IN THE SUPREME COURT OF FLORIDA

ROBERT ALLEN TEFFETELLER, Appellant, vs. STATE OF FLORIDA, Appellee	APPEAL DOCKET NO. 66,672 Supplement to Appeal No. 60,337 CASE NO. 79-931-BB

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The following abbreviations are contained in this brief:

"T"	Transcript of Trial Proceedings
"S"	Transcript of the taped statement of Robert Teffeteller
"ST"	Supplemental Transcript of Proceedings
"SR"	Supplemental Record On Appeal

STATEMENT OF THE CASE

Pursuant to the ruling in Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), this cause was reversed for re-sentencing. Appellant was convicted of the first degree murder of Peyton Moore, III, a pharmacist, while he was jogging in Ormond Beach, Volusia County, Florida.

On December 28, 1984, a Motion for Disqualification of Judge and Appointment of a Special Prosecutor was filed and denied after a hearing held on January 7, 1985. The Order denying same was entered on January 14, 1985. A Writ of Prohibition based thereon was applied for in the Supreme Court of Florida. This Court refused to hear the Writ application.

On January 18, 1985, a 3.850 hearing was held based upon ineffective assistance of counsel during a prior conviction of a violent crime. Said motion was denied and same is currently on appeal to the Florida Fifth District Court of Appeal.

On January 21, 1985, Appellant proceeded to a re-sentencing hearing before Judge Foxman and a new advisory panel of twelve jurors. Deliberations were held on January 25, 1985, and the jury advised ten to two that Appellant be sentenced to death. Judge Foxman immediately sentenced Appellant to death for first degree murder and filed his written findings of acts in support of the death sentence on January 25, 1985. (SR 1064-1066)

On February 14, 1985, a Motion for Interview of Jurors was filed by defense counsel based upon a letter received from the jury foreperson, Helen Ronca. (SR 1088-1090) Said interview was subsequently granted and the Court specifically found no jury misconduct. (ST 964)

A timely Notice of Appeal was filed. Appellant was adjudged insolvent and a Special Public Defender, Carmen F. Corrente, was appointed to represent Appellant in this appeal.

STATEMENT OF THE FACTS

On January 14, 1979, at approximately 9:30 P.M., Peyton Moore was returing to his home after jogging on the beach. (T 640) In front of the house at 122 Amsden Road, Ormond Beach, Moore was stopped by two men in a light blue Ford Torino. (T 640) The man on the passenger side, a young, white male with short dark hair and no facial hair, asked for Moore's wallet. (T 640) When Moore told the men he had no money, he saw a single-barrel shotgun emerge from the lower portion of the passenger-side window. (T 640) Without warning, Moore was shot once and fell to the ground as the car sped away. (T 640) Moore did not known which man shot him. (T 654-655)

At approximately 9:30 P.M., on January 14, 1979, Ernest and Violet Mangaudis were watching television in their home at 122 Amsden Road in Ormond Beach. (T 609,613) They heard a loud bang, like a car backfiring, followed by the sound of a car speeding away. (T 609,613) Mr. Mangaudis went outside to get his eyeglasses from his car. (T 610,614) While outside he heard a moan and a voice calling, "Help me, I've been shot." (T 610) Mr. Mangaudis ran into his house and told his wife that a man was lying in their front yard with a gunshot wound. (T 611,614) Mr. Mangaudis called the police while Mrs. Mangaudis, a registered nurse, went out to the man to administer first aid. (T 611,614) The man told Mrs. Mangaudis that he had been shot and she observed a gunshot wound on the right side of his abdomen under his ribs. (T 614,619) There was little external bleeding but obvious internal bleeding. (T 620) While Mrs. Mangaudis attended

the injured man, the police arrived. (T 621) She stayed with the man until the ambulance arrived. (T 621) She then called the hospital, told them to prepare for surgery and left for the hospital, since she was on call as a scrub nurse in the operating room and knew she would be called anyway. (T 621-622) Moore was taken to the hospital where he received emergency surgery. (T 685) It was apparent, however, that due to damage caused by the gunshot, Moore had little chance of survival. (T 685,842-843) Moore died on the operating table and the cause of death was loss of blood due to massive internal injuries to the liver, pancreas, duodenum, bowel, and inferior vena cava. (T 688-689,843-844)

Officer Chris Mason of the Ormond Beach Police Department arrived on the scene at 122 Amsden Road on January 14, 1979, at approximately 9:30 P.M. (T 589) The injured man was still alive when he arrived. (T 602) Officer Mason made diagrams and took measurements of the area. (T 583) Corporal Ronald Morgan of the Ormond Beach Police Department was the first officer to arrive at the scene and observed a woman kneeling next to the injured man. (T 628) He observed a wound on the man's arm from which there was profuse bleeding and a lower chest wound from which there was little bleeding. (T 629) He spoke with the victim who told him his name and what had happened. (T 632-655) Upon arrival at the hospital, Moore made comments to the effect that he felt he was dying. (T 634) Corporal Morgan then asked Moore to again describe what happened which he did. (T 640)

On January 8, 1979, John Overbay, then an employee of T.G.&.Y. in Sevierville, Tennessee, sold a shotgun to Robert Teffeteller, who produced a Tennessee driver's license as identification. (T 622, 666) He remembers the transaction because Teffeteller was accompanied by George Overton, an old high school buddy of Overbay. (T 663) Teffeteller also purchased two boxes of shotgun shells. (T 663) The shotgun was a Mossberg 12-gauge, single barrel selecta-choke. (T 671) The model number was 600AKT and the serial number was G904219. (T 671) The shotgun cost $99.99 (T 663) Overbay identified the gun at trial as being the one he sold to Teffeteller but could not positively identify Teffeteller. (T 672-673)

Gerald Shafer, the day bartender for Broadway Sam's bar, met Robert Teffeteller early in January, 1979, when he began to frequent the bar with his friend George. (T 674-675) Shafer recalled discussing a shotgun with Teffeteller who said he had one. (T 676) Teffeteller brought a new single barrel shotgun to the bar and said he was interest in selling it to the bar owner. (T 676-678) Teffeteller left the gun on the back counter for a few days but later, Shafer noticed it was gone and figured Teffeteller took it back. (T 678-679) Shafer recalled that Teffeteller drove a light blue Ford with a dark vinyl top. (T 677) On his way to work on Super Bowl Sunday, January 15, 1979, Shafer heard the radio news reports of Peyton Moore's death. (T 680) When Teffeteller came into the bar later that day, he joked that people might think that he shot the pharmacist because he had a light blue car and a shotgun. (T 680-682)

In late January, 1979, Robert Teffeteller and George Overton traveled to Georgia where they met Donald and Daniel Poteet. (T 766-769,865) Donald agreed to go with Teffeteller and Overton to Knoxville, Tennessee to pick up Teffeteller's truck and then deliver a load to New Jersey. (T 77-774) Prior to leaving, Teffeteller met George Lewis, Donald's employer, who loaned Teffeteller $75.00 (T 754-757) Teffeteller gave him a Mossberg 12-gauge pump shotgun and agreed to give Lewis $90.00 the following week to get the gun back. (T 757) Teffeteller, Overton and Donald Poteet left for Knoxville. (T 774) From there the proposed itinerary was to drive to Patterson, New Jersey, then to Compton, California, and back to Atlanta. (T 774) Once in Knoxville, however, Teffeteller said the plans were changed and they were going to meet his brother in Compton, California. (T 775) As they were driving through Texas, Overton began bragging about having shot some guy in the shoulder. (T 781) Teffeteller then told Poteet that they had shot a pharmacist in Florida. (T 778) Poteet saw a shotgun in the car, and observed Teffeteller wrap it in a white cloth and hide it behind the back seat of the car. (T 781,786-787) The trio never reached Compton, California, but instead turned around and headed back east at Blythe, California. (T 790) When they returned to Georgia, George Overton was no longer with Teffeteller and Poteet. (T 761) Teffeteller, Donny Poteet and Danny Poteet then left Georgia for Daytona Beach. (T 791-792,866) The trio remained in Daytona for two weeks during which time they stayed at the house of Becky Hunter. (T792-794,866) When the trio left Daytona to return to Atlanta they

proceeded north on A1A. (T 794,866) As they traveled, Appellant indicated a side street to the Poteets and told them that it was where George and he had shot the pharmacist. (T 795,867) Later, in Texas, Donny Poteet was in jail with Appellant, who had told him that he should tell everyone that George had shot the pharmacist since George was dead. (T 800)

Richard Wayne Kuykendall was in Harrison County Jail, Marshall, Texas, in March, 1979, having been convicted of forgery. (T 885) While in jail he met Appellant and Donny Poteet who were also in jail at that time. (T 885-886) For a while he shared a cell with Appellant who told him that he and George Overton were riding around when they saw a jogger whom they decided to rob. (T 887) When the jogger said he had no money, they shot him. (T 887) After Appellant had spoken with authorities about the incident, he spoke to Kuykendall and told him that George was the one who shot the jogger. (T 889-890) Texas Ranger Glenn Elliott spoke with Appellant in March, 1979. (T 876) After being advised of his Miranda rights, Appellant decided to talk to Ranger Elliott about the murder of the pharmacist in Ormond Beach in January, 1979. (T 878) Appellant said he and George Overton were driving around in a 1972 Ford Torino and needed money. (T 879) They saw a man jogging, approached and pulled up alongside him. (T 879) Overton was driving at the time. (T 879) They called out to the jogger and Overton picked up the shotgun and demanded money. (T 879) When the jogger told them he had none, Overton shot him. (T 879)

On February 25, 1979, Lieutenant James R. Blankenship of the Clayton County, Georgia Police Department, stopped a 1972 Ford Torino which was driven by Appellant. (T 697) At the time of the stop, the Poteet brothers were also passengers in the car. (T 697) An inventory of the car was done which revealed both spent and unspent shotgun shells which were Remington-Peters brand, 12-gauge high velocity pistons, 7½-shot, and which were located inside a metal lock-box inside the car. (T 700-702) Lt. Blankenship interviewed Donald Poteet and as a result contacted George Lewis from whom he received a Mossberg, New Haven, 12-gauge pump-action shotgun, five Remington-Peters shotgun shells, the owner's guide and instruction manual for the shotgun. (T 744-747) This evidence was later released to Florida authorities. (T 746-747)

On February 27, 1979, Investigator Al Legg of the Ormond Beach Police Department, traveled to Clayton County, Georgia and had contact with Appellant in the counse of his investigation of the murder of Peyton Moore. (T 703) He searched Appellant's car and found the shotgun shells. (T 704-705) On March 27, 1979, he received a shotgun and other evidence from the Clayton County Police Department. (T 750) On March 28, 1979, Investigator Legg conducted a taped interview with Appellant in Tyler, Texas, where the Appellant was then in jail. (T 918) Appellant related that in early January he and George Overton traveled to Daytona Beach. (S2-10) They also had a shotgun which they purchased in Sevierville, Tennessee. (S10) They met and stayed with Becky Hunter. (S7-8,14) Toward evening, on

January 14, 1979, Appellant and George Overton left Becky's house in Appellant's 1972 Ford Torin. (S15) Appellant was driving and the shotgun was on the floorboard in the front set of the car. (S17) They were traveling south on A1A from Flagler Beach when George saw a man running and told Appellant to turn up a street in the direction of the runner. (S18) George told Appellant to pull up to the runner because he was going to rob him. (S19) He pulled the car up to the man, George called him over to the car, and stuck the shotgun in his face. (S20) George demanded money but the runner said he had none. (S20-21) All of a sudden, George just shot the runner. (S21) Appellant got very scared and immediately drove away. (S21) They returned to Becky Hunter's house (S23-24) The next day, Appellant and George left Daytona Beach. (S27) Appellant stated that although he knew George was going to rob the man, he had no idea that he would kill him. (S29,33-34) Appellant recalled having spoken with the Poteets about the incident but never told them he had shot the jogger. (S31-32) Appellant acknowledged having given a previous statement that he was the passenger in the car, but that was not true. (S32)

ARGUMENT SUMMARY

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR DISQUALIFICATION OF JUDGE AND APPOINTMENT OF SPECIAL PROSECUTOR

The lower court judge and prosecutor were members of an organization that offered a reward for the apprehension of Defendant in this case. A motion for disqualification was filed prior to the re-sentencing as the written resolution establishing the reward was located by defense counsel. Procedure should not triumph over substance in this matter by requiring said motion for disqualification to be filed prior to trial or be waived. The lower court further ruled upon the merits of the motion in violation of case law.

POINT II

IT WAS ERROR TO ALLOW INTRODUCTION OF THE PRIOR SEXUAL BATTERY CHARGE AS AN AGGRAVATING CIRCUMSTANCE WHEN APPELLANT WAS ONLY CONVICTED OF AGGRAVATED ASSAULT

While awaiting the original trial in this cause, Appellant was charged with sexual battery and was convicted of aggravated assault after a trial. Case law clearly states that only convictions can be admitted into evidence. The great disparity between the life felony charge and the third degree felony

conviction clearly resulted in prejudice to Appellant when the sexual battery charge was admitted into evidence.

POINT III

THE TRIAL COURT ERRED IN ALLOWING TESTIMONY AND EVIDENCE TO BE RECEIVED WHICH ADVISED THE JURY THAT APPELLANT HAD BEEN PREVIOUSLY SENTENCED TO DEATH BY THE TRIAL JURY

The lower court ruled that the previous sentence of death given to Appellant would not be emphasized during the hearing. Yet the prosecutor was allowed to squarely address the issue during closing argument and directly communicate to the jury that Appellant had previously been sentenced to death, thereby prejudicing the jury against Appellant.

POINT IV

APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE SYSTEMATIC EXCLUSION OF POTENTIAL JURORS WHO STEADFASTLY OPPOSE THE DEATH PENALTY

The systematic exclusion of jurors who express that they oppose the death penalty deprived the Appellant of his right to a jury comprised of a fair cross-section of the community.

POINT V

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ALLOWING PHOTOGRAPH OF VICTIM INTO EVIDENCE

The introduction of a photograph of the victim, showing the wounds, was irrelevant and its only purpose was to inflame the jury. There were no aggravating circumstances allowed for which the photograph could be remotely probative.

POINT VI

APPELLANT WAS DENIED A FAIR HEARING WHEN A REQUEST FOR INDIVIDUAL VOIR DIRE WAS DENIED AND WHEN ONE JUROR WAS LESS THAN TRUTHFUL ON VOIR DIRE

Appellant moved for individual voir dire and the lower court denied same in violation of the applicable Rule of Criminal Procedure. One juror denied that life imprisonment was a waste of tax-payers money during voir dire but expressed this opinion during jury deliberations. This is a misconduct that is prejudicial to Defendant.

POINT VII

THE TRIAL COURT ERRED IN IGNORING THE EXISTENCE OF VALID MITIGATING CIRCUMSTANCES

The lower court judge failed to find mitigating factors that did exist - as at least two jurors found that the mitigating factors outweighed the aggravating. There was competent reasonable evidence introduced to support at least two mitigating factors.

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR DISQUALIFICATION OF JUDGE AND APPOINTMENT OF SPECIAL PROSECUTOR

Both the trial court judge and the prosecutor in this case were members of the Volusia County Bar Association during the time when said organization offered an award for information leading to the arrest and trial or conviction of the persons who killed the victim in this case. (ST1017-1023)

This fact alone is enough to create a suspicion of impropriety. How many defendants could or should proceed comfortably to trial when their own counsel and the judge have, in essence, offered a reward for their apprehension? This set of circumstances is a flat denial of the right to a fair trial and should not be condoned by this Court.

In the past, this Court has granted disqualification motions based upon a well-grounded fear that the Appellant does not feel he will receive a fair trial at the hands of the judge. See Livingston v. State, 441 So. 2d 1083 (Fla. 1983). Thus, a subjective test must be applied. The record clearly indicates that Appellant felt that the entire judicial system of Volusia County should be disqualified due to prejudice. (ST888) There is no question that any man would have a well-grounded fear of prejudice in a similar situation.

Untimeliness of the motion should not be a bar at this stage of the proceedings. Certainly this motion to disqualify was made more than ten days prior to re-sentencing. Appellant must consistently have the right to challenge a judge's impartiality at a de novo sentencing phase. A new jury was picked and, in essence, a new trial was held.

In addition, timeliness is a procedural rather than a substantive question, and this Court has often overlooked procedural error when necessary. In Livingston, supra, this Court entertained the motion for disqualification even though it was erroneously filed pursuant to an incorrect statute. When a man's life is a stake, form should not conquer substance.

Furthermore, it is clear that Appellant attempted to have such a motion filed by his defense counsel at the trial level, but that said counsel did not do so. Therein lies one of the reasons Appellant attempted to dismiss counsel many times. Appellant should not be denied a definitive ruling herein because of a procedural matter totally beyond his control.

The lower court judge ruled that, in addition to being untimely, the motion for disqualification was legally insufficient. (ST895) When asked for an explanation, the lower court elaborated that even if true, the underlying facts of said motion were not grounds for disqualifying the judge and prosecutor. (ST896) (SR 1053-1054) This ruling is patently in controvention of Bundy v. Rudd, 366 So. 2d

440 (Fla. 1978) where this Court held that the lower court judge "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification". (366 So. 2d at 442) This Court further stated that in going behind legal sufficiency, the trial judge has established grounds for his disqualification. (366 So. 2d at 442)

This Court should not allow a rule of procedure to override the serious question of impropriety based upon offering a reward for Appellant's capture and conviction. It is noteworthy that once one becomes a judge in the County of Volusia, he is no longer a member of the local bar association. Thus, there were many other judges in this circuit who could have held the re-sentencing without much inconvenience.

This cause should therefore be remanded for re-sentencing before a new judge and prosecutor. A message must be sent throughout this State that bar associations should not offer rewards, and if they do so, its members should expect to be disqualified from further participation in the case.

POINT II

IT WAS ERROR TO ALLOW INTRODUCTION OF THE PRIOR SEXUAL BATTERY CHARGE AS AN AGGRAVATING CIRCUMSTANCE WHEN APPELLANT WAS ONLY CONVICTED OF AGGRAVATED ASSAULT

While in jail awaiting trial in this murder case, Appellant was charged with sexual battery and a jury convicted him of aggravated assault. Prior to re-sentencing a motion in limine was made by

Appellant to preclude mention of the sexual battery charge to the jury. (ST12)

Said motion was denied and Appellant contends that Provence v. State, 337 So. 2d 783 (Fla. 1976) controls. In that case this Court ruled that conviction is the key to admissibility. Mere arrests or accusations are not to be counted in aggravation. (375 So. 2d at 786) Because of the great disparity between the charge and the conviction, admission of the charge was highly prejudicial to Appellant. The underlying facts of the crime could be delved into by the State without disclosure of the actual charge. Appellant was charged with sexual battery and was actually found not guilty of that charge. It should not be used against him and it was prejudicial error to allow same to be received into evidence.

The lower court relied on Morgan v. State, 415 So. 2d 6 (Fla. 1982) in allowing the sexual battery charge in evidence. That case can be distinguished as the charge of first degree murder led to a conviction of second degree murder. While Appellant herein did not waive the mitigating circumstance of insignificant criminal history, the admission of a mere accusation of a life felony resulting in a third degree felony conviction is prejudicial to Appellant herein. Further, it is to be noted that Appellant did interpose an objection to its admission - unlike the facts in Morgan, supra.

The lower court also relied upon Perri v. State, 441 So. 2d 606 (Fla. 1983) for the proposition that if the Court deems that the evidence is probative, said evidence may be admitted as long

as defendant is accorded a fair opportunity to rebut any hearsay. Appellant requested evidence admitted during the recent 3.850 motion on the sexual battery case to be brought in for purposes of rebuttal. Said request was disallowed and Appellant was therefore deprived of a fair hearing. See also State v. McCormick, 397 N.E. 276 2d (Ind. 1979) and State v. Bartholomew, 654 P. 2d 1170 (Wash. 1982). Given the extremely short period of time allowed to defense, Appellant was unable to contact any rebuttal witnesses. Therefore, this cause should be remanded for a new sentencing hearing where the sexual battery charge will not be admitted into evidence.

POINT III

THE TRIAL COURT ERRED IN ALLOWING TESTIMONY AND EVIDENCE TO BE RECEIVED WHICH ADVISED THE JURY THAT APPELLANT HAD BEEN PREVIOUSLY SENTENCED TO DEATH BY THE TRIAL JURY

Appellant moved for a motion in limine to prohibit introduction of evidence that Appellant had previously been sentenced to death. (ST23) The Court ruled that if said evidence were to come in, it would not be grounds for a mistrial. It was agreed that any such evidence would be de-emphasized.

During closing arguments, the Court allowed the prosecutor to squarely address that evidence and prejudice the Appellant thereby. (ST805) This ruling was based upon the supposition that witness Harry Krop testified that Appellant had been on death row. Dr.

Krop was only asked whether he had interviewed people on death row and his response was that 90 percent of the men on death row typically denied the crime. (ST627) At no time was it elicited that Appellant had been on death row.

Clearly, a re-sentencing juror will give much weight and credibility to the trial jurors' recommendation if it is made known to them. This appears to be an issue of first impression in Florida and this Court should not ignore ruling on this question. It is clear from the voir dire that most, if not all jurors, were unfamiliar with the history of the case.

It is without question prejudicial to let such evidence in and this cause should be remanded for a new sentencing hearing on this ground alone. The trial jurors had superior knowledge of the facts in this case and the re-sentencing jurors were aware of that fact.

POINT IV

APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE SYSTEMATIC EXCLUSION OF POTENTIAL JURORS WHO STEADFASTLY OPPOSE THE DEATH PENALTY

The United States Supreme Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968) clearly ruled that if a prospective juror would automatically vote against the imposition of the death penalty without regard to the evidence, that juror can be disqualified.

Four jurors were excused on this ground over objection. (ST55, 72,97,102) The exclusion of these prospective jurors was not properly based upon Witherspoon, supra, as the jurors never stated that they

"automatically" would vote against the death penalty. Appellate courts have required strict adherence to the Witherspoon standards and have not hesitated to rule that jurors were improperly excluded - even when one juror had stated three times that she did not believe in the death penalty. Burns v. Estelle, 626 F. 2d 396 (5th Cir. 1980). See also Granviel v. Estelle, 655 F. 2d 673 (5th Cir. 1981).

In addition, such exclusion of jurors deprives the accused of trial by a jury comprised of a fair cross-section of the community. It is time that this Court recognize this and issue a ruling prohibiting denial of this fundamental right.

POINT V

THE TRIAL COURT COMMITTED PREJUDICAL ERROR IN ALLOWING PHOTOGRAPH OF VICTIM INTO EVIDENCE

The bloody and ghastly color photograph of the victim (State's 6) should not have been admitted into evidence. (ST421-428) It certainly had no probative value and any such value was outweighed by the prejudice resulting therefrom. The trial court had previously ruled - in conformity with the earlier opinion of this Court - that the "especially heinous, atrocious and cruel" aggravating circumstance did not exist. (ST7) What purpose, then, could introduction of such a photograph accomplish, other than inflamation of the jury.

It certainly did not acquaint the jurors with information about the case that they previously did not have. The preliminary statement

in the case read by the court explained how the murder was committed. Identification of the deceased was not an issue and neither was anything else relating to the body of the victim.

The lower court, after a break, was so concerned about allowing said photograph into evidence that it bolstered its reasoning with other authority. (ST434,C.F. 425) Appellant submits that no reason can justify admission of such a photograph into evidence in this cause. In addition, the admission is of such magnitude to qualify as reversible error.

POINT VI

APPELLANT WAS DENIED A FAIR HEARING WHEN A REQUEST FOR INDIVIDUAL VOIR DIRE WAS DENIED AND WHEN ONE JUROR WAS LESS THAN TRUTHFUL ON VOIR DIRE

During the interview of the jurors, one juror admitted blurting out during deliberations that life imprisonment for Appellant would be a waste of taxpayer's money. (ST950-952) Appellant was very concerned about such an attitude being present on the jury and Appellant's counsel clearly asked all potential jurors about that question. (ST177) The fact that one juror was less than truthful under oath undermined the jury system by precluding attorneys from finding the truth and picking a fair an impartial jury. In a civil case, Loftin v. Wilson, 67 So. 2d 185 (Fla. 1953) this Court ruled that it is the duty of a juror to make full and truthful answers during voir dire and any juror who does not do so is guilty of misconduct that is prejudicial and requires a new trial.

This point is coupled with the fact that Appellant moved for individual voir dire (ST18) pursuant to Florida Rule of Criminal Procedure 3.300 which states that the court shall examine each prospective juror individually unless there is consent from both parties for collective examination. This is not harmless error, especially when coupled with Point VII on appeal, and requires reversal for a new sentencing hearing.

POINT VII

THE TRIAL COURT ERRED IN IGNORING THE EXISTENCE OF VALID MITIGATING CIRCUMSTANCES

In imposing the death penalty, Judge Foxman properly found three aggravating circumstances: (1) that at the time of the murder, Defendant was serving a sentence of imprisonment; (2) the murder was committed during the course of an attempted robbery; and (3) the Defendant was previously convicted of another felony involving the use or threat of violence to the person. (SR1064-1066)

However, the trial court failed to consider the relevant mitigating factors that Defendant was under the influence of extreme mental or emotional disturbance and that Defendant acted under extreme duress or under the substantial domination of another person.

Appellant stated under oath that he had taken LSD a minimum of 250 times and a maximum of 300. (ST707) He also admitted to drinking alcohol steadily beginning at age 10 or 11. (ST655) It

is clear that this pattern of drugs and alcohol consumption stayed with Defendant throughout his short-lived escape and even during furloughs from the Tennessee Work Release Center. (ST671,676) The transcript is replete with evidence that Defendant was under the influence of narcotics or alcohol whenever possible. The trial court ignored the presence of this factor which certainly amounted to the existence of a mental or emotional disturbance.

Further, the court ignored the fact that George Overton contributed greatly to Defendant's criminal behavior and that Overton's actions caused the escape (ST669); and Overton was undoubtedly present when the instant murder was committed. There were two occupants in the car. (ST459,460) It was Overton who suggested that he and Defendant rob a bank (ST752) and the clerk who sold the shotgun to them was a friend of Overton's. (ST753)

Sufficient evidence did exist to prove the mitigating circumstances alluded to above and the trial court erred in not acknowledging same. The fact that two jurors found mitigating circumstances outweighed any aggravating shows that some mitigating factors may have existed for all jurors. It was reversible error for the trial court to ignore the existence of these mitigating factors.

CONCLUSION

BASED UPON the cases, authorities and policies recited herein the Appellant respectfully requests this Honorable Court to reverse the sentence herein and to grant a new sentencing hearing to Appellant.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32015, and Mr. Robert A. Teffeteller, No. 075785, Florida State Prison, Post Office Box 747, Starke, Florida 32091, this 22nd day of May, 1985.

Carmen F. Corrente

CARMEN F. CORRENTE