capacity of the defendant to appreciate the criminality of his conduct under Section 921.141(6)(f). These circumstances may not be controlling, but they were present in this cause and should have been considered. (emphasis added).

Mines, Id. at 337. See also Perri v. State, 441 So.2d 606 (Fla. 1983).

This Court has recognized that these particular mitigating circumstances may be sufficient to outweigh aggravating circumstances involved in the most atrocious crime. cf. Huckaby v. State, 343 So.2d 29 (Fla. 1977); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976); Swan v. State, 322 So.2d 485 (Fla. 1975). As noted in Burch, supra, these two categories of mitigating circumstances relating to a defendant's mental condition are to be considered by the jury. Id. at 834. Sub judice, neither the jury nor the trial court considered the mitigating circumstance of whether the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. It is respectfully submitted that this omission fatally taints that imposition of the death sentence, and that at the very least a new sentencing proceeding is required.

CONCLUSION

BASED UPON the argument and authority contained herein, this Court is respectfully requested for the following relief:

In reference to Points I-V - To reverse the conviction and remand the matter for retrial.

In reference to Points VI-IX - To vacate the sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida and Mr. Robert Ira Peede, Inmate No. 093094, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 10th day of September, 1984.

Larry B. Henderson

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