IN THE SUPREME COURT OF FLORIDA



SONNIE BOY OATS, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 65,381

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

# INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

Appellant, Sonnie Boy Oats, Jr., on January 30, 1980, was indicted for first degree murder and robbery. (R 1521-1522) Appellant, on January 13, 1981, filed a Motion for Change of Venue due to alleged excessive prejudicial pretrial publicity. (R 1577-1591, 1603, 1604-1606) This motion was denied on February 2, 1981. (R 1698-1700) Appellant filed, on January 15, 1981, a Motion to Suppress Statements and Physical Evidence. (R 1607-1608) This motion was also denied on February 2, 1981. (R 1395, 1698-1700) Appellee, the State of Florida, on January 16, 1981, filed a Notice of intent to Introduce Similar Fact Evidence of Prior Crimes. (R 1567-1568) Appellant responded by filing, on January 19, 1981, a Motion in Limine to exclude all evidence of other collateral criminal activity. (R 1571-1573) This motion was denied, on February 2, 1981, as to Appellant's conviction in Case Number 79-1352, Marion County, of armed robbery and attempted murder but granted to Appellant's escape charge. (R 1406, 1407, 1698-1700) Appellant also filed, on January 16,

1981, a Motion in Limine requiring the prosecutor to refrain from mentioning certain items during closing arguments. (R 1593) This motion was granted, subject to modification by the court based upon evidence introduced at trial, on February 2, 1981. (R 1399, 1698-1700) A jury trial was held on February 2-6, 1981. (R 1-1114)

The jury, on February 6, 1981, found Appellant guilty of first degree murder and robbery with a firearm. (R 1109, 1617-1618) The jury, on February 10, 1981, rendered an advisory sentence of death. (R 1275) The court, on the same day, issued its findings of fact showing six (6) aggravating circumstances and one (1) mitigating circumstance. The court found that the jury's advisory sentence of death should be imposed. (R 1675-1677) The trial court then adjudged Appellant guilty of first degree murder and sentenced him to be electrocuted until dead. The court also adjudged Appellant guilty of robbery and sentenced him to ninety-nine (99) years. (R 1112-1113, 1287, 1703-1705)

Appellant, on February 20, 1981, filed a Motion for New Trial, Arrest of Judgment, and Directed Verdict of Acquittal. (R 1706-1714) An addendum was filed on February 23, 1981. (R 1715) The motion was denied on March 17, 1981. (R 1520, 1717)

A notice of appeal was filed on April 7, 1981. (R 1718) Briefs were submitted and argument had before this Honorable Court. On February 23, 1984, this Court rendered its opinion affirming the judgment of conviction but setting aside the sentence of death and remanding this cause to the trial court for entry of a new sentencing order in accordance with the views

expressed in the opinion. (R 1744-1753) This Court determined that the trial court had erred in its determination of three (3) of the aggravating circumstances found.

On remand, Ronald Fox, Esquire, Appellant's original trial attorney, was appointed as counsel for the purpose of resentencing. (R 738-739) Counsel filed a motion to continue resentencing which was granted. (R 1740-1742)

Prior to resentencing, Appellant filed a motion to impanel a jury for an advisory recommendation and a motion for life. (R 1756-1761) Both of these motions were eventually denied by the trial court. Appellant also filed an objection to sentencing on the grounds that he was presently insane. (R 1762-1765) In this motion, Appellant also requested that the trial court appoint three (3) experts to examine and evaluate the accused and to testify as to his present mental condition. (R 1765) The objection was overruled and the request to appoint experts was denied by the trial court at the sentencing hearing. (R 1784-1869)

On April 26, 1984, a hearing was held on the motions and sentencing was had before the Honorable William T. Swigert, Circuit Judge, Fifth Judicial Circuit, In and For Marion County, Florida. (R 1784-1869) Following this hearing at which Appellant's previous motions were denied and objections to proceed to sentencing were overruled, the trial court sentenced the appellant to death by electrocution. (R 1864-1865) The trial judge adopted the written findings of fact in support of the death sentence which had been prepared by the Office of the State

Attorney prior to the hearing. (R 1767-1769, 1857-1865) In doing so, the trial court found four (4) aggravating circumstances: (1) that the appellant had previously been convicted of another felony involving the use or threat of violence; (2) that the crime was committed while the appellant was engaged in the commission of a robbery; (3) that the offense was committed for the purpose of avoiding or preventing a lawful arrest; and (4) that the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R 1767-1768) The trial court also found that the mitigating circumstance that the appellant was only twenty-two (22) years of age at the time of the offense had been established. (R 1768) The court adjudicated the appellant guilty and sentenced him to death. (R 1770-1774)

A timely notice of appeal was filed on May 25, 1984. (R 1770-1775) This appeal follows.

## STATEMENT OF THE FACTS

The following Statement of the Facts is recited verbatim (for the most part) from this Honorable Court's Opinion rendered as a result of Appellant's previous direct appeal of his convictions and death sentence. The opinion is contained in the record on appeal (R 1744-1753), and is reported as Oats v. State, 446 So.2d 90 (Fla. 1984).

On December 20, 1979, Jeanette Dyer, the clerk at the Little Country Store in Martel, Florida, was found on the floor with a head wound. She had no palpable pulse or respiration but she did show a faint heart beat. She died shortly thereafter at the hospital. Cause of death was a single bullet fired from approximately one foot away which penetrated her right eye and her brain. A sum of money was also missing from the store's cash register.

On December 24, 1979, an Ocala policeman observed an automobile with two suspicious looking occupants in the vicinity of a Jiffy Food Store. As the officer approached the car, it drove away at a high rate of speed. The officer gave chase. With lights out, the car entered I-75 and started weaving in and out of traffic at a speed of about one hundred miles an hour. The vehicle exited I-75 and soon crashed. Its occupants were not immediately apprehended, but shortly thereafter one Donnie Williams was arrested as a suspect in the high-speed chase and transported to the Marion County Jail. Upon Williams' arrival at the jail, it developed that Oats was already there inquiring about getting Williams released. Oats was then informed that he

was a suspect in the high-speed chase and given Miranda warnings. He also signed a waiver-of-rights form. Oats was then questioned concerning the chase. He admitted his involvement in the chase and stated he would show the police where he had thrown a weapon during the chase. The weapon was found near where Oats said it would be. Oats also admitted his involvement in an ABC liquor store robbery and shooting that had occurred on December 19, 1979, one day prior to the Martel robbery and murder. In that crime, a clerk was robbed and then shot in the right side of the face.

On December 28, 1979, Oats again admitted robbing and shooting the ABC clerk. He then admitted robbing and killing the Martel clerk. He first stated his hand had slipped and the gun had discharged accidentally. He later stated his foot slipped and that the gun had gone off accidentally when it hit the counter. Ballistics tests conducted on the gun recovered from the roadside established that it was the same weapon used in both the ABC and Martel shootings.

In June 1980, Oats was tried in a separate proceeding for the ABC robbery and shooting and was convicted of robbery with a firearm and attempted murder in the first degree. On June 14, 1980, Oats escaped from the Marion County Jail. He was recaptured in Texas in December 1980. (R 1744-1745)

On December 23, 1981, while Appellant's first initial appeal was pending before this Honorable Court, the Fifth District Court of Appeal reversed Oats' conviction for the ABC robbery and attempted murder. Oats v. State, 407 So.2d 1004

(Fla. 5th DCA 1981). (R 1746) On February 9, 1982, Oats was again convicted of the ABC robbery but was convicted of attempted second degree (rather than first degree) murder. (R 1746, 1815-1817) That conviction was subsequently per curiam affirmed by the Fifth District Court of Appeal. Oats v. State, No. 82-398 (Fla. 5th DCA June 28, 1983).

## ARGUMENT

### POINT I

THE FAILURE OF THE TRIAL COURT TO APPOINT EXPERTS FOR FURTHER PSYCHIATRIC EXAMINATION OF THE APPELLANT WHERE THERE WAS SUFFICIENT EVIDENCE THAT HE WAS INSANE AT THE TIME OF SENTENCING RESULTED IN A DEPRIVATION OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND VIOLATED THE PROSCRIPTION AGAINST CRUEL AND UNUSUAL PUNISHMENT SECURED TO ALL PERSONS BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

On April 23, 1984, Appellant filed an objection to sentencing on the grounds of insanity. (R 1762-1765) This objection was based in part on the prior examinations and diagnoses prior to his initial trial which detailed that he suffered from anti-social personality disorder and that his intellectual functions were marginal. (R 1762) The objection also detailed his prior heavy use of alcohol and marijuana. (R 1762) The objection also recited his poor family background as well as his history of animal abuse which Dr. Carrera testified was the result of his problems with impulse control and expressions of rage. (R 1762-1764) Trial counsel additionally stated that he had personally represented the appellant at the previous trial in the above-styled cause as well as at the retrial for the ABC robbery. (R 1764) Based upon personal contact with the appellant during this time as well as prior to the sentencing hearing in this case, counsel stated that he had reason to believe that the appellant was insane and is presently insane. (R 1765, 1796-1797) The conversations between the appellant and his counsel prior to the sentencing hearing in the instant case confirmed

trial counsel's belief in Appellant's present insanity. (R 1797) While counsel declined to disclose the substance of the conversation to the court due to attorney-client privilege, Mr. Fox stated, "I can tell you that if the conversations I had with him are the conversations of a sane man facing execution, then all the rest of us must be insane." (R 1797)

At defense counsel's request, the appellant testified briefly. (R 806-809) This testimony revealed that, although his attorney had explained the proceedings to him, the appellant still had great difficulty understanding exactly what was going to happen at the hearing. The state argued that since the appellant was a layman, he could not be expected to understand the proceedings against him. Defense counsel took offense at this contention, pointing out that this was the heart of the matter. (R 1809-1810) In the written objection as well as by oral motion at the sentencing hearing, defense counsel requested that the court appoint experts to examine and evaluate the appellant on the issue of insanity at the time of sentencing. (R 1765, 1810) Defense counsel correctly pointed out that no prejudice could possibly accrue to the state, since the appellant was currently serving in excess of 200 years imprisonment such that time was certainly not of the essence. (R 1811) The state argued that defense counsel had not filed a motion for appointment of experts in the month preceding the sentencing hearing and also argued that no evidence was presented that the appellant was currently insane. (R 1811-1812) The trial court denied the motion to appoint experts and sentencing continued. (R 1812-

1813) In an attempt to clarify the record, defense counsel argued that the motion was filed at the proper time and that the court heard argument on it. (R 1813) The trial court stated that it was denying the motion based upon Appellant's demeanor and testimony and the reports of psychiatrists and psychologists which were done prior to the first trial in early 1981. (R 1813-1814)

Rule 3.740(a), Florida Rules of Criminal Procedure, provides as follows:

> When the cause alleged for not pronouncing sentence is insanity, if the Court has reasonable ground to believe that the defendant is insane, it shall postpone the pronouncement of sentence and shall immediately fix a time for a hearing to determine the defendant's mental condition. The Court may appoint not exceeding three disinterested qualified experts to examine the defendant and testify at the hearing as to his mental condition. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

Appellant contends that it was error for the trial court to deny Appellant's timely motion for appointment of experts for purposes of mental examination. Based upon Appellant's testimony as well as defense counsel's assertions, it is clear that the appellant failed to adequately understand the proceedings against him. This is an important consideration as evidenced by Baranko v. State, 428 So.2d 324 (Fla. 1st DCA 1983). In holding that there was insufficient proof of insanity to warrant an additional sanity hearing prior to sentencing, the Court relied upon the legal standard set forth in Section

916.12(1), Florida Statutes, relating to incompetency to stand trial. The primary thrust of this standard was a defendant's understanding of the proceedings against him. Baranko evidenced no difficulty in conferring rationally with his counsel and even persuaded the trial judge that he should take over the defense of his case without further assistance of a public defender. Baranko, supra at 325. While the court questioned Baranko's legal skills, his sanity was clearly intact. In the instant case, Appellant's testimony reveals otherwise.

Additionally, Appellant's defense counsel should be the primary source for information to justify further psychiatric examination. While courts in criminal proceedings are not required to accept without question a defense counsel's representations concerning his client's mental competence to stand trial, an expression of doubt in that regard by defense counsel is an important factor which should be considered in deciding a motion for psychiatric examination. Drope v. Missouri, 420 U.S. 162 (1975). This arises from the fact that a defense attorney is the individual with the closest contact with the defendant. Id. In the instant case, the trial court seemed to ignore defense counsel's representations in this regard. The court appeared to base the denial solely on its brief glimpse of Appellant's demeanor at the sentencing hearing and the psychiatric reports that were conducted more than three years prior to this sentencing. (R 1814) A similar error occurred in Stines v. State, 409 So.2d 234 (Fla. 1st DCA 1982) wherein the trial court improperly relied on medical reports filed two years earlier

which found the defendant competent at the time he was committed to a treatment center. The court held that such reliance was error in view of the uncontradicted expert medical evidence of incompetency presented at the sentencing hearing. While no such expert testimony was presented in the instant case, trial counsel expressed difficulty with communicating with his client during his interview prior to the sentencing hearing. (R 1797) This coupled with the fact that the appellant did not fully understand the proceedings as evidenced by his testimony should have resulted in the trial court's granting of the motion to appoint experts for psychiatric examination.

Appellant submits that he set forth sufficient allegations and evidence to justify the appointment of experts. The appellant set forth at least as much as was proven in Schlicher v. State, 422 So.2d 1046 (Fla. 4th DCA 1982), wherein Schlicher's pre-sentence motion alleged that he had recently attempted suicide and that he had made seven such attempts in the past year. Schlicher's father also stated that his son needed psychiatric help, but that the family had never been able to afford it. The state argued that Schlicher's suicide attempt was done in order to obtain a better cell in prison. Once this was accomplished, there was no reoccurrence of self-inflicted wounds. Id. at 1047. The appellate court found that the trial court erred in failing to grant the motion for further examination.

The allegations set forth in Appellant's pretrial objection to sentencing on grounds of insanity were sufficient to at least justify further examination by appointed experts. These

grounds coupled with defense counsel's allegations regarding his reason to believe that the appellant is insane should require the trial judge to grant the motion. This is especially true in light of the limited disclosure available to defense counsel as a result of the attorney-client privilege. Although this Court's opinion in State v. Hamilton, 448 So.2d 1007 (Fla. 1984) is apparently confined to a different rule of criminal procedure (3.216(a) Fla.R.Crim.P.), Appellant urges this Honorable Court to adopt the same holding and rationale. In State v. Hamilton, supra, this Court held that where court-appointed counsel expresses belief that a defendant may be incompetent to stand trial or that the defendant was insane at the time of the offense, a trial court has no discretion and must appoint an expert to examine the accused and to assist his counsel. An inquiry of defense counsel by the court as to the basis for the request would improperly invade the attorney-client confidential relationship. Id. at 1008. A similar rule should apply in the case at bar.

In the instant case, where the appellant's life is at stake, Appellant submits that minimal inconvenience to the state would occur should experts be appointed. The manifest injustice that may accrue otherwise can be easily avoided. No prejudice would occur to the state in light of the fact that the appellant was under sentence of a term of years in excess of 200.

## POINT II

THE FAILURE OF THE LOWER COURT TO CONVENE A JURY FOR RESENTENCING VIOLATES THE RIGHT AFFORDED THE APPELLANT BY VIRTUE OF SECTION 921.141(1), FLORIDA STATUTES (1983), THE PROSCRIPTION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND THE PROSCRIPTION AGAINST THE DEPRIVATION OF LIFE WITHOUT DUE PROCESS OF LAW SECURED TO ALL PERSONS BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

This Court in its opinion remanding this cause for resentencing by the trial court ruled that:

> Although the use of this aggravating factor was in error at the time it was found, and we therefore disallow it, were we to remand for a new penalty phase trial the jury could properly consider evidence of the later, valid conviction. Because a new jury would be considering essentially the same evidence as was presented to the original jury, we find no reason to resubmit the evidence to a jury. Oats v. State, 446 So.2d 90, 95 (Fla. 1984); (R 1750)

Prior to the sentencing hearing, Appellant filed a motion to impanel the jury for an advisory recommendation. (R 1756-1758) This motion was primarily based upon the contention that the jury at the appellant's trial heard evidence and instruction upon erroneous and inapplicable aggravating factors over defense objection. Since it was impossible to determine how this affected the jury's recommendation of death, the impaneling of a jury for the new sentencing hearing was required. After hearing argument on this motion, the trial court denied it and proceeded to sentencing. (R 1814-1833, 1855)

A. Pursuant to Section 921.141(1), The Impaneling Of A Jury For A Capital Sentencing Proceeding Is Mandatory.

The clear and unambiguous, mandatory language of Section 921.141(1) provides that "...the sentencing proceeding shall be conducted before a jury impaneled for the purpose... ." (Emphasis supplied) The word "shall" is normally construed to be mandatory in nature. In the Interest of S.R. v. State, 346 So.2d 1018 (Fla. 1977). Although the construction of the word "shall" is not fixed, "[i]ts interpretation depends upon the context in which it is found and upon the intent of the Legislature as expressed in the statute." Id., at 1019.

The intent of the Florida Legislature as defined by this Court is crystal clear. This Court held:

> The Legislature has. . .provided a system whereby the possible aggravating and mitigating circumstances are defined, but where the weighing process is left to the carfully scrutinized judgment of jurors and judges. (Emphasis supplied).

State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). This Court characterized the five steps between conviction and the imposition of the death penalty as "...providing concrete safeguards beyond those of the trial system to protect [the defendant] from death where a less harsh punishment might be sufficient." Id., at 7. The second step that this Court emphasized was "...that the jury -- the trial jury if there was one, or a specially called jury if jury trial was waived -- must hear the new evidence presented at the post conviction hearing and make a recommendation as to the penalty, that is, life or death." Id., at 8.

In Messer v. State, 330 So.2d 137, 142 (Fla. 1976), this Court characterized the input of the jury in the "scheme of checks and balances" as an "integral part." This Court found that "the jury's recommendation is directly related to the information it receives to form a foundation for such recommendation." This Court also found that "in reviewing the propriety of the death sentence, the Court "must weight heavily the advisory opinion of the sentencing jury." See also McCaskill v. State, 344 So.2d 1276 (Fla. 1977).

Neither the Florida Legislature nor this Court contemplated the imposition of the extreme penalty of death without twelve citizens expressing the view of the conscience of the community. Indeed, the Florida statutory scheme, which receives its vitality from the role of the jury, reflects the Legislature's acknowledgment of the function of a jury. This function was best expressed in Witherspoon v. Illinois, 391 U.S. 510 (1968) wherein the Supreme Court of the United States emphasized that juries "do little more -- and must do nothing less -- than express the conscience of the community on the ultimate question of life or death." The Supreme Court of the United States observed that:

> (O)ne of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment hardly reflects "the evolving standards of decency that mark the progress of a mature society." Trop v. Dulles, 356 U.S. 86.

Id., at 519 n. 15. Indeed, it has long since been the role of the jury in capital cases, to speak to the question of life or death. Florida Acts of 1872, number 15 Chapter 1877.

B. The Function Of The Jury In The Factfinding Process On The Question Of Life Or Death Is Critical And The Failure To Provide A Jury For This Purpose Injects Unreliability Into The Sentencing Process And Renders Any Ensuing Death Penalty Violative Of the Eighth Amendment Proscription Against Cruel And Unusual Punishment And The Fourteenth Amendment Proscription Against Deprivation Of Life Without Due Process Of Law.

A death sentence imposed without a jury is fatally defective because a jury serves several critical functions in the capital sentencing process. As noted previously, one function is to serve as a link between contemporary community values and the penal system. Witherspoon v. Illinois, 391 U.S. 510, 519 at n. 15 (1968). Another function is to meaningfully channel the limited discretion afforded the sentencing judge. Proffitt v. Florida, 448 U.S. 242, 250-252 (1976); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); State v. Dixon, 283 So.2d 1, 8 (Fla. 1970). Another function is to provide a comparative basis by which the findings of the sentencing judge is measured, for the purposes of both reliability and appellate review. Proffitt v. Florida, supra; Tedder v. State, supra, 322 So.2d at 910; Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977).

The Supreme Court of the United States has observed that "it is of vital importance to the defendant and to the community that any decision to impose the death penalty be, and

appear to be, based on reason rather than caprice or emotion." (Emphasis supplied). Gardner v. Florida, 430 U.S. 349 (1977). Thus, the jury is crucial in determining the reliability of the sentencing process.

Reliability is a factor of paramount importance in determining the appropriateness of the infliction of the penalty of death. Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S.280 (1976). The "qualitative difference between death and other penalties calls for a greater degree of reliability where the death sentence is imposed." Lockett v. Ohio, supra.

C. The Failure To Provide Oats With A Jury On Resentencing Deprives Him Of An Important Ingredient In The Imposition Of The Death Sentence And In The Review Of That Sentence.

This Court has stated that "in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (1975). However, in cases where a jury recommendation of death exists, the standard for review is that the:

> recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation.

Leduc v. State, 365 So.2d 149, 157 (Fla. 1978).

This Court has held that, where erroneous factors in aggravation have been submitted to the trial jury which might have influenced its weighing process, a remand for a new jury and judge sentencing proceeding is dictated.

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the factor of the Gaffney murder shall not be considered.

Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977) (Citations Omitted). Thus, where a jury recommendation of death is tainted by the consideration of erroneous factors in aggravation, a remand for a new jury sentencing hearing is required. Elledge v. State, supra.

This Court in Menendez v. State, 368 So.2d 1282 (Fla. 1979), while remanding for a resentencing by the trial court alone, clarified the circumstances under which a new sentencing jury must be impanelled. Citing Elledge, the Court stated:

> Menendez has not demonstrated any error in the instructions given to the jury or the evidence it considered in making its recommendation. Moreover, our independent review of the record reveals no error so that it is not essential that a new jury be impanelled.

Menendez, supra at 1282. Error, therefore, in the evidence considered by the advisory jury requires the impanelling of a new advisory jury at the sentencing.

Here, the original sentencing jury recommended a sentence of death. (R 1695) However, this Court determined that the trial court erred in its determination of three of the aggravating circumstances. Oats v. State, 446 So.2d 90, 94 (1984); (A 1749) The original record in this cause expressly shows that the prosecutor argued to the jury each one of the aggravating circumstances which were either stricken by this Court or found to be unsupported by the evidence. (R 1117-1119, 1127-1140) The jury was instructed by the lower court that it could consider each one of the aggravating factors which has been stricken or found not to exist by this Court. (R 1264-1265)

All of these factors grossly interjected unreliability into the sentencing process and effectively deprived Oats of the right to have his sentence measured and reviewed by this Court using the Tedder standard. As presented in Point III of this brief, supra, the mitigating circumstances clearly outweigh the aggravating circumstances which this Court found to exist, and a jury having not heard argument as to inappropriate aggravating circumstances would unquestionably resolve its weighing function as life over death. A factfinding process such as this, infected with aggravating circumstances which should not have been considered is grossly unreliable.

## POINT III

IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS GUARANTEED UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO DEATH BY ELECTROCUTION.

The trial court found that the state proved beyond a reasonable doubt the existence of the following aggravating circumstances in accordance with Florida Statute 921.141:

1) That the appellant had previously been convicted of another capital offense or a felony involving the use or threat of violence of;

2) That the appellant murdered the victim while engaged in the commission of a robbery;

3) That the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; and

4) That the murder was committed in a cold, calculated premeditated manner without any pretense of moral or legal justification. (R 1767-1768)

The court found that the appellant proved the mitigating circumstance that he was twenty-two (22) years of age at the time the crime was committed. The court claimed that the appellant proved no other mitigating circumstances. (R 1768)

Preliminarily, Appellant objects to the form of the trial court's findings of fact in support of the death penalty. The trial court fails to cite <u>any</u> facts in support of the aggravating circumstances that the judge relied upon. (R 1767-1768) As a result, Appellant feels extremely handicapped in his argument on the instant issue.

Appellant submits that the court's findings are so inadequate that meaningful review by this Court is precluded. Holmes v. State, 374 So.2d 944 (Fla. 1979). Appellant contends that he is prejudiced in his argument on appeal as a result of the perfunctory nature of the findings. Appellant requests that this Court remand for a more detailed statement of findings of fact. Hall v. State, 381 So.2d 683 (Fla. 1978). Given the limited nature of the findings, Appellant will attempt to argue this point, but urges this Court to grant the requested relief.

Before a trial court finds the existence of an aggravating circumstance, there must be proof of the aggravating circumstance by the state beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980).

Upon consideration of the statutory circumstances in an effort to reach a sentence of life imprisonment or death, the trial court must weigh the aggravating and mitigating circumstances instead of merely tabulating each. State v. Dixon, 283 So.2d 1 (Fla. 1973). In weighing the circumstances, there should be reasoned judgment on the part of the judge and jury as to what factual situations require the imposition of life or death in light of the totality of the circumstances. Dixon, supra; Holmes v. State, 374 So.2d 944 (Fla. 1979). (Emphasis Supplied). It is the duty of the trial judge to follow the dictates of Florida Statute 921.141 in sentencing a defendant convicted of a capital felony and cull through the statutory circumstances to determine the appropriate sentence. Mikenas v. State, 367 So.2d 606 (Fla. 1978).

The appellant takes the position that the trial judge did not cull through the circumstances as required by law. A number of aggravating circumstances found to apply should have been rejected. In addition, certain mitigating circumstances that were rejected were proven by the appellant.

First, the only proof by the state of a prior violent felony was through a witness, Clerk Hoppe, who had violated the rule of witness sequestration invoked at the beginning of trial. (R 1127-1139) Additionally, the trial judge was obviously influenced by the tainted jury recommendation for death following the first trial in determining that this factor had been established. As argued in Point II, infra, the jury considered improper evidence concerning this precise issue. This evidence dealt with Appellant's prior conviction for burglary [which this Court specifically ruled was neither a capital felony nor one involving the use or threat of violence (R 175)]. The jury also heard impermissible evidence regarding Appellant's prior convictions for robbery and attempted first degree murder.

Second, the mere fact of killing a witness to a crime is not enough to invoke Florida Statute 921.141(e) (murder to avoid or prevent a lawful arrest or effect escape from custody) when the victim is not a law enforcement official. Riley v. State, 366 So.2d 19 (Fla. 1978). Further, it must be clearly shown that the dominant or only motive for the murder was the elimination of a witness. Menendez v. State, 368 So.2d 1278 (Fla. 1979). The Court said:

> We cannot assume Menendez's motive; the burden was on the state to prove it. Id. at 1232.

In Riley, the facts involved the robbery of a business resulting in two first degree murder counts and one count of assault with intent to commit first degree murder. In Menendez, the defendant committed a robbery using a silencer on the murder weapon.

Third, the evidence at trial revealed that, circumstantially, there was not proof beyond a reasonable doubt that the murder was committed in a cold, calculated and premeditated manner. This was the only evidence of premeditation relied on by the state during the advisory portion, except improper prosecutorial remarks during closing argument. (R 1241-1243) Additionally, in his statement to police, the appellant stated that he did not intend to shoot the victim. (R 846-847, 850-854) Once he was in the store nervously reaching for some money, the appellant slipped resulting in the gun firing. (R 848-851) He expressed sorrow to his accomplice immediately after the incident. (R 582-583)

Finding the age of the appellant as the only mitigating circumstance was contrary to the evidence. The appellant proved that he was under the domination of a person named Adell. Adell instigated the robbery; when the appellant objected to going along, Adell threatened the appellant with being left in the woods and gave him a white pill under false pretense. (R 846-847, 854, 921-922)

Moreover, there was substantial evidence adduced by the appellant showing that his life had been marred by physical and emotional abuses and disturbances, including at the time of the incident. (R 921-922, 1149-1206, 1221-1233) Yet, the trial

court did not find as a mitigating circumstance that the appellant was under extreme mental or emotional disturbance. [Cf. Kampff v. State, 371 So.2d 1007 (1979) (extreme and chronic problem with alcoholism satisfied test of being under extreme or emotional disturbance)].

Principally, the state relied on trial evidence to support its approach for the advisory sentence of death. The only other evidence came from the clerk and two documents that were admitted into evidence. (R 1127-1136) The trial court erred in accepting the aggravating circumstances found and in rejecting the mitigating circumstances above-mentioned.

Had reasoned judgment been used, and the statutory circumstances properly weighed by the trial court, support for a sentence of death would not have been found. Wherefore, on the foregoing authority, the appellant's sentence must be vacated and this cause remanded for the entry of a life sentence.

## POINT IV

### 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.

## CONCLUSION

Based upon the foregoing cases, authorities and policies, Appellant respectfully requests that this Honorable Court vacate Appellant's death sentence and remand to the lower court with instructions to sentence SONNIE BOY OATS to life imprisonment as to Point III. As to Point I, Appellant requests that the death sentence be vacated and this cause be remanded for the appointment of psychiatric experts for purposes of examination prior to sentencing. As to Point II, Appellant requests that the death sentence be vacated and this cause be remanded for the impaneling of a new sentencing jury and a new penalty phase.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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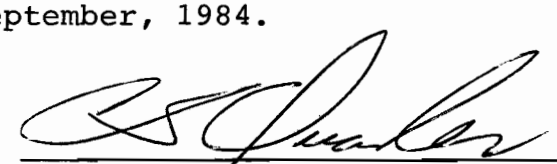
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014 and to Mr. Sonnie Boy Oats, Jr., Inmate No. A051769, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 10th day of September, 1984.



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