IN THE SUPREME COURT OF FLORIDA

DONALD WILLIAM DUFOUR,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

Case No. 65,694

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

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
1012 South Ridgewood Avenue
Daytona Beach, Florida
32014-6183
Phone: (904) 252-3367

ATTORNEY FOR APPELLANT.

TABLE OF CONTENTS

	PAGE NO.
TABLE OF CONTENTS	i
TABLE OF CITATIONS	iv
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
SUMMARY OF ARGUMENT	10
ARGUMENT	
POINT I THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE SEIZED DURING AN ILLEGAL SEARCH OF HIS RESIDENCE.	14
POINT II THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO EXCLUDE STATEMENTS MADE TO A COUNTY JAIL CELLMATE INFORMANT.	18
POINT III THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS FOR A MISTRIAL MADE WHEN REFERENCES WERE MADE, IN THE STATE'S OPENING STATEMENT AND DURING TESTIMONY, TO COLLATERAL, IRRELEVANT OTHER CRIMES.	22
POINT IV THE TRIAL COURT ERRED BY GRANTING THE STATE'S MOTIONS TO LIMIT CROSS EXAMINATION OF ROBERT TAYLOR, A KEY PROSECUTION WITNESS AGAINST APPELLANT.	28
POINT V THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTION TO BOLSTER THE TESTIMONY OF A MATERIAL WITNESS BY INTRODUCING THE TEXT OF PRIOR CONSISTENT STATEMENTS.	30

TABLE OF CONTENTS (CONTINUED)

		PAGE NO.
POINT VI	THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR A MISTRIAL BASED ON THE PROSECUTOR'S COMMENT IN CLOSING ARGUMENT ON APPELLANT'S FAILURE TO TESTIFY AT TRIAL.	33
POINT VII	THE TRIAL COURT ERRED BY CONDUCTING A PRETRIAL HEARING AND HEARING TESTIMONY OUTSIDE THE PRESENCE OF APPELLANT WHERE HIS PRESENCE HAD NOT BEEN WAIVED.	35
POINT VIII	THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS FOR A CONTINUANCE.	39
POINT IX	THE TRIAL COURT ERRED BY REFUSING TO IMPOSE SANCTIONS FOR THE PROSECUTION'S VIOLATION OF DISCOVERY RULES IN BARRING DEFENSE COUNSEL FROM THE DEPOSITION OF A DEFENSE WITNESS.	42
POINT X	THE TRIAL COURT ERRED BY FORCING APPELLANT TO APPEAR BEFORE THE JURY THROUGHOUT HIS TRIAL SHACKLED IN LEG IRONS.	45
POINT XI	THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR A MISTRIAL MADE WHEN AN EXCUSED JUROR, AGAINST THE COURT'S INSTRUCTIONS, COMMUNICATED THE REASON FOR HER EXCUSAL TO THE REMAINING JURORS.	47
POINT XII	THE TRIAL COURT ERRED BY DENYING APPELLANT'S PROPOSED INSTRUCTION ON THE JURY'S SENTENCING RECOMMENDATION.	50
POINT XIII	THE TRIAL COURT ERRED BY PERMITTING EXTENSIVE TESTIMONY REGARDING A PRIOR CAPITAL CONVICTION TO BE INTRODUCED AT THE PENALTY PHASE OF APPELLANT'S TRIAL WHERE IT BECAME THE FEATURE OF THAT PORTION OF THE TRIAL.	52
POINT XIV	THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO STRIKE DEATH AS A POSSIBLE PENALTY.	56

TABLE OF CONTENTS (CONTINUED)

		PAGE NO.
POINT XV	APPELLANT WAS IMPROPERLY SENTENCED TO DEATH.	60
POINT XVI	THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.	63
CONCLUSION		67
CERTIFICATE OF SERVICE		67

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Able Builders Sanitation Co. v. State 368 So.2d 1340 (Fla. 3d DCA 1979)	43
Alvord v. State 322 So.2d 533 (Fla. 1975)	52
Argersinger v. Hamlin 407 U.S. 25 (1972)	64
Blue v. State 441 So.2d 165 (Fla. 3d DCA 1983)	14,15
Brown v. Wainwright 392 So.2d 1327 (1981)	65
Caldwell v. Mississippi 443 So.2d 806 (Miss. 1983), cert. granted October 9, 1984, Case No. 83-6607, 83 L.Ed.2d 182	52
Childers v. State 277 So.2d 594 (Fla. 4th DCA 1973)	34
Cooper v. State 336 So.2d 1133 (Fla. 1976)	60,64
Daniels v. State 374 So.2d 1166 (Fla. 2d DCA 1979)	29
David v. State 369 So.2d 943 (Fla. 1979)	34
Davis v. Alaska 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)	29
Drake v. State 400 So.2d 1217 (Fla. 1981)	27
DuFour v. State 453 So.2d 337 (Miss. 1984), cert. pending, U.S. Sup. Ct. Case No. 84-5626	52
Elledge v. State 346 So.2d 998 (Fla. 1977)	53
Estelle v. Williams 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)	45

TABLE OF CITATIONS (CONTINUED)

CASES CITED:	PAGE NO.
Francis v. State 413 So.2d 1175 (Fla. 1982)	37
Gardner v. Florida 430 U.S. 349 (1977)	64
Godfrey v. Georgia 446 U.S. 420 (1980)	63
Gregg v. Georgia 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)	51
Harvard v. State 375 So.2d 833 (1978), cert. denied, 414 U.S. 956 (1979)	66
Hill v. State 422 So.2d 816 (Fla. 1982)	62
Illinois v. Gates ___ U.S. ___, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)	15
Jenny v. State 447 So.2d 1351 (Fla. 1984)	28
Jent v. State 408 So.2d 1024 (Fla. 1981)	40,62
Jones v. State 194 So.2d 24 (Fla. 3d DCA 1967)	26
King v. State 410 So.2d 586 (Fla. 2d DCA 1982)	14,15
Lindsey v. State 416 So.2d 471 (Fla. 4th DCA 1982)	57,58,59
Lockett v. Ohio 438 U.S. 586 (1978)	64
Malcolm v. State 415 So.2d 891 (Fla. 3d DCA 1982)	24
McElveen v. State 415 So.2d 746 (Fla. 1st DCA 1982)	31

TABLE OF CITATIONS (CONTINUED)

CASES CITED:	PAGE NO.
McRae v. State 383 So.2d 289 (Fla. 2d DCA 1980)	30
Menendez v. State 368 So.2d 1278 (Fla. 1979)	61
Middleton v. State 426 So.2d 548 (Fla. 1982)	62
Mikensas v. State 367 So.2d 606 (Fla. 1978)	60
Moreno v. State 418 So.2d 1223 (Fla. 3d DCA 1982)	29
Mullaney v. Wilbur 421 U.S. 684 (1975)	63
Perez v. State 453 So.2d 173 (Fla. 2d DCA 1984)	28
Proffitt v. Florida 428 U.S. 242 (1976)	65,66
Quince v. Florida 414 So.2d 185 (Fla. 1982), cert. denied, 459 U.S. 895, 103 S.Ct. 192, 74 L.Ed.2d 155 (1982)	65
Randolph v. State 8 FLW 446 (Fla. November 10, 1983)	50
Riley v. State 366 So.2d 19 (Fla. 1978)	60,61
Rodriguez v. State 433 So.2d 1273 (Fla. 3d DCA 1983)	26
Singer v. State 109 So.2d 7 (Fla. 1959)	53
Sireci v. State 399 So.2d 964 (Fla. 1981)	23,56
Smigiel v. State 439 So.2d 239 (Fla. 5th DCA 1983)	16
Songer v. State 365 So.2d 696 (Fla. 1978)	64

TABLE OF CITATIONS (CONTINUED)

CASES CITED:	PAGE NO.
State v. Barreiro 432 So.2d 138 (Fla. 3d DCA 1983)	43,44
State v. Dixon 283 So.2d 1 (Fla. 1973), cert. denied 416 U.S. 943 (1974)	50,57,60,61
State v. Lavazzoli 434 So.2d 321 (Fla. 1983)	17
State v. Melendez 244 So.2d 137 (Fla. 1971)	37
State v. Williams 443 So.2d 952 (Fla. 1983)	17
United States v. Henry 447 U.S. 264, 65 L.Ed.2d 115, 100 S.Ct. 2183 (1980)	19,36
United States v. Leon 468 U.S. ___, 104 S.Ct. ___, 82 L.Ed.2d 677 (1984)	16
Van Gallon v. State 50 So.2d 882 (Fla. 1951)	30
Vaught v. State 410 So.2d 147 (Fla. 1982)	58
Watts v. State 450 So.2d 265 (Fla. 2d DCA 1984)	29
White v. State 377 So.2d 1149 (Fla. 1980)	34
Williams v. State 110 So.2d 654 (Fla. 1959)	26,27
Williams v. State 117 So.2d 473 (Fla. 1960)	53
Witherspoon v. Illinois 391 U.S. 510 (1968)	64
Witt v. State 387 So.2d 922 (Fla. 1980)	63,64
Yesnes v. State 440 So.2d 628 (Fla. 1st DCA 1983)	14,15

TABLE OF CITATIONS (CONTINUED)

OTHER AUTHORITIES:	PAGE NO.
Fourth Amendment, United States Constitution	17, 16
Fifth Amendment, United States Constitution	11,12,27,28, 32,34,38,39, 41,44,51,53, 54,62,64
Sixth Amendment, United States Constitution	21,29,32,34, 36,41,49,51, 64
Eighth Amendment, United States Constitution	51,64,65,66
Fourteenth Amendment, United States Constitution	17,21,27,29, 32,34,38,41, 44,49,53,54, 62,64,65,66
Article I, Section 9, Florida Constitution	27,29,32,34, 38,41,44,51, 53,54,62,64
Article I, Section 12, Florida Constitution	17
Article I, Section 15(a), Florida Constitution	64
Article I, Section 16, Florida Constitution	21,27,29,32, 34,41,49,51, 64
Article I, Section 17, Florida Constitution	51
Section 90.404(2), Florida Statutes (1983)	29
Section 90.404(2)(b), Florida Statutes (1983)	24
Section 90.404(2)(b)1, Florida Statutes (1983)	22
Section 90.801(2)(b), Florida Statutes (1983)	31
Section 775.08(1), Florida Statutes (1983)	56
Section 775.082(3), Florida Statutes (1983)	56
Section 775.087(2), Florida Statutes	56
Section 782.04(1)(a)(1), Florida Statutes (1983)	62
Section 810.02, Florida Statutes (1983)	57
Section 914.04, Florida Statutes (1983)	28
Section 921.141, Florida Statutes (1979)	65
Section 921.141(1), Florida Statutes (1983)	53
Section 921.141(5), Florida Statutes (1983)	52
Section 921.141(5)(b), Florida Statutes (1983)	54
Section 921.141(5)(e), Florida Statutes (1983)	60
Section 921.141(5)(h), Florida Statutes (1983)	54
Section 921.141(5)(i), Florida Statutes (1983)	61,62
Section 921.141(5)(i), Florida Statutes (1979)	65
Section 921.141(6), Florida Statutes (1983)	13
Rule 3.180, Florida Rules of Criminal Procedure	36
Rule 3.180(a)(3), Florida Rules of Criminal Procedure	37
Rule 3.180(a)(4), Florida Rules of Criminal Procedure	37

TABLE OF CITATIONS (CONTINUED)

OTHER AUTHORITIES:	PAGE NO.
Rule 3.180(a)(6), Florida Rules of Criminal Procedure	37
Rule 3.180(b), Florida Rules of Criminal Procedure	37
Rule 3.220(b)(3), Florida Rules of Criminal Procedure	43

IN THE SUPREME COURT OF FLORIDA

DONALD WILLIAM DUFOUR, Appellant, vs. STATE OF FLORIDA, Appellee.	)	Case No. 65,694

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE

Appellant was indicted by the Orange County Grand Jury on January 20, 1983, for the first-degree murder of Zack Doyle Miller. (R 2224) He was tried by a jury on May 21 through 31, 1984, and found guilty as charged. (R 1460, 2670) A trial on the penalty was held on June 15, 1984, and the jury recommended that the death sentence be imposed. (R 1642, 2711) Appellant was sentenced on July 3, 1984, to death by electrocution. (R 1657-1660, 2720-2721, 2722-2723) Appellant's motion for a new trial was timely filed and was denied on July 3, 1984. (R 2679-2682, 1495, 1500, 1640, 1649, 2718-2719)

Notice of appeal was timely filed on August 1, 1984, and the Office of the Public Defender was appointed to represent Appellant on appeal. (R 2727, 2728)

STATEMENT OF THE FACTS

On September 6, 1982, Zack Doyle Miller's body was discovered under an orange bedspread in an orange grove on Gatlin Avenue in Orange County, Florida. (R 626, 679) He had died from two gunshot wounds causing injury to his brain and hemorrhaging in his chest, some time late in the evening of September 4th or the early morning of September 5th. (R 679, 680, 681, 682, 685, 686) A bullet recovered from his body and spent casings found in the orange grove were consistent with having been fired in a Ravens Arms .25 calibre semiautomatic pistol. (R 697, 700, 701, 703-705, 648, 651, 653) A resident living near the orange grove said that at about 9:30 or ten o'clock on the evening of September 4th, she heard two loud and angry men's voices arguing, a commotion that sounded like running, and what sounded like a shot. (R 620, 621, 622, 623)

Mr. Miller had been last seen by his sister and brother-in-law about nine o'clock in the evening of September 4th, wearing a custom-made gold chain with a nugget pendant, a gold Seiko watch, a diamond horseshoe ring, and a tiger's eye ring. (R 719, 720, 721, 733, 710, 711, 712, 714, 715) A red chenille bedspread had been in the trunk of his car, and Mark Kite, whom Mr. Miller had met in Jacksonville, had left his orange back pack in the car. (R 737, 788, 790) There was no jewelry found on Mr. Miller's body, and his shoes had been removed. (R 626, 679, 853)

Stacey Sigler, Appellant's former girl friend and lover, testified that one evening in early September 1982, Appellant announced as they drove through Eola Park in Orlando that he

would find a homosexual, rob and kill him. (R 742, 875, 879, 880) Ms. Sigler waited at a bar for Appellant to call, and then met him at his brother's house where he was going through the trunk of a car she had never seen before, out of which came blue floor mats and an orange back pack. (R 881, 882, 883, 884) She said she and Appellant parked the car on a street with orange groves on one side, although a deputy who later found Zack Miller's car said there were no orange groves in the immediate area of where it was found. (R 885, 900, 638)

Ms. Sigler said that that night she saw Appellant wearing two gold chains, one with a nugget pendant, and later she saw a horseshoe ring and one with a gold stone. (R 885, 887, 888) She said Appellant told her that he had killed a man and left him in an orange grove. (R 886)

When Ms. Sigler was questioned in October of 1982, she denied knowing anything about Zack Miller's death, but in December 1983 she contacted an attorney, was granted immunity from prosecution, and changed her story. (R 890, 891, 901) She admitted that frequent drug use since the age of fourteen had affected her memory, but when she testified after the grant of immunity her memory was aided quite a bit by those questioning her. (R 892-896, 903, 904, 909) After her trial testimony was completed, she was arrested that night for armed robbery. (R 1477)

Robert Taylor, a four-time convicted felon, lived in the same triplex apartment building as Appellant and Appellant's brother in 1982, and deemed himself one of Appellant's closest

associates. (R 740, 741, 743, 794) In September 1982, he said he saw Appellant cleaning out Stacey Sigler's car and observed new floor mats and an orange back pack which Appellant threw behind the apartment. (R 744, 746, 747) Appellant, he said, was wearing a medallion necklace, a ring, and a gold Seiko watch, items which Taylor had never seen before. (R 745, 746, 750) Taylor said Appellant told him he had shot a homosexual from Tennessee in an orange grove, using a .25 automatic, and took his car. (R 747, 748) Taylor helped Appellant disassemble a Raven Arms .25 automatic pistol, which Taylor said he disposed of in a junkyard; but when a detective looked for the gun a month later, the described location was grown over with grass. (R 748, 751, 752, 837, 838, 839, 840) Taylor bought a tiger's eye ring, which he said Appellant told him came from the orange grove robbery, for thirty-five dollars, and gave it to his brother Leoine Taylor. (R 748, 749, 795) Taylor said he had received no deals regarding this prosecution, but he had earlier testified against Appellant in Mississippi in a murder trial, in exchange for a life sentence subject to parole in ten years, had agreed to testify against an accomplice in an Orange County robbery prosecution in exchange for one of his charges being dropped, and was facing murder charges in Georgia. (R 752, 753, 781, 772, 1532, 1533, 1545, 1552, 1560, 1546, 1547, 1552) Taylor at first denied and then admitted to having taken jewelry from his victims in previous robberies committed by him. (R 779)

Ray Ryan, also convicted of "four or five" felonies and granted immunity for three robberies, testified that he too was a

close associate of Appellant's. (R 806, 807, 810, 811, 812) Around Labor Day of 1982, he said he noticed Appellant with some new jewelry, and commented on the tiger ring and pendant necklace. (R 807, 808, 815, 816) When Ryan asked how much he gave for it, Appellant was said to have replied, "You can't afford it. It cost a man his life." (R 807, 808, 809, 813, 816, 826) Ryan said Appellant told him that he had used a .25 automatic when he shot and stabbed the owner of the jewelry, and Ryan also saw Appellant and Robert Taylor dismantling a Raven Arms .25 automatic, at Taylor's direction. (R 809, 810, 814) Taylor, according to Ryan, was the owner of all the guns in that location, and was the planner of various activities. (R 814, 815, 817, 825)

Ryan further testified that he saw not only Appellant but Robert Taylor, Stacey Sigler, and Appellant's brother Gary DuFour wearing the pendant necklace, and at one time Appellant told Ryan he could not give him the necklace because it would make Taylor mad. (R 818, 819, 821) Ryan saw Taylor picking diamonds out of a horseshoe ring, and with a tiger's eye ring. (R 819, 820) There was always a lot of jewelry around Taylor's apartment, he said. (R 821)

In 1984 Richard Dean Miller a/k/a Montgomery a/k/a Thomas Kipers a/k/a Rosenthal a/k/a Henry Carr was housed in a single-man cell next to Appellant's in the Orange County Jail. (R 1257, 1258, 1284, 1285) Miller had been convicted of five felonies, and had previously cooperated with law enforcement in exchange for favorable treatment. (R 1287, 1295, 1309) In exchange for his testimony against Appellant in this case, three

bank robbery charges were dropped, and he understood that the State of Florida would recommend that his sentences in federal court on those charges would run concurrently, and would be served in the federal facilities that he preferred to the State's. (R 1259, 1260, 1281, 1288, 1289, 1292) Frank Tamen, the prosecutor in this case, would speak to the federal judge in Miller's behalf, and Miller would not be required to testify against his sister in other prosecutions. (R 1260, 1294, 1306)

Miller testified that Appellant wanted him to help generate publicity about this case so that a change of venue could be had. (R 1262, 1263) Miller said Appellant told him that he had had an associate drop him off at a store where he met a man with whom he drove to an orange grove where he shot him with a .25 automatic, removed his shoes, and drove the man's car to another orange grove where Stacey Sigler picked him up. (R 1263, 1264, 1266, 1267)

Miller also was allowed to testify that Appellant had wanted to have Stacey Sigler killed because "their" testimony could convict him and he would end up in the electric chair. (R 1271, 1272) Miller said that when he represented that he thought he could have Sigler killed for five thousand dollars, he was given a picture of her with her name and address written on the back. (R 1273, 1274, 1276) Sigler's address was in the telephone book but under her mother's different last name. (R 1236) Miller obtained a second picture of Sigler, he said, and had Appellant write information at the bottom of a note that Miller had penned. (R 1276, 1277)

At the penalty phase trial, Robert Taylor was permitted to testify, over objection, to the details of a murder he and Appellant had committed in Mississippi in October of 1982. (R 1501, 1503) Although Taylor was usually the planner, in this incident he said he followed Appellant's directions in picking up two homosexual men at a bar in Jackson, and going to their apartment to rob them. (R 1545, 1549, 1550, 1534, 1535, 1536) At the apartment, Taylor found a screwdriver and a steak knife in the kitchen and created a disturbance to distract the victims. (R 1536, 1537, 1539, 1550) He threw the steak knife to Appellant and held one of the men against a wall with the screwdriver. (R 1539, 1550) When Appellant's demands for money were not met, Taylor said, Appellant stabbed one of the men with the steak knife and later with his buck knife, in the chest and arms. (R 1539, 1540, 1541, 1542) Taylor stuck the screwdriver in the second man's chest about four times. (R 1542, 1550) Appellant was convicted of first-degree murder in Mississippi on March 31, 1983. (R 1560) In exchange for his testimony in that case, Taylor was given a life sentence from which he will be eligible for parole in 1992. (R 1532, 1533, 1545, 1546, 1547, 1552, 1560)

In Appellant's behalf, Stacey Sigler and Gary DuFour, Appellant's brother, testified that Appellant was very kind to children and respectful of Sigler's grandmother. (R 1576, 1589) Appellant's alcoholic father had particularly abused Appellant, the youngest of four brothers. (R 1577, 1584, 1583, 1585, 1591) When their father died, Appellant's oldest brother, a homosexual, took him to Gainesville at about age 15 and introduced him to the

"gay" community there. (R 1581, 1582, 1587, 1589, 1592) Appellant had had a drug and alcohol problem since an early age, and in September of 1982 he was using a lot of drugs and drinking a fifth or two of hard liquor every day. (R 1578, 1588, 1579, 1603) He had a poor school record. (R 1594; Defendant's Exhibit 1) A prison ministry worker testified that since being incarcerated Appellant had been spiritually reborn, and wanted to dedicate himself to helping young people avoid his fate. (R 1596, 1602)

SUMMARY OF ARGUMENT

POINT I (Page 14)

A search of Appellant's residence was conducted pursuant to a warrant that had been issued on less than probable cause, i.e., the affidavit for search warrant did not state when the alleged observations of the informant which connected Appellant to this crime had occurred, or that there was any reason to believe that the fruits of the crime would be found specifically at Appellant's apartment. The search occurred in 1982, prior to the repeal of Florida's constitutional provision that illegally seized evidence be excluded from criminal trials.

POINT II (Page 18)

An inmate in the isolation cell next to Appellant's in the Orange County Jail testified that Appellant told him the details of the murder, and solicited the inmate to murder a State witness. Appellant argues that the use of the known informant in obtaining self-incriminating statements from the accused violated his right to post-indictment assistance of counsel.

POINT III (Page 22)

The jail informant testified that Appellant told him he was in jail for "murder," that he had run four or five other guys out of the jail cell, and that the informant's testimony referred to "the single homicide." The prosecutor told the jury in his opening statement about an alleged escape plot that Appellant had discussed with the informant, which testimony was later excluded. Appellant's motions for mistrial as to all these matters were denied.

POINT IV (Page 28)

The trial court granted two of the State's motions to limit the defense's cross-examination of Robert Taylor, a key witness against Appellant. Taylor was facing murder charges in Georgia and had been granted "police immunity" for numerous burglaries and robberies; but Appellant was forbidden to ask any questions, in response to which Taylor might invoke the Fifth Amendment, or about any dismissed charges not connected with this case, and was thereby denied his right to effective confrontation of witnesses.

POINT V (Page 30)

A detective was permitted to read the transcript of Robert Taylor's prior consistent statement to police officers, improperly bolstering Taylor's credibility where no suggestion of recent fabrication had been made.

POINT VI (Page 33)

In discussing the testimony of a witness whose only source of information about the case was his alleged communication with Appellant in jail, the prosecutor told the jury in closing argument that nobody had testified that the witness' testimony was wrong, impliedly referring to Appellant's failure to take the stand and testify at his trial.

POINT VII (Page 35)

The trial court conducted a pre-trial hearing at which evidence addressed to the admissibility of the jail informant's testimony was taken, where Appellant was absent, hospitalized, and where his presence was not waived.

POINT VIII (Page 39)

The trial court denied Appellant's motions for a continuance. Defense counsel had previously been denied permission to travel out of state to depose witnesses whose presence in Florida was promised within thirty days of trial. One witness was not made available until within ten working days of trial, and another invoked his Fifth Amendment right against self-incrimination when the defense attempted to depose him, while names of additional witnesses were still being furnished to the defense.

POINT IX (Page 42)

The prosecutor deposed a witness whose name had been listed on the defense's list of witnesses, without notice to defense counsel and at a proceeding where defense counsel was threatened with physical expulsion. The trial court refused to impose sanctions for the prosecution's violation of the discovery rules.

POINT X (Page 45)

Appellant was forced to appear before the jury throughout his trial in leg irons, which undermined his right to be presumed innocent.

POINT XI (Page 47)

A juror was excused because of a strange phone call she received during the trial during which the jury was not sequestered. Against the court's instructions, after she was excused, she communicated with the rest of the jurors about the incident.

POINT XII (Page 50)

The trial court denied Appellant's requested jury instruction on the penalty proceedings, which would have informed them of their right to recommend life at their discretion.

POINT XIII (Page 52)

Evidence of a prior capital conviction introduced at the penalty phase of Appellant's trial was too detailed and became the "feature" of his sentencing trial.

POINT XIV (Page 56)

Appellant argues that the aggravating circumstances of Section 921.141(6), Florida Statutes (1983), are substantive elements and must be alleged in the indictment in order to charge a crime punishable by death.

POINT XV (Page 60)

The trial court improperly found that the murder was committed for the purpose of avoiding arrest and in a cold, calculated and premeditated manner.

POINT XVI (Page 63)

Appellant urges that the Florida capital sentencing statute is unconstitutional.

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE SEIZED DURING AN ILLEGAL SEARCH OF HIS RESIDENCE.

On October 11, 1982, Detective Payne and other officers of the Orlando Police Department conducted a search of Appellant's triplex apartment. (R 862) A search warrant had been obtained that day on the basis of Detective Payne's affidavit recounting information she had received from Ray Ryan. (R 3562-3565) The affidavit recited that Detective Payne was an experienced homicide investigator; that Zack Doyle Miller had died from a .25 calibre gunshot wound; that Ray Ryan had seen Appellant in possession of jewelry resembling Zack Miller's sister's description of his jewelry; that Ray Ryan had seen Robert Taylor, Appellant's neighbor, in possession of a .25 calibre Raven Arms automatic and a ring like Zack Miller's; and that Appellant had told Ray Ryan that he had killed a man for his gold jewelry. (R 3562-3565) Although the affidavit, dated October 11, 1982, alleged that Ryan had seen Taylor in possession of the gun within the past ten days, there was no indication of when Appellant possessed the jewelry, or at what location. There was also no indication of when Detective Payne interviewed Ray Ryan.

King v. State, 410 So.2d 586 (Fla. 2d DCA 1982); Yesnes v. State, 440 So.2d 628 (Fla. 1st DCA 1983); and Blue v. State, 441 So.2d 165 (Fla. 3d DCA 1983), are all cases dealing with the issuance of a search warrant on the basis of the uncorroborated information of a confidential source, but the insufficiencies of

the affidavits in those cases are the same as in this case where the informant is identified. In King, supra, the affidavit was silent regarding the date the illegal activity occurred, and the District Court held that an affidavit supporting a search warrant must contain the specific time or times when the informant observed the illegal activity. Here, there likewise is no indication of when Ray Ryan supposedly saw Appellant with the jewelry.

Yesnes, supra, was another case dealing with unidentified, uncorroborated informants, but where a critical omission from the affidavit was any reference to the location where the photographs sought to be seized might be located. The Yesnes Court analyzed the affidavit and search warrant in light of the then-new "totality of the circumstances" test announced in Illinois v. Gates, ___ U.S. ___, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), and found that an inquiry to determine the reliability of the informants' information was still an integral part of determining the sufficiency of an affidavit.

In Blue, supra, the District Court found that the critical inquiry was not whether the substance the informant observed was probably marijuana, but whether there was a demonstrated probability that the substance came from the defendants' nursery as the informant alleged. Similarly, while Ray Ryan's description of the jewelry allegedly in Appellant's possession corresponded to Faye Sark's, there is no allegation that it was being kept in Appellant's residence or that it had even been seen on those premises. The Blue Court found that the fact that one

could infer that the contraband was on particular premises did not establish the probability that it was in fact on the premises sought to be searched and the affidavit thus failed the Gates test.

In arguing against Appellant's motion to suppress, the prosecutor cited the Fifth District Court of Appeal decision in Smigiel v. State, 439 So.2d 239 (Fla. 5th DCA 1983), for the proposition that the October 11, 1982, search warrant affidavit in this case did not contain "stale" information because here, the affidavit was executed five weeks after the crime and in Smigiel, ten months had elapsed since the crime. (R 1180) Although the lapse of time in this case was a consideration, the major deficiency in the affidavit was the omission of any indication of where or when Ray Ryan made his observations. The affidavit in Smigiel stated precisely when the electronic eraser had been used, and concluded with the statement that the named informant, whose information was substantially corroborated otherwise, believed that the eraser was still in the law office whose address was specifically recited.

On July 5, 1984, the United States Supreme Court held that, since the exclusionary rule was designed to deter police violations of the Fourth Amendment, and that appellate declarations that a magistrate had erred would sufficiently deter future judicial errors, then evidence seized pursuant to a defective search warrant need not be excluded from evidence at trial where the police reasonably relied on the warrant. United States v. Leon, 468 U.S. ___, 104 S.Ct. ___, 82 L.Ed.2d 677

(1984). The search in this case, however, occurred on October 11, 1982, at which time not only the Fourth Amendment to the United States Constitution but the former version of Article I Section 12 of the Florida Constitution were in effect. Article I Section 12 was amended, effective January 4, 1983, but in 1982 it provided protection against unreasonable searches and seizures and required that warrants be issued only upon probable cause. Articles obtained in violation of the Florida Constitution were not to be admissible in evidence. The exclusionary rule, sought by Appellant's motion to be applied in this case, was therefore in effect at the time the search of his apartment took place. (R 2521-2522) The subsequent amendment, which curtails Florida courts' freedom to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the United States Supreme Court, is not to be applied retroactively. State v. Lavazzoli, 434 So.2d 321 (Fla. 1983); State v. Williams, 443 So.2d 952 (Fla. 1983).

Because the affidavit for search warrant was insufficient and the search warrant should not have been issued, and because at the time of the search herein illegally seized evidence was not admissible at a trial in Florida, the motion to suppress should have been granted. Art. I §12, Fla. Const.; Amends. IV and XIV, U.S. Const.

POINT II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO EXCLUDE STATEMENTS MADE TO A COUNTY JAIL CELLMATE INFORMANT.

While awaiting trial on this charge, Appellant was housed in the Orange County Jail, in a single-man cell from which one could see other inmates only while they were in transit. (R 1125) Into the adjacent single cell was placed Richard Miller a/k/a Montgomery, et cetera whom the trial judge described as the type who "will do whatever the request from anybody who might be able to cut his time or get him out." (R 1487, 1258) Miller had been convicted of five felonies, and had previously worked deals for himself with the prosecution. (R 1295, 1307, 1309, 1137) Appellant had been indicted for murder in this case, and was represented by court-appointed counsel. (R 2224, 2561, 1122)

At his first meeting with county jail officers, Miller told them that he had had conversations with Appellant and a corrections officer about a planned escape attempt. (R 1125, 1126) He was placed back in his cell next to Appellant's. Said the jail captain at the hearing on Appellant's motion to exclude Miller's testimony:

> I don't recall that he was specifically encouraged to continue, but he certainly wasn't discouraged. (R 1129, 1136)

At his fourth or fifth meeting with jail officials, Miller furnished information regarding Appellant's statements about a homicide; he was returned to his cell next to Appellant's. (R 1126, 1127, 1136) Miller had not been told to

question Appellant regarding his murder charges, but to let jail officials know if he heard any further information regarding an escape plan. (R 1133, 1134, 1135, 1129, 1130) At one point Appellant was brought out of his cell to talk to the jail officers, to "cover" for Miller, and to allay Appellant's suspicions. (R 1130, 1131, 1137) When Miller asked the jail captain for money for his information, the Assistant State Attorney was called and Miller's bargain with the State was struck. (R 1128, 1140, 1259, 1260, 1294)

This situation was, as Appellant's counsel urged in the trial court, nearly identical to that in United States v. Henry, 447 U.S. 264, 65 L.Ed.2d 115, 100 S.Ct. 2183 (1980). Like the informant in Henry, Miller had previously provided information to the authorities about suspects. (R 1295, 1309, 1311) Also like the Henry informant, Miller was not told to solicit information about Appellant's charges. The Henry informant was told to "be alert" to any statements by the several prisoners in his cell block; the record in Henry did not disclose whether the informant was contacted specifically to acquire information about Henry or his robbery charge. Id., 447 U.S. at 266.

Beyond the facts of Henry, moreover, Miller was specifically told to gather information about escape plans involving a corrections officer. (R 1129, 1130, 1133) Miller, therefore, was acting as a government agent for the purpose of acquiring information from Appellant. The fact that he was not encouraged (nor discouraged) to ask questions or even direct his attention to the particular charges against Appellant does not remove his

actions from the prohibition announced in Henry. Even if the jail officers did not intend that Miller would take affirmative steps to secure incriminating information from Appellant, they could surely expect that that would result. That they did expect that Miller would gain useful information from Appellant is indicated by the care taken to allay Appellant's suspicion and "cover" for Miller by removing Appellant from his cell, too, to balance out Miller's frequent absences. (R 1130, 1131, 1137)

The mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of government agents. Id., 447 U.S. at 274. This was a relevant factor in the Supreme Court's decision in Henry, and the coerciveness of the atmosphere in this case is even greater: whereas Henry was merely one of several prisoners in a cell block, Appellant and Miller were in isolation cells, with verbal access only to the next cell and to corrections officers. (R 2561, 1122) In other words, Appellant had no one but Miller to talk to.

The trial court's decision to let Miller testify was bottomed on the fact that Miller's aid was not solicited for the purpose of gathering information about this case but to insure the security of the county jail. (R 336, 1250-1251) This in no way distinguishes Miller from the informant in Henry, who was only told to "be alert" to any incriminating statements that his cellmates might make. When the jail officers placed Miller back in his cell next to Appellant's, with the knowledge that he would "be alert" to Appellant's conversations, they violated

Appellant's right to assistance of counsel. The motion to suppress should have been granted. Art. I §16, Fla. Const.; Amends. VI and XIV, U.S. Const.

POINT III

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS FOR A MISTRIAL MADE WHEN REFERENCES WERE MADE, IN THE STATE'S OPENING STATEMENT AND DURING TESTIMONY, TO COLLATERAL, IRRELEVANT OTHER CRIMES.

Prior to his trial, Appellant moved, inter alia, to prohibit the State from introducing evidence, exhibits, or arguments at Appellant's trial referring to any other alleged "bad acts" on the part of Appellant. (R 2572-2573, 1117) The State, in the first place, had furnished no notice of any intent to introduce such evidence, as is required by Section 90.404(2)(b)1., no fewer than ten days prior to trial. (R 1118) Six days before trial, the trial court declined to rule "out of context" on the motion. (R 1121)

Defense counsel interrupted the prosecutor's opening statement to object to any reference to Richard Miller's testimony, and moved for a mistrial. (R 603) The trial court had ruled that Miller's testimony would be admissible at trial, but defense counsel wanted to insure that inadmissible, collateral crime evidence would be excluded from his client's trial. (R 336, 606) In response to defense counsel's question of what harm could come from the prosecutor's "carving that part out" of his opening statement, those matters which the trial court had deferred ruling on, the court responded:

> THE COURT: For the record, I have already instructed the jury that should the evidence be contrary to what the attorneys say they're to rely upon their recollection of the evidence. So I don't think it's, if he makes his presentation and it doesn't come into evidence that can certainly be argued

> very strongly by you in closing argument. He makes these statements at his peril when he says he's going to present this testimony. If he doesn't he'll have a problem with the jury.

(R 605-606)

The prosecutor said that he intended to tell the jury that Appellant had solicited Miller in an escape plot, and would make no mention of a contract for slaying Stacey Sigler. (R 607) Defense counsel requested that the trial court make its ruling on his motion to exclude collateral crime evidence, before anything was said about it before the jury. (R 607) While not formally ruling on the motion, the trial court apparently was satisfied with the prosecutor's representation that he would tell the jury about "just the escape plot," and allowed him to continue with opening statement. (R 608) The prosecutor then proceeded to detail Miller's testimony regarding the escape plot. (R 609)

As it turned out, just before Miller testified, the trial court ruled, on the basis of Sireci v. State, 399 So.2d 964 (Fla. 1981), that Miller could testify to being solicited to have Stacey Sigler killed, and to what Appellant allegedly told him about the facts of this case, but that he could not tell the jury about the supposed escape plans. (R 1250, 1251)

Miller's testimony should have been excluded entirely, for the reasons argued in Point II herein; but particularly the motion for mistrial made during the State's opening statement should have been granted, because Miller's testimony and the references thereto went beyond the facts of this case and introduced irrelevant, collateral crime evidence to the jury.

There had been no notice to defense counsel that collateral crime evidence would be introduced, and defense counsel made every effort to prevent even a reference to such inadmissible testimony. Evidence of "collateral crimes" should be considered presumptively inadmissible and excluded unless the State can affirmatively establish its propriety. Malcolm v. State, 415 So.2d 891 (Fla. 3d DCA 1982); §90.404(2)(b), Fla. Stat. (1983). The deferral of ruling on defense counsel's motions and objections, moreover, was error in itself, since the practical effect of reserving ruling on such motions is to overrule the objections. Id., 415 So.2d at 892, fn. 1. Later excluding actual, live testimony about an "escape plot" did not cure the harm of letting the prosecutor tell the jury about it "at his peril," and then expecting the jury to disregard it, a procedure of "legendary ineffectiveness," as the Malcolm Court termed it.

Miller's testimony also included other matters, the introduction of which were grounds for a mistrial. First he told the jury on direct examination:

> BY MR. TAMEN: Okay. Did he tell you any of the facts, or just what the charge was?
>
> A Just that he was in there for murders, and he run four or five other guys out of that cell, so I was apprehensive. (R 1261)(Emphasis supplied.)

The trial court correctly sustained Appellant's objection to this answer, but denied his motion for a mistrial. (R 1261) Later, another reference was made to separate charges against Appellant:

> BY MR. TAMEN: Did he say what kind of a person it was that he had killed, what kind of a man?
>
> A That it had come from the single homicide. (R 1268) (Emphasis supplied.)

In response to defense counsel's immediate motion for a mistrial, the prosecutor claimed that the jury had "no idea" that anything else was involved, on the basis of that answer. (R 1268) As defense counsel replied, however, "What other reference could there be?" (R 1268) The trial court worried that the witness "apparently hasn't been talked to before," to which the prosecutor replied:

> MR. TAMEN: He has, Your Honor, quite extensively. I saw him on Friday. I saw him yesterday, and I talked to him in the holding cell just before we brought him in here. (R 1269)

Another motion for a mistrial was made in reference to Miller's testimony that he had been threatened while in jail, apparently because of his practice of exchanging testimony for favorable treatment, and that the Federal authorities were "better able to keep him alive" in their facilities. (R 1308, 1316, 1320, 1321) Instead of granting the mistrial, the trial judge told the jury that the purported threats to Richard Miller were not related to Appellant, ostensibly negating bad inferences about Appellant but actually bolstering the witness' credibility by implying that the threats were real. (R 1322, 1324, 1331, 1334, 1335)

The trial court recognized that the State had a problem with using a witness like Richard Miller:

> THE COURT: It certainly is, you have we have a person that is so eager to volunteer information and embellish on things. (R 1321)

While the trial court may have sympathized with the prosecutor's "problem," Appellant nevertheless fails to see how the overeagerness of a witness presented by the State should be an excuse to deprive him of a fair trial, free from prejudicial and irrelevant references to other crimes. Collateral evidence that tends to suggest the commission of an independent crime is inadmissible unless such evidence is relevant to a fact in issue. Jones v. State, 194 So.2d 24 (Fla. 3d DCA 1967). If the logical effect of evidence relating to other offenses by an accused is to establish bad character or propensity to commit crimes, it is inadmissible. Williams v. State, 110 So.2d 654 (Fla. 1959). That the prosecutor knew of Miller's tendency to "volunteer" testimony was revealed by his representations to the trial court that he had been extensively "talked to" about it. (R 1269) Moreover, the prosecutor himself contributed to the damage made by references to other murders:

> BY MR. TAMEN: After he told you he was charged with murders, did he tell you any of the facts of the case, or the charge against him? (R 1262)(Emphasis supplied.)

The fact that the alleged statement about murders in the plural was made by Appellant himself does not render it admissible at his trial for a single homicide. The District Court in Rodriguez v. State, 433 So.2d 1273 (Fla. 3d DCA 1983), found that, had the point been properly preserved for appeal, reference to a separate murder made by Rodriguez himself in a

taped confession to a jail cellmate would have been grounds for reversal of his conviction for first degree murder, on the grounds of Drake v. State, 400 So.2d 1217 (Fla. 1981); Williams, supra; et al.

The several motions for a mistrial should have been granted. Appellant is entitled to a new trial where only proper, relevant evidence as to his guilt or innocence in this case will be admitted. Art. I §§ 9 and 16, Fla. Const.; Amends. V and XIV, U.S. Const.

POINT IV

THE TRIAL COURT ERRED BY GRANTING THE STATE'S MOTIONS TO LIMIT CROSS EXAMINATION OF ROBERT TAYLOR, A KEY PROSECUTION WITNESS AGAINST APPELLANT.

Prior to trial, the prosecutor filed several motions in limine regarding the testimony of Robert Taylor, Appellant's co-defendant in a murder prosecution in Mississippi who was awaiting trial on murder charges in Georgia. (R 2564, 2565) The trial court granted two of the motions, ruling that defense counsel could not ask any questions of Taylor in response to which it was anticipated he would exercise his right against self-incrimination, or to bring out the fact that Taylor confessed to many crimes in exchange for an Orange County Sheriff's detective's promise not to turn the cases over to the State Attorney's Office for prosecution. (R 1212, 1223-1224) The trial court accepted the prosecutor's representation that although there were other robberies and burglaries admitted by Taylor to the same investigator who was involved in this case, there were no promises or inducements to secure Taylor's testimony for this trial. (R 1223-1224) The trial court's granting of the motions was clearly in error.

A witness cannot be excused from testifying on Fifth Amendment grounds when he has been duly served with a trial subpoena by the State. Perez v. State, 453 So.2d 173 (Fla. 2d DCA 1984); §914.04, Fla. Stat. (1983). (R 2474) For a Florida charge, Taylor's subpoena for this trial would have granted him immunity. Jenny v. State, 447 So.2d 1351 (Fla. 1984). Whether it was within the Orange County prosecutor's or the Florida

Legislature's power to grant Taylor immunity for a crime in Georgia, there was nevertheless no basis for the prosecutor to base his motion in this respect on the fact that invocation of Taylor's right against self-incrimination might "tend to improperly prejudice the jury against him." (R 2564) The prohibition against introducing evidence of other crimes in a criminal trial applies only to use of similar crime evidence by the State against the defendant. Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982); §90.404(2), Fla. Stat. (1983). On the other hand, the fact that Taylor was facing charges of murder in an upcoming prosecution, and particularly the fact that many charges had been disposed of because of his past cooperation with authorities was highly relevant to demonstrate his bias or motive in testifying in this prosecution brought by the State of Florida. While Taylor's grant of immunity was not specifically made in regard to this case, it would have been probative to show that he had a motive to testify so as to please authorities who had discretion over his status in this or any case against him. Watts v. State, 450 So.2d 265 (Fla. 2d DCA 1984); Daniels v. State, 374 So.2d 1166 (Fla. 2d DCA 1979); Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Art. I §§ 9 and 16, Fla. Const.; Amends. VI and XIV, U.S. Const.

Appellant should be afforded a new trial and the opportunity to fully cross-examine one of the key witnesses against him.

POINT V

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTION TO BOLSTER THE TESTIMONY OF A MATERIAL WITNESS BY INTRODUCING THE TEXT OF PRIOR CONSISTENT STATEMENTS.

After Robert Taylor had testified, the prosecutor called Detective Hansen of the Orange County Sheriff's Department to the stand. When Taylor was arrested in Mississippi in October of 1982, he was interviewed by Detective Hansen and gave statements about Appellant's involvement in this case. (R 752, 837, 838) Over defense counsel's objections, Detective Hansen was permitted to read portions of Taylor's 1982 statement, verbatim, at Appellant's trial. (R 834, 835, 836, 841, 843) Defense counsel unsuccessfully argued that he could not cross examine a transcript; there was no specific issue of impeachment being covered; and the reading of the transcript improperly bolstered Robert Taylor's testimony. (R 834, 835, 836, 841) The prosecutor's excuse, which was accepted by the trial court, was that the "prior consistent statements" of Taylor were being offered to rebut a suggestion of recent fabrication. (R 834, 841)

A witness' testimony may not be corroborated by his own prior consistent statements. Van Gallon v. State, 50 So.2d 882 (Fla. 1951); McRae v. State, 383 So.2d 289 (Fla. 2d DCA 1980). The Florida Evidence Code makes an exception to the rule:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> * * *

> (b) Consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive or recent fabrication...

§90.801(2)(b), Fla. Stat. (1983).

It was already established, on Robert Taylor's direct testimony, that he had given Detective Hansen a statement in October 1982. (R 753, 754) It is true that defense counsel brought out, on cross and redirect examination, that Taylor had made a deal regarding multiple, unrelated armed robbery charges in Orange County. (R 756, 758-759, 781-782) This does not, however, bring the prior consistent statement presentation within the exception of an implied charge of improper influence or motive; rather, it was only fair to bring out that Taylor had struck a bargain with the State, lest the direct testimony that he had not received any consideration for testimony in this case be construed to mean that he had not made any deals in his own interest. (R 752, 753) Moreover, the fact that Taylor was looking forward to prosecution for murder in the State of Georgia, negates the exception, which is only applicable where the statement is made prior to the existence of a fact suggested to indicate motive to falsify. McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982). Taylor had no promises that the Orange County prosecutor would speak for him in Georgia, but it "would help." (R 783)

The only "improper motive" suggested by the defense for Taylor's trial and interview testimony were that it might help him on a murder charge in Georgia and that he, and not Appellant,

was Zack Miller's murderer. (R 1366-1383) Since there was no suggestion of "recent fabrication" by the defense, the verbatim introduction of Taylor's 1982 statement was improper and unfair. Art. I §§9 and 16, Fla. Const.; Amends. V, VI, and XIV, U.S. Const.

POINT VI

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR A MISTRIAL BASED ON THE PROSECUTOR'S COMMENT IN CLOSING ARGUMENT ON APPELLANT'S FAILURE TO TESTIFY AT HIS TRIAL.

In his closing argument to the jury, the prosecutor discussed the testimony of Richard Miller, who testified that he learned the facts of this case while he and Appellant were housed in neighboring isolation cells in the Orange County Jail. (R 1258, 1263-1267) While reviewing the bargain that Miller had struck with the State in exchange for his testimony, the prosecutor said:

> MR. TAMEN: Nobody has come here and said, Mr. Miller's testimony was wrong, or incorrect, or that that was not the deal that he was offered.

(R 1398) The prosecutor then went on to emphasize that Appellant was the only possible source of Miller's knowledge about the case, and added:

> MR. TAMEN: . . . and you haven't, number one, heard any evidence that Donald DuFour had any legal papers in the cell with him, and, number two, you haven't heard that any of his legal papers --

(R 1400)

Appellant's counsel moved for mistrial, on the basis of the prosecutor's comment on Appellant's right not to take the stand. (R 1400-1402) The motion was denied. (R 1402)

Rule 3.250 of Florida Criminal Procedure prohibits a prosecutor from commenting to either the jury or the court on an accused's failure to testify in his own behalf, and if the

comment is subject to an interpretation which would bring it within the prohibition, the comment's susceptibility to a different, valid construction does not remove it from the operation of the Rule. Childers v. State, 277 So.2d 594 (Fla. 4th DCA 1973). This Court held in David v. State, 369 So.2d 943 (Fla. 1979), that any comment which is fairly susceptible of being interpreted by the jury as referring to a criminal defendant's failure to testify constitutes reversible error, without resort to the harmless error doctrine.

Appellant presented no evidence at the guilt phase of his trial. (R 1332, 1459) Normally a prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence during argument to the jury. White v. State, 377 So.2d 1149 (Fla. 1980); but the prosecutor's argument was that all of Miller's information about the case had to come from Appellant himself. (R 1259, 1399) Only Appellant, therefore, could contradict him. The prosecutor's remark that "Nobody has come here and said, Mr. Miller's testimony was wrong, or incorrect," was not merely susceptible to being interpreted as a comment on Appellant's failure to testify; it could not have been interpreted otherwise. The motions for a mistrial should have been granted. Art. I §§ 9 and 16, Fla. Const.; Amends. V, VI, and XIV, U.S. Const.

POINT VII

THE TRIAL COURT ERRED BY CONDUCTING A PRETRIAL HEARING AND HEARING TESTIMONY OUTSIDE THE PRESENCE OF APPELLANT WHERE HIS PRESENCE HAD NOT BEEN WAIVED.

At the May 11, 1984, hearing on pretrial motions, Appellant was falling asleep, could not read, and, his counsel represented, was not able to effectively assist his lawyers at the hearing. (R 1050) The trial court proceeded with the hearing, finding that there was no need for Appellant to be present anyway, since there was no testimony being taken at that hearing. (R 1052) Argument was had on several motions, and the hearing concluded with Appellant's request for Tylenol. (R 1101)

The following Tuesday, Appellant had been hospitalized. (R 1105, 1108) The Orange County Jail corrections director testified at that hearing that Appellant had refused to eat but had, the day before, consented to intravenous feedings and had been admitted to the hospital. (R 1107, 1108, 1110) The director had not heard that Appellant had been less than lucid in the jail, but neither had he sought any such information. (R 1109) He told the court that Appellant could be transported to court that day, if the judge ordered it. (R 1112)

The prosecutor asked the trial court to find that Appellant's absence was due to his own actions, and the trial court stated:

> THE COURT: Most of the things we will be covering are not evidentiary. They are legal argument on motions that have been filed up to this point in time, so his presence is not mandated by the Florida Rules of Procedure, by

> rights, United States and Florida Constitution.
>
> There are some matters that would be taken up, but I would be finding that his actions are not due to anyone other than his own fault and arose from circumstances that were totally within his own control. (R 1113)

Defense counsel objected to the typification of Appellant's starvation as a "hunger strike," pointing out that there had been only a hearsay basis for that conclusion and that there "might be a good reason of mistrust from jail personnel." (R 1114) He cited an incident wherein Appellant fell in the jail, struck his head, and lay bleeding for more than an hour and a half. (R 1113) Appellant's presence was specifically not waived, and his absence was objected to. (R 1114)

Although "most of the things" the court and counsel were "covering" on May 15th were not evidentiary, the hearing included testimony on Appellant's motion to suppress statements allegedly made to Richard Miller a/k/a Montgomery et cetera. (R 1123-1141) That motion, while bottomed on the Sixth Amendment principles of United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), essentially relied on the facts surrounding the purported conversations. Appellant's presence was critical in order to assist counsel in examining the jail captain who testified at the hearing.

Rule 3.180 of the Florida Criminal Rules provides that the defendant shall be present in all prosecutions:

> (3) At any pre-trial conference; unless waived by Defendant in writing;
>
> * * *

> (6) When evidence is addressed to the court out of the presence of the jury for the introduction of evidence before the jury.

Rule 3.180(a)(3) and 3.180(a)(6), F.R.Crim.P.

Appellant was charged with, and convicted of, a capital offense. In State v. Melendez, 244 So.2d 137 (Fla. 1971), involving a noncapital offense, this Honorable Court held that where a defendant is absent during jury selection, if he has counsel he is presumed to have constructive knowledge of the proceedings--but only where he later acquiesces or ratifies his counsel's actions in his absence. See Rule 3.180(a)(4), F.R.Crim.P. In Francis v. State, 413 So.2d 1175 (Fla. 1982), a capital case, Francis' attorney waived his presence during the exercise of peremptory challenges. Because the record did not affirmatively demonstrate that Francis knowingly waived his right to be present or that he acquiesced in his counsel's actions, this Court found that the State had failed to show that Francis had made a knowing and intelligent waiver and his conviction was reversed. Likewise, in this case, when Appellant was next present in the courtroom, on May 21st, the trial court made no inquiry into his absence on the 15th nor, Appellant submits, did it make sufficient inquiry on the 15th into the circumstances of his absence. See Rule 3.180(b), F.R.Crim.P.

Because Appellant was absent during an essential stage of the proceedings against him at which the Criminal Rules state that he shall be present, and because there was neither a sufficient showing that his absence was voluntary or that he acquiesced in or ratified the holding of the proceedings in his

absence, he was deprived of his right to due process of law below. Art. I §9, Fla. Const.; Amends. V and XIV, U.S. Const.

POINT VIII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS FOR A CONTINUANCE.

On May 4th and May 11th, Appellant's counsel asked that his May 21st trial date be continued. (R 1011, 1038) Defense counsel had gained access to key witnesses only within the past month, and had yet to be able to reach some other witnesses who had interviewed Robert Taylor and Richard Miller. (R 1011) Robert Taylor had finally been made available for deposition, but had invoked his Fifth Amendment right against self-incrimination and thus thwarted attempts to examine him thoroughly. (R 1012, 1022) In other words, with ten and then only six working days left until trial, defense counsel found himself in the position of being continuously furnished with new witness names. (R 1012, 1038)

The prosecutor responded that the new witnesses whose names had just been furnished to defense counsel were "collateral," and that his chief witness, Robert Taylor was "on loan" to Orange County from Georgia where prosecutors were very anxious to put him on trial for murder. (R 1013, 1016, 1017, 1041, 1049) Zack Doyle Miller's family also was anxious to see the case tried at an early date. (R 1018, 1019, 1042)

Earlier motions by defense counsel to authorize travel to Mississippi and Georgia to investigate Robert Taylor, Ray Ryan, and their testimony, had been denied. (R 967, 2363-2364, 2400, 2401) The prosecutor in this case did not "have the time" to travel to Mississippi, and the investigators that Appellant's counsel wished to interview had not investigated this case. (R

961-963) Although defense counsel argued that he could not prepare Appellant's defense based on the State's representations and the prosecutor's lack of time, the trial court denied the motions to travel out of state, and directed that the essential witnesses (but not the officials to whom they had given statements) be made available to the defense within thirty days of trial, as well as the Mississippi offense reports. (R 967, 968)

Ray Ryan, a former associate of Appellant's who testified that Appellant admitted to committing the murder charged in this case, was not made available to the defense until May 4th, because he had been paroled from prison in Georgia before the State of Florida had secured his presence for the promised deposition thirty days before trial. (R 1024, 1026, 1048) Three of the four major witnesses against Appellant were not available to the defense until late April preceding the May 21st trial. (R 1046)

The trial court should have granted the continuance. If a trial court denies a motion for continuance, its ruling will not be disturbed, unless a palpable abuse of discretion is demonstrated. Jent v. State, 408 So.2d 1024, 1028 (Fla. 1981). The grounds for the trial court's denial of the motions for continuance, i.e., that unless the May 21st trial date was adhered to, witnesses might not be available at a later date, demonstrate this abuse. (R 1028) The reason at least one of the witnesses, Robert Taylor, might not be readily available later was that the prosecutor in this case had obtained his presence "out of turn" and "on loan" from the state of Georgia where he

faced murder charges. (R 1017, 1029) Appellant voiced no objection to the possibility that a continuance under these circumstances could mean that his trial might be delayed indefinitely while Georgia completed its proceedings against Taylor. The prosecutor in this case, however, feared that once that case was concluded, Appellant's counsel might try to redepose Taylor. (R 1012, 1029) The State's creation of a situation in which a major prosecution witness would be available to the defense for only a short while is inadequate grounds for denying Appellant's motion for a continuance, particularly in light of the fact that it was the prosecutor's busy schedule which prevented Appellant from taking earlier, adequate steps to obviate his need for additional time to prepare for trial. Under the circumstances, Appellant was denied effective assistance of counsel at his trial. Art. I §§ 9 and 16, Fla. Const.; Amends. V, VI, and XIV, U.S. Const.

POINT IX

THE TRIAL COURT ERRED BY REFUSING TO IMPOSE SANCTIONS FOR THE PROSECUTION'S VIOLATION OF DISCOVERY RULES IN BARRING DEFENSE COUNSEL FROM THE DEPOSITION OF A DEFENSE WITNESS.

Prior to trial, Appellant's counsel moved to exclude the testimony of Stacey Sigler in a motion which recited:

> b. There has been a serious violation of F.R.Cr.P. 3.220 relating to discovery. In Stacy Sigler's original statements to the police in October of 1982, she denied knowledge as to any potential criminal activities of the Defendant. In December of 1983, Stacy Sigler was subpoenaed by Assistant State Attorney, Frank Tamen[,] to give a statement in reference to this case. Prior to the date of the proposed statement, the defense herein supplied the State with a witness list pursuant to reciprocal discovery rules and said list included Stacy Sigler. After receipt of said witness list, Assistant State Attorney Tamen "released" Stacy Sigler from his subpoena and proclaimed the statement to be taken would now be "voluntary". This action was clearly a sham and was designed to thwart the provisions of F.R.Cr.P. 3.220(b)(3) which provides, in part: "When the prosecution subpoenaes [sic] a witness whose name has been furnished by defense counsel . . . reasonable notice shall be given to defense counsel as to the time and place of examination pursuant to the subpoena. At such examination, defense counsel shall have the right to be present and to examine the witness." The required notice was not given in this cause. Defense counsel, through other means, found out the time and place of the deposition and did attempt to be present. Assistant State Attorney Tamen demanded the defense attorney leave the deposition room and even went to the point of threatening physical expulsion. Under such duress, defense counsel exited. Subsequently, a "statement" was taken of Stacy Sigler where

> she repudiated earlier statements she had made. During said statement, Sigler was frequently led in questioning and was supplied facts by the detectives who were present as well as by Assistant State Attorney Tamen. Accordingly, her statement is not, in large part, her own words but is, in fact, the words of others. Mr. Tamen's actions were a gross ignorance of the discovery rule and the only appropriate sanction would be to prohibit t[h]e calling of Stacy Sigler as a witness in this cause.

Although the trial court, denying the motion to exclude Stacey Sigler's testimony, found that there was no improper use of procedure or subpoenas, Appellant would argue that the denial of the motion was error, and that some sanction should have been imposed. (R 1202) The State's right to subpoena witnesses to take ex parte testimony may not be exercised in such a way as to defeat the discovery provisions of Florida's Rules of Criminal Procedure. Able Builders Sanitation Co. v. State, 368 So.2d 1340 (Fla. 3d DCA 1979). Under Rule 3.220(b)(3), a prosecutor must give notice to and allow defense counsel to be present at a witness examination, where an indictment has been filed and the defendant has furnished the State with a list of witnesses he expects to call at trial, which list contains the name of the witness the State has subpoenaed. This requirement was clearly thwarted by the prosecutor's actions in this case. The State was free to depose Stacey Sigler, even though she was listed as a defense witness and an indictment in this case had been returned almost a year earlier, but not on an ex parte basis. State v. Barreiro, 432 So.2d 138 (Fla. 3d DCA 1983). (R 2224) In Barreiro, the District Court noted that:

> "If defense counsel wants to protect against the State's ex parte examination of a witness, he can do so by furnishing the witness's name on his list of defense witnesses."

Id., 432 So.2d at 140, fn. 5. This, of course, is precisely what Appellant had done, and the State's violation of the discovery Rule under these circumstances called for sanctions. The trial court erred by failing to impose them. Art. I §9, Fla. Const.; Amends. V and XIV, U.S. Const.

POINT X

THE TRIAL COURT ERRED BY FORCING APPELLANT TO APPEAR BEFORE THE JURY THROUGHOUT HIS TRIAL SHACKLED IN LEG IRONS.

At his trial, Appellant's counsel objected to the fact that Appellant's legs were hobbled by leg irons, with a makeshift "modesty panel" in front of the defense table supposedly disguising that fact. (R 3, 5, 333, 334, 1505-1506) The covering on the defense table stuck "out like a sore thumb," according to defense counsel's observations. (R 3) The prosecutors opposed unshackling Appellant, because he might attempt an escape, however unsuccessful it might be, and he was armed with a pen. (R 334-335) Because Appellant was already sentenced to death in Mississippi, the trial court wanted the shackles to remain in place, although the judge conceded that any attempt to escape would be a failure. (R 335) The leg restraints were left on, to "prevent or seriously dampen any thoughts he may have on attempting to make a break." (R 335) Defense counsel pointed out that that he and Appellant at the defense table were surrounded by bailiffs, and Appellant was cornered by defense counsel's chair. (R 335)

An accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption of innocence so basic to the adversary system. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). Williams held that compelling an accused to wear jail clothing furthers no essential state policy. In light of the fact that Appellant was guarded by several bailiffs in the

courtroom and was himself armed only with a writing pen, there appears to be no essential reason why the fact of his custody had to be further emphasized to the jury by his wearing leg shackles.

POINT XI

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR A MISTRIAL MADE WHEN AN EXCUSED JUROR, AGAINST THE COURT'S INSTRUCTIONS, COMMUNICATED THE REASON FOR HER EXCUSAL TO THE REMAINING JURORS.

During Appellant's trial, one of the jurors, Phyllis Girdner, reported that a strange telephone call had been received at her house. (R 1282, 1283) Appellant requested that she be replaced by an alternate juror:

> MR. DVORAK: If a woman receives a strange phone call, and it's in reference to this case, I really don't think she is going to think that you made it, or Mr. Tamen made it, or I made it, and that leaves one individual who could have made it, and just the fear of that in her mind, I think, would justify replacing of her with one of the alternates in the case. So, we would make that request.

(R 1283)

The request was taken under consideration, and later granted. (R 1283, 1344) Defense counsel specifically sought assurance in the first instance that Mrs. Girdner had not related the incident to any of the other jurors, and acquiesced in the trial court's deferral of ruling on his request, "As long as she is not talking to anyone." (R 1283-1284)

Immediately prior to the closing arguments, the trial court did excuse Mrs. Girdner, who stated that she had mentioned the phone call, after the judge had said not to. (R 1344, 1346, 1347) Defense counsel had requested that her excusal be conducted in private, so that no communication of the matter could be made to the rest of the jury, and made a motion for mistrial when

it was learned that the juror had violated the court's instructions. (R 1345, 1348) Further inquiry showed that Mrs. Girdner had told Dianne McGee, another juror, about the telephone call. (R 1349, 1350) She revealed that it was Mrs. Girdner's husband who had answered the phone and talked to a caller who hung up on him. (R 1349) Of special concern to the defense was the comment by Mrs. Girdner to the other jurors that "nothing like this had ever happened" to her before, during the trial of a first-degree murder charge. (R 1350, 1352)

After the examination of Mrs. McGee, Appellant's repeated motion for a mistrial and discharge of the jury panel was denied. (R 1352, 1354) Then Juror Vicky Kline was asked if she had heard anything about the telephone call:

> VICKY KLINE: No, not until just a few seconds ago.
>
> THE COURT: Okay. And what did you hear just a few seconds ago?
>
> VICKY KLINE: Somebody came in and she said maybe, we could not figure out why we were coming in here individually, and she said, maybe it has to do with a phone call that she had gotten, and I said, what was it, and she didn't say anything else, and when you said that, that is when I heard it, but not since then.

(R 1355)

As defense counsel put it: "[W]e have a whole panel knowing that there was a mystery phone call... and now she is off the jury." (R 1356)

Whether the "mystery phone call" was interpreted by Mrs. Girdner to have been connected with this case or not, she

was specifically instructed not to communicate the fact of the call, or her excusal, to the other jurors--but immediately did so. The court's instruction that the call had nothing to do with this trial could not erase the taint, insofar as the drastic step of excusing a juror and replacing her with an alternate had occurred on account of it. (R 1358-1360) The action had been taken at defense counsel's request, but defense counsel had been reasonably assured that the details of the situation would not be revealed to the rest of the panel, because the court had so instructed. (R 1283, 1284, 1345) Because of the juror's misconduct, the motions for a mistrial should have been granted. Art. I §16, Fla. Const.; Amends. VI and XIV, U.S. Const.

POINT XII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S PROPOSED INSTRUCTION ON THE JURY'S SENTENCING RECOMMENDATION.

Appellant requested that the trial court tell the jury:

> With regard to your decision to recommend life or death, the Court hereby instructs you that there is nothing which would suggest that the decision to afford an individual defendant mercy violates our Constitution. You are empowered to decline to recommend the penalty of death even if you find one or more aggravating circumstances and no mitigating circumstances.

(R 2693) The request was denied. (R 2693) The trial court did, however, instruct:

> THE COURT: However, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether a sufficient mitigating circumstance or circumstances exist to outweigh any aggravating circumstances found to exist.

(R 1632-1633)(Emphasis supplied.)

In an appeal from a death sentence, this Honorable Court may presume that death was the proper sentence, where one or more aggravating circumstances are found unless they are overridden by one or more mitigating circumstances. Randolph v. State, 8 FLW 446 (Fla. November 10, 1983); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied 416 U.S. 943 (1974). But, as Justice McDonald observed in his concurring opinion in Randolph, supra, that rule should be restricted to an appellate standard,

not as a guide to the jurors deciding a defendant's fate by their sentencing recommendation.

The jury is an "actor in the criminal justice system" that makes a decision to remove a defendant from consideration as a candidate for the death penalty. Gregg v. Georgia, 428 U.S. 153 at 199, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) Since the jurors represent a stage in the proceedings at which pure discretion (or mercy) may be exercised, the trial court should inform them of that fact, if requested to do so by the defendant. They should know that they are not bound by whether the aggravating circumstances are outweighed or not by mitigating circumstances. They should know that aggravating circumstances may be outweighed by the jurors' consciences.

The requested instruction is taken directly from the United States Supreme Court's decision in Gregg, supra, 428 U.S. at 203. The "isolated decision of a jury to afford mercy" does not render other recommendations of death unconstitutional. Id.

Since the jury in a capital case is constitutionally empowered to show mercy, the person whose life is in their hands is entitled to have them informed of that power. The instruction should have been given. Art. I §§9, 16, and 17, Fla. Const.; Amends. V, VI, VIII, and XIV, U.S. Const.

POINT XIII

THE TRIAL COURT ERRED BY PERMITTING EXTENSIVE TESTIMONY REGARDING A PRIOR CAPITAL CONVICTION TO BE INTRODUCED AT THE PENALTY PHASE OF APPELLANT'S TRIAL WHERE IT BECAME THE FEATURE OF THAT PORTION OF THE TRIAL.

Appellant was convicted of first-degree murder in Mississippi on March 31, 1983.[1] (R 1560) Defense counsel in this trial did not dispute the fact that Appellant had previously been convicted of a capital felony, but objected to the introduction of extensive details, from Robert Taylor, about the Mississippi murder. (R 1501, 1503) Robert Taylor had testified against Appellant in the Mississippi murder trial, in exchange for a life sentence, and all of the information about what happened in that case had come from Taylor. (R 1532, 1533, 1545, 1552, 1560, 1567, 1569)

In the sentencing proceeding, testimony about the details of a prior felony involving the use or threat of violence to the person is properly admitted, and certain types of evidence which may be inadmissible in a trial on guilt may be admissible and relevant to the aggravating and mitigating circumstances of a capital offense. Perri v. State, 441 So.2d 606 (Fla. 1983); Alvord v. State, 322 So.2d 533 (Fla. 1975); §921.141(5), Fla.

---

[1] DuFour v. State, 453 So.2d 337 (Miss. 1984), cert. pending, U.S. Sup. Ct. Case No. 84-5626, on same grounds (indigent accused of a capital crime denied appointment of an investigator where defense dependent on factual matters) as Caldwell v. Mississippi, 443 So.2d 806 (Miss. 1983), cert. granted October 9, 1984, Case No. 83-6607, 83 L.Ed.2d 182.

Stat. (1983). A defendant is entitled, however, to a fair and impartial penalty proceeding, free from prejudicial and inflammatory statements. Singer v. State, 109 So.2d 7, at 30 (Fla. 1959); Art. I, §9, Fla. Const.; Amends. V and XIV, U.S. Const.

The details of the Mississippi murder conviction comprised the State's entire case at the penalty trial. (R 1533-1570) Recognizing that the events surrounding a prior conviction are admissible in penalty proceedings, Elledge v. State, 346 So.2d 998 (Fla. 1977), Appellant nevertheless would argue that in this case the State's presentation simply went too far. One reason for this is based on an analogy Appellant would draw between the admissibility of collateral crimes evidence in guilt phase proceedings and in sentencing proceedings. While some evidence of prior offenses may be admissible at a trial on guilt, this Honorable Court in Williams v. State, 117 So.2d 473 (Fla. 1960), held that the State may not make a prior or subsequent offense a feature instead of an incident of the trial. A similar policy should be adopted in capital sentencing proceedings, i.e., that even that broad range of probative matters which the statute deems admissible should be restricted to a limited, incidental status. §921.141(1), Fla. Stat. (1983). Otherwise, a capital defendant's prior criminal acts can become the focal point of the penalty trial and operate to deny the defendant's constitutional right to a fair proceeding.

The second reason why the State's making the Mississippi murder the "main event" of the sentencing trial in this case was unfair is that here, Appellant's sentence for the murder of Zack

Miller was being determined. He had already been sentenced--to death--for the murder of Earl Wayne Peeples in Mississippi. (R 1501, 1505, 1508) Appellant was, in effect, being retried as to sentence for the Mississippi stabbing murder which was in fact committed subsequent to the Orange County gunshot killing. (R 1541, 1542) When Zack Miller was shot in the head, he was rendered unconscious almost immediately, and would have felt no pain from that wound. (R 687, 692) Peeples, on the other hand, died from numerous stab wounds inflicted with extreme force all over his body, including one wound which hearsay testimony said had cut his heart to pieces. (R 1561, 1562) The trial judge in this case sustained an objection to the Florida prosecutor's asking the Mississippi prosecutor what the coroner's report that he was reading from said Peeples' sensations were. (R 1562) Since there was no basis for the State to argue that Zack Miller's murder was especially heinous, atrocious, and cruel, therefore, that aggravating factor was instead established by the extensively detailed account of Earl Wayne Peeples' death, under the guise of evidence that Appellant had been previously convicted of a capital felony. §§921.141(5)(b), 921.141(5)(h), Fla. Stat. (1983). The trial court's order sentencing Appellant to death, ostensibly for Zack Miller's death, makes note of the Mississippi murder as being "particularly brutal, violent, and senseless." (R 1657-1658, 2720)

Since the nature of a separate crime, the ultimate penalty for which has already been ordered, probably influenced the jury's recommendation and undoubtedly affected the trial

court's determination of his sentence in this case, Appellant should be afforded a new sentencing trial at which the details of his conviction for murder in Mississippi will be properly restricted. Art. I, §9, Fla. Const.; Amends. V and XIV, U.S. Const.

POINT XIV

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

Prior to trial, Appellant moved to strike death as a possible penalty, because the indictment by which he was charged failed to allege the aggravating factors which might subject Appellant to the death penalty. (R 2516-2517, 1075-1077) Appellant recognizes that this Honorable Court has held, in Sireci v. State, 399 So.2d 964 (Fla. 1981), that where an indictment charges all the elements of murder in the first degree, the defendant has notice of the aggravating circumstances. Sireci dismissed analogies to the minimum three-year sentence pursuant to Section 775.087(2) of the Florida Statutes, which cannot be imposed unless an indictment alleges that the defendant carried a firearm, and to the burglary and robbery statutes where various aggravating circumstances elevate the degree of burglary or robbery. Appellant, however, urges this Honorable Court to review its position in Sireci, and consider the following argument.

Sireci distinguished substantive "degrees" of burglary and robbery and "aggravating factors" that merely increase the penalties therefor, saying that it is not "aggravating factors" that determine a sentence for burglary but it is the "elements" which make a burglary a felony of a particular degree. The effect of classifying felonies by degrees, from third-degree to life, is simply to determine the number of years in prison to which a convicted person can be sentenced. §§ 775.08(1), 775.082(3),

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

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

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

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

Appellant's contention that these factors are on a par with "elements" of a crime punishable by death is supported by

this Honorable Court's decision in Vaught v. State, 410 So.2d 147 (Fla. 1982), in which a challenge to the capital felony sentencing law's constitutionality was rebuffed by a finding that the aggravating factors were not merely procedural:

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

The State contended in Lindsey, supra, that the defendants were not prejudiced at their trial by the omission of assault's elements from the information. Appellee may argue that Appellant was not prejudiced at his trial by the indictment's

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

POINT XV

APPELLANT WAS IMPROPERLY SENTENCED TO DEATH.

The trial court erroneously found that the evidence had established that the murder of Zack Doyle Miller was committed for the purpose of avoiding a lawful arrest, and that it was committed in a cold, calculated, premeditated manner, without any pretense of moral or legal justification. (R 1657-1568, 2720-2721) Neither of these aggravating factors had been proven beyond a reasonable doubt, and therefore must be stricken. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

A. THE TRIAL COURT INAPPROPRIATELY FOUND THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

Section 921.141(5)(e), Florida Statutes (1983), provides that as an aggravating circumstance, the trial court may find:

> (e) The capital felony was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody.

This aggravating circumstance is typically found where the evidence clearly demonstrates that the defendant killed a police officer who was attempting to apprehend the defendant. E.g., Mikenas v. State, 367 So.2d 606 (Fla. 1978); Cooper v. State, 336 So.2d 1133 (Fla. 1976). However, the circumstance is not limited to those situations and has been found to exist where civilians were killed. Riley v. State, 366 So.2d 19 (Fla. 1978).

This Honorable Court in Riley, supra, held that an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses. See also Menendez v. State, 368 So.2d 1278 (Fla. 1979).

The trial court based its finding that the crime was committed to avoid arrest on the fact that Appellant could have avoided killing Zack Miller, and on the basis of Ray Ryan's testimony that Appellant allegedly told him, "Anybody hears my voice or sees my face has got to die." (R 2720, 809) In addition to this, however, there was also the testimony of the resident who lived next to the orange grove where Zack Miller's body was eventually found. She said that she heard a "commotion" in the orange grove on the night of September 4, 1982, which sounded like running and angry yelling back and forth between two men. (R 619-623) This evidence is more consistent with a struggle or resistance to the alleged robbery than with the avoidance of lawful arrest. Since this factor was not proved beyond a reasonable doubt, it should be stricken. State v. Dixon, supra.

B. THE TRIAL COURT INAPPROPRIATELY FOUND THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial court found that Section 921.141(5)(i), Florida Statutes (1983), was applicable in sentencing Appellant because he had announced his plans to commit a murder, and

because he carried out those plans. (R 1658, 2721) These are the facts upon which the jury had convicted Appellant of first-degree murder and, Appellant would submit, they are insufficient to support any further finding in aggravation of the crime of which he was found guilty. The level of premeditation needed to convict in the guilt phase of a first-degree murder trial does not necessarily rise to the level of premeditation contemplated by Section 921.141(5)(i). Jent v. State, 408 So.2d 1024 (Fla. 1981). The opportunity to reflect on and contemplate the crime he was about to commit, relied upon by the trial court, is nothing more than the element of premeditation required to prove murder in the first degree. §782.04(1)(a)(1), Fla. Stat. (1983). It does not compare with the calculating aforethought present in such cases as Hill v. State, 422 So.2d 816 (Fla. 1982) (wherein the victims were stripped, beaten and tortured over a period of hours before being killed); Middleton v. State, 426 So.2d 548 (Fla. 1982) (wherein the defendant sat for hours holding a shotgun and thinking about killing the victim); or Jent v. State, supra (wherein the defendant transported his captive victim to the scenes of beating, rape, and setting her on fire while still living).

Since two of the aggravating circumstances found by the trial court to exist in this case are not supported by the evidence beyond a reasonable doubt, Appellant's sentence should be vacated and this cause remanded for a new sentencing hearing. Art. I, §9; Amends. V and XIV, U.S. Const.

POINT XVI

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

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

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

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

The Florida capital sentencing process at both the trial and appellate levels fails to provide for individualized

sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976), with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

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

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

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

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

erred when it failed to grant Appellant's motion to preclude challenges for cause. (R 2507-2508, 1087-1089)

The Amendment of Section 921.141, Florida Statutes (1979), by adding aggravating factor 921.141(5)(i) (cold and calculated) renders the statute in violation of the 8th and 14th Amendments to the United States Constitution because it results in death being automatic unless the jury or trial court in their discretion find some mitigating circumstances out of an infinite array of possibilities as to what may be mitigating.

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

This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 414 So.2d 185 (Fla. 1982), cert. denied, 459 U.S. 895, 103 S.Ct. 192, 74 L.Ed.2d 155 (1982) (Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death sentences encompasses two functions. First, death sentences must

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

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

CONCLUSION

For the reasons expressed in Points I through XI herein, Appellant respectfully requests that this Honorable Court reverse his conviction and remand this cause to the trial court for a new trial. In the alternative, and for the reasons expressed in Points XII through XVI herein, Appellant respectfully requests that this Honorable Court vacate his sentence and remand this cause to the trial court for a new trial on the penalty.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Brynn Newton

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
1012 South Ridgewood Avenue
Daytona Beach, Florida
32014-6183
Phone: (904) 252-3367

ATTORNEY FOR APPELLANT.

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. Donald W. DuFour, Main Jail, Post Office Box 1440, Orlando, Florida 32801 this 25th day of January, 1985.

Brynn Newton

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER