IN THE SUPREME COURT OF FLORIDA

ROY CLIFTON SWAFFORD,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 68,009

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
DAYTONA BEACH, FLORIDA 32014
PHONE: 904/252-3367

ATTORNEY FOR APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On August 9, 1983 Appellant ROY CLIFTON SWAFFORD was indicted by a Volusia County Grand Jury on charges of first degree murder, sexual battery and robbery with a firearm. (R1510) It was alleged that Appellant robbed, assaulted and murdered Ms. Brenda Rucker, an attendant at a gasoline station in Ormond Beach.

Prior to trial the defense made three motions in limine, one of which is relevant here. Defense counsel sought exclusion of evidence that Appellant committed the crime of "soliciting another to commit kidnapping and/or murder", so called "Williams Rule" evidence. (R1600-1601) The motion was not ruled upon prior to trial.

The case was tried by jury before the Honorable Kim C. Hammond, Circuit Judge, beginning October 28, 1985. (R1-1500)

During trial Appellant again objected to the "Williams Rule" testimony of Earnest Johnson. (R927) The testimony was proffered and after hearing argument from counsel, Judge Hammond allowed the jury to hear the evidence. (R928-957)

The trial court also allowed testimony concerning Appellant's escape from custody prior to trial. (R1161-1248)

During the defense presentation of evidence the state objected when Appellant sought to introduce a police "BOLO" description of a man spotted near the crime scene. (R1306-1311) The court sustained the objection. (R1312)

At the close of the State's case and again at the close of all evidence, Appellant moved for judgment of acquittal on all counts. The motions were denied. (R1252-1261,1319)

Following deliberation the jury found Appellant guilty of first degree murder and sexual battery, but not guilty of armed robbery. (R1425-1426)

On November 7, 1985 the capital sentencing phase of the trial took place before the same judge and jury. (R1431-1500) By a ten to two (10-2) vote the jury recommended the death sentence. (R1493) Five days later Judge Hammond sentenced Appellant to death for murder, and life in prison for sexual battery. (R1502-1507)

Timely Notice of Appeal was filed, Appellant was adjudicated insolvent and the Office of the Public Defender was appointed for purposes of appeal. (R1671-1672)

STATEMENT OF THE FACTS

GUILT PHASE

On February 14, 1982, the date of the year's Daytona 500 auto race, Ms. Brenda Rucker disappeared from the Fina gas station where she worked. She was last seen alive at the station at around 6:17 a.m. that morning. (R1265) By 6:27 a.m. the police had received a call because the station was open but no employee was present. (R722) The manager was called to the scene and identified Ms. Rucker as the person scheduled to work. (R728) Her car and purse were found at the station and the cash register drawer was found open. (R728-729)

The following day Brenda Rucker's body was found in a wooded area 6.5 miles from the Fina station. An autopsy showed she had been shot at least eight (8) times. The medical examiner identified two bullet entrance wounds in the head, two in the torso, one in the right arm, two in the right leg and one in the left leg. (R765-767,774) The immediate cause of death was one of the two chest wounds, though the head wounds were potentially fatal. (R770) The body was fully clothed at the time of the shooting and when found. (R764-765) The medical examiner believed Ms. Rucker had been sexually assaulted, based on the presence of seminal fluid in the body, and superficial lacerations and blood around the arms. (R768-769)

Roy Swafford arrived in Daytona Beach Saturday, the day before the shooting with four friends from Nashville. Swafford, Roger Harper, Carl Johnson, Ricky Johnson and Chan Hirtle were in town for the Daytona 500 race. (R796) They rented space for a

tent at Tomoka State Park. (R798) They went to the beach, to a bar called the Shingle Shack, and back to camp. (R854) Ricky Johnson, Chan Hirtle and Swafford went drinking again for a while and returned to their campsite. (R801,854) Later Swafford took the car and went out leaving the other four at camp. (R855) He arrived back at the Shingle Shack alone at about 1:00 a.m. Saturday night/Sunday morning to meet Patricia Atwell. (R915) He waited until Ms. Atwell got off work at 3:00 a.m., then the two of them spent the rest of the night together at a friend's house. (R915-916) Swafford dropped Atwell off back at the Shingle Shack at about 6:00 a.m. (R916-917) There is no testimony from Ms. Atwell or any other witness that Roy Swafford had any alcoholic drink after midnight Saturday night. Swafford's friends said he got back to their campground around daybreak Sunday morning. (R803,845,851,856) Chan Hirtle thought Swafford may have returned as early as 6:00 a.m. or 6:30 a.m. (R862-863) It was stipulated that the sun rose at 7:04 a.m. that morning in Daytona. (R1249)

Sunday evening after the race Swafford and his friends returned to the Shingle Shack. (R807,858) Chan Hirtle went outside to attempt to buy drugs from some black people. (R858) The blacks were about to leave having taken Hirtle's money and left him empty handed, when Swafford came outside. (R858) According to Hirtle and Roger Harper, Swafford pulled a gun and got Hirtle's money back. (R807-811,859) Later the black people returned with the police, Swafford and his friends were arrested and a gun was seized which was later identified through balistics

testimony as the murder weapon. Swafford's alleged possession of the murder weapon was the only direct link between Swafford and the Rucker shooting. The testimony linking Swafford to the gun was conflicting.

Chan Hirtle and Roger Harper saw Swafford pull a gun on the black drug dealers. (R807,859) Harper saw Swafford put a gun back in his jacket pocket, while Hirtle thought he returned it to his pants. (R812,960)

Clark Griswold was a bouncer at the Shingle Shack on the date in question. (R1041) He "knew of" the incident outside and knew there was a gun involved. (R1042) A man (later identified by police witnesses as Swafford) came in and sat down following the incident. (R1043) Griswold was outside when the police arrived and told them "the fellow was inside." (R1043-1044) When Griswold went in to get him, Swafford was "in a state of panic" and asked to use the restroom. (R1044) Griswold let him use the restroom apparently believing (but not seeing) that Swafford still had a gun and would leave it there. (R1044-1045) Swafford came out in 30 or 45 seconds. Griswold asked someone to watch the restroom and not allow anyone in while he took Swafford outside. (R1045) He turned Swafford over to the police and said "the weapon's inside and I can get that too". Griswold then went back inside and allegedly found a gun in the trash can of the men's room. (R1045) He brought it outside and handed it to a police officer. (R1046)

Frank Iocco, a Daytona Beach Police Officer, said Griswold came outside first with a gun, then went back inside with Officer Vaughn to get Swafford. (R1062)

Officer William Vaughn agrees with Iocco that Griswold brought a gun outside, but says that he thinks Swafford was already outside the bar. (R1068-1070)

Karen Sarniak, a Shingle Shack waitress, gave a fourth version of the recovery of a gun. She says she and Swafford went together into the ladies' room and she saw Swafford place a gun into the trash can. (R1093-1094) Then "as far as she remembers" a police officer came in the ladies' room and personally retrieved a gun. (R1100)

Officer Vaughn testified that only one gun was seized during the incident. (R1156) Vaughn gave the gun to Officer Grey Cooper who recorded the serial number and submitted it to the property room. (R1076)

Over one year after the murder of Brenda Rucker, Roger Harper was in prison and found out he had Hodgkins Disease. (R793) He "found out through rumors that Roy Swafford might have done something here in Daytona Beach" and contacted authorities. (R794) Based on Harper's information the gun seized at the Shingle Shack incident was tested and found to be the weapon that killed Brenda Rucker. (R1127,1142)

Over strenuous defense objections the trial court allowed the jury to hear testimony from Ernest Johnson concerning an incident that occurred in Nashville, Tennessee about two months after Brenda Rucker's murder. Ernest Johnston met Roy Swafford

at "the fairgrounds speedway". (R961) They went to Swafford's brother's house and drank beer for a while. (R962) When they left the house Swafford said something about going to get some women. (R962) They got in Swafford's car, got a six-pack of beer and started riding. (R963) Swafford again asked if Johnson wanted to "get a girl" and Johnson said yes. Johnson testified further, as follows:

> So, as we was driving, I said, you know, where are you going to get her at. He said, I'll get her. He said -- he said, we'll get one and we'll do anything we want to to her. And he said, you won't have to worry about it because we won't get caught.
>
> So, I said, how are you going to do that. And he said, we'll do anything we want to and I'll shoot her.
>
> * * *
>
> So, he said if -- you know, he said that he'd get rid of her, he'd waste her, and he said, I'll shoot her in the head.
>
> I said, man, you're crazy. he said, no, I'll shoot her in the head twice and I'll make damn good and sure that she's, you know, she's dead. He said, there won't be no witnesses.
>
> So, I asked him, I said, man, don't -- you know, don't that bother you. And he said, it does for a while, you know, you just get used to it.

(R963-964)

Johnson said he and Swafford went as far as to pick out a woman in a parking lot and Swafford pulled a gun from under the seat or out of the glove box. (R964-965) Johnson backed out when he saw a child restraint seat in the woman's car. (R965)

The jury also heard testimony from four witnesses concerning an escape attempt made by Swafford and Michael Anderson on September 11, 1985.

Bobby Lambert of the Volusia County Sheriff's Officer was bringing prisoners back from court in a county vehicle on the date in question. Swafford had appeared for a pretrial conference. (R1162) Lambert arrived back at the jail with six prisoners cuffed two by two. (R1163) When Swafford and Anderson broke and ran, Lambert realized they were not handcuffed together. (R1164) Lambert had to secure the other prisoners so he could not give chase, but Officer Jacob Ehrhart saw the two men driving away with a female companion and gave chase. (R1188-1189) Ehrhart cornered the vehicle near Fish Memorial Hospital and the two escapees got out and went into the hospital. (R1189-1190)

Robert Nolin, a reporter for the Daytona Beach News Journal, received a call from Swafford and Anderson while the two men were holed up on the third floor of the hospital. (R1224) The men said they had two guns. (R1227) They seemed primarily interested in the fate of their female accomplice Kathy, and were attempting to negotiate immunity from prosecution for her. (R1224-1226) Twice during the conversation with Nolin, the caller identifying himself as Roy said "we're both murderers." (R1228) After a few hours Swafford and Anderson surrendered to police.

Five days later Swafford called Nolin again from jail. He said he regretted the escape incident and was happy no one was hurt. (R1230) He asked Nolin to make clear in future newspaper

stories that he professed his innocence in the Rucker murder case. He said "I'm accused of killing somebody, I'm innocent until proven guilty." But he confirmed the accuracy of the "we're both murderers" quote. (R1231-1232)

The defense called two witnesses. Paul Seiler was perhaps the last witness to see Brenda Rucker alive. He worked until 6:00 a.m. at a local restaurant on the date in question. (R1263) At about 6:17 he was on his motorcycle stopped at a traffic light in front of the Fina station. (R1265) He saw a young lady behind the counter, then noticed that she walked outside followed by a man in a flannel shirt. (R1265) The man got in a car and headed north. (R1267) Seiler could not say whether the woman was with him. Later in the day Seiler heard the news of Ms. Rucker's disappearance and contacted the police. (R1271) He gave a description to the police from which he and an officer constructed two identi-kit photos. (R1267-1269) Seiler remembered describing the individual as a white male, late twenties/early thirties, 160 to 170 pounds, 5'10" to 6' tall, with brown hair with a reddish tint, wearing a long sleeve blue or brown flannel shirt and bluejeans. (R1269) Seiler said the police never suggested any description to him and that the identi-kit pictures were made solely from his information. (R1269) But Seiler said he only glanced at the individual at the Fina station and didn't know how close his description was to reality. (R1271) When questioned about the very detailed description noted in police reports Seiler didn't recall giving much of the information and said "I really don't know where I

could even come up with something like that because I didn't get that good of a look at him." (R1280)

The Court refused to allow into evidence the detailed description put out in a police "BOLO" based on Seiler's information. (R1306-1313) Apparently the description Seiler gave did not match the defendant, Roy Swafford. (R1361-1362,1391-1392)

PENALTY PHASE

The State called two witnesses at the penalty phase to recount an incident which occurred June 19, 1982. Warren Milner and his family were spending a weekend at Panama City Beach. (R1440) As Milner and his son Heath were heading back to their motorhome from the beach they came upon two men identified as Roger Harper and Roy Swafford burglarizing the trailer. (R1442) When Milner tried to stop them Swafford picked up Milner's shot gun and apparently was trying to figure out how to use it. Milner grabbed the shotgun and knocked Swafford down. (R1443) Harper then got into the fight and as the two men struggled with Milner the shotgun went off tearing a hole in the trailer. (R1444) Swafford then told Harper to get him his gun "and that he was going to teach this mother fucking son of a bitch a lesson". (R1444) Swafford then shot Milner in the face and in the hip. (R1445) Swafford was convicted of burglary with an assault and sentenced to thirty years in prison. (R1446)

The State also introduced into evidence copies of six certified criminal convictions against Swafford. (R1447-1451)

The defense called no witnesses at the penalty phase. It was stipulated that Swafford's father would have testified were he able, that Roy had achieved the rank of Eagle Scout in the Boy Scouts of America. (R1459)

Following deliberations the jury recommended the death penalty by a vote of ten to two. (R1493) The trial court, in an order issued five days later, accepted the recommendation and

sentenced Appellant to death for the first degree murder conviction. The judge stated his findings of fact as follows:

> On November 6, 1985, in Daytona Beach, Florida, the Defendant, ROY CLIFTON SWAFFORD, was found guilty of First Degree Murder in violation of F.S. §782.04. An advisory opinion recommending the imposition of the death penalty was returned the following day by the Jury. Upon considering the recommendations and the requisite aggravating and mitigating circumstances, this Court sentenced the Defendant to death on the 12th day of November, 1985.
>
> 1. The facts proven beyond a reasonable doubt in the issue of aggravating circumstances are as follows:
>
> 1. The defendant has been previously convicted of a felony involving the use of threat or violence to a person in that on the 10th day of January, 1983, the Defendant was convicted of Burglary with Assault and was sentenced to thirty (30) years with the Department of Corrections in Florida. Furthermore, testimony was heard that in the beforementioned burglary with assault, the Defendant shot a victim in the face and hip with a .38 caliber revolver.
>
> 2. The capital felony committed by the Defendant in this case was committed while he was engaged in the commission of a crime of sexual battery. Testimony elicited at the trial confirmed the the victim, Brenda Rucker, was vaginally and/or anully [sic] sexually battered as charged in the indictment.
>
> 3. The crime committed by the Defendant was committed for the purpose of avoiding or preventing lawful arrest. One of the factors identifying the Defendant in this case as the murderer was that he believed he could avoid arrest by shooting his victims.
>
> 4. The crime for which the Defendant was convicted was especially

wicked, evil, atrocious or cruel. The Defendant carried the victim, a Brenda Rucker, away from the place of her employment to an isolated spot in Volusia County, sexually battered her vaginally and/or anully [sic], and then proceeded to shoot her at least nine (9) times in and about her person. Wounds were found on her about her legs, abdomen, chest and head.

5. The crime for which the Defendant was convicted was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The evidence supports the finding that the Defendant was of a state of mind that he believed that he could seize a female and do what he wished to her and shoot her twice in the head to eliminate any witnesses. It also was proven that not only did the Defendant empty his firearm into the victim one time, but he would have had to reload his five-shot revolver again and shooting her while she was completely helpless.

II. The aggravating circumstances not supported by the facts in this case are:

1. There is no evidence that the capital felony was committed by a person under sentence or of imprisonment.

2. There is no evidence that the Defendant knowingly created a great risk of death to many persons.

3. The capital felony was committed for pecuniary gain.

4. That the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or enforcement of laws.

III. The following mitigating circumstance is found to exist by this court is:

1. The Court accepts as a fact that the Defendant was an Eagle Scout and fully appreciates the efforts required to achieve such an honor.

IV. The following mitigating circumstances are found not to exist in this case:

1. No evidence exists supporting circumstances of lack of significant history of criminal prior activity exists. In fact, the evidence is overwhelming to the contrary.

2. There is no evidence to support the finding of a mitigating circumstance of the Defendant being under the influence of extreme mental or emotional disturbance.

3. There is no evidence to support a finding that the victim was a party to the conduct or consented to the act.

4. There is no evidence to support a mitigating circumstance that the Defendant was an accomplice in a capital felony committed by another person and his participation was relatively minor, in fact, the evidence only supports the conclusion that the Defendant was the sole planner and perpetrator of the crimes involved.

5. There is no evidence to support a finding of a mitigating circumstance that the Defendant acted under extreme duress or dominance of another person.

6. There is no evidence to support the mitigating circumstance that the Defendant lacked capacity to appreciate the criminality of his conduct nor was he impaired in such a way as to prevent him from conforming to the requirements of the law.

7. The Defendant's age at the time of the commission of the crime was thirty-five (35) and the Court does not consider this a mitigating circumstance.

SUMMARY

The Court finds five (5) aggravating circumstances exist and only one (1) mitigating factor has been established. Not only do the aggravating

factors numerically outweigh the mitigating factors, but the aggravating factors are of far more weight that the fact that the Defendant was an Eagle Scout. The mitigating factor does demonstrate that the Defendant, at some point in his life, had training and supervision that should have led him to become a lawful contributing citizen. Nevertheless, the Defendant has chosen to pursue a life of crime and has sunk so low that he has brutally battered and murdered a woman. This Court is mindful of the jury's recommendation of death. After carefully reviewing the events as did the jury, the Court finds the imposition of death to be warranted under Florida law.

(R1617-1619)

SUMMARY OF ARGUMENT

POINT I: Over objection the state was allowed to present the testimony of Ernest Johnson concerning a criminal episode that occurred in Nashville, Tennessee. The testimony was allowed in as "Williams Rule" evidence to prove identity. This was error because the Nashville incident and the Rucker murder share no unusual similarities. Without unusual similarities evidence of other crimes merely proves propensity or bad character and is therefore inadmissible.

POINT II: The trial court sustained a state objection when the defense attempted to offer into evidence a police "BOLO" description of a man seen with Brenda Rucker the morning of her death. This evidence was crucial to the defense case and should have been admitted under the "identification" exclusion from the hearsay rule. Section 90.801(2)(c), Florida Statutes (1985). The description, given to police on the day of the murder, was inherently more reliable than the witness' in-court testimony three years after the fact and should have been admitted.

POINT III: A. There was insufficient evidence to support the trial court's finding that the capital felony was committed for the purpose of avoiding lawful arrest. This aggravating circumstance is not established unless it is proven beyond a reasonable doubt that the dominant or only motive for the murder was the elimination of witnesses. In the instant case there is no

evidence concerning motive, other than speculation based on Appellant's statements about an entirely different offense.

B. When the instant case is compared with other capital offenses, the trial court's finding that the murder was "especially heinous atrocious and cruel" cannot be supported. Other than the fact that the victim was sexually assaulted and murdered, very little is known about what occurred at the time of the crime. The known facts do not support the finding of this aggravating circumstance.

C. The trial court found that the capital felony was "committed in a cold, calculated and premeditated manner ..." based mainly on Appellant's alleged statement made following a separate crime. It is baseless speculation to assume Appellant's state of mind was the same before the Nashville incident and the instant offense. Without the Nashville statement, this case cannot be distinguished from the many cases where this Court has struck this aggravating circumstance.

D. This Court should not allow the sexual battery committed at the time of the murder to support an aggravating circumstance, as it was the underlying felony that allowed the killing to be classified as first degree felony murder.

E. This Court should reverse Appellant's sentence and order a new sentencing hearing because on mitigating circumstance was properly found and several aggravating circumstances were improperly found.

POINT IV: The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment for several reasons discussed in Point IV herein.

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION IN LIMINE AND OVERRULING HIS OBJECTIONS AND ALLOWING INTO EVIDENCE TESTIMONY ON COLLATERAL CRIMES, THUS DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Appellant moved in limine prior to trial to prevent the state from presenting the so called "similar fact" or "Williams rule" testimony of Ernest Johnson. (R1600-1601) Appellant continued to object at every possible juncture to Ernest Johnson's testimony. (R652-662,927,937-957,959) After the testimony was received Appellant again objected and moved for mistrial. The motion was denied. (R971) Appellant does not believe the preservation of this issue for review can be seriously questioned.

In the case for which he stood trial Appellant was accused of the sexual battery, robbery and murder of Brenda Rucker with the following facts established:

(1) The crime occurred in Ormond Beach, Florida

(2) It was just after 6:15 a.m., while it was still dark, that Ms. Rucker was seized.

(3) Roy Swafford was drinking alcoholic beverages before midnight the night before the crime.

(4) The victim was sexually assaulted anally.

(5) The victim was shot with a pistol at least eight times, twice in the head, twice in the back, once in the right arm, twice in the right leg, and once in the left leg.

The "Williams rule" testimony of Ernest Johnson concerned the offense of "criminal solicitation to commit kidnapping and/or murder." (R1536) From the testimony of Ernest Johnson, the following facts are established:

(1) The crime occurred in Nashville, Tennessee.

(2) It was afternoon or early evening.

(3) Swafford and Johnson were drinking before and during the time of the offense.

(4) Swafford suggested that the two men could get a girl and do anything they wanted with her, then he would shoot her twice in the head so there would be no witness.

(5) Swafford produced a pistol and had picked a woman out of a parking lot and appeared ready to kidnap her before Johnson objected.

(6) After the fact when asked if such a thing bothered him, Swafford replied: "It does for a while, you just get used to it."

The State argued that the incident was relevant to prove identity. (R952) It was also argued that the statement in paragraph (6) above was admissible as an admission. Section 90.803(18) Fla. Stat. (1985).

The trial court allowed the evidence cited in paragraphs one through five above to prove identity, citing the following points of similarity between the two events:

(1) The use of a gun.

(2) The suggestion of where the shots should be

placed.

(3) The seizing of a female for apparent sexual purposes.

(4) The likelihood of murder.

(5) The suggestion that this is how one eliminates witnesses.

(6) The use of alcohol prior to the crime.

Appellant asserts that while there are some general similarities between these two offenses they are far from what would be necessary to allow admission of collateral crime evidence.

The Florida standard for the introduction of evidence revealing other crimes is clear. Williams v. State, 110 So.2d 654 (Fla. 1959), is the leading case in the area. Williams reveals that:

> [Evidence] revealing other crimes is admissible if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity of a system or general pattern of criminality so that the evidence of prior offenses would have a relevant or material bearing on some essential aspect of the offense being tried. Id. at 662.

This holding has been codified in §90.404(2)(a), Florida Statutes (1985).

In Drake v. State, 400 So.2d 1217 (Fla. 1981) this Court dealt more specifically with the type of collateral crime evidence offered here, evidence offered to prove identity through similarity of modus operandi:

> The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of the factual situations being compared. A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant.

Id at 1219.

An excellent summary of the logic behind the modus operandi theory of proving identity is contained in Professor Charles Ehrhardt's text on Florida Evidence:

> Evidence of similar acts is admissible to prove identity. The most common basis of proving the identity of the person who committed the crime in question is from evidence that collateral crimes were committed by the use of a distinctive modus operandi which was the same as that used in the crime in question. Proof that the defendant committed the other crimes provides a basis for an inference that the defendant committed the crime in question. The fact that the defendant is identified as having committed a prior crime does not, by itself, mean the evidence is relevant. The probative value comes from the fact that the collateral crimes were committed with a unique modus operandi which was the same as that used in the crime in question; therefore it may be inferred that the same person committed both crimes. When that evidence is coupled with an identification of the defendant as the person who committed the prior crime, the evidence is relevant. Evidence that the defendant has committed prior crimes, without evidence of a similar modus operandi, does not raise the same inference. Only when the court can find that modus operandi is so unusual so that it is

> reasonable to conclude that the same person committed both crimes is the evidence of the prior crime admissible to prove identity.

Ehrhardt, Florida Evidence §404.10 (2d.Ed. 1984)(footnotes omitted).

In the instant case the similarities between the two offenses cited by the trial court are either unsupported factually by the record or are not "so unusual as to point to the defendant." Drake, supra.

(1) "The use of a gun", or even more specifically the use of a handgun, is not at all unusual in kidnapping, sexual assault or murder. No specific facts are known about the gun used in the incident in Nashville.

(2) There is little similarity between the eight entrance wounds found in the Rucker case and Swafford's alleged suggestion in Nashville that he would shoot the victim twice in the head. Certainly there is no unusual similarity.

(3) "The seizure of a female for apparent sexual purposes" is a factor common to any sexual battery case. Further, although the trial court seemed to assume he did, Ernest Johnson never even mentioned any type of sexual offense in his description of the Nashville offense.

(4) "The likelihood of murder" is of course present in any murder or solicitation to murder.

(5) The elimination of the witness is common to any rape/homicide case. As this court well knows, unfortunately this is not an unusual crime.

(6) There is no evidence that Swafford used alcohol within at least six hours of the Rucker killing. Even if the proof were present, use of alcohol before a crime is hardly unusual.

Not only are there no unusual similarities between the two offenses compared here, there are several significant differences.

(1) There is no evidence that more than one person committed the offenses against Ms. Rucker.

(2) One crime occurred in Tennessee, the other in Florida.

(3) One crime was carried out, the other was not.

(4) One offense occurred in the morning, the other in the evening.

(5) Swafford allegedly suggests shooting the Nashville victim twice specifically, while Ms. Rucker was shot at least eight times.

This Court has made clear as recently as April, 1986, its position that the type of evidence admitted here must be excluded. In Peek v. State, 11 FLW 175 (Fla. April 17, 1986) the defendant was convicted of murder, sexual assault and other crimes. His conviction was reversed because evidence of another rape was admitted. As in the instant case, similarities between the charged crimes and the "Williams Rule" crime were few, and there were significant differences. This Court wrote:

> Collateral crime evidence...is not relevant and admissible merely because it involves the same type of offense.
>
> * * *

> If we held the testimony concerning Peek's collateral crime admissible under these circumstances, any collateral crime evidence would be admissible as long as the crimes were of the same type and were committed within the same vicinity.
>
> The explanation for excluding this type of evidence was set forth in Jackson v. State, 451 So.2d 458 (Fla. 1985) where we quoted with approval the Third District Court of Appeal's comment in Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976), cert. denied, 348 So.2d 953 (Fla. 1977):
>
> > There is no doubt that this admission [to prior unrelated crimes] 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 ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded.
>
> Jackson, 451 So.2d at 461 (citation omitted). Our justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that the defendant may have a propensity to commit the particular type of offense. The admission of improper collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So.2d 903, 908 (Fla. 1981).

Id., 11 FLW 176-177.

In the instant case the Rucker murder and the incident reported by Ernest Johnson share no unusual characteristics. Comparing only the facts patterns, there is simply no basis for

an assumption that the same person committed the two offenses. It was error to admit the collateral crime testimony of Ernest Johnson and such error must be presumed harmful error "because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So.2d 903, 908 (Fla. 1981).

The final portion of Ernest Johnson's testimony, the alleged "you get used to it" statement, was allowed into evidence as an admission. A statement by a criminal defendant is admissible despite being hearsay, if the statement is:

(a) voluntary,

(b) relevant, Section 90.402 Fla.Stat. (1985); and

(c) the relevance of the statement is not outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury or needless presentation of cumulative evidence.

Swafford's alleged statement is not excluded hearsay because it is a statement of a party to the case. Section 90.803(18) Fla.Stat. (1985). No question was raised about the voluntariness of the statement. Appellant did question the relevance of the statement below, and does so here. The statement may imply that Appellant would have little remorse if he committed crimes, but it refers to no specific act, time or place. The alleged statement is relevant only to show bad character or propensity to crime, thus it is inadmissible for the same reason the "Williams Rule" evidence should be excluded.

Both the "Williams Rule" testimony and the alleged "admission" were erroneously admitted into evidence and each error

provides an independent basis for finding that Appellant was denied a fair trial as guaranteed by the United States Constitution and the Constitution of the State of Florida.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN IMPROPERLY RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE WHERE SUCH EVIDENCE WAS CRUCIAL TO HIS DEFENSE THEREBY RESULTING IN A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT.

The right of an accused to present witnesses to establish his defense is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14 (1967). Indeed, this right is a cornerstone of our adversary system of criminal justice. Both the accused and the prosecution present a version of facts to the trier of fact so that it can be the final arbiter of truth. Id.; United States v. Nixon, 418 U.S. 683, 709 (1974). Subject only to the rules of discovery, an accused has an absolute right to present evidence relevant to his defense. Campos v. State, 366 So.2d 782 (Fla. 3d DCA 1979); Roberts v. State, 370 So.2d 800 (Fla. 2d DCA 1979).

Appellant asserts his fundamental right to present evidence in his defense was violated when the trial court refused to allow the jury to here to contents of a detailed "BOLO" description issued on the day of the offense. Paul Siler testified he saw a young woman leave the Fina Station with a man at about the time Brenda Rucker must have been seized. (R1265-1267) He gave a detailed description of the man to police on the day of the crime and again the next day. Seiler's description led to the "BOLO" in question. Over three years later, at trial, Seiler did not recall giving such a detailed description, thus the

defense sought to introduce the "BOLO" itself to corroborate Seiler's testimony and add detail. The Court excluded the "BOLO" description as inadmissible hearsay.

A statement of identification of a person made after perceiving him is not hearsay, if the declarent is subject to cross examination. Section 90.801(2)(c) Fla.Stat. (1985). The lower court did not allow application of this exception stating that the "BOLO" was a description and not an identification. (R1312) Appellant believes Section 90.801(2)(c) should have been applied to admit this evidence and the distinction between description and identification is not contemplated by the statute. The rationale for the identification exclusion is stated in State v. Freber, 366 So.2d 426, 428 (Fla. 1978):

> In our view, an identification made shortly after the crime is inherently more reliable than a later identification in court. The fact that the witness could identify the respondent when the incident was still so fresh in her mind is of obvious probative value. See State v. Ciongoli, 313 So.2d 41 (Fla. 4th DCA 1975), cert. discharged, 337 So.2d 780 (Fla. 1976)

(footnote omitted)

The rationale of the exclusion does not support the distinction made by the trial judge. It in fact explains why the profferred evidence should have been admitted. When Paul Seiler's memory was fresh he gave a more detailed description. Seiler was available for cross examination, thus the "BOLO" description should have been admitted.

Appellant recognizes that the trial court has some discretion in the introduction of evidence, but nevertheless

contends that the exclusion of the BOLO constituted an abuse of discretion on the part of the trial court. Relevant evidence is evidence tending to prove or disprove a material fact. §90.401, Fla.Stat. (1985). All relevant evidence is admissible, except as provided by law. §90.402, Fla. Stat. (1985). While Appellant anticipates that the state will argue that any error committed in this instance is harmless, Appellant submits that this Court should not reject this issue in haste. It must be remembered that the instant case is a capital case in which the Appellant was sentenced to death. The trial was a long one with an enormous amount of testimony and evidence for the jury to consider. Where the crux of the defense involved identification (or rather misidentification) of the Appellant as the culprit, the early descriptions of the assailant became critical. The defense case was bottomed on the variances between the Appellant's physical appearance and that contained in the BOLO. Since the evidence went to the heart and soul of Appellant's defense, Appellant contends that the trial court should have allowed the admission of this relevant and important evidence.

POINT III

THE TRIAL COURT'S IMPOSITION OF THE DEATH PENALTY VIOLATED APPELLANT'S RIGHTS AS GUARANTEED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9,16 AND 17 OF THE FLORIDA CONSTITUTION.

Following the penalty phase the jury returned with a 10-2 vote in favor of death. (R1493) In imposing the death sentence the trial court found that the evidence established five aggravating circumstances and one mitigating circumstance. (R1617-1619) The court found that (1) Appellant had been previously convicted of a felony involving the use or threat of violence; (2) the murder was committed while Appellant was engaged in the commission of a sexual battery; (3) the crime was committed for the purpose of avoiding or preventing lawful arrest; (4) the crime was especially wicked, evil, atrocious or cruel; (5) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

As a mitigating circumstance the court found "that the Defendant was an Eagle Scout and fully appreciates the efforts required to achieve such an honor."

A. THE TRIAL COURT ERRED IN FINDING AGGRAVATING CIRCUMSTANCE 5(e), THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING LAWFUL ARREST.

In support of this finding the trial judge stated that, "One of the factors identifying the Defendant in this case as the murderer was that he believed he could avoid arrest by shooting

his victims." (R1617) This finding obviously rests on the testimony given by Ernest Johnson about the incident in Nashville Tennessee.

For the reasons expressed earlier in Point I, this aggravating circumstance is based on testimony which should not have been admitted into evidence. Further Ernest Johnson did not witness or hear any statement referring to the Brenda Rucker killing. It is pure speculation to base an aggravating circumstance on a statement Appellant allegedly made in reference to another crime.

As with all aggravating circumstances, this one must be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1,9 (Fla. 1973). This circumstance is typically found where the evidence clearly demonstrates that a defendant killed a police officer who was attempting to apprehend him. See e.g. Mikenas v. State, 367 So.2d 606 (Fla. 1978); Cooper v. State, 336 So.2d 1133 (Fla. 1976). However, this circumstance is not limited to those situations and has been found to exist where civilians were killed. Riley v. State, 366 So.2d 19 (Fla. 1978). However, this Court in Riley held that an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses. Appellant submits that the state has failed in meeting its burden of proof regarding this particular aggravating circumstance.

In the instant case all that is known is that the victim was taken to a remote area, sexually assaulted and shot to death. There is no evidence as to the motive for the killing.

An examination of cases where this Court has upheld the finding of this aggravating circumstance shows that more evidence that avoiding arrest was the dominant motive is required. Wright v. State, 473 So.2d 1277 (Fla. 1985)(defendant stated that he killed victim because she recognized him and he did not want to return to prison); Gove v. State, 475 So.2d 1205 (Fla. 1985)(victim shot while trying to escape after sexual assault); Johnson v. State, 465 So.2d 499 (Fla. 1985)(defendant said he shot victim because she was going to send him back to prison); Herring v. State, 446 So.2d 1049 (Fla. 1984)(defendant stated he shot victim a second time to prevent his testifying against him); Clark v. State, 443 So.2d 973 (Fla. 1983)(defendant told cellmate victim could identify him and would have known that he shot her husband); Stevens v. State, 419 So.2d 1058 (Fla. 1982)(defendant insisted on need to eliminate witnesses); Vaught v. State, 410 So.2d 147 (Fla. 1982)(victim shot after announcing he recognized defendant).

In factual situations analogous to the instant case the "avoiding arrest" aggravating circumstance has been rejected.

In Griffin v. State, 474 So.2d 777 (Fla. 1985) the defendant shot a store clerk who had not resisted a robbery. The trial court found the killing was done to avoid lawful arrest. This Court held:

> We do not agree with the judge that because the victim offered no resistance, and because he was the sole eyewitness, he was killed to avoid arrest. While this is certainly a plausible inference, it is not the only one. There is no direct evidence of why

> Frank Griffin killed Raul Nieves. There is no evidence that Nieves knew or recognized Griffin.

Id at 781.

In Caruthers v. State, 465 So.2d 496 (Fla. 1985) the defendant shot a store clerk who did recognize him. This Court ruled as follows:

> The victim's recognition of appellant as a customer speaks to the question of whether he killed her to prevent a lawful arrest. The state does not without more establish this fact by proving that the victim knew her assailant, even for a number of years. See Rembert v. State, 445 So.2d 337 (Fla. 1984). We stated in Riley that "the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest, and detection must be very strong in these cases." Riley, 366 So.2d at 22. The state has not met its burden in the present case.

Id at 499.

Bates v. State, 465 So.2d 490 (Fla. 1985) is strikingly similar to the instant case. Bates abducted a woman from her office, took her into some woods behind the building, attempted to rape her and stabbed her to death. This Court stated:

> We agree with Bates, however, that the trial court improperly found the avoid arrest and cold, calculated, and premeditated aggravating circumstances. Concerning avoiding arrest, in Riley v. State, 366 So.2d 19, 22 (Fla. 1978), we held that
>
> > the mere fact of death is not enough to invoke this factor when the victim is not a law enforcement officer. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.

> The mere fact that a victim might be able to identify an assailant is insufficient. Moreover, "it must be clearly shown that the dominant or only motive for the murder was the elimination of the witness.
>
> * * *
>
> In the instant case the victim was not a police officer and did not know her assailant. Also, the contention that Bates killed the victim solely to avoid her identifying him is mere speculation. We do not find the proof strong enough to support finding that Bates committed this murder in order to avoid or prevent his lawful arrest.

Id. at 492-493.

Because the evidence does not establish beyond a reasonable doubt that the murder was committed to avoid lawful arrest this aggravating circumstance must be struck.

B. THE TRIAL COURT ERRED IN FINDING AGGRAVATING CIRCUMSTANCE 5(h), THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS ATROCIOUS OR CRUEL.

This Court has defined "heinous, atrocious, and cruel in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) as such:

> 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.

Recognizing that all murders are heinous, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that this aggravating circumstance only apply to crimes especially heinous, atrocious and cruel. In light of this, the facts enumerated by the trial court do not support the finding of this factor.

In support of this aggravating circumstance, the trial court recited the following facts:

> The defendant carried the victim, a Brenda Rucker, away from the place of her employment to an isolated spot in Volusia County, sexually battered her vaginally and/or anully [sic], and then proceeded to shoot her at least nine (9) times in and about her person. Wounds were found on her about her legs, abdomen, chest and head.

(R1618)

As with all aggravating circumstances, this one must be proven beyond a reasonable doubt. State v. Dixon, supra.

Since State v. Dixon, supra, this Court has focused on the infliction of physical pain or mental anguish prior to death. Scott v. State, 411 So.2d 866 (Fla. 1982); Adams v. State, 412

So.2d 850 (Fla. 1982); Palmes v. State, 397 So.2d 648 (Fla. 1981); White v. State, 403 So.2d 331 (Fla. 1981); Barclay v. State, 343 So.2d 1266 (Fla. 1977). In each of these cases, proof was presented and accepted by this court which clearly demonstrated that the victim was subjected to physical torture or mental anguish prior to death: Scott, supra (victim bludgeoned to death, while hands and feet tied); Adams, supra (victim abducted, brutally raped, strangled before finally being stabbed to death); Palmes, supra (victim tied, gagged, and covered with garbage bag before being stabbed); White, supra ("protracted ordeal" during which victims tied up, searched, and executed one by one); Barclay, supra (victim writhing in pain, begging for help, while being stabbed repeatedly).

In the instant case the proof shows that the victim was subjected to sexual battery before death, and no more. The sexual battery was a separate crime for which Appellant was convicted and sentenced. It also served as the basis for finding the killing to be first degree felony murder. Further the same fact supports the trial court's finding of aggravating circumstance 5(d) - that the murder was committed while Appellant was engaged in a sexual battery. (R1617) To allow the sexual battery to serve as the factual basis for two separate aggravating circumstances would violate this Court's prohibition of "improper doubling" first stated in Provence v. State, 337 So.2d 783 (Fla. 1976).

The fact that prior to death the victim had been subjected to sexual battery does not necessarily support a

finding of this aggravating factor. In Purdy v. State, 343 So.2d 4 (Fla. 1977), this Court reversed the imposition of the death penalty despite a finding by the trial court that the rape of a six year old child was especially heinous, atrocious and cruel. As this Court noted, the act of rape is always so reprehensible as to cause outrage, but without more, the mere act of rape is not especially heinous atrocious and cruel. Accord Shue v. State, 366 So.2d 387 (Fla. 1978).

The trial judge also cited the fact that the victim was shot nine (9) times as support for this aggravating circumstance. (R1618) The number of times the victim is shot is relevant to the degree of cruelty of the crime only if it is proven that the repeated shooting caused the victim more pain. In the instant case medical testimony established that six (6) of the shots were fired when the victim was dead or very close to death. (R778) There is no evidence that death took place more than seconds after the shooting started. Events occurring after death are not relevant to the atrocity of a homicide. Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983); Simmons v. State, 419 So.2d 316 (Fla. 1982). And events occurring once a victim is unconscious do not make the killing "unnecessarily torturous to the victim," as is required by Dixon, supra, and Tedder, supra.

It is the duty of this Court to review the case in light of other decisions and determine whether or not the punishment is too great. State v. Dixon, supra at 10; McCaskill v. State, 344 So.2d 1276, 1278-1279 (Fla. 1977). A comparison to other cases wherein this Court has reduced death sentences to

life imprisonment reveals that the instant crime was no more shocking than the norm of capital felonies.

In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the defendant beat the victim's skull with lethal blows from a 19-inch breaker bar and then continued beating, bruising, and cutting the victim's body with the metal bar after the first fatal injuries to the brain. The Halliwell crime is surely more brutal than that of the instant case, yet this Court found in Halliwell's conduct "nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court." Halliwell, 323 So.2d at 561.

Similarly, the cases of Burch v. State, 343 So.2d 831 (Fla. 1977)(36 stab wounds during frenzied attack), Chambers v. State, 339 So.2d 204 (Fla. 1976)(severely beat girlfriend to death -- victim bruised over her entire head and legs, had a deep gash under her left ear; her face was unrecognizable, and she had several internal injuries), and Jones v. State, 332 So.2d 615 (Fla. 1976)(38 "significant" lacerations on rape victim), involve similar or more gruesome killings. In each of these cases, however, this Court has vacated the death sentences. The Appellant's death sentence must likewise be vacated. Were the impositions of life sentences in these and other similar or more heinous cases to be ignored, Florida's death penalty statute could not be upheld under the requirements of Proffitt v. Florida, 438 U.S. 242 (1976), and Furman v. Georgia, 408 U.S. 238 (1972). See also Godfrey v. Georgia, 446 U.S. 420 (1980)

C. THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING FACTOR (5)(i), THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In Combs v. State, 403 So.2d 418 (Fla. 1981), this Court declared that Section 921.141(5)(i), Florida Statutes (1981) authorizes a finding of aggravation for premeditated murder where the premeditation is "cold, calculated and... without any pretense of moral or legal justification." Id. at 421. This Court further stated that "Paragraph (i) in effect adds nothing new to the elements" of premeditated murder, but does add "limitations to those elements for use in aggravation." Id. (emphasis added). Subsequently, in Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982), this Court held:

> The level of premeditation needed to convict in the [guilt] phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor - "cold, calculated... and without any pretense of moral or legal justification." (emphasis supplied).

In Middleton v. State, 426 So.2d 548 (Fla. 1982) this Court approved the finding of (5)(i) where according to the defendant's own confession, he sat with the shotgun in his hands for an hour, looking at the victim as she slept and thinking about killing her. In light of these facts, this Court stated:

> This is clearly the kind of intentional killing this aggravating circumstance was intended to apply to. The cold-blooded calculation of the murder went beyond mere premeditation. (emphasis added).

In the instant case the trial court found this aggravating circumstance based on the following facts:

> The evidence supports the finding that the Defendant was of a state of mind that he believed that he could seize a female and do what he wished to her and shoot her twice in the head to eliminate any witnesses. It also was proven that not only did the Defendant empty his firearm into the victim one time, but he would have had to reload his five-shot revolver again and shooting her while she was completely helpless.

(R1618)

Again it is apparent that the lower court relied on the testimony of Ernest Johnson to support its finding. Again Appellant asserts that Johnson did not witness or hear any statements referring to the Brenda Rucker killing. There is no basis to infer that Appellant's state of mind was the same during two entirely separate incidents.

The fact that Appellant allegedly fired nine (9) shots is not relevant to this aggravating circumstance. Even if it is assumed that the number of shots helps prove the definite intent to kill once the shooting starts, how does it prove (beyond a reasonable doubt) what Appellant intended before the crime began?

A review of other decisions of this Court in which (5)(i) was disapproved, supports the conclusion that its application in the instant case is error. Brown v. State, 473 So.2d 1260 (Fla. 1985)(defendant and others broke into house of elderly victim, raped and killed her and stole a t.v. set, (5)(i) not applicable); Preston v. State, 444 So.2d 939 (Fla. 1984)(convenience store clerk robbed, kidnapped, transported to an open

field where she was stabbed repeatedly and almost decapitated - (5)(i) not applicable); Peavy v. State, 442 So.2d 200 (Fla. 1983)(defendant broke into house of elderly victim unable to walk great distances, repeatedly stabbed him - (5)(i) not applicable); Mann v. State, 420 So.2d 578 (Fla. 1982)(ten-year-old girl abducted and suffered several cuts and stab wounds and a fractured skull - (5)(i) not applicable); Smith v. State, 424 So.2d 726 (Fla. 1982) (convenience store clerk robbed, sexually battered and taken to a wooded area where she was shot three times in the head - (5)(i) not applicable);

This aggravating circumstance must be struck.

D. THE TRIAL COURT ERRED IN FINDING AGGRAVATING FACTOR (5)(d), THAT THE MURDER WAS COMMITTED DURING THE COMMISSION OF A FELONY TO SUPPORT THE IMPOSITION OF THE DEATH PENALTY. 1/

In light of the impropriety in finding that the aggravating factors of avoiding arrest, heinous, atrocious and cruel and cold, calculated and premeditated were applicable (See arguments, Sections A, B and C, supra), one of only two aggravating factors found to apply by the trial judge is (d) that the murder occurred in the commission of a sexual battery. The use of the underlying felony as an aggravating circumstance would apply to every felony-murder situation and defeat the function of the statutory aggravating circumstances to confine and channel

1/ Appellant recognizes this issue has been rejected by this Court in Mills v. State, 476 So.2d 172 (Fla. 1986); Breedlove v. State, 413 So.2d 1 (Fla. 1982) and Quince v. State, 414 So.2d 185 (Fla. 1982), but urges reconsideration in light of the fact that this aggravating circumstance is one of only two which could be upheld, and one mitigating circumstance was found.

capital sentencing direction, and thus would violate the principles enunciated in Furman v. Georgia, 408 U.S. 238 (F1972). A death sentence for a felony-murder cannot be supported by an aggravating circumstance which takes into account the same underlying felony in which the murder was committed. Certainly, all felony-murders do not, and constitutionally cannot, mandate the death penalty. To the extent a death sentence is founded upon automatic aggravating circumstances, it is unconstitutional. Woodson v. North Carolina, 428 U.S. 280 (1976). To uphold a death sentence simply because a murder was committed in the course of another felony would leave judges and juries with unfettered, unchanneled discretion, would provide no meaningful basis for distinguishing between those felony-murder cases which receive the ultimate penalty and those that receive life, and would render the Florida death penalty statute arbitrary and capricious as applied. Cf. Proffitt v. Florida, 428 U.S. 242 (1976); Godfrey v. Georgia, 446 U.S. 420 (1980).

Applying such reasoning, the North Carolina Supreme Court invalidated the use of the underlying felony as an aggravating circumstance. State v. Cherry, 257 S.E.2d 551 (N.C. 1979). The Cherry Court found that the death penalty in a felony-murder case would be disproportionately applied due to the "automatic" aggravating circumstance, and thus struck the use of the underlying felony as an aggravating circumstance. Likewise, in Keller v. State, 380 So.2d 926 (Ala.Ct.Cr.App. 1979) app. after remand 380 So.2d 1162 (Ata.Ct.Cr.App. 1980), writ. den. 382 So.2d 1175 (Ala. 1980), the court held that the underlying felony of robbery

could not be used as an aggravating circumstance to support the imposition of the death penalty.

E. WHERE THE TRIAL COURT RELIED ON IMPROPER AGGRAVATING CIRCUMSTANCES AND SPECIFICALLY FOUND THE EXISTENCE OF A MITIGATING CIRCUMSTANCE, THIS COURT MUST VACATE THE DEATH SENTENCE AND REMAND FOR RESENTENCING.

In the instant case the trial court found the existence of five (5) aggravating factors and one (1) mitigating factor. He concluded that the aggravation outweighed the mitigation and imposed the death sentence. (R1617-1619) Appellant argues above that at least three of the aggravating circumstances were erroneously found. If this Court agrees, Appellant's sentence must be reversed because the Court cannot know whether the trial court's judgment would have been the same absent the improper consideration. Randolph v. State, 463 So.2d 186, 193 (Fla. 1985); Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979); Fleming v. State, 374 So.2d 954, 959 (Fla. 1979).

This Court's duty is well stated in Menendez, supra:

> There is, therefore, only one properly found aggravating circumstance and one mitigating circumstance. Since the trial judge has committed error in considering matters outside the permissible range of legal standards set by the statute, and because it is impossible for us to evaluate the weight given by the trial judge to those factors which were proper to consider in imposing the death penalty, we can only vacate the sentence of death and remand the case for resentencing.

The fact that two or three valid aggravating circumstances may remain to be weighed against one factor in

mitigation does not effect this Court's duty, as recently expressed in Bates v. State, 465 So.2d 490, 493 (Fla. 1985):

> After striking these two factors we are left with three valid aggravating circumstances to be weighed against one mitigating circumstance. The analysis of aggravating and mitigating circumstances and the appropriate sentence "is not a mere counting process." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973) cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). As a reviewing court, we do not reweigh the evidence. Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). We have consistently held that the weighing of aggravating circumstances is the trial judge's function. When the evidence does not support an aggravating factor and there are mitigating circumstances to be weighed, the death sentence should be vacated and the case remanded to the trial judge for reconsideration without utilizing the insufficiently established aggravating circumstances because we cannot know if the result would have been different if the impermissible circumstances had not been used. Oats; Lewis v. State, 377 So.2d 640 (Fla. 1979); Menendez; Riley. See Moody v. State, 418 So.2d 989 (Fla. 1982), cert. denied, 459 U.S. 1214, 103 S.Ct. 1213, 75 L.Ed.2d 451 (1983).
>
> Hence, we vacate the death sentence and remand to the trial court for a reweighing of the valid aggravating circumstances against the mitigating evidence.

Appellant must be granted a new sentencing hearing at which only proper aggravating circumstances are considered.

POINT IV

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

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

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 685 (1975), and does not define "sufficient aggravating circumstances." The statute, further, does not sufficiently define for the jury's consideration each of the aggravating circumstance listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

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

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

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

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

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

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

The Elledge Rule (Elledge v. State, 346 So.2d 998 (Fla. 1977)), if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the 8th and 14th Amendments to the United States Constitution.

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

Additionally, a disturbing trend has become apparent in this Court's recent decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, ___ U.S. ___, 32 C.L. 4016 (U.S. Sup.Ct. Case No. 82-5096, Oct. 4, 1982) (Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (1891). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard review was subsequently confirmed by this Court when it states that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 834 (1978) cert. denied 414 U.S. 956 (1979) (emphasis added).

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

CONCLUSION

Based on the arguments and authorities cited in Points I and II herein, Appellant respectfully requests that this Honorable Court reverse the judgment and sentence in this cause and order a new trial.

Alternatively, based on Points III and IV herein, Appellant requests that the Court reverse the sentence to life imprisonment or order a new sentencing hearing.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Daniel J. Schafer

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, Florida 32014
Phone: 904/252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth floor, Daytona Beach, Florida 32014, and to Mr. Roy Swafford, Inmate #087905, P.O. box 747, Starke, Florida 32091 on this 3rd day of July 1986.

Daniel J. Schafer

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER