IN THE SUPREME COURT OF FLORIDA

OTTIS ELWOOD TOOLE,

APPELLANT, CROSS-APPELLEE,

-VS- CASE NO. 65,378

STATE OF FLORIDA,

APPELLEE, CROSS-APPELLANT.

ANSWER BRIEF OF APPELLEE AND INITIAL BRIEF OF CROSS-APPELLANT

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OTHERS

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STATEMENT OF THE CASE

Appellee accepts the statement of the case as stated on pages one and two of appellant's brief as being accurate to the extent stated.

Appellee wishes to add the following facts. First, the trial judge, over the State's objection, suppressed one of three admissions made by appellant prior to trial (TT 952-953) although no motion was filed as required by Fla.R.Crim.P. 3.190 (i)(2) even though the facts upon which it was predicated were well known to counsel prior to trial based upon pretrial discovery depositions (R 276-300). Secondly, the trial judge denied numerous challenges for cause of prospective jurors who stated

unequivocally that they were unable to consider or recommend a death sentence under any circumstances (TT 156-157; 187-188; 365-366; 379-381; 524-526). The trial judge denied the challenges for cause since the prospective jurors stated they could fairly determine appellant's guilt, although he ruled said jurors would not be allowed to participate in the penalty phase of the trial if appellant was convicted of first degree murder (TT 193, 369, 382, 529). The State continuously objected to the trial judge's actions in this regard.

STATEMENT OF THE FACTS

Appellee accepts the statement of the facts contained on pages two through twelve of appellant's brief as being a reasonably accurate summary of the testimony given by the witnesses called by the respective parties.

That evidence demonstrates the appellant was properly found guilty of murder in the first degree since he admitted setting the fire to the dwelling house in which George N. Sonnenberg died as a direct result of the injuries sustained from said fire.

Other facts deemed relevant to the issues raised by appellant and the State pursuant to its cross-appeal will be included in the argument portion of this brief.

ISSUES ON APPEAL

ISSUE I

THE TRIAL JUDGE DID NOT ERR IN ADMITTING THE DEFENDANT'S ADMISSIONS TO SERGEANT VIA THAT HE WAS A HOMOSEXUAL, HAD A HOMOSEXUAL RELATIONSHIP WITH THE DECEASED AND HAD AN ARGUMENT WITH HIM PRIOR TO SETTING THE FIRE.

ISSUE II

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO CROSS-EXAMINE APPELLANT CONCERNING HIS INCARCERATION IN LAKE BUTLER SINCE THE MATTER WAS BROUGHT OUT ON DIRECT EXAMINATION. THE TRIAL JUDGE DID NOT ERR IN ALLOWING QUESTIONS PERTAINING TO A PRIOR ACT OF BURNING A BUILDING AND THIS ISSUE IS NOT PROPERLY BEFORE THE COURT.

ISSUE III

THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY, PURSUANT TO APPELLANT'S REQUEST, ON TWO STATUTORY MITIGATING CIRCUMSTANCES, THEREBY RENDERING APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL.

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ISSUE VII

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ISSUE VIII

THE TRIAL JUDGE ERRED IN SUPPRESSING THE VOLUNTEERED STATEMENTS BY THE APPELLANT TO SGT. VIA ON OCTOBER 18, 1983.

ISSUE I

THE TRIAL JUDGE DID NOT ERR IN ADMITTING THE DEFENDANT'S ADMISSIONS TO SERGEANT VIA THAT HE WAS A HOMOSEXUAL, HAD A HOMOSEXUAL RELATIONSHIP WITH THE DECEASED AND HAD AN ARGUMENT WITH HIM PRIOR TO SETTING THE FIRE.

ARGUMENT

Appellant contends the trial judge erred in admitting the admissions made by him to Lt. Cummings and Sgt. Via relative to his relationship with the victim because it was an attack upon his character which had not been put in issue and was inflammatory and prejudicial which outweighed its relevance to the issues in the cause.

Appellee respectfully submits that the argument is without merit and that appellant has failed to demonstrate the trial judge's evidentiary rule was clearly erroneous.

As appellant has candidly admitted, once it was learned that appellant admitted having an argument with the deceased, the testimony tended to establish the motive and as Judge Harrison ruled, it had "great relevance" and the possible inflammatory aspect is outweighed by its relevance (TT-972). The statement made by the appellant to or in Cummings' presence was:

> He said that he knew this individual that they had had a homosexual relation with one another and he had become angry with him and this is when he left.

(TT 968).

The clear and unequivocal import of this admission was that after leaving he set the fire to the house and proceeded across the street where he then engaged in masturbation twice while he observed residents jumping from the window (TT 968,974). Of course, appellant was charged with premeditated murder and the argument with the deceased provided a motive for the crime. The fact that said testimony may point to the commission of a crime or that the appellant was homosexual is no basis to exclude the relevant testimony pertaining an issue in the cause. This is because the testimony was not introduced solely to establish bad character. Williams v. State, 110 So.2d 654 (Fla.1959) and Alford v. State, 307 So.2d 433 (Fla.1975). Appellant's contention that the motive could have been a fight over a gambling debt (App's brief at 15) aside from the fact that there is no evidence to support such an inference it ignores the fact that whether the argument was the motive for the homicide was for the jury to determine which is why it was admissible. Alford v. State, supra. This explains why the State argued the matter to the jury in support of a conviction for first degree murder.

Appellant, relying upon Harris v. State, 183 So.2d 291 (Fla.2d DCA 1966), urges the relevance was outweighed by the prejudicial impact of the testimony. Appellee respectfully submits this argument is untenable. Without the evidence it is doubtful there would have been adequate evidence from which the jury could conclude that the killing was premeditated. Interestingly, the jury elected not to so view the evidence and found

him guilty of murder in the first degree on the basis of the murder felony theory of which the evidence was uncontradicted and unimpeached. This is the best evidence that the jury was not led astray by the "inflammatory evidence" relating to appellant's sexual lifestyle. CF. Smith v. State, 424 So.2d 726 (Fla.1982). More importantly, appellee submits it is for the trial judge to determine whether the prejudicial nature of the evidence outweighs its relevance and appellant has failed to demonstrate the ruling below was clearly erroneous. Alford, supra, at 438.

In Harris, supra, there was no connection between the defendant's previous homosexual activity and the crime charged, 183 So.2d at 293, and the court concluded the evidence was irrelevant to the crime charged. The case at bar is clearly different for there was a direct connection between the defendant's conduct with the victim in this case and the homicide. Since the evidence was not introduced solely to prove bad character and was relevant to a material issue in the cause, the trial judge properly admitted the complained of evidence. Alford v. State, supra, and the cases cited therein at pages 437 and 438; Heiney v. State, 447 So.2d 210 (Fla.1984), evidence of threats to others admissible to prove motive; and Ruffin v. State, 397 So.2d 277 (Fla.1981), evidence of prior homicide admissible to establish motive for killing.

ISSUE II

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO CROSS-EXAMINE APPELLANT CONCERNING HIS INCARCERATION IN LAKE BUTLER SINCE THE MATTER WAS BROUGHT OUT ON DIRECT EXAMINATION. THE TRIAL JUDGE DID NOT ERR IN ALLOWING QUESTIONS PERTAINING TO A PRIOR ACT OF BURNING A BUILDING AND THIS ISSUE IS NOT PROPERLY BEFORE THE COURT.

ARGUMENT

A. Appellant contends the trial judge erred in allowing the prosecutor to ask appellant why he could not return to Jacksonville, Florida, citing to numerous cases which forbids the prosecution from asking a defendant the nature of prior convictions in an effort to impeach the defendant. (See App's brief at p. 18).

It should be noted that at no time did counsel object to the questions propounded to the appellant. Moreover, the prosecutor did not identify the nature of the crimes for which appellant was previously convicted in the guilt stage. Indeed, the prosecutor, when appellant misstated the number of convictions, made an inquiry outside the presence of the jury to establish the precise number of convictions (TT 1019-1021). Since the jury was never told the nature of the crimes for which appellant was previously convicted, the cases relied upon are inapplicable to the instant case!

In actuality the question and answers complained of for the first time on appeal were not to impeach the appellant based upon his prior convictions. These questions were asked because appellant, on direct examination, testified that he confessed while in Lake Butler to the officers so that he could get back to Jacksonville and "get in touch with my kin people and my friends and all" (TT 996, 999). On direct examination appellant admitted telling the officers he set fire to the house but stated he in fact didn't and only said that to get back to Jacksonville (TT 999). This is a clear example of the defendant opening the door on direct examination to a subject thereby allowing the prosecutor to inquire into that matter on cross-examination. McCrae v. State, 395 So.2d 1145 (Fla.1981). It also explains why no objection was interposed by counsel for the defendant.

The State suggests the matter is not properly before this Court because there was no objection to the line of questioning and no judicial ruling made which would preserve the issue for review. Castor v. State, 365 So.2d 701 (Fla.1978); Clark v. State, 363 So.2d 331 (Fla.1978); State v. Cumbie, 380 So.2d 1031 (Fla. 1980) and Maggard v. State, 399 So.2d 973 (Fla.1981). Appellant's inquiry of the trial judge as to whether he was required to answer the question did not constitute an adequate substitution for a properly presented objection because the appellant was not representing himself, was a question and not an objection, and did not state grounds for said objection. Interestingly, counsel for appellant has cited no authority to support the assertion that the inquiry was sufficient to preserve the point.

Even assuming the issue was preserved, it is meritless under McCrae v. State, supra. In McCrae, the defendant testified concerning his prior criminal record implying he had not committed any serious violation of the law. Over objection of the defense the trial judge allowed the prosecutor to cross-examine the defendant with regard to the prior conviction including the nature thereof, to negate the incorrect implication of the direct testimony. On appeal, this Court in affirming the judgment and sentence stated:

> This line of questioning could have deluded the jury into equating appellant's conviction of assault with intent to commit murder with his previous misdemeanors. Consequently, the state was entitled to interrogate appellant regarding the nature of his prior felony in order to negate the delusive innuendoes of his counsel. As stated by one learned scholar:
>
> > [T]he rule limiting the inquiry to the general facts which have been stated in the direct examination must not be so construed as to defeat the real objects of the cross-examination. One of these objects is to elicit the whole truth of transactions which are only partly explained in the direct examination. Hence, questions which are intended to fill up designed or accidental omissions of the witness, or to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony, are legitimate cross-examination.
>
> 4 Jones on Evidence, Cross Examination of Witnesses § 25:3 (6th Ed. 1972) (footnote omitted). A defendant cannot take advantage on appeal of a situation which he has created at trial. See Sullivan v. State, 303 So.2d 632 (Fla.1974); White v. State, 348 So.2d 1170 (Fla.3rd DCA 1977); Jackson v. State, 336 So.2d 633 (Fla.4th DCA 1976).

395 So.2d at 1152. See also: Jones v. State, 440 So.2d 570 (Fla.1983).

It is rather clear that the cross-examination was designed to establish that appellant's explanation for giving the allegedly untruthful statement to the authorities was unworthy of belief and thus the statement was in fact true. The line of inquiry was legally proper and the claim to the contrary should be rejected even if the merits are reached.

In any event, the alleged error would clearly be harmless beyond a reasonable doubt because the jury was not informed of the nature of the prior convictions and the jury properly heard evidence that appellant was previously convicted of four felonies (TT 1022). Under these circumstances the error, if one occurred, could not have been reversible error. Houston v. State, 337 So.2d 852 (Fla.1st DCA 1976).

B. Under this sub-issue the appellant urges that the cross-examination was improper because it introduced a prior "criminal incident." This is likewise without merit. First, counsel did not object on the grounds that the testimony elicited constituted evidence of other criminal activity: he only objected on the grounds that it was beyond the scope of cross-examination (TT 1014). Thus, counsel is attempting to raise a ground different from that raised in the trial court in violation of Steinhorst v. State, 412 So.2d 332 (Fla.1982) and State v. King, 426 So.2d 12 (Fla.1982). See also North v. State, 65 So.2d 77 (Fla.1953). All of the foregoing cases correctly hold that only the grounds asserted in the trial court will be considered on direct appeal and grounds raised on appeal that were not raised will not be considered.

Notwithstanding, the cross-examination was proper for when asked whether he set the fire, appellant answered that if he set the fire he would have done it by soaking the whole house down and that nobody would have gotten out (TT 1012). This testimony, of course, was to bolster his direct testimony that he did not set the fire. Counsel for the State naturally asked appellant how he knew that was how to get a fire started, and appellant mentioned that he had previously burned down an old house that his "people" were going to tear down (TT 1013,1015). This was allegedly how he knew how to burn a house down, which was not the way the building in the instant case was burned.

There is absolutely no evidence given by appellant that the burning of the farm house ... constituted the crime of arson which is the predicate for appellant's argument. Moreover, it was appellant who mentioned the burning of the wood house, in an effort to explain his previous testimony to the effect that he didn't set fire to the apartment building.

The questioning herein was relevant and proper cross-examination and did not involve the introduction of Williams rule evidence. What appellant fails to understand is that when the defendant takes the stand in a criminal case in his own behalf he occupies the same status as any other witness, and all the rules applicable to other witnesses are likewise applicable to him. Johnson v. State, 380 So.2d 1024 (Fla.1979) and Booker v. State, 397 So.2d 910 (Fla.1981). In the case sub judice, when appellant volunteered testimony to support his claim that he did

not set the fire (TT 1012) and what he told Officer Cummings (TT 1012), the prosecutor had the right and the duty to inquire into the area (TT 1013-1014), and appellant cannot be heard to complain about that which he made relevant. Cf. Jackson v. State, 359 So.2d 1195 (Fla.1978). The questioning of appellant on cross-examination was nothing more than a legitimate effort to "illuminate the quality of his testimony" 380 So.2d at 1026, so his credibility could properly be assessed by the jury.

It should be observed that when the assistant state attorney asked an improper question, the trial judge interceded and sustained counsel's objection to the question which was never answered by appellant. Counsel for appellant apparently did not view any of the questions prejudicial including the last question for he did not ask for a mistrial. Having failed to do so appellant cannot now claim he is entitled to a new trial. Clark v. State, supra.

ISSUE III

THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY, PURSUANT TO APPELLANT'S REQUEST, ON TWO STATUTORY MITIGATING CIRCUMSTANCES, THEREBY RENDERING APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL.

ARGUMENT

Appellant contends the trial judge erred in refusing to instruct the jury on the statutory mitigating circumstances enumerated in subsection 6(b) and (e) of Section 921.141, Florida Statutes.

Appellee respectfully disagrees. More importantly, however, is that appellant is in no position to complain at this stage of the proceedings because he failed to comply with the requirements of Fla.R.Crim.P. 3.390(d) which provides:

> No party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection.

The record affirmatively shows that counsel for the appellant in the trial court did not interpose an objection to the trial court rulings refusing to instruct the jury on the statutory mitigating circumstances referred to hereinabove, either at the charge conference (TT 1321) or at the conclusion of the charge to the jury (TT 1364).

This being the case, appellant cannot assert reversal of the lower court's actions at this stage of the proceedings. McCaskill v. State, 344 So.2d 1276 (Fla.1977); Jent v. State, 408 So.2d 1024 (Fla.1982); Vaught v. State, 410 So.2d 147 (Fla. 1982); Rembert v. State, 445 So.2d 337 (Fla.1984) and Ford v. Wainwright, ___ So.2d ___(Fla.1984), 9 F.L.W. 203,204. This is particularly true since appellant has not attempted to show he was actually prejudiced by the court's actions. Jent v. State, supra; Wainwright v. Sykes, 433 U.S. 72 (1977) and Engle v. Isaac, 456 U.S. 107 (1982). This is particularly true since the jury and judge could have considered these circumstances--and did--the mitigating evidence under catchall provision of Section 921.141(1), to-wit: any other aspect of the defendant's character (TT 1361). In fact, trial counsel argued this to the jury (TT 1356-1358). See: State v. Pinch, 292 S.E.2d 203,224 (N.C.1982), a case cited to by appellant!

In Pinch the trial judge, like Judge Harrison, refused to instruct the jury that the murders were committed while the defendant was "under the influence of mental or emotional disturbance." In that case the defendant relied upon evidence similar to that introduced by appellant (292 S.E.2d at 224) and the court found no error. The court, however, went on to conclude that "[i]n any event, the omission could not have possibly been prejudicial since the trial court told the jury it could evaluate 'any other circumstances of circumstances arising from the evidence which you, the jury deem to have mitigating value" Id. at 224.

Therefore, since there was no objection to the instructions as given and no actual prejudice has or could be shown, this Court should not consider the merits of appellant's claim.

Even considering the merits, appellant should not prevail.

The claim that there was evidence that appellant was under "duress" and therefore entitled to an instruction pertaining thereto is totally devoid of merit either legally or logically. Although appellant relies upon Mines v. State, 390 So.2d 332 (Fla.1980), which held there are two statutory mitigating factors that relate to the mental condition of the accused he urges that the term "duress" is divorced from the words of "another person" and that mental duress, whatever that is, is likewise included. That argument, if accepted, would mean there are three statutory mitigating factors relating to mental state and not two as this Court held in Mines. Appellee submits the trial judge was correct in concluding that 6(e) pertained to extermal domination or duress by another individual. E.g., Parker v. State, ___ So.2d ___ (Fla.1984), 9 F.L.W. 348 (Fla.1984). The reason for this mitigating circumstance is that duress is not a legal defense to a homicide but all would agree that such would be a legitimate consideration as to the penalty to be imposed. Dixon v. State, 283 So.2d 1, 10 (Fla.1973). So too where a young person is unduly influence by a more sophisticated accomplice. To urge that 6(e) encompasses a broader scope is to

urge a construction which would render it vague and ambiguous and incapable of meaningful application. Moreover, the duress contemplated by appellant is contemplated by and included within (6)(f). There was no evidence that appellant was under the duress or domination of another person (TT 1272) and the trial judge properly refused to give an instruction relating thereto.

By like token, the trial judge did not err in refusing to instruct the jury on the statutory mitigating circumstance that the crime "was committed while the defendant was under the influence of extreme mental or emotional disturbance" inasmuch as there was no evidence from which a jury could rationally find this circumstance existed.

The State readily accepts the fact that there are two statutory mitigating circumstances which relate to the mental or emotional state of the defendant at the time the crime was committed. That is evident from subsection (6) itself. The fact that there are two circumstances does not mean both are always present or that if one is established the other likewise exists based upon the same evidence. If that were the case, not only would there be a "doubling" of the circumstances, the Legislature would not have enumerated the factors separately. There would be no need to since the process does not involve a mere counting of circumstances. Dixon v. State, supra, at 10.

Appellee submits that the Legislature intended each circumstance to cover a specific and discrete situation. Subsection 6(b) contemplates a person who although normal from a psychological standpoint, is suffering, at the time of the crime, to emotional or mental trauma induced by some event or external pressure, e.g., Lemon v. State, ___ So.2d ___ (Fla.1984), 9 F.L.W. 308.

Neither expert testified that at the time appellant set fire to the building he was suffering under any mental or emotional disturbance. Indeed, Dr. Urbina, the psychologist who examined appellant, testified that the latter was not suffering from a "thought disorder" or "psychotic condition" (TT 1264) and that he suffered from a personality disorder (TT 1264), was borderline retarded (TT 1263) which is not a mental disturbance, Pinch, supra, and acted on impulse. Dr. Sanches, also stated appellant suffered a "personality disorder" (TT 1286) but was unable to express an opinion concerning the appellant's mental state or condition at the time of the crime (TT 1286). See also: Judgment and Sentence at p. 6, R 183. This Court when it reads the entire testimony of Dr. Urbina and Dr. Sanches will readily see that their testimony went solely to appellant's mental capacity "to appreciate the criminality of his conduct . . . [or his ability] . . . to conform his conduct to the requirements of the law. . ." and whether it was substantially impaired. The trial judge properly concluded there was no testimony on emotional disturbance (TT 1320) and that there was no evidence to support the instruction (TT 1315).

Appellant's reliance upon Mines v. State, supra, is totally inapplicable. In that case the trial judge erroneously concluded that since appellant was found legally sane, he did not establish mental disturbance or mental incapacity. This Court, consistent with Dixon, supra, at 10, reversed because such mitigation may exist notwithstanding the finding that the defendant was legally sane. 390 So.2d at 337. Judge Harrison was aware of that principle and cited to a number of cases handed down by this Court so holding. Judgment and Sentence at p. 8, R 185.

Appellant's contention that the trial judge violated Eddings v. Oklahoma, 455 U.S. 104 (1982) and Lockett v. Ohio, 438 U.S. 586 (Fla.1978) is refuted by the record and the Judgment and Sentence entered by Judge Harrison (R 138). Those cases make it apparent that the trial judge may not restrict any relevant evidence pertaining to the defendant's character or the nature of the crime but they do not pretend to hold that evidence must be found to constitute mitigation. The trial judge must receive all relevant evidence and consider it. Whether the proffered evidence constitutes a mitigating circumstance is for the sentencer to determine. Raulerson v. State, 420 So.2d 567 (Fla.1982); White v. State, 446 So.2d 1031 (Fla. 1984); Card v. State, ___ So.2d ___ (Fla.1984), 9 F.L.W. 217; and Stano v. State, ___ So.2d ___ (Fla.1984), 9 F.L.W. 475. The trial judge did not refuse to admit any evidence and he considered all that evidence in determining the issues. Therefore,

Eddings and Lockett are not involved herein. The same is true of Spivey v. Zant, 661 F.2d 464 (5th Cir.1981) wherein no instructions were given as to mitigating circumstances or their relationship to the jury's function. None of those cases hold that the jury must be instructed on a statutory mitigating circumstance which has no evidentiary support.

Appellee respectfully submits that appellant is not entitled to reversal of the sentence on this ground because he failed to preserve the issue for appeal and has failed to demonstrate prejudicial error even if the issue is considered on the merits.

ISSUE IV

THE TRIAL JUDGE DID NOT ERR IN CONCLUDING THE EVIDENCE FAILED TO ESTABLISH THE EXISTENCE OF STATUTORY MITIGATING CIRCUMSTANCES.

ARGUMENT

Appellant contends the trial judge erred in failing to find several statutory mitigating circumstances based upon the medical evidence presented at the sentencing hearing and therefore he is entitled to a remand for resentencing.

Appellee submits that this argument should be rejected. The underlying premise of appellant's argument is that simply because evidence is submitted, whether contradicted or not, the sentencer is required to find that evidence establishes the existence of a mitigating circumstance. This simply is not the case and this Court has repeatedly so held. Hargrave v. State, 366 So.2d 1 (Fla.1979); Lucas v. State, 376 So.2d 1149 (Fla.1979); Smith v. State, 407 So.2d 894 (Fla.1982); Daugherty v. State, 419 So.2d 1067 (Fla.1982); Card v. State, 453 So.2d 17 (Fla.1984); and Stano v. State, ___ So.2d ___ (Fla.1984), 9 F.L.W. 475. All of the aforementioned cases hold that while all relevant evidence of mitigation must be considered by the trial judge it is the function of the jury and trial judge to determine whether a specific mitigating circumstance has been proven and, if so, the weight to be given that mitigating factor. The record demonstrates beyond dispute that the trial judge considered

the testimony of appellant's witnesses and elected to give it little or no weight.

In Smith, this Court distinguished the cases relied upon by appellant and quoted from both Lucas and Hargrave to the effect that simply because a psychiatrist testified the defendant suffered from a sociopathic personality resulting in defective judgment did not mean the sentencer was required to find mitigating circumstances were proven. 407 So.2d at 902. This Court said:

> Returning to appellant's argument that the trial judge erred in failing to find the mitigating circumstances delineated above, we respond that the jury and the judge could have resolved the evidence in favor of appellant's position, but neither was compelled to do so. We are not here dealing with a case where either the jury or the court considered matters it should not have considered or failed to consider matters it should have considered. Appellant simply disagrees with the force and effect given to the testimony of a psychologist and a psychiatrist at the sentencing hearing.... [T]he trial judge did not ignore or fail to consider the psychological evidence bearing on mitigation. Obviously, he and the jury were not persuaded that it provided a sound basis for establishment of the statutory mitigating circumstances.

407 So.2d at 902.

In Card there was also expert testimony that the defendant possessed a sociopathic personality disorder, reacted impulsively and had little awareness of the consequences yet this Court held that the jury and judge was not required to find this evidence established substantial impairment of the defendant's ability to conform his conduct to the requirements of law.

That is exactly what is involved herein for Dr. Urbina described appellant's condition as a "personality disorder" (TT 264) and that his antisocial personality and low mental capacity--borderline retarded (TT 1263)--lowered his ability to cope than most people (TT 1265). She candidly admitted, however, that appellant was not retarded (TT 1267) and had the capacity to understand the criminality of his conduct (TT 1269, 1275). The bottom line was that whatever appellant feels like doing he goes ahead and does and doesn't think through the fact (TT 1274). Dr. Sanches' testimony was for all practical purposes to the same effect (TT 1286,1291) and his opinion was predicated to a large degree upon Dr. Urbina's reports (TT 1282). Dr. Sanches' main concern was to determine appellant's intellectual ability! (1283).

Of course, appellant was a sociopath and suffers from a character or personality disorder but it is submitted he is not suffering from any mental disorder. Jennings v. State, ___ So.2d ___ (Fla.1984), 9 F.L.W. 297. A sociopath is nothing more than a label given to a person who is unwilling to conform to the social standards of society. In Jennings the defendant was described as a sexually perverse individual who could not limit his conduct as a normal person; that his ability to control his behavior was limited; and that he couldn't control his impulses and lacked self-control. While he obviously suffered a character or personality disorder that did not mean he suffered a mental disease or defect and this Court rejected the argument

that the sentencer erred in failing to find the existence of any statutory mitigating circumstances. 9 F.L.W. at 299.

Appellee respectfully submits that the trial judge considered all evidence that was introduced and simply found it qualitatively lacking to establish the mitigating circumstances. As this Court stated in Stano, "...[f]inding or not finding a specific mitigating circumstance applicable is within the trial judge's domain, and a reversal is not warranted simply because an appellant draws a different conclusion..." 9 F.L.W. at 476.

ISSUE V

APPELLANT'S DEATH SENTENCE IS NOT UNCONSTITUTIONAL, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE IT IS FOUNDED UPON AN AUTOMATIC AGGRAVATING CIRCUMSTANCE.

ARGUMENT

Appellant, relying upon State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979) and Keller v. State, 380 So.2d 926 (Ala.Ct.Cr. App.1979), aff'd after remand, 380 So.2d 938 (1979), contends his sentence is unconstitutional under the Eighth and Fourteenth Amendment to the United States Constitution because it is founded on an automatic aggravating circumstance.

Appellee submits this constitutional claim is clearly without merit and that this Court should reject the Cherry decision as fundamentally unsound, as have several other courts. State v. Laney, 654 S.W.2d 383 (Tenn.1983), cert.den., ___ U.S. ___, 104 S.Ct. 510 (1983); State v. Pritchett, 621 S.W.2d 127 (Tenn.1981); Gray v. Lucas, 677 F.2d 1086 (5th Cir.1982); Adams v. Wainwright, 709 F.2d 1443 (11th Cir.1983) and Henry v. Wainwright, 721 F.2d 990 (11th Cir.1983).

The rationale of Cherry is that considering the aggravating circumstance that the homicide was committed during the commission of a felony would lead to an automatic sentence of death and the defendant would always start out with one aggravating circumstance in a murder felony prosecution.

This argument was specifically rejected in Gray v. Lucas, supra, at 1105 and Adams v. Wainwright, supra, citing to Proffitt v. Florida, 428 U.S. 242 (1976), The Court of Appeals correctly held that death is not the "automatically preferred sentence" in a felony murder case because one of the statutory aggravating circumstances is that the homicide occurred during the commission of a felony. As the Court noted this aggravating factor was upheld in Proffitt and the statute does not mandate the death penalty in all felony murder cases. Indeed, in Enmund v. Florida, 458 U.S. 782 (1982) it was established that simple guilt of first degree murder felony would preclude the imposition of a death sentence.

In Henry, supra, he argued that ". . . reliance by the trial judge on the §(5)(d) aggravating circumstance, murder while committing robbery, resulted in an automatic imposition of the death penalty in his case. . . ." The Court, in rejecting said claim, stated:

> This argument has no merit. The sentencing authority clearly has discretion in deciding whether to impose the death penalty. See Barclay, 103 S.Ct. at 3431 (Stevens, J., concurring). It is certainly not unconstitutional for the State of Florida, in constructing a death sentencing procedure, to consider murders committed in the course of other dangerous felonies to be reprehensible. Nor, as Henry argues, does the use of the underlying felony shift the burden of proof to the defendant; the state must nevertheless prove the existence of aggravating circumstances. The Supreme Court has held the Florida statute constitutional.

721 F.2d at 996.

This Court has likewise rejected the claim that the aggravating factor set forth in subsection (5)(d) makes death an automatic penalty in violation of due process or the Eighth Amendment. White v. State, 403 So.2d 331, 335-336 (Fla.1981); Clark v. State, 443 So.2d 973 (Fla.1984), note 2; and Squires v. State, supra.

Appellant states that Zant v. Stephens, ___ U.S. ___, 77 L.Ed.2d 235 (1983) compels the conclusion that application of Section (5)(d) to support a death sentence for a felony murder violates the Eighth and Fourteenth Amendments (App's Br.). Appellee finds no such mandate either expressly or by implication. In Zant, the Court simply held that no constitutional infirmity existed where one aggravating circumstance was improperly considered by the sentencer and two proper aggravating circumstances were found to exist. Indeed, the Supreme Court has held death is appropriate in a murder felony case so long as the evidence shows the defendant was the actual killer, intended to kill or contemplated that life would be taken. Enmund v. Florida, supra. Of course, there is no claim that appellant did not kill George N. Sonnenberg and no such claim could be made since this appellant admitted he started the fire in the house where Sonnenberg was sleeping.

Appellant is actually suggesting that all murderers start out with this aggravating circumstance when that is simply not the fact. Most homicides do not involve the felonies enumerated in Section 782.04(2)(a) through (i). Before an aggravating

circumstance under (5)(d) may be found, an individual must be shown to have committed a homicide during the commission of one of the enumerated felonies and thus this circumstance is not automatically established in every homicide prosecution.

Appellant's argument that aggravating circumstance (5)(d) is unconstitutional as calling for an automatic death sentence or was unconstitutionally applied to him should be rejected as without merit, and this Court should decline to follow Cherry v. State,

ISSUE VI

APPELLANT'S DEATH SENTENCE IS NOT UNCONSTITUTIONAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE IT IS FOUNDED UPON AN IMPROPER DOUBLING OF AGGRAVATING CIRCUMSTANCES.

ARGUMENT

Appellant contends the trial judge erred in finding two aggravating circumstances existed in this case, to-wit: that the capital felony was committed while the defendant was engaged in the commission of an arson under §921.141(5)(d) and the defendant knowingly created a great risk of death to many persons under (5)(c), citing to Provence v. State, 337 So.2d 783 (Fla.1976) and Oates v. State, 446 So.2d 90 (Fla.1984).

This argument is totally without merit. Not every arson--although many do--involves a knowing risk of death to many persons as a matter of law. Indeed, the arson statute itself recognizes this fact by distinguishing between dwellings and other places or facilities where persons are residing and structures where persons may be present although not reasonably so. See: §806.01. In fact an individual could commit an arson with the knowledge that it involved no risk of harm to any person, much less many persons.

Interestingly, the burning of the old house when he was a child may or may not have been arson but it did not involve any risk of death to any person. By like token, in the prior

arsons testified to by Charles Hammock revealed the building at 1126 Market Street (TT 1219) was unoccupied and that the appellant warned others about the fire so they would not be injured (TT 1224). In contrast to those instances, in the instant case the appellant after setting the fire went across the street and masturbated while he watched individuals jump from the windows (TT 960-961). Moreover, if we believe the testimony of his employer and Mrs. Toole, he returned to his own residence several blocks away and did nothing to warn anyone of the fire. Of course, many individuals were injured and there was a risk of death to many persons. King v. State, 390 So.2d 315 (Fla.1980); Welty v. State, 402 So.2d 1159 (Fla.1981).

In Provence v. State, supra, this Court was presented with a situation where the trial judge found the defendant committed the homicide during the commission of a robbery and that the homicide was committed for pecuniary gain. In holding this was improper the court observed that since every robbery necessarily involves pecuniary gain it was the same aspect of the defendant's crime and to hold otherwise would mean every person convicted of murder-robbery would start out with two aggravating circumstances.

That situation simply does not exist in arson cases and thus each factor is concerned with a different aspect of the crime. Not every arson involves a risk of death to many persons and the State must present evidence, circumstantial or direct, that the defendant "knowingly" created such a risk. See:

§921.141(5)(c). Of course, knowledge of that risk is not part of the proof that the defendant killed an individual during the commission of an arson or any other felony. Adams v. State, 341 So.2d 765,768 (Fla.1977) [under the felony murder rule, state of mind is immaterial].

Interestingly, if every arson involved a risk of death to many persons as a matter of law--which appellee insists is not the case, cf. Mann v. State, 420 So.2d 578 (Fla.1982)--then the trial judge would have been required to instruct the jury on aggravating circumstance (5)(b) [previous conviction of a felony involving the use or threat of violence to the person], which Judge Harrison declined to do, because the building in those cases were unoccupied. (TT 1195).

Since both of the separate factors were based upon competent evidence--there being no argument to the contrary--and the one does not necessarily require the presence of the other or that both always exist from the same operative facts Provence v. State, simply does not apply. Squires v. State, 450 So.2d. 213 (Fla.1984); Delop v. State, 440 So.2d 1242 (Fla.1983); Waterhouse v. State, 429 So.2d 301 (Fla.1983); Preston v. State, 444 So.2d 939 (Fla.1984) and Squires v. State, 9 F.L.W. 98 (Fla.March 15, 1984.).

Assuming this Court were to conclude the trial judge erred in concluding two separate discrete aggravating circumstances were

presented under King, supra, then the sentence would still be valid because the sentencer found no statutory mitigating circumstances and the majority of the jury found whatever mitigating circumstances existed they did not outweigh the aggravating circumstances. Sims v. State, 444 So.2d 922 (Fla.1983); Hargrave v. State, 366 So.2d 1 (Fla.1978) and Brown v. State, 381 So.2d 696 (Fla.1980).

ISSUE VII

THE TRIAL JUDGE ERRED IN REFUSING TO GRANT THE STATE'S SEVERAL CHALLENGES OF PROSPECTIVE JURORS WHO UNEQUIVOCALLY STATED AND WERE FOUND BY THE TRIAL JUDGE TO BE UNABLE TO CONSIDER DEATH AS A POSSIBLE PUNISHMENT REGARDLESS OF THE FACTS AND CIRCUMSTANCES.

ARGUMENT

This issue is presented by the State of Florida pursuant to its cross-appeal filed herein (R 199).

As was previously stated in the Statement of the Case the trial judge refused to grant the State's challenges for cause of several prospective jurors who unequivocally acknowledged they could not consider death as a possible penalty (TT 157,187-188; 365-366;379;524). Counsel's attempts to rehabilitate these jurors was totally unsuccessful (TT 158;193;368-369;380-381;526).

The trial judge refused to excuse said prospective jurors because they all stated that their opposition to the death penalty would not interfere with their determination of the appellant's guilt (TT 167). The trial judge decided that he would allow the jurors to determine the guilt issue and substitute alternate jurors who could consider the death penalty if the cause proceeded to a penalty hearing on this issue (TT 169 ,369, 370,382,529). These rulings, of course, establishe the judge determined the jurors were unalterably opposed to the death penalty and the State is not challenging a question of fact but

one of law. The trial judge's ruling was predicated upon the defense's argument that to excuse jurors who could vote for guilt but unable to consider the death penalty would deprive him of a jury composed of a cross-section of the community guaranteed by the Constitution (TT 162), and the trial judge's disagreement with Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.1978) which he held he was not bound by until this Court said otherwise (TT 167-168). Spinkellink and Downs v. State, 386 So.2d 788 (Fla.1980) were both cited to the trial court to no avail (TT 159-161), as were other cases decided by this Court (TT 166).

The State respectfully submits the trial judge erred as a matter of law in refusing to grant the State's motions to excuse the prospective jurors and that this Court should make it clear that when it is unequivocally determined that a prospective juror cannot consider the death penalty under any circumstance a timely challenge for cause by the State must be granted notwithstanding the fact that the juror can decide guilt or innocence of the accused.

This Court has consistently held that there is a ground for excusal for cause when prospective jurors state that they would be unable, after finding the accused guilty of a capital offense, to participate in the required weighing of aggravating and mitigating circumstances and to consider death as a possible penalty. Witt v. State, 342 So.2d 497 (Fla.1977); Riley v. State, 366 So.2d 19 (Fla.1978); Jackson v. State, 366 So.2d 752 (Fla.1978);

Maggard v. State, 399 So.2d 873 (Fla.1981); Downs v. State, supra; Steinhorst v. State, 412 So.2d 332 (Fla.1982) and King v. State, 436 So.2d 50 (Fla.1983). Of course, this is a correct interpretation of Witherspoon v. Illinois, 395 U.S. 510 (1968). See: Spinkellink v. Wainwright, supra at 596. Moreover, this Court has repeatedly rejected trial counsel's argument that the excusal of the prospective jurors would deprive him of a jury composed of a cross-section of the community. Riley, Jackson, Steinhorst, Downs and Maggard.

The trial judge's apparent disagreement with the reasoning of Spinkellink is at stark odds with this Court's acceptance of said reasoning for it was relied upon heavily in Downs v. State, supra, at 790-791 and cited as authority in Maggard. In Downs the precise argument made in the trial court was made in this Court, to-wit: if the prospective juror could decide guilt or innocence impartially it was improper to excuse him simply because he could not consider the death penalty and that the State could simply empanel another jury to decide the penalty. This Court rejected the argument on the basis of the Spinkellink decision quoting from the opinion in said case. The Court noted that the Constitution does not require the State to have separate jurys to decide guilt and penalty.

Actually this Court in Riley answered this question, including the "novel" argument that separate jurys could be impaneled, and while the trial judge was not bound by Spinkellink, he was bound by Downs and Riley.

In Riley, supra, this Court after rejecting the argument that the excusal would deprive the defendant of a jury randomly selected from a cross-section of the community said:

> It is suggested that jurors for the first phase of our bifurcated proceedings in capital cases would serve in that proceeding only, to determine the accused's guilt or innocence, and that alternate jurors who qualify under the standard prescribed in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) would serve either with them or in their stead for the second, or sentence-advisory, phase of trial. While this suggestion is novel, we have given it full consideration and find no compulsion in law or logic to so structure capital case trials.

366 So.2d at 21. It is evident that even before Downs which relied on Spinkellink, this Court rejected the approach resorted to by the trial judge.

Section 921.141(1) makes it clear that the jury that determines the defendant's guilt shall determine the penalty unless through "impossibility or inability" the trial jury is unable to reconvene for the hearing on the issue of the penalty. The trial judge had no authority to order separate jurys because the Constitution does not require that prospectie juror capable of determining guilt but unable to consider a penalty authorized by law be permitted to serve on the guilt phase thereby making it impossible to use them in the penalty phase. Spinkellink v. Wainwright; Downs v. State and People v. Lewis, 430 N.E.2d 1346, 1354 (Ill.1982). This Court was correct in Riley in concluding the trial structure employed in this case is neither compelled by law or logic, and it was error for the trial judge to do so.

The prospective jurors Ervin , Sheffield, Hopins, Bennett and Brandon by stating they were unwilling to consider all the penalties provided by law, they evidenced their inability to follow the law and the State's motions to excuse them for cause should have been granted. Downs v. State, supra; Thomas v. State, 403 So.2d 371 (Fla.1981) [trial judge erred in failing to grant an excusal for cause when juror stated he could not "recommend any mercy" under any circumstances]. Surely if it is judicial error not to excuse a juror for cause who cannot consider life imprisonment as an alternative penalty, it is clearly error not to excuse a juror for cause who cannot consider death as an alternate penalty.

ISSUE VIII

THE TRIAL JUDGE ERRED IN SUPPRESSING THE VOLUNTEERED STATEMENTS BY THE APPELLANT TO SGT. VIA ON OCTOBER 18, 1983.

ARGUMENT

Although Sgt. Via and Lt. Cummings were deposed prior to trial (R 200-300) and counsel was fully aware that appellant gave statements to them about this case, no motion to suppress was filed prior to trial as required by Rule 3.190(i)(2), counsel objected to the introduction of said statements for the first time during the trial after jeopardy had attached. The State specifically objected on this basis (TT 955) and trial counsel offered no cause for his failure to timely challenge the admissions.

Notwithstanding the trial judge admitted the statements given to Sgt. Via on September 16, 1984, but suppressed the statement given on October 18, 1984 (TT 952). The reason for suppressing this statement was that the officers violated appellant's right to counsel (TT 952-953).

The uncontradicted testimony of Sgt. Via--appellant did not testify at the hearing outside the presence of the jury--was that he, Lt. Cummings and Det. Terry met appellant at the courthouse and indicated they wanted to talk at a later time with him respecting the homicides committed in Louisiana (TT 929);

that appellant advised them he was in court for a hearing in this case and began giving details concerning the instant case (TT 929); that they were not questioning the defendant at that time (TT 929); that counsel for appellant came into the room where they were talking and instructed appellant not to discuss this case (TT 929) but that appellant disregarded that advice and gave additional details (TT 929-930). That statement while conforming to the statement given on September 16, 1983, revealed in addition thereto that appellant was in fact aware that Mr. Sonnenberg was in the building passed out in a bed when he set the fire by using gasoline poured on a mattress and other parts of the building (TT 929-930). The witnesses' testimony on cross-examination revealed that counsel left after telling appellant not to make any statement about the case (TT 938) and that appellant "indicated he didn't care what his attorney said, that he wanted them to know all of the details." (TT 949).

The trial judge as indicated above ruled the admission made on October 16, 1984, was inadmissible because it was improper for the officers to "seek to talk to a defendant who is represented by an attorney without the consent of that attorney and with that attorney present and telling that defendant to not speak to those officers" and was "an attempt to circumvent and to undermine the right to counsel." (TT 953).

Appellee respectfully submits the trial judge erred in entertaining the motion to suppress because it was untimely filed and no cause was established for the failure to file it

prior to trial. Parker v. State, ___ So.2d ___ (Fla.1984), Case No. 61,512, 9 F.L.W. 354, Opinion filed September 6, 1984, and the cases cited therein at p. 355. Of course, the State was prejudiced because it could not appeal the ruling since the jury was sworn and jeopardy attached. The State was deprived of critical evidence which was relevant to both guilt and punishment. The evidence that appellant knew Sonnenberg was in the building passed out in bed was relevant to the issue of premeditation in the guilt phase and the aggravating circumstance of cruel, heinous or atrociousness in the penalty phase.

Even assuming the trial judge did not err in entertaining the tardy motion to suppress, it should have been denied as a matter of law. State v. Craig, 237 So.2d 737 (Fla.1970); Witt v. State, 342 So.2d 497 (Fla.1977); Waterhouse v. State, 429 So.2d 301 (Fla.1983); Jordon v. Watkins, 681 F.2d 1067 (5th Cir. 1982), reh. en banc denied, 688 F.2d 395; and Watson v. State, 382 A.2d 574 (ME Ct.App.1978).

In Craig, supra, this Court recognized that the right to remain silent and the decision to waive counsel is the defendant's right--not counsel's saying: ". . . the determination for the need of counsel is the defendant's prerogative. . ." 237 So.2d at 740. In Clowers v. State, 244 So.2d 140 (Fla.1971), the Court held Miranda did not require counsel to be present to advise the defendant as to whether he should waive his rights, saying: ". . . The State may not force a person to be represented by counsel any more than it can deny counsel. . ." 244 So.2d at 141.

By like token, police officers are not required to tell the defendant to follow counsel instructions or refuse to listen to volunteered statements the accused insists on making.

More to the point, in Watershouse it was urged that an admission made after the appointment of counsel without notification to counsel before proceeding with the interview rendered the statement inadmissible. This Court rejected that claim on the authority of Witt and said:

> The fact that an accused is represented by counsel does not preclude his waiver of the right to have counsel present when talking to law enforcement officers.

429 So.2d at 305. Moreover, the Court rejected the claim that the officers had to notify the defendant's counsel before communicating with the accused. This rule has been recognized in numerous other jurisdictions both state and federal. Watson v. State, supra, and the cases cited therein at p. 579, footnote 1; Jordon v. Watkins, supra; Blasingham v. Estelle, 604 F.2d 893 (5th Cir.1979); State v. Cotton, 341 So.2d 355 (La.1977); State v. Smith, 241 S.E.2d 674 (NC 1978); Lamb v. Commonwealth, 227 S.E.2d 737 (VA.1976); People v. Morgan, 350 N.E.2d 27 (Ill. App.1976); State v. Blizzard, 366 A.2d 1026 (Md 1976); United States v. Lam Lek Chong, 544 F.2d 58 (2d Cir.1976); United States v. Barone, 467 F.2d 247 (2d Cir.1972) and State v. Lopez, 452 P.2d 199 (N.M.App.1969) to name but a few. In Watson, the Maryland Court of Appeals held a statement taken from the accused, after counsel was retained and it was known counsel had instructed his client not to give any statement, was admissible. The Court

held that the taking of the statement did not violate Miranda v. Arizona, 384 U.S. 436 (1966); Massiah v. United States, 377 U.S. 201 (1964) or Brewer v. Williams, 430 U.S. 387 (1977). 382 A.2d at 574-578. Indeed, Mr. Justice Powell in Brewer at page 413, clearly noted:

> The opinion of the Court is explicitly clear that the right to assistance of counsel may be waived, after it has attached without notice to or consultation with counsel.

The trial judge's ruling that the admission was inadmissible because the interview was conducted without the consent of counsel and because the officers knew appellant was instructed not to discuss the case by counsel is clearly erroneous and contrary to established precedent. This is particularly true in this case because the only evidence before the court was that the statement was volunteered and appellant was not even being interrogated by Sgt. Via and Lt. Cummings. Miranda itself makes it clear that it does not apply to volunteered statements. This Court should overrule the order granting the motion to suppress the admission given on October 18, 1984, by appellant.

CONCLUSION

For the reasons and authotities stated hereinabove, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee and Initial Brief of Cross-Appellant has been forwarded to Ms. Paula S. Saunders, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 7th day of December 1984.

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