IN THE FLORIDA SUPREME COURT

JAMES FLOYD, :

Appellant, :

vs. : Case No. 66,088

STATE OF FLORIDA, :

Appellee, :

:

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On March 6, 1984, a Pinellas County grand jury indicted James Floyd for first degree murder for the stabbing death of Annie Barr Anderson. (R7-8) The State also filed an information charging Floyd with two counts of forgery, two counts of uttering a forgery and two counts of grand theft. (R15-18) Upon the State's motion (R25), the court consolidated the indictment case and the information case for trial. (R44) Floyd pleaded not guilty to all charges. (R41-42) He proceeded to a jury trial before Circuit Judge Philip A. Federico. (R226-941) The jury found Floyd guilty as charged of all counts on August 23, 1984. (R88-84A,883-884) After hearing additional evidence during the penalty phase of the trial on the following day, the jury recommended a death sentence for the murder by a 7 to 5 vote. (R93,940)

On August 27, 1984, Circuit Judge Federico adjudged Floyd guilty on all counts. (R94,103-104) He sentenced him to death for the murder (R105-106), and five years imprisonment on each of the six counts charged in the information case. (R96-102) In support of the death sentence, the court found five aggravating circumstances: (1) homicide committed during the commission of a burglary; (2) homicide committed to avoid arrest; (3) homicide committed for pecuniary gain; (4) homicide was especially heinous, atrocious or cruel; and (5) homicide committed in a cold, calculated and premeditated manner. (R107-108,949-951)(A1-3)

James Floyd timely filed his notice of appeal to this Court on October 17, 1984. (R109)

STATEMENT OF THE FACTS

Annie Barr Anderson was an elderly woman who lived alone in her home in St. Petersburg. On January 17, 1984, a neighbor and her pastor called the police to check on her welfare. (R402,422) She had not been seen since the previous day. (R392-395,399,422) Sergeant Thomas Gavin and Officer Roy Olsen arrived at Anderson's residence around 8:44 p.m. (R402,422) The officers checked the house for an easy access and found the back door leading into the kitchen unlocked. (R403,423) They checked through out the house, and finally, upon entering a second bedroom, they found Annie Anderson (R404,424) She was fully clothed, lying on her bed, with blood covering her abdomen. (R404-405,424) Several stab wounds had caused her death. (R449-451)

Associate Medical Examiner Edward R. Corcoran examined the body at the scene and also performed an autopsy on the following day. (R449-451) He found one stab wound to the chest area, eleven to the abdomen, and one in the wrist. (R454-456) The wound to the chest was the most severe since it penetrated the heart causing bleeding into the sac around the heart and interfering with the heart's functioning. (R456) Death would have resulted from that wound within a few minutes. (R457) Corcoran concluded that Anderson died rapidly (R469), and that death occurred on January 16, 1984. (R469)

Detectives and crime scene technicians examined the scene and collected physical evidence. On the bed where the

body was found was a partially folded table cloth which appeared to have been used to wipe blood off an instrument of some kind. (R411) From a white sweater which Annie Anderson wore (R463), two Negroid facial hair fragments were recovered. (R699,702-703) Three Negroid head hair fragments were discovered on a bedsheet and five Negroid hair fragments were found on a white bedspread. (R701-702) Technicians lifted latent fingerprints from the house but none were of identifiable quality. (R562-564) Motorcycle tire tracks were located and photographed on the driveway of the residence. (R612-613,672-682) Finally, two fresh chips were found on the inside frames of two of the bedroom's windows. (R406-407,426-433) They appeared to have been made by someone attempting to pry open the windows, which had been painted shut, from the inside. (R406-407,426-433) There was no evidence of pry marks on the outside leading detectives to conclude that the point of entry was the unlocked back door. (R585)

At approximately 4:00 p.m. on January 16, 1984, Zelma Ravenel, a teller at Landmark Bank, cashed a check for James Floyd. (R478-483) The check was made payable to him on the joint account of Annie Barr Anderson and Ann Shirley Anderson. (R480-482) Ann Shirley Anderson was Annie Barr Anderson's daughter. (R551) The check was signed Ann S. Anderson (R482), but she testified at trial that the signature was not hers. (R551-553) Bank security cameras photographed the transaction and pictures of Floyd were introduced into evidence. (R471-477,480-481)

On January 18, 1984, James Floyd attempted to cash another check at the Landmark Bank on the same account. (R484-485) Floyd and his friend, Huie Byrd, rode their motorcycles to the bank's drive-in teller. (R484) Kenneth Williams, the teller, was concerned about the check and advised Floyd he would have to have it approved by the customer service manager whose office was across the street. (R485-486) The service manager, Mark Baldwin, verified that the account had sufficient funds. (R488) As he walked to have the signature verified, he recalled that the bank had received a report about the account holder having been found dead. (R488-489) He advised his boss who, in turn, called the police. (R488-490)

Detective and uniformed officers arrived at the bank in response to the call. (R494-495,512) Detective Buggle advised the uniformed officer, Thomas Lockwood, to enter through the south door. (R494) Buggle, Detective Kepto and Lockwood walked into the bank and approached the desk in the lobby area where Floyd sat. (R495,513) Buggle identified himself and stated he was investigating the check. (R495-496,513) He began to frisk Floyd. (R496) Floyd, however, turned and ran from the bank. (R496) The officers chased him. (R496-497) Finally, two detectives in an unmarked car pulled up and apprehended Floyd. (R497) Floyd was searched and a checkbook and checks for the Anderson account were seized from him. (R498-499) Officer Lockwood returned to the bank where he seized a brown jacket from Floyd's Honda motorcycle. (R514) Inside a pocket of the jacket, Lockwood found a sock with a brown substance on it. (R515) He also impounded the motorcycle. (R514-515)

Evidence seized from Floyd, including his fingerprints, his hair and blood samples was compared to the other items of evidence in the case. Latent fingerprints discovered on the checkbook and checks matched Floyd's known prints. (R543-550) The hair fragments found at the scene were identified as Negroid, but they could not be compared to Floyd's because the fragments were insufficient. (R698-703) Testing on the sock from Floyd's jacket revealed that the brown stain was human blood, type O. (R687-688) Annie Anderson's blood was also type O. (R687) Floyd's blood proved to be type B. (R688) Motorcycle tire tracks photographed at the scene were similar in tread design to the ones on Floyd's motorcycle. (R673-682) However, the design was a quite common one found on Japanese motorcycles. (R680) The tires were not positively matched to the tracks. (R680,682)

After Floyd's arrest, Ann Shirley Anderson discovered an old business card among her mother's papers. (R555) The card was from Suncoast Lawn Service and the owner was listed as Johnnie Floyd. (R555,559) The name "James" was handwritten in the upper right corner of the card. (R1002) Ann Anderson identified the handwriting as her father's, and she testified that he had been dead for at least eight years. (R561-562) She was not aware of anyone from Suncoast Lawn Service having done work for her mother. (R559)

After his apprehension, Floyd admitted to trying to pass a forged check. (R520-521) Officer Lockwood testified Floyd made such an admission spontaneously while in the prebooking area of the jail. (R520-521) Detective Greg Totz was also

present when Floyd made the statements. (R501-503) Over defense objections, Totz was allowed to testify to Floyd's explanation for running from the officers. (R504-509) Floyd said, "I know the police are mad at me for running, but I've been in jail before and I didn't want to go back." (R508)

Later, Detective Robert Engelke obtained a more detailed statement from Floyd in which he related his activities for January 16th through the 18th. (R590-602) Floyd stated that on Monday, January 16th, he spent the day at his girlfriend's apartment. (R594) He arrived there around 9:00 or 9:30 a.m. (R594); at approximately 5:00 p.m. some of his friends visited and he rode with them on their motorcycles downtown. (R595) His motorcycle was not running at that time. (R595-596) He returned to his girlfriend's apartment and remained until the following morning. (R595)

On Tuesday, January 17th, Floyd went to his mother's residence where he remained until 11:00 a.m. when he began walking to a friend's house to work on his motorcycle. (R596) Another friend, Larry, gave Floyd a ride to Bruce's house where Floyd's motorcycle was located. (R596-597) Huie Byrd was present assisting Floyd with the work. (R597) Around 2:00 p.m., Floyd borrowed Byrd's motorcycle and drove to the Waco Gas Station to buy beer. (R597) He bought a six-pack of Schlitz Bull. (R598) While there, he noticed a pile of papers near trash containers behind the station. (R598) Among the papers was the checkbook which he took. (R598) Byrd gave Floyd a ride to his mother's house. (R598) At first, Floyd said he remained there the rest of the day. (R598) He corrected that information and admitted

that he and his brother, Johnny Floyd, discussed the checks and cashed one for $500. (R601-602) James stayed at his mother's residence that night. (R598)

Wednesday morning, Floyd and his brother decided to cash another check for $700. (R599) Floyd met Huie Byrd and they were able to repair Floyd's motorcycle. (R599) Floyd and Byrd then rode their motorcycles to Landmark Bank. (R599) The drive-in teller would not cash the check. (R599) Floyd went inside the bank while Byrd waited outside with the motorcycles. (R599) The officers arrived and Floyd was arrested. (R599)

The State presented witnesses in an attempt to discredit Floyd's story. (R628-669) Edna Whitfield, Floyd's girlfriend, testified she had gone to her vocational school and to work on Monday, January 16th rather than remaining home with Floyd. (R629-632) Later that evening, he also gave her $120. (R633) She verified that Floyd had friends visiting in the apartment on Monday and Tuesday. (R639-640) Furthermore, she knew Floyd had been having trouble with his motorcycle. (R639-640) Huie Byrd said that he assisted Floyd in repairing his motorcycle and spent some time with him on January 16,17, and 18. (R643) Byrd said Floyd's motorcycle was running on Tuesday and Wednesday, but it did not run well. (R644,652-653) He also said that Floyd asked to borrow Byrd's motorcycle and another friend's on Monday, but both refused. (R645) Byrd, Floyd, and some others rode their motocycles together on Tuesday and Wednesday. (R647-648) Byrd also remembered that Floyd had a six-pack of Schlitz Malt Liquor on Tuesday. (R649) Finally, Anna Ferencz, a supervisor and clerk at the Waco Oil Station

where Floyd said he bought beer and found the checks, testified. (R662) She could not identify Floyd as a regular customer, and she found no record on the cash register receipt for a sale of a six-pack of Schlitz Bull Malt Liquor on January 16th or 17th. (R663-664) She also said that there were no papers around the trash dumpster (R664-665), however, she acknowledged that there were trash dumpsters for neighboring businesses about which she had no knowledge. (R665-669)

A cellmate of Floyd's, Gregory Lee Anderson, testified for the State. (R724) Anderson became acquainted with Floyd when they were secured in the same holding cell shortly after their arrests. (R726) They were also later incarcerated in the same cell area of the jail. (R727) Anderson befriended Floyd even though Anderson admitted that he "does not particularly care for" black people. (R743-744) Anderson wrote a couple of letters for Floyd. (R730) Anderson testified that during their conversations about their cases, Floyd admitted to the stabbing of a white woman. (R731) According to Anderson, Floyd said he was inside the woman's house to steal when she entered the room and surprised him. (R731-732) Upon that confrontation, Floyd stabbed her. (R731-732)

Anderson approached the detective who had arrested him with the information he had obtained from Floyd. (R732-734) In turn, Anderson told the story to the detective investigating the homicide and the assistant state attorney who was handling the case. (R734) Although Anderson denied being promised anything for his testimony, he admitted he did not give away

"freebies." (R769) He said that he was testifying to help himself on his own criminal charges. (R782) These charges carried potential penalties of life plus 25 or 30 years. (R781) Anderson said that he had provided information to police on cases in the past, particularly one involving narcotics, in exchange for beneficial treatment on earlier charges. (R753,764) He also admitted to lying to stay out of trouble and to using false names on numerous occasions. (R737-747) Finally, Anderson said he was not sure what would happen to him on his pending charges (R795), but he was no longer in jail at the time he testified. (R781)

During the penalty phase of the trial, one witness testified for the defense in mitigation, Ann Shirley Anderson, the victim's daughter. (R900-911) She said she and her parents were devoutly religious people. (R904) Her father had been a Presbyterian minister (R901-902), and she had spent the past 28 years as an educational missionary in Africa. (R901-902) She obtained her religious heritage from her parents. (R904) She also knew that her mother was an instrument of the peace of God and God's mercy. (R905) Furthermore, she knew that her mother would have forgiven her killer, and forgave him as she died. (R911) Ann Anderson testified that neither she nor her mother believed in capital punishment (R905), and while punishment for the crime was necessary, killing the killer was contrary to their principles and would make her tragic loss even more tragic. (R905)

Ann Anderson also wrote to James Floyd during the case. (R898-899,910) Floyd also responded. (R898-899,910)

She was reaching out to someone in trouble. (R910) In the letter, she suggested that she wanted to visit him, and he welcomed her to do so. (R898-899,910) But, upon the advice of the state attorney, she did not visit Floyd. (R910) However, Floyd did relate some of his family background to her in one of his letters. (R1016)

At the close of the penalty phase, the court refused to instruct on any mitigating circumstances. (R917-919,928-932) The court completely omitted the section of the standard jury instructions listing and defining mitigating circumstances. (R917-919,928-931) The prosecutor argued that there were no mitigating circumstances, and that the court would so instruct the jury. (R921) Shortly after retiring to deliberate, the jury returned with a question regarding how the court defines aggravating versus mitigating in the portion of the instructions which directs a weighing. (R9322) The court reread the original instructions. (R932-934,935-938) Later, the court also gave a clarifying instruction regarding the vote required for a life recommendation. (R938-939) The jury recommended a death sentence by a 7 to 5 vote. (R93,940)

SUMMARY OF ARGUMENT

1. James Floyd is entitled to a new trial because irrelevant evidence of collateral crimes was admitted into evidence. Over objection, a detective testified to Floyd's comments about having previously been in jail. Such comments suggested the commission of an irrelevant prior crime which prejudiced the jury. The trial judge acknowledged the evidence was prejudicial, but erroneously thought he was bound to allow the testimony because its source was Floyd's voluntary statement. Jackson v. State, 451 So.2d 458 (Fla.1984).

2. Four jurors were excused for cause because of their opposition to capital punishment. As a result, Floyd's jury was not representative of a cross-section of the community and was unconstitutionally prone to convict. Grisby v. Mabry, __F.2d__(8th Cir. 1985)(No.83-2113, January 30, 1985).

3. At the close of the penalty phase of Floyd's trial, the court refused to instruct the jury on any mitigating circumstances. The jury had no guidance or direction that any aspect of the crime or the defendant's background could be considered in mitigation. Consequently, Floyd's sentence, based in part upon the jury's tainted recommendation for a death sentence, is unconstitutional. See. Lockett v. Ohio, 438 U.S. 856 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

4. The trial judge erroneously ruled that testimony from the victim's daughter offered in mitigation was irrelevant to the sentencing decision.

5. James Floyd's death sentence is unconstitutional because the sentencing judge improperly found and considered certain statutory aggravating circumstances, and erroneously failed to consider any of the existing mitigating circumstances. The court improperly found the homicide was especially heinous, atrocious or cruel; cold, calculated and premeditated; committed to avoid arrest; committed during a burglary and for pecuniary gain. The court failed to consider in mitigation Floyd's past and current family background and conditions; his employment record or his age.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE OF COLLATERAL CRIMES WHICH ONLY TENDED TO PROVE FLOYD'S PROPENSITY TO COMMIT CRIME.

Detective Espiscopo testified about the substance of a statement James Floyd allegedly made while being booked on the forgery charges. (R505,508) At one point, Episcopo testified to Floyd's explanation for his running from the officers:

> Q. Now, you didn't question the Defendant, did you?
>
> A. No, sir.
>
> Q. But he said some things to you, did he not?
>
> A. Yes, sir. He did.
>
> Q. Well, what did he say?
>
> A. Well, his first statement was that he was--he says, "I know the police are mad at me for running, but I've been in jail before and I didn't want to go back."

(R508) When this statement was related to the court during a proffer (R505), defense counsel objected and moved to exclude it as irrelevant and prejudicial because it indicated to the jury that Floyd had a criminal record. (R506)[1/] The court acknowledged the prejudicial nature of the statement but refused to exclude it because it was Floyd's own voluntary and spontaneous

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1/ Floyd's statement that he had been in jail before did not actually prove a collateral crime; it merely suggested one. The statement was inadmissible on that basis alone. Green v. State, 190 So.2d 42,45 (Fla.1966); Norris v. State, 168 So.2d 541 (Fla.1964); Dibble v. State, 347 So.2d 1096 (Fla.2d DCA 1977).

comment.[2/]

The trial court erred in admitting the statement. Floyd's reference to having been in jail before was irrelevant to any issue in the case. It was merely prejudicial evidence suggesting collateral crimes tending to prove nothing more than bad character or propensity and was inadmissible. §90.404(2)(a), Fla.Stat; Jackson v. State, 451 So.2d 458 (Fla.1984); Drake v. State, 400 So.2d 1217 (Fla.1981); Williams v. State, 110 So.2d 654 (Fla.1959). Furthermore, the fact that the inadmissible evidence came from Floyd's spontaneous, voluntary statement does not alter its inadmissible character. Jackson v. State, 451 So. 2d 458; Paul v. State, 340 So.2d 1249 (Fla.3d DCA 1976); Curry v. State, 355 So.2d 462 (Fla.2d DCA 1978).

2/ The entire colloquy between the court and counsel regarding the defense motion to exclude proceeded as follows:

> MR. MURRY: Other than to exclude the fact that he spent time in jail and didn't want to go back, I'm moving to exclude that on the grounds that it indicates to the jurors that he's got a previous criminal record and it's prejudicial and it's irrelevant at this particular juncture and I don't think it's necessary.
>
> THE COURT: Well, but it's a spontaneous statement made by the Defendant. How do I properly exclude it? It may be prejudicial to him, but he said it. I think it's admissible.
> Do you want to be heard on that?
>
> MR. EPISCOPO: That's my argument, it's a spontaneous statement.
>
> THE COURT: Obviously it's prejudicial but I don't think it can be excluded because he made it freely and voluntarily.

In Paul v. State, the Third District Court of Appeal reversed a defendant's conviction because his admissions to prior unrelated crimes during his confession were introduced at trial. The defendant confessed to the burglary and grand theft charges for which he was tried and during that confession admitted to seventeen unrelated burglaries. On appeal the Third District Court held that the admissions regarding the seventeen unrelated burglaries were irrelevant and inadmissible evidence of collateral crimes. Moreover, the fact that the evidence of those collateral crimes was the defendant's own voluntary statement did not make the collateral crimes evidence admissible. The court noted,

> There is no doubt that this admission would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the oridinary in that it requires proof of a particular crime. Where the evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded.

Paul v. State, 340 So.2d at 1250.

2/ (Continued)

> MR. MURRY: Well, my particular position is that the State is eliciting evidence of a previous apparently conviction at this juncture and it's not appropriate at this juncture despite the Court is probably going to rule that it's a spontaneous statement given without any prejudice to his Miranda Right.
>
> THE COURT: I'm going to find that the statements he made were spontaneous and were freely and voluntarily made by the Defendant, and obviously the Miranda Rights had been given prior to it, but I don't think it's a Miranda situation because he made them spontaneously.

(R506-507)

Quoting the opinion in Paul, this Court in Jackson v. State, 451 So.2d 458, reversed a murder conviction because a witness was allowed to testify to statements the defendant allegedly made boasting that he used to be a "thoroughbred killer." In the opinion, this Court said,

> [T]he "thoroughbred killer" statement may have suggested Jackson had killed in the past, but the boast neither proved that fact, nor was that fact relevant to the case sub judice. The testimony is precisely the kind forbidden by the Williams rule and section 90.404(2).

451 So.2d at 461. The fact that the collateral crimes evidence came from the defendant's own words did not exempt it from relevancy requirements.

In Dillman v. State, 411 So.2d 964 (Fla.3d DCA 1982), the trial court allowed a witness to testify to a comment the defendant made about an unrelated murder which suggested his involvement. According to the witness, the defendant said, "Man, that was a cold blooded scene." 411 So.2d at 965,n.4. Furthermore, the witness said the defendant placed a scorpion ring on his finger and said that he was like a scorpion, "he sting you, you're going to die." The Third District Court reversed stating:

> However, because the State over the defendant's objection, persisted in eliciting statements of the defendant made to a State witness, which statements implicated the defendant in a murder totally unrelated to the armed robbery charge being tried and establishing nothing more than the criminal propensities of the defendant, we are compelled to reverse the defendant's conviction and remand the cause for a new trial.

Ibid.

Finally, the Second District Court in Curry v. State, 355 So.2d 462 (Fla.2d DCA 1978), reversed a defendant's conspiracy and heroin possession convictions because statements he made implicating himself in other drug transactions were admitted. A State's witness was allowed to relate the contents of a conversation she had with the defendant concerning drugs. According to the witness, the defendant said that he could get drugs because he was behind most of the drug transactions in that area. He told the witness that he was "fixing to do a THC deal in Fort Myers." 355 So.2d at 464. In reversing the convictions, the appellate court said,

> We are unable to see how this evidence was relevant to any of the essential or material issues framed within the charges being tried. [citation omitted] The testimony did nothing more than tend to prove criminal propensity, which cannot be a basis for its admission. [citation omitted] The prejudicial effect of the evidence is obvious.

Ibid.

The trial judge agreed with Floyd's contention that the evidence was prejudicial but refused to exclude the statement because it was freely and voluntarily made. (R506-507)

> THE COURT: Obviously, it's prejudicial but I don't think it can be excluded because he made it freely and voluntarily.

(R506) This ruling reflects a misunderstanding of the law. Irrelevant, prejudicial collateral crimes evidence is not made admissible simply because its source is the defendant's own statement. Jackson, 451 So.2d 458; Paul, 340 So.2d 1249.

Admission of this irrelevant, prejudicial evidence is not harmless error in this case. The State's evidence was primarily circumstantial. Only the testimony of Gregory Anderson provided any arguably direct evidence of the murder when he related Floyd's alleged admission. However, his testimony was severely impeached. The impact of evidence suggesting to the jury that Floyd had a prior conviction cannot be minimized. Floyd has been denied his right to due process and a fair trial by the admission of the evidence. Amends. V, XIV, U.S. Const; Art. I §9, Fla.Const. He urges this Court to reverse his convictions for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN EXCLUDING PROSPECTIVE JURORS FROM FLOYD'S TRIAL BECAUSE OF THEIR OPPOSITION TO CAPITAL PUNISHMENT, SINCE A JURY SELECTED IN SUCH A MANNER IS NOT REPRESENTATIVE OF A CROSS-SECTION OF THE COMMUNITY AND IS ALSO MORE PRONE TO CONVICT IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

During jury selection, the State moved to exclude several propective jurors who expressed opposition to the death penalty. (R242,347-348) The trial court granted excusals for cause for four of those jurors. (R242,347-348) This method of selecting a jury deprived Floyd of his right to a jury representative of a cross-section of the community and also resulted in a jury unconstitutionally prone to convict.

In Witherspoon v. Illinois, 391 U.S. 510 (1968) the Supreme Court of the United States failed to resolve the question of whether a jury which excludes persons opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. The Court rejected Witherspoons's arguments that such a jury was unconstitutional because the data adduced was "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." 391 U.S. at 517 (footnote omitted). The Court held open the possibility that, if presented with persuasive data, it would find a jury which excluded death-scrupled jurors to be violative of a defendant's rights.

Since Witherspoon was decided, studies have been conducted which show beyond peradventure that death-qualified juries are not as representative of the community as they should be and and cannot be considered fair and impartial with respect to the issue of guilt or innocence. This was the conclusion reached by the United States District Court for the Eastern District of Arkansas in Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), and recently affirmed by the United States Court of Appeals for the Eighth Circuit in Grigsby v. Mabry, __F.2d__ (8th Cir. 1985) (No.83-2113, January 30, 1985).

Grigsby arose from petitions for writs of habeas corpus filed in federal district court by three state prisoners convicted of capital murder. Petitioner Girgsby was sentenced to life in prison without parole for his crime. In Grigsby v. Mabry, 483 F.Supp. 1372 (E.D. Ark. 1980), the federal district court agreed with Grigsby's contention that the trial court abused its discretion in denying him a continuance so that he could present evidence that exclusion of prospective jurors unalterably opposed to the death penalty might affect the jury's determination on the question of his guilt. The court ordered the case sent back to state circuit court for an evidentiary hearing wherein Grigsby could supply proof of his legal premise. The court noted that the data concerning the conviction-proneness issue was "considerably less fragmentary and tentative" than it was when Witherspoon was decided. 483 F.Supp. at 1388. Both Grigsby and the state appealed, and in Grigsby v. Mabry, 637 F.2d 525 (8th Cir. 1980) the federal appeals court modified the order of the district court to provide for the evidentiary hearing to be held in federal

district court rather than the State court.

After the evidentiary hearing, the federal district court issued its opinion in Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983). The court reviewed at some length the studies and scholarly works with which it had been presented and concluded from the evidence that death-qualified juries are not sufficiently representative of the community and "are not only 'uncommonly', but also unconstitutionally, prone to convict." 569 F.Supp. at 1323. A majority of the en banc United States Court of Appeals for the Eighth Circuit affirmed the holding of the district court. Grigsby v. Mabry, __F.2d__ (8th Cir.1985) (No. 83-2113, January 30, 1985). (The appellate court modified the lower court's requirement that a bifurcated trial with two juries was needed to remedy the constitutional problems identified in the opinion by permitting the state to formulate other alternatives that would safeguard defendants' Sixth Amendment rights.) The court of appeals recognized that its holding was in conflict with decisions of other circuits, referring to Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), modified 671 F.2d 858, cert.denied, 459 U.S. 882 (1982), Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert.denied, 440 U.S. 976 (1979), and Keeten v. Garrision, 742 F.2d 129 (4th Cir. 1984), and expressed the hope that the United States Supreme Court would grant a writ of certiorari to resolve this "important issue." (The Eighth Circuit's opinion also conflicts with McCleskey v. Kemp, No. 84-8176 (11th Cir. Jan. 29, 1985), in which the en banc court summarily rejected petitioner's claim, which was based in part on Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), that

exclusion of jurors adamantly opposed to capital punishment violated his right to be tried by an impartial and unbiased community-representative jury.) The day after it decided Grigsby, the Eight Circuit declared its holding therein to be retroactive. Woodard v. Sargent, No. 83-2168 (8th Cir. Jan. 31, 1985).

Floyd realizes that the Eighth Circuit Court of Appeals' decision in Grigsby is not binding authority on this Court. Witt v. State, __So.2d__, 10 F.L.W. 148 (Fla.1985). However, this question is likely to soon be resolved by the United States Supreme Court as the Grigsby court urged. See also, Witt v. Wainwright, __U.S.__, 36 Cr.L. 4227; J. Marshall, dissenting from denial of certiorari. Floyd urges this Court to follow Grigsby and reverse his conviction. Alternatively, he asks this Court to reserve ruling on this question until the matter is resolved in the United States Supreme Court.

ISSUE III

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON ANY MITIGATING CIRCUMSTANCES.

At the close of the penalty phase, the trial judge refused to instruct the jury on any mitigating circumstances (R917-919,928-931)(A3-6)[3/] The court was of the opinion that the evidence did not support any mitigating circumstances, and consequently, no jury instructions on mitigating circumstances were required. (R917-919) Not only did the court delete instructions on all statutory mitigating circumstances, but the instruction which direct the jury to consider any aspect of the defendant's background or character and the nature of the offense was also deleted. Fla.Std. Jury Instr.(Crim.) Penalty Proceedings--Capital Cases at page 81. (R928-931)(A3-6) Failure to give instructions on any mitigating circumstances usurped the jury's function to consider and weigh mitigating evidence. James Floyd's death sentence was unconstitutionally imposed. Amends. V,VI,VIII,XIV, U.S. Const; Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Songer v. State, 365 So.2d 696 (Fla.1978); Cooper v. State, 336 So.2d 1133 (Fla.1976).

Due Process requires that the jury be instructed on all mitigating circumstances. Limiting instructions to those mitigating factors which the trial judge deems appropriate distorts the death penalty sentencing scheme:

> If the advisory function were to be limited initially because the jury could only consider

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3/ The jury instructions as read are set forth in full in the appendix to this brief. (A3-6).

> those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.

Cooper, 336 So.2d at 1140. The sentencing scheme was distorted in this case, and Floyd's death sentence should be reversed.

Apparently, the trial judge was attempting to follow the Florida Standard Jury Instructions when he refused to instruct on any mitigating circumstances. Notes to the trial judges in the standard instructions directs that instructions should be given only upon the aggravating and mitigating circumstances for which there is evidence. Before the aggravating circumstances instructions the following note appears:

> Give only those aggravating circumstances for which evidence has been presented.

Fla.Std.Jury Inst. at 78. A similar note appears before the instructions on mitigating circumstances:

> Give only those mitigating circumstances for which evidence has been presented.

Fla.Std.Jury Inst. at 80. However, the trial court failed to properly follow these directions. Evidence of mitigating circumstances existed. (Issue IV and V-E, infra.) The court improperly usurped the jury's function by denying instructions on mitigating factors. It was not within the trial judge's authority to instruct only upon those mitigating circumstances which he believed established. Just as a defendant has the right to a theory of defense instruction which is supported by any evidence, e.g., Bryant v. State, 412 So.2d 347 (Fla.1982), he is also entitled to an instruction on mitigating circumstances supported

by any evidence. A trial judge cannot substitute his opinion for that of the jury and deprive the defendant of the jury's consideration of the issue by denying jury instructions.

Deletion of the jury instructions on mitigating circumstances cannot be deemed harmless error, particularly in this case. Even without proper instructions, the jury recommended death by a vote of only 7 to 5. (R93,940) A life recommendation would have materially changed the sentencing decision. See, e.g., Walsh v. State, 418 So.2d 1000 (Fla.1982); Tedder v. State, 322 So.2d 908 (Fla.1975). Furthermore, the deletion clearly confused the jury. At one point after retiring to deliberate, the jury returned with a question regarding mitigation. (R932) The jury wanted to know the definition of aggravating versus mitigating. (R932) The court responded by rereading a portion of the same jury instruction. (R932-937) Finally, the prosecutor capitalized on the erroneous instruction in his closing argument by lending the judge's authority to his position that no mitigating circumstances existed:

> BY MR. ESPISCOPO: Thank you, your Honor.
>
> Ladies and gentelmen of the jury. This is a legal argument, you are still under oath, you are sworn to follow the law and this is going to be a legal argument.
> To assist you in your deliberations you are going to be given aggravating factors that you can use for your recommendation for the death penalty. There are no mitigating factors in this case.
> The State has five aggravating factors. There are no mitigating factors for the defense. You are not going to hear them from the Judge. They are not legal considerations. They don't exist.

(R921)

The mandate of the United States Supreme Court in Lockett and Eddings has been violated. Instructions which deprive the jury, as part of the sentencing authority, of direction to consider any aspect of the defendant's character or background and the nature of the offense violate the fundamental principle of individualized sentencing in capital cases. This Court must reverse Floyd's sentence with directions that he be afforded a new penalty phase trial.

ISSUE IV

THE TRIAL COURT ERRED IN RULING THAT ANNE ANDERSON'S TESTIMONY DURING THE PENALTY PHASE OF THE TRIAL WAS IRRELEVANT TO SENTENCING.

Anne Shirley Anderson, the victim's daughter, testified in mitigation during the penalty phase of Floyd's trial. (901-911) She testified about her family's deep religious beliefs. (R904) Her father had been a Presbyterian minister. (R901-902) He and her mother, Annie Barr Anderson, gave her a strong religious heritage. (R904) This background lead her to the missionary field and she had spent 28 years as an educational missionary in Africa. (R901-902) Anne Anderson knew her mother was an instrument of the peace of God and God's mercy. (R905) And, she knew that her mother forgave her killer even as she died. (R911) Capital punishment was contrary to the Anderson family's beliefs, and Annie Bar Anderson would not have desired the death penalty for her killer. (R905) Anne Anderson wanted to visit Floyd in jail but did not on the prosecutor's advice. (R910) She did correspond with Floyd, and those letters were introduced into evidence. (R898-899,910,1016)

Three days later at the sentencing before the court, Anne Anderson spoke to the judge in chambers. (R948-949) The court summarized her statement there as an expression of her feelings regarding capital punishment. (R948) Moreover, the court stated that her personal feelings did not have any relevancy to the sentencing decision. (R949) Next, the court proceeded with sentencing with the conclusion that no "mitigating factors, legal or otherwise" (R949) existed.

While Anne Anderson's personal feelings about capital punishment may not be relevant to sentencing, her testimony before the jury was not limited to such matters. (R900-911) Indeed, before her testimony, the judge said he would preclude her testimony if it did nothing more than "expound her views on capital punishment which have no relevance to the penalty phase of the proceeding." (R895) Her testimony was relevant to the nature of the crime and the background of the defendant which are pertinent considerations in sentencing. §921.141(1), Fla.Stat.; State v. Dixon, 283 So.2d 1,7 (Fla.1973). The Eighth and Fourteenth Amendments compel the consideration and weighing of any such evidence offered in mitigation. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Songer v. State, 365 So.2d 696 (Fla.1978); see also, Perry v. State, 395 So.2d 170, 174 (Fla.1981).

Anne Anderson's testimony was relevant to both the nature of the offense and Floyd's personal background. She gave insight into the victim's beliefs and attitudes which was relevant to the degree of suffering she experienced in death. (See, Issue V, A, infra.) Furthermore, Anderson's correspondence with Floyd provided evidence of his family background. (R1016) The letters revealed that Floyd's father was dead, his mother was an alcoholic and that Floyd was the father of two small children. (R1016) Finally, Anderson's testimony demonstrated that Floyd is a person worthy of evoking human compassion. (R910)

The trial court erred in concluding that Anne Anderson's testimony was irrelevant to the sentencing decision. It should have been considered and weighed in mitigation. Floyd urges this Court to reverse his death sentence.

ISSUE V

THE TRIAL COURT ERRED IN SENTENCING JAMES FLOYD TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court improperly applied Section 921.141, Florida Statutes in sentencing James Floyd to death in the electric chair. Nonexisting aggravating circumstances were improperly found, and existing mitigating circumstances were not found, thereby skewing the sentencing determination. This misapplication of Florida's sentencing law renders Floyd's death sentence unconstitutional. See, Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (Fla.1973). Specific misapplications are addressed separately below:

A.

The Trial Court Erred In Finding That The Homicide Was Especially Heinous, Atrocious Or Cruel.

This Court defined the aggravating circumstance of especially heinous, atrocious or cruel in State v. Dixon, 283 So. 2d 1 (Fla.1973) as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

283 S.2d at 9. In finding that the homicide in this case fit this description, the trial judge relied on the fact of multiple stab wounds and the victim's survival for 2 to 4 minutes after the attack commenced:

> 4. This capital felony was especially heinous, atrocious and cruel. The medical examiner testified that the victim died from the deep stab wound to the chest within a short period of time, perhaps two to four minutes, after sustaining that wound. However, from the evidence, it may reasonably be inferred that the defendant continued stabbing the victim while she was still alive for a total of twelve stab wounds to her torso and what was characterized by the medical examiner as one defensive stab wound to the hand.

(R108)(A2)

Multiple stab wounds do not necessarily render a homicide especially heinous, atrocious or cruel. Demps v. State, 395 So.2d 501 (Fla.1981). Furthermore, the wounds in this case were not administered to enhance pain and suffering. The State's evidence and theory of the case was that the victim suprised the perpetrator during a burglary. (R388-389,731,851-852) The multiple wounds were, under this theory, the product of a frenzied attack by a panicked individual. See e.g., Jones v. State, 332 So.2d 615 (Fla.1976).

The victim in this case died rapidly--2 to 4 minutes after the beginning of the attack. (R108)(A2) Instantaneous death never qualifies as especially heinous, atrocious or cruel. Cooper v. State, 336 So.2d 1133,1140-1141 (Fla.1976). Furthermore, surviving an attack for a couple of hours in pain and suffering does not necessarily qualify for this aggravating

circumstance. Teffeteller v. State, 439 So.2d 840,846 (Fla. 1983). There must be something more which sets the crime apart from the norm of homicides. Dixon, 283 So.2d at 9. Certainly, the rapid death in this case, which was the product of a frenzied attack by a panicked burglar, does not qualify. There was no intentional infliction of pain beyond that inherent in the homicide.

The lack of significant victim suffering in this case is also evidenced by the photographs of the victim herself in death. (R961)(State's Exhibit No.5) She has a calm, serene expression reflecting that she was at peace when she died. See, Funchess v. State, 341 So.2d 762,764 (Fla.1976)(J. England, concurring opinion, noting that the State introduced photograph of victim's gruesome facial expression as evidence of the victim's horror and suffering at the time of death). Her being at peace in death is corroborated by her daughter's testimony. Anne Anderson testified to her mother's deep religious convictions, and that in keeping with those convictions, she was sure that her mother forgave her killer even as she died. (R911)

There is insufficient evidence of victim suffering in this case to support the court's finding that the homicide was especially heinous, atrocious or cruel. In fact, the evidence of a rapid death suggests the contrary. Floyd urges this Court to reverse his sentence of death based in part on this erroneous finding.

B.

The Trial Court Erred In Finding That The Homicide Was Committed In A Cold, Calculated And Premeditated Manner Without Any Pretense Of Moral Or Legal Justification.

As this Court has noted several times, the premeditation aggravating circumstance provided for in Section 921.141(5)(i), Florida Statutes, requires more than evidence of the premeditation element for first degree murder. E.g., Hardwick v. State, 461 So. 2d 79 (Fla.1984); Jent v. State, 408 So.2d 1024 (Fla.1981). There must be evidence proving beyond a reasonable doubt that the premeditated murder was done coldly in calculated fashion without any pretense of moral or legal justification. Ibid. The trial court erroneously found this circumstance in this case upon the following findings:

> 5. This homicide was committed in a cold, calculating and premeditated manner without any pretense of moral or legal justification. The defendant is a tall, muscular individual who could have easily pushed the victim aside and made his escape from her residence when she caught him in the process of committing the burglary, but instead the defendant chose to stab the victim repeatedly as indicated above, resulting in her death.

(R108)(A2) At best, the above statement of facts might support mere premeditation, but not the heightened form required to aggravate the murder. The fact that Floyd could have pushed the victim aside when confronted during the burglary (R108)(A2), does not evidence a premeditated design to kill, much less the enhanced premeditation needed to aggravate. At best, the evidence shows a spontaneous killing during a moment of stress in an unexpected confrontation. All murders are senseless and unnecessary. However, all murders are not cold, calculated and premeditated. E.g., Peavy v. State, 442 So.2d 200 (Fla.1983); Harris v. State, 438 So.2d 787 (Fla.1983); Jent v. State, 408 So.2d 1024 (Fla.1981).

This Court has rejected the finding of this circumstance in other similar cases. In Peavy, the defendant was convicted of murder, robbery and burglary. The elderly victim was found stabbed to death in his room in a rooming house. Only circumstantial evidence linked the defendant to the crime. This Court held,

> This murder occurred during the commission of a burglary and robbery and is susceptible to other conclusions than finding it committed in a cold, calculated and premeditated manner. The trial court improperly found the existence of this aggravating circumstance because the evidence does not establish it beyond a reasonable doubt.

Peavy, 442 So.2d at. 202. The evidence in this case, like the evidence in Peavy, established nothing more than a stabbing death during the commission of a burglary.

This Court again rejected the finding of the premeditation aggravating factor in Harris, 438 So.2d 787, another case virtually identical to the present one. The defendant in Harris confessed to murder, robbery and burglary. The victim was a 73 year-old woman who was stabbed numerous times in her own home. The trial court found the premeditation aggravating circumstance. This Court disapproved the finding because the State presented no evidence the murder was planned. 438 So.2d at 798. The murder in this case was also not planned. In fact, according to Floyd's alleged statement, the murder occurred only because the victim confronted him.

The premeditation aggravating circumstance should not have been found. Floyd urges this Court to reverse his death sentence.

C.

The Trial Court Erred In Finding That The Homicide Was Committed For The Purpose Of Preventing Or Avoiding Arrest.

In finding that the homicide was committed to avoid or prevent arrest, the court said,

> 2. This capital felony was committed for the purpose of avoiding or preventing a lawful arrest. It can be inferred from the evidence that the victim recognized the defendant from prior contact between them, and, further, she was the only eyewitness to the crime and was, therefore, killed by the defendant to prevent his arrest on the burglary charge.

(R107)(A1) This finding relied upon two factors: (1) that the homicide victim was also the only eyewitness to the burglary, and (2) that the victim recognized Floyd. The first factor is legally insufficient to support the finding of this aggravating circumstance. See, Foster v. State, 436 So.2d 56 (Fla.1983). The second factor is also legally insufficient, see, Rembert v. State, 445 So.2d 337 (Fla.1984), and furthermore, the evidence did not prove that the victim knew or recognized Floyd.

When the homicide victim is not a police officer, this aggravating circumstance is not properly found unless the evidence clearly proves that the elimination of witnesses was the dominant or only motive. §921.141(5)(e), Fla.Stat.; Menendez v. State, 368 So.2d 1278,1282 (Fla.1979); Riley v. State, 366 So.2d 19,21-22 (Fla.1978). Moreover, even in cases where the homicide victim was also the only witness to another felony, such as robbery or burglary, the circumstance cannot be found absent some additional evidence establishing the motive. Rembert v. State; Foster v. State. Consequently, the court's reliance upon the fact that the homicide victim was the only witness to the burglary is

insufficient to support the aggravating circumstance.

Contrary to the trial court's finding, the evidence did not prove beyond a reasonable doubt that the victim recognized Floyd. This fact was not proven and cannot justify the aggravating circumstance. The only evidence suggesting that the victim may have known Floyd was the discovery of an old business card from Suncoast Lawn Service. (R555,559-562) The owner of the business was listed as Johnnie Floyd. (R559,985) In the victim's husband's handwriting was the name "James" on the card. (R561-562,985) Her husband had been dead for at least eight years. (R561-562) The victim's daughter did not know if anyone from the service had even done any work for her mother. (R559) Even assuming the Floyd connected with the business was the same Floyd family, and that the James referred to on the card is the defendant, there is still no evidence that the victim ever saw or knew the defendant. Only through an impermissible compounding of inferences can such a conclusion be reached. See, Gutsine v. State, 86 Fla.24, 97 So. 207,208 (1923); Harrison v. State, 104 So.2d 391 (Fla.1st DCA 1958). Circumstantial evidence of an aggravating circumstance must preclude every other reasonable hypothesis. See, Simmons v. State, 419 So.2d 316,318 (Fla. 1982). The evidence in this instance simply does not meet that requirement.

The aggravating circumstance of avoiding or preventing a lawful arrest was improperly found. Floyd's sentencing has been tainted, and he urges this court to reverse his death sentence.

D.

The Trial Court Erred In Finding That The Homicide Was Committed During A Burglary And Was Committed For Pecuniary Gain.

It is well established that two aggravating circumstances cannot be found on the same facts or aspects of the case. Clark v. State, 379 So.2d. 97 (Fla.1979); Provence v. State, 337 So.2d 783 (Fla.1976). The sole motive for the burglary in this case was to obtain money. Consequently, evidence of the pecuniary gain motive and the burglary are based upon the same facts and both should not have been found, weighed and considered in sentencing. (R107)(A1) Welty v. State, 402 So.2d 1159 (Fla.1981); Maggard v. State, 399 So.2d 973 (Fla.1981). This aggravating circumstance improperly tainted Floyd's death sentence, and he asks this court to reverse the trial court's decision.

E.

The Trial Court Failed To Find, Weigh and Consider Existing Mitigating Circumstances.

The trial court erroneously concluded that there were no mitigating circumstances in this case. (R108)(A2) Several mitigating factors existed which the trial court was constitutionally required to consider and weigh in sentencing. See, Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). Indeed, not only did the trial court fail to consider and weigh the mitigating circumstances, but it also failed to even recognize the existence of any mitigating evidence. (See Issues III and IV, supra.) An erroneous standard regarding

the degree of proof for the existence of mitigation was undoubtedly employed to reach such results.

Evidence of Floyd's background established several mitigating factors. First, he lived at home with his mother who was an alcoholic. (R1016) Second, he indicated in a letter to Anne Anderson that he was a father of two small children. (R1016) Jacobs v. State, 396 So.2d 713 (Fla.1980). Third, he was gainfully employed for at least the full year preceding the homicide. (R658-661) McCampbell v. State, 421 So.2d 1072 (Fla.1982). Fourth, his age of 23 years at the time of the crime. (R1)

The Eighth and Fourteenth Amendments compel the consideration of the mitigating evidence mentioned above. As the United States Supreme Court in Eddings v. Oklahoma has said,

> Just as the State may not by statute preclude the sentence from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.

455 U.S. at 113-114. Floyd urges this Court to reverse his death sentence which has been unconstitutionally imposed.

CONCLUSION

Upon the reasons and authorities presented in Issues I and II, James Floyd asks this Court to reverse his convictions for a new trial. Alternatively, Floyd asks this Court to reverse his death sentence upon the arguments presented in Issues III through V.

Respectfully submitted,

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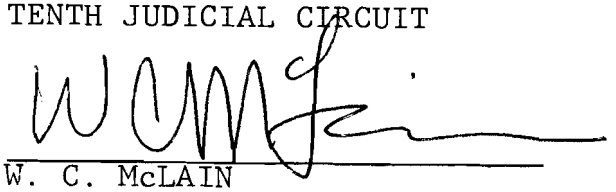
TENTH JUDICIAL CIRCUIT

BY: 
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