

IN THE FLORIDA SUPREME COURT

JAMES FLOYD, :
Appellant, :
vs. : Case No. 66,088
STATE OF FLORIDA, :
Appellee. :
_____ :

FILED
SID J. WHITE

AUG 5 1985

CLERK, SUPREME COURT

By *[Signature]*
Chief Deputy Clerk

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

W.C. McLAIN
ASSISTANT PUBLIC DEFENDER
Chief, Capital Appeals

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830-3798
(813)533-0931 or 533-1184

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

	<u>PAGE NO.</u>
PRELIMINARY STATEMENT	1
ARGUMENT	
ISSUE I. ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE OF COLLATERAL CRIMES WHICH ONLY TENDED TO PROVE FLOYD'S PROPENSITY TO COMMIT CRIME.	1
ISSUE III. ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON ANY MITIGATING CIRCUMSTANCES.	2
ISSUE V.-D. ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN FINDING THAT THE HOMICIDE WAS COMMITTED DURING A BURGLARY AND WAS COMMITTED FOR PECUNIARY GAIN.	3
CONCLUSION	4
CERTIFICATE OF SERVICE	4

TABLE OF CITATIONS

CASES CITED:

PAGE NO.

<u>Bottoson v. State</u> 443 So.2d 962 (Fla.1983)	2
<u>Brown v. State</u> So.2d __, 10 FLW 343 (Fla.1985) (Case No. 62,922, opinion filed June 27)	3
<u>Eddings v. Oklahoma</u> 455 U.S. 104 (1982)	3
<u>Goode v. State</u> 365 So.2d 381 (Fla.1978)	2
<u>Jackson v. State</u> 451 So.2d 458 (Fla.1984)	1
<u>Jacobs v. State</u> 396 So.2d 713 (Fla.1981)	2
<u>LeDuc v. State</u> 365 So.2d 149 (Fla.1978)	2
<u>Lockett v. Ohio</u> 438 U.S. 586 (1978)	3
<u>Mankiewicz v. State</u> 114 So.2d 684 (Fla.1959)	2
<u>Sireci v. State</u> 399 So.2d 964 (Fla.1981)	1,2
<u>Straight v. State</u> 397 So.2d 903 (Fla.1981)	2
<u>Vaught v. State</u> 410 So.2d 147 (Fla.1982)	2

PRELIMINARY STATEMENT

Appellant Floyd relies on the arguments and authorities presented in his initial brief to respond to the State of Florida's answer brief except for the following additions:

ARGUMENT

ISSUE I.

ARGUMENT IN REPLY TO THE STATE
AND IN SUPPORT OF THE PROPOSITION
THAT THE TRIAL COURT ERRED IN AD-
MITTING IRRELEVANT EVIDENCE OF
COLLATERAL CRIMES WHICH ONLY
TENDED TO PROVE FLOYD'S PROPEN-
SITY TO COMMIT CRIME.

The State has argued that no error occurred in admitting evidence that Floyd had previously been in jail because the evidence showed consciousness of guilt. This contention is without merit.

Floyd has no quarrel with the admission of evidence regarding his flight from the police. The question is propriety of the evidence telling the jury that he had been in jail on other occasions. Flight may be evidence of guilty knowledge, but Floyd's prior incarceration is not. Evidence of Floyd's jail history was inadmissible, and the fact that the evidence was part of his own voluntary statement does not change its inadmissible character. E.g., Jackson v. State, 451 So.2d 458 (Fla.1984).

Floyd's case is distinguishable from the three cases upon which the State relies. Sireci v. State, 399 So.2d 964

(Fla.1981); Straight v. State, 397 So.2d 903 (Fla.1981); Mankiewicz v. State, 114 So.2d 684 (Fla.1959). In each of those three, the collateral crimes held admissible were crimes actually occurring during and a part of the flight or attempt to evade prosecution. Floyd's comment about his prior unrelated incarceration was not part of his flight or attempt to evade prosecution and was therefore irrelevant.

ISSUE III.

ARGUMENT IN REPLY TO THE STATE
AND IN SUPPORT OF THE PROPOSITION
THAT THE TRIAL COURT ERRED IN RE-
FUSING TO INSTRUCT THE JURY ON
ANY MITIGATING CIRCUMSTANCES.

Although Floyd's trial counsel failed to object to the court's refusal to instruct on mitigating circumstances, this Court must reverse the sentence in this case. Failure to give any direction to the jury regarding the consideration of mitigation is fundamental error. Moreover, this Court has refused to enforce the contemporaneous objection rule in other cases, e.g., Jacobs v. State, 396 So.2d 713,717-718 (Fla.1981); Goode v. State, 365 So.2d 381,384 (Fla.1978); LeDuc v. State, 365 So.2d 149,150 (Fla.1978), and, in the interest of justice, should refuse to do so in this case.

This case is distinguishable from cases such as Bottoson v. State, 443 So.2d 962 (Fla.1983) and Vaught v. State, 410 So.2d 147 (Fla.1982), where a special instruction or the form of particular instructions was at issue. Floyd's jury was never instructed in any manner to consider mitigating circum-

stances. The death sentence imposed based in part upon a recommendation from a jury which did not have the benefit of such instruction cannot withstand the requirement of the Eighth and Fourteenth Amendments. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

ISSUE V.

D.

ARGUMENT IN REPLY TO THE STATE
AND IN SUPPORT OF THE PROPOSITION
THAT THE TRIAL COURT ERRED IN
FINDING THAT THE HOMICIDE WAS
COMMITTED DURING A BURGLARY AND
WAS COMMITTED FOR PECUNIARY GAIN.

The State argues that the burglary in this case had broader significance than a simple theft and contends that Brown v. State, __So.2d__, 10 FLW 343 (Fla.1985) (Case No. 62,922, opinion filed June 27) defeats Floyd's position. This argument is incorrect. Brown is distinguishable.

In Brown, this Court recognized that the burglary was more than an opportunity for a theft. The victim was bound, gagged, beaten and raped before killed by strangulation. Her house was ransacked while she was alive. In the instant case, the State's best evidence merely shows that the victim was stabbed upon confronting Floyd while he was looking for valuables in her bedroom. There was no evidence that the burglary was converted into a robbery as the State suggests. (State's brief, page 20.) The holding in Brown simply is not applicable.

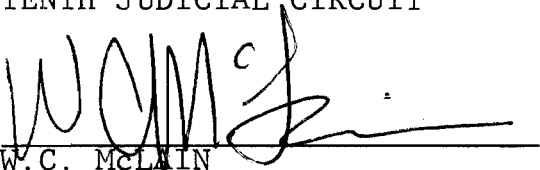
CONCLUSION

For the reasons and authorities presented in this brief and in the initial brief, James Floyd asks this Court to reverse his convictions and remand his case for a new trial. Alternatively, he asks this Court to reverse his death sentence.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY:


W.C. McLain
Assistant Public Defender
Chief, Capital Appeals

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830-3798
(813)533-0931 or 533-1184

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 1st day of August, 1985.


W.C. McLain

WCM:js