IN THE SUPREME COURT OF THE STATE OF FLORIDA

JUDIAS BUENOANO a/k/a JUDY
ANN GOODYEAR,

Appellant,

v. CASE NO: 68,091

STATE OF FLORIDA,

Appellee.

APPEAL FROM
THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIRST DISTRICT

INITIAL BRIEF OF APPELLANT

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LIST OF CITATIONS

PRELIMINARY STATEMENT

Judy Buenoano, a/k/a/ Judy Ann Goodyear, was the Defendant below and will be referred to here as Defendant.

The Record of Appeal in this case is 22 volumes or 3382 pages. Defendant introduced the records of two other court cases as evidence in this trial and asked they be made a part of the record.

One case, Judias W. Buenoano v. State, Case No: 84-1390 in the Circuit Court of Escambia County, Florida, is included as Volumes XVI through XXII, pages 2358 through 3382.

The other case, Judias Buenoano v. State, Case No: 84-I-17 in the Circuit Court of Santa Rosa County, Florida, has been appealed and is now before this Court as Case No: 68,074. Therefore, the Record of Appeal from Santa Rosa County is already before this Court and could not physically be made a part of the record in the instant case.

When reference is made to a part of the record from the Santa Rosa County case, it is noted as such.

STATEMENT OF THE CASE

Defendant was indicted August 31, 1984, by the Grand Jury for the Ninth Judicial Circuit, Orange County, Florida, for murder in the first degree. The indictment charged that Defendant did, on September 1, 1971, and on prior days during 1971, more particularly unknown, adminis-

ter arsenic poison to James E. Goodyear and as a result thereof, he died on September 16, 1971. (R-2179)

The State's theory of the case is that as soon as James E. Goodyear returned home from duty in Viet Nam, Defendant began to administer arsenic poisoning to him on several occasions and that when he became ill, she would not take him to the doctor right away but waited until he was in a really bad condition. Defendant's theory is the State did not prove James E. Goodyear actually died of arsenic poison, but only that there was arsenic present when an autopsy was performed 13 years after his death. Defendant further contends there is no evidence she purchased or administered arsenic to James E. Goodyear. Further, without evidence of similar fact and "confessions" by Defendant, the State could not prove the corpus delicti.

The State filed a Notice of Intent to offer evidence of other criminal offenses on November 9, 1984. (R-2194) There were four other crimes offered, including an attempted murder by paraformaldehyde poison, and murder by arsenic poison.

Defendant filed a Motion in Limine January 29, 1985, regarding the other crimes evidence (R-2210) and the State filed a Response on March 1, 1985. Defendant filed an Amended Motion in Limine (R-2221) concerning testimony of one Mary Lloyd which was a purported confession by Appellant which should not have been admitted until the State met its

burden of proving the corpus delicti.

On March 19, 1985, a hearing was held concerning the other crimes evidence and Motion in Limine. The Motion in Limine concerning the attempted murder by bombing and the murder by drowning was granted and Defendant's Amended Motion in Limine concerning the testimony of Mary Lloyd was granted. Defendant's Motion in Limine concerning the arsenic poisoning of Bobby Joe Morris in 1977 and 1978 and the attempted murder of John Gentry in 1982 and 1983 by paraformaldehyde poisoning was denied. This order was entered April 1, 1985. (R-2245)

Defendant filed her Motion to Dismiss May 28, 1985 (R-2252). A traverse was filed by the State. (R-2263) The Motion to Dismiss was denied. (R-2269)

Jury selection began on October 21, 1985. (R-2285) On November 1, 1985, the jury found Defendant guilty of murder in the first degree as charged, (R-2313) and on November 26, 1985, recommended the Court impose the death penalty. (R-2329)

The Court imposed a sentence of death in open court on November 26, 1985. (R-2331) Defendant filed a Motion for New Trial on November 12, 1985 (R-2217) and an Amended Motion for New Trial on December 17, 1985. (R-2338). Notice of Appeal was filed December 20, 1985. (R-2339)

The Court's Order of Factual Finding Supporting the Imposition of the Death Penalty was entered January 29,

1986 (R-2342) and Order denying Defendant's Motion for New Trial was entered February 11, 1986.

STATEMENT OF THE FACTS

James E. Goodyear was a sergeant in the United States Air Force. In 1971 he was in Viet Nam as an airplane mechanic and returned home to Orlando in June, 1971. (R-238) In September, 1971, Mr. Goodyear began suffering from nausea, vomiting, and diarrhea. He was seen by Dr. R. C. Auchenbach at the Naval Hospital in Orlando on September 13, 1971. He had a two-week history of these symptoms (R-238-239) and told Dr. Auchenbach he had been working at McCoy Air Force Base where he would be exposed to toxic fumes and substances such as lead fumes. (R-243) Prior to his seeing Dr. Auchenbach at the hospital, records show he had been seen on several occasions by the infirmary. (R-238)

Goodyear was hospitalized from the 13th of September through September 16, 1971, when he died. (R-245)

Dr. Auchenbach testified Goodyear died predominantly as a consequence of cardiovascular collapse and renal failure. (R-254) He testified he gave Goodyear 5,000 cc's (five quarts) of fluid and only 300 cc's was excreted. (R-290) Mr. Goodyear got fluid overload and pulmonary congestion. (R-292) Dr. Auchenbach admitted forced IV fluid given Mr. Goodyear was a contributing circumstance in his death. (R-328)

At the time of Goodyear's death, toxicological assays were not performed because at the time, they did not think of the possibility of toxic poisoning. (R-283)

Dr. Auchenbach said tests were performed to determine the absence or presence of lead which test was negative. (R-254) A report of Dr. Spencer of the Armed Forces Institute of Pathology (State's Exhibit "2"), stated traces of both lead and arsenic were found. (R-317, 320) Dr. Auchenbach said the tests performed at the Naval Hospital then may have been conducted improperly which would have been the reason no lead was found there. (R-325-326)

Fourteen years later, the body of Goodyear was exhumed and an autopsy performed. (R-227) Dr. Leonard Bednarczyk, Ph.D., a forensic toxicologist for Miami/Dade Criminal Justice Council, analyzed samples given to him. (R-337)

Dr. Bednarczyk said he analyzed portions of the liver, kidney, and sections of hair and nails from one side of the body. (R-338) His findings were as follows: Liver, 4.5 mg per kg; kidney, 8.3 mg per kg; hair was approximately two inches in length and divided into three equal portions: root, 95 mg per kg; medial or center, 30 mg per kg; and distal end, 10 mg per kg. (R-344)

These levels are inconclusive to say James E. Goodyear actually died from arsenic poisoning. (R-1300) Two scales indicating fatal ranges of arsenic poisoning were introduced. They are Curry and Bhsalt. (R-1295-1297)

The Curry Book gives the fatal ranges as follows: Liver, 10 to 500 mg. per kg., and kidney, 5 to 150 mg. per kg. (R-1295)

The Bhsalt Book gives the fatal ranges as follows: Liver, 2 to 120 mg. per kg., and kidney, 0.2 to 70 mg. per kg. Average fatal ranges are: Liver, 29 mg. per kg, and kidney, 15 mg. per kg. (R-1296-1297)

Liver is the best organ from which to determine concentration of arsenic. (R-912) Mr. Goodyear's level of 4.5 mg. per kg. in the liver is not even in the fatal range in the Curry table and far below the average of 29 mg. per kg. listed in Bhsalt.

In addition to testimony which merely showed James E. Goodyear had some exposure to arsenic, the State presented the testimony of Constance Lang who knew the Defendant in 1969 or 1970 when Defendant was married to Goodyear. (R-461)

Ms. Lang said she had difficulty in her marriage and discussed this with the Defendant often. (R-462) She said she had a feeling Judy and James had grown apart--didn't have the same interests anymore. This was while Goodyear was in Viet Nam. (R-462-463)

Ms. Lang said they joked about solving their problems by lacing their husbands' food with arsenic. She said this was a running joke. (R-463) In her deposition taken before trial. Ms. Lang was not sure whether the word "arsenic" was actually used when she and the Defendant joked

about poisoning their husband, but during the trial she became absolutely sure that specificially they used the word "arsenic". (R-495)

Debra J. Sims lived with the Defendant when Goodyear returned home from Viet Nam. (R-570) She said the Defendant never appeared to be unhappy with her marriage and she saw no fussing or fighting between Defendant and her husband. (R-580) She said after Mr. Goodyear returned home from Viet Nam he became sickly and at one time was hallucinating. (R-571)

Robert Crawford, a/k/a Earl Howard Spence, testified he had been sexually intimate with Defendant on several occasions while her husband was in Viet Nam. (R-640-642) He said she did not ever make any derogative remarks about her marriage. (R-643)

Mary Beverly Owens said she met Defendant in 1971 in Pensacola. Bobby Joe Morris took Defendant to Mary Owens' home. (R-656) Later, Owens said she was having trouble with her husband and had moved from her home to an apartment. (R-659) She and Judy went to the grocery store one morning and were discussing Mary Owens' marital problems. Owens said Judy told her she had killed her husband and she, Owens, could kill hers by obtaining poison in the "fly bait" department of the grocery store. She said Judy told her the poison had arsenic in it and it would build up in your system. (R-661)

Mrs. Lodell Morris, mother of Bobby Joe Morris,

said Defendant stated her husband didn't deserve to live and she killed "the son of a bitch". (R-698)

There were two policies on the life of James E. Goodyear. One policy went into effect in 1961 with a face value of $5,000.00. The beneficiary was Judy A. Goodyear, wife. A total of $5,245.47 was paid October 20, 1971, on that policy. The second policy went into effect in 1969, was paid to Judy A. Goodyear in the sum of $8,039.56 and was paid on October 19, 1971. (R-425-426)

Prudential Insurance Company paid $5,000.00 on October 6, 1971, to Judy A. Goodyear. This was Servicemen Group Insurance. (R-431, 435-436)

Defendant became entitled to Veteran's Administration benefits after Goodyear's death. (R-446). The benefits started at $257.00 per month in 1971 and at the time of termination, August, 1984, the benefits were $544.00 per month. (R-447-448)

The State's theory is Defendant, over a period of time, poisoned her husband with arsenic so she could receive the insurance and VA benefits. Defendant says the State has not even proved Goodyear died from arsenic poisoning or that she was responsible for any exposure he may have had to arsenic.

Similar fact evidence was used to bolster the State's case and evidence was presented that Bobby Joe Morris, who Defendant later lived with, died and she collected insurance benefits from his death. (R-731, 739, 740,

747, 752) His body was exhumed in 1984 and arsenic was found to be present in a level the toxicologist determined to be consistent with arsenic poisoning. (R-874) There was no testimony connecting Defendant with his death.

John Gentry said he lived with the Defendant (R-949) and he and the Defendant obtained insurance naming each other as beneficiary in the amount of $500,000.00. (R-953) He said she gave him tablets which were supposed to be vitamin C and he became very ill. (R-956) Two of these tablets were later analyzed and found to contain paraformaldehyde. (R-1012)

Vickie Lewis, who was employed by the Defendant in the fall of 1982 said Defendant told her John Gentry had cancer and was going to die and he didn't want anyone to know. (R-995-997)

Francis Keith Lewis said sometime after John Gentry was ill, Defendant told him she found a letter from a doctor in Mobile, Alabama, stating that Mr. Gentry had a terminal illness. (R-1003)

ISSUE

I. THE TRIAL COURT ERRED IN AND ADMITTING COLLATERAL CRIME EVIDENCE WITH REGARD TO ARSENIC POISONING OF BOBBY JOE MORRIS AND ATTEMPTED POISONING OF JOHN GENTRY.

SUMMARY OF ARGUMENT

Similar fact evidence is only admissible if it is relevant to prove a fact in issue. It must be shown that the collateral crime was committed and committed by the person on trial. If there is no evidence connecting the Defendant to the collateral crime, it is not admissible. In this case, the State did not present evidence that Bobby Joe Morris, another individual Defendant lived with, died by criminal means, much less that Defendant was responsible for his death.

The collateral crime evidence concerning John Gentry was not similar, was too remote, and therefore not relevant.

After presenting a few witnesses to establish James Goodyear died and his exhumed body contained arsenic, the State then went right into the collateral crimes. This evidence became a feature and not merely an incident.

This collateral crimes evidence only showed propensity and bad character which is prohibited by Wiliams v. State, 110 So.2d 654, (Fla. 1959).

ARGUMENT

The evidence presented concerning Bobby Joe Morris was only that Defendant and her children lived with him at the time of his death; (R-699) she held herself out to be his wife (R-720-721, 736, 745), she collected insurance benefits upon his death (R-731, 747, 752), and his body was found to contain elevated levels of arsenic. (R-872) This amounts to no more proof Defendant administered the arsenic to Bobby Morris than did the evidence in the case of Norris v. State, 158 So.2d 803 (Fla. 1st DCA 1964)

In the Norris case, the deceased died of arsenic poisoning. The State introduced evidence a former husband's exhumed body contained arsenic and another gentlemen whom Defendant Norris became closely associated with following her husband's death also was found to have arsenic in his exhumed body.

The Defendant, Norris, was not shown to be in any manner connected therewith other than she was in such position she had an opportunity, if she so desired, to administer the poison to them.

The way the evidence worked in the instant case was, in conjunction with evidence Defendant murdered Mr. Goodyear by arsenic poisoning and the mere fact Mr. Morris' body contained arsenic would tend to make the jury assume Defendant administered the arsenic to Morris.

Similar fact evidence is not supposed to work that way. You are not permitted to prove the collateral crime

(Morris) with the crime Defendant is being tried for (Goodyear) which is what the State did. Evidence of a collateral crime is inadmissible unless accompanied by evidence connecting the Defendant therewith. Weiss v. State, 124 So.2d 528 (Fla. 3rd DCA 1960); Chapman v. State, 417 So.2d 1028 (Fla. 3rd DCA 1982); Dibble v. State, 347 So.2d 1096 (Fla. 1977); and Norris v. State, supra.

There are no cases which allow you to prove the collateral crime by other crimes and then use that collateral crime as proof one committed the crime for which he is on trial. If that were so, the State could always throw in all accusations of other crimes by a Defendant without proof the Defendant committed them. This is precisely what the Courts of this State have prohibited. Williams v. State, supra.

Prior to evidence of an independent crime being admissible, it is essential to show the former crime was committed and committed by the person on trial. Norris v. State, supra, and State v. Norris, 168 So.2d 541 (Fla. 1964); Long v. State, 407 So.2d 1018 (Fla. 2nd DCA 1981).

There were no incriminating statements by the Defendant regarding the death of Bobby Joe Morris, no evidence she purchased or possessed arsenic, no evidence she desired him dead. There was only opportunity and motive but no evidence connecting Defendant to his death by arsenic poisoning. The Morris case standing alone could never go to trial, so how could it be used as proof Defendant murdered

James Goodyear?

The evidence presented concerning the attempted poisoning of John Gentry was in no way similar to the arsenic poisoning of Goodyear. Mr. Gentry said he became ill after taking Vicon C tablets given to him by Defendant. (R-955) For purpose of proving criminal motive, design or intent, the conduct allegedly committed at other times and places must not be too remote and must be similar. U. S. v. Nill, C.A., 5188 F.2d 793 (1975); McGough v. State, 302 So.2d 751 (Fla. 1974); Farnell v. State, 214 So.2d 753 (Fla. 1968); Talley v. State, 36 So.2d 201 (Fla. 1948); Norris v. State, supra.

The time between the death of James E. Goodyear and the attempted poisoning of John Gentry was over eleven years. The Court in McGough v. State, 302 So.2d 751 (Fla. 1974) held relevancy is not the sole criterion for admissibility of a prior crime, but timeliness is a part of the relevancy. The Court concluded that remote crimes are not relevant crimes.

Recently in Peek v. State, 488 So.2d 52 (Fla. 1986), this Court held that collateral crime evidence is not relevant and admissible merely because it involves the same type of offense.

Quoting from Drake v. State, 400 So.2d 1217 (Fla. 1981), this Court noted:

> "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."

This Court further said in Drake, supra, the similiarities and uniqueness of the compared factual situations were insufficient to allow admissibility of the collateral crime evidence and the similar fact evidence only tended to prove propensity and bad character. The Court applied the Williams Rule to the Peek case and said the dissimilarities greatly outnumber the similarities.

There is no more similarity between murdering someone with arsenic poisoning and giving someone paraformaldehyde in amounts only sufficient to make you sick than shooting someone with a .44 magnum pistol and another person with a .22 rifle. Both persons were shot--both persons were poisoned--but the method is so dissimilar that no purpose could be served other than to show propensity and bad character.

In addition to the foregoing reasons, the admission of the similar fact evidence was error because it became the feature of the State's case.

Williams v. State, supra, held the State went too far in introduction of evidence of a later crime and "transcended the bounds of relevancy to the charge being tried and made the later offense a feature instead of an incident to the offense being tried". This excessive testimony resulted in an assault on the character of the accused. See also Davis v. State, 276 So.2d 846 (Fla. 2nd DCA 1973) aff'd

State v. Davis, 290 So.2d 30 (Fla. 1974).

In Matthews v. State, 366 So.2d 170 (Fla. 3rd DCA 1979), the Court held extensive use of a collateral crime in that case was to emphasize Matthew's involvement with another crime "thereby implicating appellant with criminal propensity, i.e., to make appellant's involvement in the collateral crime a main 'feature' or theme in the instant case", and was reversible error. See also Knox v. State, 361 So.2d 799 (Fla. 1st DCA 1978); and Zeigler v. State, 404 So.2d 861 (Fla. 1st DCA 1981).

The Court in Ashley v. State, 265 So.2d 685 (Fla. 1972) stated:

> "We are equally committed to the proposition that the State in introducing testimony concerning other crimes committed by a defendant may not make such crimes a feature of the trial instead of an incident so that the effect is to devolve from development of facts pertinent to the main issue of guilt or innocence into an attack on the character of the defendant."

In Mattera v. State, 409 So.2d 257 (Fla. 4th DCA 1982), the District Court reversed and remanded because it said four of the State's eight witnesses in the robbery trial testified to a collateral robbery and the prosecutor made the collateral robbery a feature, not merely an incident. "The use of the evidence to this extent constituted reversible error." Ziegler v. State, 404 So.2d 861 (Fla. 1st DCA 1981); Williams v. State, 117 So.2d 473 (Fla. 1960).

The State argues the similar fact evidence was admissible to show a common design or plan. (R-2225)

"Neither a continuing course of conduct, a plan or scheme, nor a modus operandi is an end in and of itself which may be proved in a criminal case." Duncan v. State, 291 So.2d 241 (Fla. 2nd DCA 1974)

To be relevant, evidence must prove or tend to prove a fact in issue. Coler v. State, 411 So.2d 238 (Fla. 1982) What fact in issue could the collateral crimes evidence prove in this case?

If the fact to be proved were identity, then the Gentry case would not fit within the prescribed "similarity" to prove that issue. As stated in Drake v. State, supra,

> "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."

The Morris case would not prove anything except the Defendant's bad character because there was absolutely no proof Defendant committed a crime at all concerning Mr. Morris. The only testimony in fact that anyone committed a crime with respect to Mr. Morris was from Kimberly Goodyear, the Defendant's daughter, who testified her brother Michael hated Mr. Morris and she saw Michael pour something into Mr. Morris' beer (R-75) and in a bottle in the medicine cabinet that Bobby Morris always drank out of. (R-74)

In Leonard v. State, 429 So.2d 71 (Fla. 4th DCA 1983), the District Court held there were insufficient simi-

larities between the evidence presented of Appellant's posession of a different controlled substance at a diferent time and place and the cocaine possession charged below to satisfy the requirements of Williams v. State, supra, as codified in Section 90.404(2)(a), Florida Statutes (1981). The case was reversed and remanded.

In Peek, supra, the Supreme Court said it had set forth the explanation for excluding collateral crimes evidence in Jackson v. State, 451 So.2d 458 (Fla. 1984), quoting from Paul v. State, 340 So.2d 1249, (Fla. 3rd DCA 1976), cert. denied, 348 So.2d 953 (Fla. 1977) which said:

> "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."

ISSUE

II. THE COURT ERRED IN FAILING TO DIRECT A VERDICT OF ACQUITTAL BECAUSE THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT JAMES E. GOODYEAR DIED OF ARSENIC POISONING AND, INDEPENDENT OF CONFESSION AND SIMILAR FACT EVIDENCE, DID NOT PROVE THE CORPUS DELICTI.

SUMMARY OF ARGUMENT

Similar fact evidence and Defendant's statements to Lodell Morris and Mary Beverly Owens that she killed her husband were inadmissible at trial due to the State's

failure to establish an independent corpus delicti of the crime of murder by arsenic poisoning.

Defendant's Motion for Directed Verdict of Acquittal at the end of the State's case (R-1044) and again at the close of the trial (R-380) should have been granted.

ARGUMENT

There was a lot of medical and expert testimony presented by the State and the Defendant. Some doctors who testified for the State said they felt James E. Goodyear died from arsenic poisoning. (R-298, 349, 508)

Dr. Thomas Hegert, Medical Examiner for Orange County, said his opinion was based on the toxicology report and the hospital records from the previous autopsy. He said he could not form an opinion that it was arsenic poisoning without those reports. (R-579)

Dr. R. C. Auchenbach, who testified for the State, also said his opinion as to the cause of death was based on information he received from the toxicologist in Miami, the autopsy by Dr. Hegert, and the toxicologist report from the Armed Forces Institute, and based on that information being correct. (R-268)

Leonard Bednarczyk, Ph.D., a forensic toxicolgist, analyzed the samples from the autopsy performed on Mr. Goodyear in 1984. (R-334-337) He used the atomic absorption spectrophotometry method to analyze a portion of liver, kidney and sections of hair and nails from one side of the

body. (R-338)

His analysis showed the liver contained 4.5 mg. per kg. of arsenic (R-343), and the kidney, 8.3 mg. per kg. In the hair, the part closest to the scalp, had 95 mg. per kg., the center portion contained 30 mg. per kg., and the end, 10 mg. per kg. (R-343-344)

Dr. Bednarczyk said there are fatal ranges reported as follows: Liver, 2 to 120 mg. per kg. with an average fatal amount of 29 mg. per kg.; kidney, 2 to 70 mg. per kg. with an average of 15 mg. per kg. (R-345) These figures are from a book by Dr. Randall [Baselt]. (R-354)

Dr. Ted Loomis, Doctor of Medicine from Washington, has studied arsenic for many years. (R-1291) He testified for Defendant that there are two commonly used and recognized sources on ranges in arsenic poisoning. They are Bhsalt and Curry. (R-1293)

The Curry Book gives the fatal ranges as follows: Liver, 10 to 500 mg. per kg., and kidney, 5 to 150 mg. per kg. (R-1295)

The Bhsalt Book gives the fatal ranges as follows: Liver, 2 to 120 mg. per kg. and kidney, 0.2 to 70 mg. per kg. Average fatal ranges: Liver, 29 mg. per kg. and kidney, 15 mg. per kg. (R-1296-1297)

Goodyear's level of 4.5 mg. per kg. in the liver is below the extreme low in the Curry range and on the lowest end of the Bhsalt range but far below the average of 29 mg. per kg. The level of 8.3 in Goodyear's kidney is just inside

the low end of the Curry table but far below the average of 15 in the Bhsalt table. (R-344)

Dr. Matthew Barnhill, a forensic toxicologist, testified that arsenic accumulates more in the liver and that the liver is the best of the organs from which to determine concentration of arsenic. (R-912)

Dr. Bednarczyk admitted he could not say how or what mode or manner the arsenic was administered. It could be homicidal, suicidal, or accidental. (R-379) He also admitted Mr. Goodyear could have gotten arsenic from lead arsenate in the orange groves in Orlando, or in his work environment. (R-395)

Dr. Hegert said he felt Goodyear's exposure could have been when he was in Viet Nam. (R-564)

Dr. Robert Braman, Professor of Chemistry at the University of South Florida, testified for the Defendant. He has a doctor's degree in analytical chemistry (R-1120) and has received international recognition for work on the environmental chemistry of arsenic. (R-1123-1124)

Dr. Braman questioned the validity of the test results of Dr. Bednarczyk. He said with the atomic absorption test, you can get a wave length similar to arsenic from a piece of enbalmed tissue from the liver without a background corrector. (R-1137-1138)

Given the hypothetical that 4.5 mg. per kg. of arsenic and 8.3 mg. per kg. of arsenic were found in the liver and kidney respectively of Mr. Goodyear, and the toxicolo-

gist performed only one test and used no background corrector, Dr. Braman said the result would not be valid. (R-1151)

Dr. Braman further stated if you were testing a piece of kidney for arsenic using the atomic absorption spectrophotometry as Dr. Bednarczyk used, you would need to run five or six replicas of the same sample with each replica done three times. He said running such a test one time would have absolutely no standing in the area of analytical chemistry. (R-1142-1144) Dr. Bednarczyk did not report performing the test more than once nor did he indicate he used a background corrector.

The Armed Forces Institute Report, State's Exhibit "3", stated, "This death is suspicious for arsenic and lead intoxication. However, there is not sufficient information to determine the cause or manner of death from the materials examined", (R-323) They had access to the medical records of James Goodyear, the autopsy done by Dr. Hegert in Orlando, the initial autopsy report done at the Naval Hospital, and paraffin blocks that had been preserved. (R-323-324) This was the same information the other doctors had.

So the State presented a result from a test, with no assurance that result is accurate. More important, the levels reported in James Goodyear were not high enough to detemine he died of arsenic poisoning. (R-1305) They only show he was exposed to arsenic.

Dr. Loomis further stated if an individual expires

and the figures (arsenic levels) are very low as in the Goodyear case, then the probability there is a causal relationship between the arsenic and death is less. (R-1248)

He said the levels given in Bhsalt and Curry do not prove that an individual died from arsenic exposures but only that arsenic was present. (R-1300)

The figures given by Dr. Bednarczyk only indicate the levels of arsenic found in that organ thirteen years after Mr. Goodyear's death. They do not indicate what that level would have been at the time of death. (R-364-365)

A very important fact Dr. Loomis brought out is tissue, over a period of thirteen years would have lost fluid and shrunk. The arsenic level thirteen years later in terms of mg. per kg. would be erroneously high as you would have a greater concentration in that smaller organ than you would have had at the time of death. (R-1302-1304)

He specifically said the figures given for arsenic levels found in James Goodyear were not significant enough to say he died of arsenic poisoning. (R-1305)

Dr. Loomis has done urine analysis on individuals who were alive and with no symptons, yet had levels of arsenic approaching what Mr. Goodyear had. (R-1312-1313)

Arsenic is in food, water, in the air and in the ground. (R-1349) Everybody is exposed to arsenic and you can be exposed to a high level of arsenic and not die from it. (R-1377)

Since the expert witnesses agreed they could not

tell how Mr. Goodyear was exposed to arsenic, what form of arsenic he was exposed to or that it was homicidal or accidental, the only evidence pointing to there having been a criminal act was the confession and similar fact evidence which was improperly admitted for this purpose.

Before a confession is admitted the State has the burden of proving by substantial evidence that a crime was committed. State v. Allen, 335 So.2d 823 (Fla. 1976). See also Frazier v. State, 107 So.2d 16 (Fla. 1958); and Sciortino v. State, 115 So.2d 93 (Fla. 2nd DCA 1959); State v. Hepburn, 460 So.2d 422 (Fla. 5th DCA 1984).

The Supreme Court in Jefferson v. State, 128 So.2d 132 (Fla. 1961) said:

> "In dealing with cases of homicide involving an issue of corpus delicti, it is necessary to remember that the term corpus delicti encompasses a dual aspect. On the one hand, there is the requirement that there would be sufficient evidence introduced by the State tending to prove the three essential elements of corpus delicti before the jury will be permitted to consider any admission or confession of the defendant."

In Ruiz v. State, 388 So.2d 610 (Fla. 3rd DCA 1980), the District Court said:

> "It is apodictic that, when a confession is relied upon to satisfy the State's burden of proof to establish the Defendant's guilt, there must be either direct or circumstantial evidence--apart from the confession--of the so-called corpus delicti of the offense with which he is charged."

The Florida Supreme Court in State v. Allen, supra,

summarized the controlling Florida law on this subject:

> It is a fundamental principle of law that no person be adjudged guilty of a crime until the state has shown that a crime has been committed. The state therefore must show that a harm has been suffered of the type contemplated by the charges (for example, a death in the case of a murder charge or a loss of property in the case of a theft charge), and that such harm was incurred due to the criminal agency of another. This usually requires the identity of the victim of the crime. A person's confession to a crime is not sufficient evidence of a criminal act where no independent direct or circumstantial evidence exists to substantiate the occurrence of a crime. The judicial quest for truth requires that no person be convicted out of derangement, mistake or official fabrication.
>
> This rule obviously does not require the state to prove a defendant's guilt beyond a reasonable doubt before his or her confession may be admitted. Indeed, as this Court has stated before, it is preferable that the occurrence of a crime be established before any evidence is admitted to show the the identity of the guilty party, even though it is often difficult to segregate the two. The state has a burden to bring forth 'substantial evidence' tending to show the commission of the charged crime. This standard does not require the proof to be uncontradicted or overwhelming, but it must at least show the existence of each element of the crime. The state's burden of proof 'beyond a reasonable doubt' is a requirement to establish the defendant's guilt, not to authorize admission of his confession."

See also McQueen v. State, 304 So.2d 501 (Fla. 4th DCA 1974) and Anderson v. State, 467 So.2d 781 (Fla. 3rd DCA 1985)

Certainly in this case, aside from the statements

of Defendant and the similar fact evidence, there was no evidence that anyone had committed a crime.

This case then presents the question of whether similar fact evidence may be used as the required independent evidence of the corpus delicti.

The case of Sciortino v. State, 115 So.2d 93 (Fla. 2nd DCA 1959), addresses this issue quoting Wharton's Criminal Law and Procedure, Vol. 1, Anderson, Section 66, at page 144, the Court wrote:

> "The proof of the corpus delicti does not include proof as to the identity of the wrongdoer, nor proof that the defendant was the wrongdoer. . . . The correct rule is that proof of the corpus delicti does not include proof of the identity of the defendant as the perpetrator of the crime."

In Sciortino, the only evidence that was introduced, outside of the admissions of the Defendant, was evidence that the Defendant was in possession of a bolita ticket. He was convicted of aiding and assisting in setting up, promoting and conducting of lottery, by selling shares therein.

The Court said the State could logically contend the evidence of possession of a bolita ticket would establish the corpus delicti of possession of lottery tickets and bolita paraphernalia. But the Court said, "Direct evidence of one offense may not be used as proof of corpus delicti of another crime".

The District Court set out the established principles of corpus delicti by decisions of the Florida Supreme

Court as follows:

> "1. It must be shown that the specific crime charged has been committed. Adams v. State, 153 Fla. 68, 13 So.2d 610.
>
> "2. It is not necessary that the corpus delicti be proved beyond a reasonable doubt in order to introduce a confession or admission. Lambright v. State, 34 Fla. 564, 16 So. 582; McElveen v. State, Fla. 1954, 72 So.2d 785.
>
> "3. The confession should not be received in evidence unless there is some prima facie proof of the crime charged. Smith v. State, 93 Fla. 238, 112 So. 70; McElveen v. State, Fla. 1954, 72 So.2d 785.
>
> "4. The specific crime charged must be prima facie established and it cannot be inferred that because some crime was committed that the specific crime involved in the prosecution took place. Rowe v. State, Fla. 1955, 84 So.2d 709.
>
> "5. When the corpus delicti has been prima facie proved by either positive or substantial evidence, the confessions of the defendant are admissible and may be considered and weighed together. Groover v. State, 82 Fla. 427, 90 So.2d 473, 26 A.L.R. 373; Holland v. State, 39 Fla. 178, 22 So. 298."

ISSUE

III. THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL BASED ON THE GRATUITOUS COMMENT BY A WITNESS WHICH ACCUSED DEFENDANT OF ANOTHER CRIME IRRELEVANT TO ANY ISSUE FOR WHICH SHE WAS BEING TRIED.

SUMMARY OF ARGUMENT

A witness for the State made an impermissible

statement concerning an uncharged crime which she said Defendant committed. The remark was not in response to a question and only served to further prejudice the Defendant and attack her character.

The trial court should have granted Defendant's Motion for a Mistrial based on this comment. (R-820)

ARGUMENT

The improper reference to Defendant having burned her house down to collect insurance by Mary Beverly Owens was irrelevant and was an attack on the Defendant's character.

The question asked by counsel for Defendant was:

MR. JOHNSTON: "She wasn't living in Orlando?"

WITNESS: "Not in January she wasn't because --".

MR. JOHNSTON: "Are you sure about that?"

WITNESS: "She told me she had burned her house, Mr. Johnston, and had collected the insurance." (R-674)

The question asked was proper and gave no notice of the unsolicited answer.

> "Despite cautionary instructions, the introduction of a prior unrelated criminal act is too prejudicial for the jury to disregard." Finklea v. State, 471 So.2d 596 (Fla. 1st DCA 1985). See also Vasquez v. State, 405 So.2d 177 (Fla. 3rd DCA 1981), approved in part, quashed in part. 419 So.2d 1088 (Fla. 1982)

In Jackson v. State, 451 So.2d 458 (Fla. 1984), Jackson was on trial for two first-degree murders. A witness for the State testified about an occasion when Jackson had pointed a gun at him and boasted of being a

"thoroughbred killer" from Detroit.

This Court held the testimony was impermissible and prejudicial. The Court said:

> "We envision no circumstance in which the objected to testimony could be 'relevant to a material fact in issue', nor has the State suggested any. The testimony showed Jackson may have committed an assault on Dumas, but that crime was irrelevant to the case sub judice . . . . The testimony is precisely the kind forbidden by the Williams Rule and Section 90.404(2). . . ."

The presentation before a jury of inadmissible testimony under the Williams Rule has "generally been considered classic grounds for a mistrial given its usual devastating impact upon a jury." Harris v. State, 427 So.2d 234 (Fla. 3rd DCA 1983)

See also Roman v. State, 438 So.2d 487 (Fla. 3rd DCA 1983).

ISSUE

IV. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY DURING THE SENTENCING PHASE OF TWO FORMER PROSECUTORS CONCERNING DETAILS OF TWO OTHER CRIMES AS DEFENDANT DID NOT HAVE A FAIR OPPORTUNITY TO REBUT THEIR HEARSAY TESTIMONY.

SUMMARY OF ARGUMENT

Details of two other crimes testified to by former prosecutors during the sentencing phase was hearsay and Defendant did not have a fair opportunity to rebut this testimony.

If one witness, such as a victim, testified concerning details of what happened to him, one could adequately prepare some rebuttal. But, in trials where the prosecutor is summarizing dozens and dozens of witnesses' testimony, it is impossible to adequately rebut such testimony.

Further, one of these prosecutors gave an incorrect version of the testimony presented in the former trial. His testimony was obviously biased and untruthful when compared with the actual testimony of witnesses in that trial.

Therefore, Defendant was deprived of a fair sentencing and should be granted a new sentencing hearing.

ARGUMENT

During the sentencing phase, the State introduced evidence of prior convictions of Defendant. One of these prior convictions was first-degree murder and another was attempted first-degree murder.

Murder or attempted murder is per se a crime of violence. The fact of the convictions was alone enough to find aggravating circumstances. But the State didn't stop there. The prosecutor who had tried the case where Defendant was convicted of drowning her son testified and gave extremely biased and prejudiced testimony concerning that case.

The testimony given by these two prosecutors would have the same type effect as improper Williams Rule evidence in the guilt phase. It would in effect so prejudice a jury

that rather than just considering it an aggravating factor, they may tend to judge whether the present crime is heinous, atrocious, and cruel or cold and premeditated, based on the details given of another crime.

In Trawick v. State, 473 So.2d 1235 (Fla. 1985), this Court held that detailed testimony concerning the shooting of a surviving victim about the injuries she received and the pain she suffered was error. It was not relevant to the question of whether the capital felony was especially heinous, atrocious, or cruel.

Here, as in Teffeteller v. State, 439 So.2d 840 (Fla 1983), it cannot be said that the "needless and inflamatory comments" did not substantially contribute to the jury's adivsory recommendation of death during the sentencing phase.

"There is no requirement the State go behind the conviction to show the particulars of the conviction." Thompson v. State, 456 So.2d 444 (Fla. 1984)

The detailed and obviously prejudiced presentation by two prosecutors concerning facts of the two prior convictions would not be relevant to any of the aggravating factors to be considered in this case. The fact she had been convicted would be sufficient. This case should be judged on its own facts and not details about other crimes.

Russell Edgar was the prosecutor who tried the case concerning the drowning of Michael Goodyear, the Defendant's son. Almost every word that he spoke in the sentencing

hearing was an inaccurate, deliberate misstatement of the true testimony presented at that trial.

True enough this Court has ruled that it feels testimony concerning the events resulting in a prior conviction are relevant to a character analysis of the Defendant to ascertain whether the ultimate penalty is called for. Elledge v. State, 346 So.2d 998 (Fla. 1977) However, it is certain this Court did not contemplate biased and deliberately misleading and incorrect information from officers of the Court being considered by a jury. Elledge requires the evidence which the Court deems to have probative value only be admitted if the Defendant is accorded a fair opportunity to rebut any hearsay statments.

In this case the Defendant did not have a "fair opportunity" to rebut. The trial in the Santa Rosa County Court lasted two weeks. Mr. Edgar's testimony was not a fair statement of the facts as testified to by the witnesses and it would have been impossible to present all the witnesses to give an accurate rebuttal of the testimony.

This court in Elledge, supra, also said,

> ". . .regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death."

Mr. Edgar's testimony would certainly be of the sort which could tip the scales.

Also, Mr. Edgar deliberately brought forth a state-

ment that Michael was found to have white lines on his fingers and arsenic poisoning. (R-1564) This was not evidence allowed before a jury in the former case because there was no connection of the Defendant with the arsenic in Michael. It is bad enough to have any witness blurt out improper testimony, but for an experienced prosecutor to do so is certainly conduct which deserves rebuke.

It is also conduct which prejudiced the Defendant and along with his entire testimony, deprived her of her constitutional right to a fair trial in the sentencing phase.

Due to limited space, only certain parts of his testimony will be discussed.

MR. EDGAR: (Speaking of James Goodyear, the Defendant's son) "After he testified, I called the doctor that examined him at the hospital that evening, and the doctor said that there was definitely no fracture. That he so informed the boy of that and that there was nothing really wrong with him." (R-1560)

Mr. Edgar left out the fact that Dr. Michael L. Depuis testified in that trial that he diagnosed a cervical injury, a mild cervical spain, treated him, and asked him to remain at bed rest, and put him in a soft cervical collar. (R-417, Santa Rosa County Record)

MR. EDGAR: "James Goodyear loved the boy and tried to treat him as his own son, but the Defendant didn't." (R-1562)

MR. EDGAR: "She virtually hated and despised the boy, was ashamed of him and so . . . he joined the Army. . . ." (R-1564)

Not one witness testified the Defendant hated or

even disliked her son Michael. In fact, the Defendant's other two children, Kimberly and James, testified they all loved Michael, (R-370, 1613, Santa Rosa County Record) and another witness, Dawn Fields, testified she felt Michael was very loved by Kim and Jim and his mother. (R-1503, Santa Rosa County Record) Dawn Fields was a friend of Michael's. (R-500, Santa Rosa County Record)

On cross-examination, when asked what witness testified that Michael was not loved, he said Debbie Sims, Connie Lang, and Ms. Morris. But those witnesses did not testify to that effect.

MR. EDGAR: "There was other testimony he was very fearful of the water." (R-1570)

This is not true. Dawn Fields tesified they all used to go swimming in the bay together and that included Michael. (R-1501, Santa Rosa County Record) No witness at all said anything about Michael being afraid of the water. Kimberly, his sister, testifed Michael had no fear of the water. (R-1612, Santa Rosa County Record)

MR. EDGAR: "She was in financial dire straits from high living." (R-1571)

There was no testimony even hinting that Defendant was in dire financial straits. Dorothy Balsley of Barnett Bank classified Defendant's checking account as average. (R-818, Santa Rosa County Record) The Defendant owned a home worth $50,000.00 prior to Michael's death. The only loan against the home was $2,185.00 for a sprinkler system. (R-846-847, Santa Rosa County Record) She also owned a fish

camp, a "fancy" boat, and a new car. (R-965-967, 976, Santa Rosa County Record) This was all before Michael died.

MR. EDGAR: "He (Dr. Barry) indicated that Michael was wanting to go home and go canoeing because his family was lining up apparently a trip for him." (R-1588)

Dr. Barry in fact said Michael had discussed the possibility of a boat ride with him while he was in the hospital. (R-436, Santa Rosa County Record) But Michael did not tell Dr. Barry his family had a canoe trip or boat ride "lined up" for him when he got home. The implication of course being that Defendant had this all planned so she could dump him in the river as soon as he got home.

MR. EDGAR: "And that he was virtually dying because nobody cared anything about him. That was the doctor's opinion." (R-1588)

Dr. Barry testified Michael was under emotional stress when he first saw him because of concern over whether he would be able to walk again and about sexual matters. (R-429-430, Santa Rosa County Record)

When Mr. Edgar was cross-examined and questioned whether the doctor testifed Michael's main concern was his sex life and whether he would walk again, Mr. Edgar said, "No, that's not what the doctor testified to. He was starving to death because he didn't want to live. Nobody called him and nobody seemed to care about him." (R-1589)

Nowhere is this testimony in the record in the Santa Rosa County case.

MR. EDGAR: "A gash on his forehead indicated there was injury to him (Michael), or that he was pushed,

or what." (R-1595)

Dr. David Nicholson, the pathologist who performed the autopsy on Michael, testified there was a superficial abrasion on the right side of the face, one centimeter in diameter. (R-262, Santa Rosa County Record)

MR. EDGAR: ". . .this was--this is one of the roughest areas in the country. It is a very remote river." (R-1596)

The record shows the drowning scene was a popular fishing and recreation spot and the time of year was Spring. (R-1727-1728, Santa Rosa County Record)

Mr. Edgar said no one would call or visit Michael. He said there were dozens and dozens of calls from Michael to home but only four calls from her to him. (R-1565)

MR. EDGAR: "And we related to the testimony that shows of four calls, if my memory serves me correctly, two of them concerned what his benefits were going to be, and I think one of them was making arrangements to pick him up." (R-1565)

The only testimony concerning what telephone conversations Defendant may have had was by Dr. Barry. He said one phone call concerned information about Michael in school and his pica--where he ate lead paint, etc. The second conversation was concerning preparations for Mike's return home and assuring the mother Michael was not going to be shut away in the VA. (R-444, Santa Rosa County Record)

This remark that two phone calls were inquiries about what Michael's benefits might be was especially offensive and also untrue.

There was much more but these remarks were just some of the more important ones. Even though in this case Mr. Edgar was only acting as a witness and not the proseuctor, he is still bound by the ethical rules of our Bar.

The picture he painted was that Defendant hated Michael, poisoned him with arsenic, and when he became crippled, planned a canoe trip as soon as she could get her hands on him so she could drown him. She took him to a secluded river even though he was deathly afraid of water, hit him on the head with a paddle, and knocked him out of the canoe, all because she was in dire financial straits and needed the insurance money.

Except for the inference created during the trial that she may have drowned Michael for insurance money, not one other word of that scenario is true. Because of the fact Defendant received the death penalty, this conduct should not go unnoticed. His testimony was more like his opening statement in the actual trial as opposed to the true facts as testified to by witnesses.

The statement to the jury by Mr. Edgar that Michael had arsenic poisoning was of course designed to add one more to the list of arsenic poisons by Defendant. The inference that she did it was so clear it did not have to be said. But the trial judge in Santa Rosa County did not allow testimony concerning the arsenic found in Michael while he was alive because there was no connection of it to

the Defendant. The records introduced in that trial excised anything mentioning arsenic in spite of Mr. Edgar stating to the Court that the defense "for drastic reasons or whatever reasons, thought it prudent to introduce defense evidence . . . . In that record it did indicate that he had lead arsenic poisoning, but the implication of the record it was from the Army". (R-1577)

Mr. Edgar told the Court, in an effort to condon what he had said, that a series of questions were asked of a pathologist as to what caused the paralysis and he said lead arsenic poisoning. (R-1577)

The Court allowed Dr. David Nicholson to testify in the Santa Rosa case as to what <u>may</u> have caused the peripheral neuropathy in the Deceased. Dr. Nicholson testified over objection as follows:

> "I--of course, by looking at the nerves themselves, I cannot tell what caused the peripheral neuropathy. But there are several things that can cause it. . . ." (R-267, Santa Rosa County Record)

After objection again, he testified in his opinion it was caused by heavy metal poisoning--arsenic and lead. (R-268, Santa Rosa County Record) Dr. Nicholson also said he couldn't rule out mercury causing problems with the peripheral nervous system. (R-273, Santa Rosa County Record)

This testimony was improper because it was not probative, and was designed to inflame the jury and prejudice the Defendant. It was also improper because

evidence that Michael had arsenic poisoning was never admitted in that trial.

The Defendant is entitled to a new sentencing hearing without this biased and untruthful testimony.

In Adam v. State, 403 So.2d 936 (Fla. 1981), the Supreme Court said it has held that aggravating considerations must be limited to those provided for by statute, and information must be related to one of the statutory aggravating circumstances in order to be considered.

Information pertaining to a brief summary of the fact that a jury concluded Defendant murdered her son for the purpose of collecting insurance would certainly have been sufficient to establish an aggravating circumstance. The rest was overkill.

However offensive another murder may be does not establish any aggravating factor concerning the present offense except that the Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

ISSUE

V. IT WAS ERROR FOR THE TRIAL COURT TO FIND THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

SUMMARY OF ARGUMENT

There was no evidence that Defendant murdered James E. Goodyear for pucuniary gain. The fact standing alone, that she collected insurance, does not suffice to find pucuniary gain as an aggravating circumstance.

ARGUMENT

In Simmons v. State, 419 So.2d 316 (Fla. 1912), this Court said proof of pecuniary gain "cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance." There the evidence of pecuniary motivation for the murder was not sufficient to prove that circumstance beyond a reasonable doubt, the Court said.

The trial judge here found the capital felony was committed for pecuniary gain. He said the Defendant had "discussed" with Connie Lang about her unhappiness with her marriage and using the vehicle of poison to solve her marital problems. She received $18,000.00 in insurance proceeds and veterans widows benefits. The trial judge said the evidence clearly shows the Defendant murdered her husband to end an unhappy marriage and to profit from the insurance and veteran's benefits.

First, there was no evidence or testimony that Defendant ever mentioned the possibility of receiving these benefits or that she even knew of them.

Connie Lang is the only witness who said Defendant had an unhappy marriage and specifically she just said she "had a feeling that Judy and James Goodyear had grown apart, didn't have the same interests anymore". (R-463) Mrs. Lang said they "joked" about solving their problems by poisoning their husbands. That would have to be taken less seriously than "discussed" poisoning their husbands.

But where in this is any mention of pecuniary gain? There was no testimony to that effect nor that she needed more morey or was in any financial trouble.

ISSUE

VI. THE COURT ERRED IN FINDING THE FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

SUMMARY OF ARGUMENT

The evidence was not sufficient in this case to show that this crime was so different from any other murder as to be considered especially heinous, atrocious or cruel.

ARGUMENT

Heinous means "extremely wicked or shockingly evil". Atrocious means "wicked and vile"; and cruel means "infliction of a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others". Maggard v. State, 399 so.2d 973 (Fla. 1981)

This Court in Maggard found that crime was not accompanied by such additional acts as to set it apart from

the norm of capital felonies--"the conscienceless or pitiless crime which is unnecessarily torturous to the victim".

There is no evidence that James Goodyear suffered any high degreee of pain or that he was tortured.

Debra sims testified he became "sickly". When asked to elaborate she said he was "weak". At one time he was hallucinating, she said. (R-571)

There was evidence James Goodyear was nauseated and had diarrhea. (R-238-239) This does not fit into the category of "high degree of pain" or "unnecessarily torturous". There was certainly no evidence that Defendant "enjoyed" the death of James Goodyear.

CONCLUSION

The trial court erred in admitting collateral crime evidence which was too remote, not similar, and in one, lacked any evidence whatsoever that a crime had been committed, much less connecting Defendant to it. This evidence became a feature of the trial.

Absent the collateral crimes evidence, there were only confessions of the Defendant and neither the confessions or the collateral crimes are admissible to prove the corpus delicti.

Impermissible statements were made by a witness during the guilt phase referring to another crime and during the sentencing phase by a prosecutor who testified concerning another murder case in the sentencing phase. The prosecutor's testimony was hearsay which the Defendant did not have a fair opportunity to rebut.

Because of errors made in the guilt and sentencing phase, Defendant should be granted a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been mailed to Margene A. Roper, Assistant Attorney General, Fourth Floor, 125 North Ridgewood Avenue, Daytona Beach, Florida, 32014, on this 10th day of September, 1986.

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