IN THE SUPREME COURT OF FLORIDA

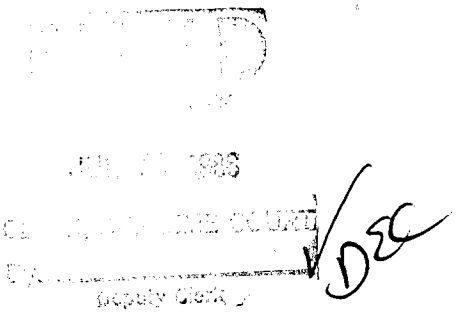
J. C. FEAD, SR.,

Appellant,

v. CASE NO. 68,341

STATE OF FLORIDA,

Appellee.



ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR MADISON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant was the defendant below, and will be referred to as appellant, or J. C., or by his nickname Buddy in this brief. An eight volume record on appeal, including transcripts, is sequentially numbered at the bottom of each page, and will be referred to as "R" followed by the appropriate page number in parentheses. All exhibits will be referred to by their exhibit number. All proceedings below were before Circuit Judge L. Arthur Lawrence, Jr.

II STATEMENT OF THE CASE

By indictment filed November 19, 1984, appellant was charged with first degree murder, the crime having occurred on October 14, 1984 (R 1-2). Appellant entered a written plea of not guilty through court appointed counsel on January 14, 1985 (R 14). A psychiatrist was appointed to examine appellant and report to his counsel (R 34-42). Appellant's pretrial motion for supplemental discovery (R 87-88), motion to dismiss the indictment (R 89-90), and motion for individual voir dire were denied just prior to the trial (R 542-49).

The jury trial was held on November 13-15, 1985, and at the conclusion thereof appellant was found guilty as charged (R 477). On November 21, 1985, the jury recommended a life sentence (R 503). Appellant's motion for new trial (R 504-505) was denied by written order filed February 5, 1986 (R 528). On November 25, 1985, appellant was adjudicated guilty and sentenced to death, the court overriding the jury's life recommendation by finding two aggravating circumstances and only one mitigating circumstance (R 506-10; 521-54).

On February 14, 1986, a timely notice of appeal was filed (R 529). On April 24, 1986, the Public Defender of the Second Judicial Circuit was designated to represent appellant.

III STATEMENT OF THE FACTS

Just prior to trial, the sheriff was cautioned not to converse with the prospective jurors, since he would be a witness at the trial (R 541-42). Appellant also presented his motion to dismiss (R 89) which was orally denied (R 542-43). Appellant also presented his motion for individual voir dire (R 91). The court agreed to allow individual voir dire if general inquiry disclosed the need for it (R 543-47). Appellant also presented his motion for supplemental discovery (R 87-88) which was orally denied (R 547-49).

The jury was selected and sworn (R 549-861). Opening statements were given (R 866-80). The state's first witness, Investigator Oliver J. Lake, identified drawings he had made of the Pine Lake Apartments, located in Greenville, eight months after the crime (R 880-89). The trial was recessed until the next day (R 889).

Reginald Jerome "Greg" Hawkins verified that the drawing of the apartment complex was accurate, and that drawing was entered into evidence without objection as state exhibit #1. The same occurred as to state exhibit #2, the diagram of the apartment. An overlay of the arrangement of furniture in the apartment was entered into evidence as state exhibit #3, over objection that it was not accurate (R 895-99).

Hawkins testified that he was the brother-in-law of the victim, Lisa Poole. On the Saturday morning before the shooting, Hawkins' wife Joanna went fishing with appellant. They returned later, at about 5:30 or 6:00 p.m., and appellant asked where Lisa was. Hawkins went with appellant to look for Lisa. They went to John Henry's Place and each had a beer. They returned home and left a second time to drive around and look for Lisa. Hawkins saw appellant put a gun on the dashboard of the truck. Appellant said he would kill the girl because he had told her to stay home. Hawkins then split up with appellant, and went to John Henry's again, where he finally located Lisa and told her what appellant had said (R 900-906).

At about 7:15 p.m., appellant and Lisa came to Hawkins' apartment and picked up Joanna, for a night out. The three returned to apartment 6 at about 1:00 a.m. while Hawkins was in apartment 10 watching a movie. Nothing appeared to be wrong between appellant and Lisa. Five minutes later Joanna came into apartment 10 and said appellant and Lisa were tearing up apartment 6. Hawkins told the two to fight elsewhere. Hawkins returned to the movie in apartment 10, but then went back to his apartment, where Lisa was trying to leave (R 906-15).

Appellant pulled the pistol from his boot. Lisa jumped behind Hawkins. Appellant fired one shot at Hawkins' feet. Lisa jumped again and appellant shot her in the neck

or shoulder. She fell, and appellant then straddled her and shot her twice in the head. Appellant left in his truck (R 915-24). In Hawkins' opinion, appellant was not drunk that night, and Lisa had had nothing at all to drink (R 925-27). Appellant, age 45, was jealous of Lisa, age 23 (R 957-58).

Joanna Poole Hawkins, Lisa's sister and Greg's wife, testified that she went fishing with appellant at 11:00 a.m. that day. They returned at 2:00 p.m. and as they were cleaning the catfish, appellant left to find Lisa. Later that evening, Joanna went with appellant and her two sisters to Monticello, where they visited a bar and bought a bottle of whiskey, which appellant and Lisa drank. The four then went to a bar in Wascissa, where Lisa danced with three or four other men. They returned to Joanna's apartment. Lisa refused to leave with appellant. Joanna witnessed the argument and the shooting. In her opinion, Buddy was not drunk (R 961-80).

Appellant was jealous of Lisa, who liked to go out and party; appellant preferred to stay home (R 995-96). Appellant and Joanna took a six pack of 16 ounce beer on the fishing trip, and each had another tall can on the way home (R 981-84). When they went out drinking that night, appellant had the whiskey and another 16 ounce can of beer (R 997-1000).

Leslie "Chuckie" Poole, Lisa's brother, testified that when he arrived at Greg's apartment, appellant and

Lisa were having an argument. Joanna left to call the police. Chuckie went to a phone booth to call the police as well. As he left the booth, he heard a shot, and then another. He then saw appellant shoot Lisa while she was lying on the floor (R 1012-24). Appellant was jealous of Lisa (R 1026).

Greenville Police Officer Odel "Rabbit" Livingston testified that he responded to the apartment at 2:30 a.m. and saw Buddy driving away. He followed appellant to appellant's house. Appellant took his boots off and said he would be ready to go with the officer after he gave his sister some papers. Appellant became upset when Odel said it was time to go, but appellant was permitted to urinate into a pot in his room and then rode with Deputy Glee to the jail in the front seat of the patrol car. Odel searched for the gun but could not find it (R 1036-46). Odel could tell that appellant had been drinking (R 1048).

Deputy Sheriff Wesley Ross testified that he responded to the apartment and saw the victim, who was not breathing. Later, he assisted the sheriff in recovering the gun at appellant's house, which appellant voluntarily gave them (R 1056). He also transported evidence to the crime lab (R 1050-55).

Deputy Sheriff H. Q. Melgaard testified that he photographed the scene, which photos were entered into evidence without objection as state exhibit #10-13,

inclusive (R 1062-65). Jailer Lester Wetherington booked appellant into the jail at 5:00 a.m. and found eight .22 rifle cartridges in appellant's pocket (R 1062-70).

Sheriff Joe Peavy testified that he arrived at the scene at 2:30. He then went to the county jail (R 1071-73). During a proffer, he testified that he advised appellant of his constitutional rights at 4:00 a.m. Both he and appellant signed the rights waiver form. Appellant stated that he and the girl were scuffling and playing with the gun, and it had discharged accidentally. Appellant also said he had thrown the gun into the bushes in front of the apartment. He also interviewed appellant again later that morning. Appellant then said he had lied about the gun, and took Peavy to his house to recover it (R 1071-79).

On cross-examination during the proffer, the sheriff testified that appellant was not heavily intoxicated at the time of his arrest. However, he also admitted that he had testified at a parole revocation hearing on November 5, 1984, that appellant was "heavily intoxicated" (R 1080).

Appellant's counsel argued that the state was guilty of a discovery violation, since the response to discovery had stated that appellant told Peavy that "defendant and victim were arguing; defendant pulled his gun; dropped it to the floor; it went off and the bullet

hit victim" (R 9) and that Peavy's deposition had stated that appellant said "He dropped the pistol and it went off, and it was just an accident, but he didn't mean to do it, and it was just an accident" (R 173), but that Peavy's trial testimony was that appellant and the girl were playing with the gun. The court found no discovery violation (R 1082-84).

Appellant's counsel also argued that the statement was not an exception to the hearsay rule for an admission against penal interests, since it was only a self-serving declaration. The court found the statement was an admission and therefore admissible (R 1085-86).

Before the jury, Sheriff Peavy identified the rights waiver form, and it was entered into evidence as state exhibit #14 without objection. Over counsel's renewed objection, Sheriff Peavy testified that appellant stated the gun accidentally went off and the victim was killed. Appellant said he threw the gun into the bushes. The second rights waiver form was also entered into evidence as state exhibit #15 and 16, without objection. Peavy testified that appellant told him the gun was at his home. The sheriff and Deputy Ross accompanied appellant to the house, where appellant retrieved the gun from the back porch. The pistol contained four spent cartridges and two unfired rounds. The sheriff identified these items, as well as other pieces of evidence (R 1088-1100).

In the sheriff's opinion, appellant did not appear to be drunk, but did smell of alcohol. When the sheriff volunteered that appellant "didn't tell me the truth", appellant's counsel objected and asked that the comment be stricken and that the jury be instructed to disregard it. The court did so (R 1100-1102).

Upon cross-examination, the sheriff reluctantly admitted that he had testified on the prior occasion that appellant was "heavily intoxicated" (R 1103-05).

Chief Deputy James O. Bunting kept custody of the pistol and the bullets. When the prosecutor offered them into evidence, appellant's counsel argued that they were irrelevant. The court agreed (R 1105-1108).

During a recess, appellant's counsel moved for a mistrial because the sheriff had testified that appellant was lying, and because the instruction for the jury to disregard the testimony was insufficient to remove the damage. The court denied the motion (R 1109-10).

It was stipulated that state exhibit #17 was a photo of the victim, and it was entered into evidence without objection (R 1110-11). Medical Examiner Dwondia Flora was qualified as an expert without objection. He identified autopsy photographs of the victim, which were entered into evidence without objection as state exhibit #18-22, inclusive (R 1111-16). He removed the three bullets from the body and they were also entered into evidence without objection as state exhibit #7-9, inclusive.

He described a gunshot wound to the back of the left side of the head, into the brain, from which he recovered a bullet. He also described a second gunshot wound to the right side of the neck, which also contained powder burns. That bullet hit a vertebrae, split in two, and exited the neck. He also described a third gunshot wound to the back and a fourth non-fatal wound to the shoulder joint. The cause of death was from any of the three wounds to the head, neck, or back (R 1116-22). The victim had a blood alcohol content of .27, which showed that she was intoxicated (R 1123-27).

FDLE Firearms Examiner David L. Williams was qualified as an expert without objection. He determined that the gun was a single action revolver with a hair trigger. He determined that if the hammer is cocked, or is resting on the firing pin, the gun would fire if hit with another object, without pulling the trigger. He also determined that the four cartridges recovered from the gun were fired by it. He could not determine whether the three bullets recovered from the autopsy were fired from the gun, only that they were .22 caliber Remington Peters (R 1128-39). When the gun, cartridges, and bullets were offered into evidence, appellant's counsel objected because they were not sufficiently connected, but the court overruled the objection and the items were entered into evidence as state exhibit #4-9, inclusive (R 1140-41).

The state proffered the testimony of Cora Howard. She testified that she never married appellant, but had eight children by him. On May 19, 1973, she saw appellant shoot and kill Mamie Hurd. The court ruled the testimony to be irrelevant and inadmissible. The state rested (R 1142-58).

Appellant rested and the jury was excused for the day. Appellant renewed his motion for mistrial regarding the testimony of the sheriff that appellant had lied. The motion was again denied. Appellant moved for a judgment of acquittal because the state had failed to prove the homicide was premeditated. The court denied the motion (R 1158-60).

During a charge conference, it was agreed that the jury would be instructed on voluntary intoxication (R 486) as a defense to first degree premeditated murder (R 1163-68). Appellant requested that the jury be instructed on the penalties for second degree murder and manslaughter, since it knew the penalty for first degree murder (R 1170-71). Appellant's counsel waived an instruction on third degree murder as a lesser offense (R 1172).

On November 15, 1985, final arguments were presented to the jury, during which appellant argued that appellant had no specific intent to commit first degree murder, due to his voluntary intoxication (R 1179-1237). The jury was instructed without further objection (R 1237-52). After 50 minutes of deliberation, the jury returned its

verdict of guilty of first degree murder, and was released until the penalty phase (R 1252-57).

On November 21, 1985, the penalty phase was conducted. The state's only witness, Cora Howard, the mother of appellant's eight children, testified, over a relevancy objection, that she saw appellant shoot and kill Mamie Hurd on May 19, 1973 (R 1269-71). The prior judgment and sentence for second degree murder (R 512-13) was stipulated into evidence (R 502) and the stipulation was read to the jury, which included the fact that appellant was on parole (R 1272-74).

Appellant presented numerous witnesses in mitigation. Dr. Umesh Mhatre, a psychiatrist, was qualified as an expert. He examined appellant on May 30, 1985, after having reviewed the deposition of the witnesses. Dr. Mhatre concluded that appellant would have had a blood alcohol of .25 at the time of the shooting. This heavy level of intoxication would have severely affected appellant's ability to think and perform other functions. Appellant also would have been under extreme mental duress and extreme mental and emotional disturbance at the time of the crime due to his heavy intoxication (R 1274-79).

Dr. Mhatre further testified that a person's motor coordination begins to be affected at the .10 blood alcohol level. At the .20 level, the sensory coordination becomes affected. At the .30 level, people have a blackout spell and

cannot remember what happened. Between .20 and .30, the person loses the ability to think rationally and to understand his behavior. The person also loses the ability to control his impulses. At this level, the person may be unable to control himself at all (R 1280-82).

Dr. Mhatre further testified that appellant's ability to think rationally would have been affected to a great extent. He did not understand the consequences of his behavior. His actions were a result of anger and impulse. Any pre-existing feelings of anger and jealousy would be magnified by the alcohol. Appellant had a greatly diminished capacity to appreciate his acts and to control his impulses (R 1282-84).

Dr. Mhatre further testified that appellant expressed remorse over Lisa's death, and cried in the doctor's office when they talked about her. Appellant had placed his anger over her dancing with other men out of proportion, into a major issue, due to the heavy intoxication (R 1297). In Dr. Mhatre's opinion, appellant did not plan to kill her. His threats to her during the day were a way of expressing his anger (R 1298).

Mamie Lee Fead, age 50, Buddy's sister, testified that they grew up in Greenville in a family of 13 children. They were a poor family and the children had to work instead of go to school. Their parents were sharecroppers. Buddy went to school, but had to drop out to work as early

as the third grade. He started working at the feed mill, which was the only job he ever had. Buddy was a hard working man who supported his children. Buddy and Lisa were living with Mamie in their own room. When they were at home, Buddy and Lisa always got along well. Buddy cared very much for Lisa. Buddy would cook food and take it to Lisa. He would also take her bathing water to the room. Buddy was a quiet, easy going person (R 1300-1307).

Leroy Handley, owner of the Greenville Dry Cleaners, testified that he had known appellant all of his life. Handley would see J. C. almost every day, and very often took J. C. to work at the feed mill. J. C. also brought his clothes and his kids' clothes to the laundry every Friday. J. C. was always quiet and easy going; Handley had never seen appellant drunk. All of the businessmen and residents of the town liked J. C. (R 1307-12).

Wallace Bailey, an employee of the Greenville Feed and Farm Supply, testified that he had known Buddy all of his life, but became well acquainted with him since 1976, when they began working together at the feed mill. The two were in charge of the rest of the employees. Buddy was a faithful employee and a hard worker who always got along well with the other employees (R 1313-16).

James Tracy Stephens, supervisor at Florida Plywood in Greenville, testified that he had known Buddy to be an easy going, hard working man (R 1317-20). Jacqueline Day, a resident of Greenville for 19 1/2 years, testified that

Buddy was employed by her husband Wayne Day. Buddy had worked at Wayne's feed mill and also at their farm. She knew that Buddy had been convicted of murder and sent to prison in 1973. She never felt Buddy was a danger to her or to her two children (R 1321-25).

Wayne Day, former owner of the Day Feed Mill, testified that he began working with J. C. in March of 1958, at the feed mill. Both worked six or seven days a week, often at night. J. C. was highly trusted and rarely missed work. When Day bought the business in 1970, he made J. C. a production leader. He also worked well with customers. J. C. also worked with Day's hog and cattle operation at his farm (R 1326-28).

Day visited J. C. in prison in 1973. When J. C. was moved from Raiford to Tallahassee to a work release program, Day contacted him and personally brought J. C. back to Greenville upon his release. Day advised J. C. to put the money he had made on work release in the bank. J. C. did so, and about a year later, J. C. used the money for a down payment on a house. Day made him a personal loan and got J. C. settled into the house. Day never felt his children were in danger of J. C. (R 1329-31).

Troy Rhodes, Probation Supervisor with the Department of Corrections, testified that he had been in the Madison office since 1964, and had known appellant since the 1973 murder. When appellant was paroled from his life sentence in 1979, Rhodes became his supervisor. Rhodes' files reflected

that appellant was a model prisoner, having received no disciplinary reports while in prison. Rhodes also believed appellant to be a model parolee, having received no complaints about him. If appellant received a life sentence, he could work in farming within the prison system. Rhodes was not permitted to testify before the jury as to his opinion about whether the death sentence would be appropriate (R 1336-44). During a proffer, he did express his opinion that the aggravating circumstances were not sufficient to justify the death penalty (R 1347-56).

During a charge conference, appellant's counsel objected to the giving of an instruction on the aggravating circumstance of under sentence of imprisonment by virtue of being on parole, but conceded that this Court had ruled otherwise (R 1356-58). Appellant conceded that the instruction on prior violent felony was appropriate (R 1359). It was agreed that other aggravating circumstances would not be given. The prosecutor requested an instruction on heinous, atrocious and cruel, and on cold, calculated, and premeditated, to which appellant objected. The court overruled the objection as to the former but sustained the objection as to the latter (R 1359-68).

Appellant received instructions on two statutory mental mitigating circumstances, but two special requested mitigating instructions were denied, although counsel would be permitted to argue them to the jury (R 1368-75).

During the prosecutor's closing argument, he argued that there were three aggravating circumstances, but conceded that there were three mitigating circumstances (R 1379-92). Appellant's closing argument (R 1392-1411) resulted in a life recommendation from the jury after 40 minutes of deliberation (R 1417-20).

At sentencing on November 25, 1985, appellant introduced into evidence the report of appellant's preliminary parole violation hearing (R 1425). Appellant's counsel again conceded the first two aggravating circumstances existed, but argued that the third - heinous, atrocious, and cruel - should not be found (R 1426-36). Appellant's counsel further argued that the predominately white jury's recommendation of a life sentence should be followed (R 1436-57).

The judge stated that he had come to court with a "tentative idea" of what sentence to impose, and that appellant's counsel had not persuaded him otherwise (R 1463-64). The court made no mention of the life recommendation, but stated:

> I do feel very strongly that there are two aggravating circumstances, both conceded by the defense, which far outweigh any mitigating circumstances.

(R 1464).

A written sentencing order was filed on January 17, 1986. It notes that the jury recommended life (R 522). It finds two aggravating circumstances: Under sentence of

imprisonment by being on parole, and prior violent felony conviction for second degree murder (R 522). It finds no statutory mitigating circumstances. It finds one non-statutory mitigating circumstance relating to appellant's character, but also notes that appellant had committed an uncharged crime of possession of a firearm by a convicted felon (R 523). The order finds the sole mitigating circumstance "has almost no weight in relationship to the [two] aggravating circumstances" (R 524). The order further finds that "either one of the aggravating circumstances alone far outweigh [sic] the single mitigating circumstance" (R 524). This appeal follows.

IV SUMMARY OF ARGUMENT

Appellant will argue in this brief that his death sentence should be vacated, and the lower court directed to impose a sentence of life in prison without possibility of parole for 25 years. The death sentence is illegal in many respects. First, the judge gave absolutely no weight or consideration to the jury's life recommendation. Second, the jury's life recommendation is based upon statutory and non-statutory mitigation; the jury's life recommendation was entirely reasonable. Third, the sentencing judge totally ignored the expert testimony regarding appellant's mental condition at the time of the shooting. Fourth, the judge expressly gave very little weight to the overwhelming non-statutory mitigating evidence regarding appellant's history and background. Fifth, the sentencing judge found that appellant had committed another crime, possession of a firearm by a convicted felon, even though appellant was never charged with nor convicted of this crime. Finally, appellant will make a proportionality argument that a death sentence is not appropriate for this homicide.

For any or all of these reasons, appellant will argue that this Court must vacate his death sentence.

V ARGUMENT

ISSUE PRESENTED

APPELLANT'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, BECAUSE ABSOLUTELY NO CONSIDERATION WAS GIVEN TO THE JURY'S LIFE RECOMMENDATION AND TO THE UNREBUTTED TESTIMONY CONCERNING STATUTORY MITIGATING CIRCUMSTANCES, BECAUSE LITTLE WEIGHT WAS GIVEN TO THE UNREBUTTED NON-STATUTORY MITIGATING EVIDENCE, BECAUSE THE COURT IMPROPERLY FOUND EVIDENCE OF A CRIME FOR WHICH APPELLANT WAS NOT CONVICTED, AND BECAUSE APPELLANT DOES NOT DESERVE A DEATH SENTENCE FOR THIS HOMICIDE.

A. The life recommendation is entitled to great weight; the lower court gave it no consideration at all.

As noted above, this rural, North Florida, predominately white jury recommended a life sentence for a poor black man after a short period of deliberation. The sentencing judge, in orally imposing the death sentence, made absolutely no mention of the life recommendation. He admitted coming into court that day, predisposed to impose a death sentence. He should have been predisposed toward life, because of the jury's recommendation. In his written order, the life recommendation received only passing reference.

This Court has on many occasions reversed a death sentence, in favor of a life sentence without parole for 25 years, where it was obvious that the sentencing judge had ignored the reasonable basis supporting the jury's life recommendation: Taylor v. State, 294 So.2d 648 (Fla. 1974); Slater v. State, 316 So.2d 539 (Fla. 1975); Swan v. State, 322 So.2d 485 (Fla. 1975); Tedder v. State, 322

So.2d 906 (Fla. 1975); Thompson v. State, 328 So.2d 1 (Fla. 1976); Jones v. State, 332 So.2d 615 (Fla. 1976); Provence v. State, 337 So.2d 783 (Fla. 1976); Chambers v. State, 339 So.2d 204 (Fla. 1976); Burch v. State, 343 So.2d 831 (Fla. 1977); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Buckrem v. State, 355 So.2d 111 (Fla. 1978); Brown v. State, 367 So.2d 616 (Fla. 1979); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Neary v. State, 384 So.2d 881 (Fla. 1980); Williams v. State, 386 So.2d 538 (Fla. 1980); Phippen v. State, 389 So.2d 991 (Fla. 1980); Lewis v. State, 398 So.2d 432 (Fla. 1981); Barfield v. State, 402 So.2d 377 (Fla. 1981); Welty v. State, 402 So.2d 1159 (Fla. 1981); Stokes v. State, 403 So.2d 377 (Fla. 1981); Smith v. State, 403 So.2d 933 (Fla. 1981); Odom v. State, 403 So.2d 936 (Fla. 1981); McKennon v. State, 403 So.2d 389 (Fla. 1981); Goodwin v. State, 405 So.2d 170 (Fla. 1981); McCray v. State, 416 So.2d 804 (Fla. 1982); Gilvin v. State, 418 So.2d 996 (Fla. 1982); Walsh v. State, 418 So.2d 1000 (Fla. 1982); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Cannady v. State, 427 So.2d 723 (Fla. 1983); Norris v. State, 429 So.2d 688 (Fla. 1983); Washington v. State, 432 So.2d 44 (Fla. 1983); Webb v. State, 433 So.2d 496 (Fla. 1983); Hawkins v. State, 436 So.2d 44 (Fla. 1983); Richardson v. State, 437 So.2d 1091 (Fla. 1983); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Thompson v. State, 456 So.2d 444 (Fla. 1984); Rivers v. State, 458 So.2d 762 (Fla. 1984); Barclay v. State, 470 So.2d 691 (Fla. 1985); Huddleston v. State, 475 So.2d 204 (Fla. 1985); and Amazon v. State,

487 So.2d 8 (Fla. 1986).

The test for evaluating an override is provided by Tedder, supra, 322 So.2d at 910:

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. That is not the situation here.

See Thompson, supra, 328 So.2d at 5 ("The advisory opinion of the jury must be given serious consideration"); McCaskill, supra, 344 So.2d at 1280 ("This Court, in reviewing the propriety of the death sentence, must weigh heavily the advisory opinion of the sentencing jury"); Neary, supra, 384 So.2d at 885 ("The facts justifying the death sentence must be clear and convincing in order to override the jury's recommendation"); and McKennon, supra, 403 So.2d at 391 ("There was a rational basis for the jury's recommendation, and there was no indication that the jury was misled"). See especially Smith, supra, 403 So.2d at 935:

> The trial judge did not articulate any reason for rejecting the jury's recommendation of a life sentence. The record does not show that he had anymore information than the jury did; the trial judge did not demonstrate how reasonable men would not differ on the matter of sentencing. Whatever his rational, we are unable to discern a basis which would be sufficient to reject the life sentence recommendation.

Under any of these aforesaid tests, appellant's death sentence must fall for the following reasons.

B. A reasonable basis exists for the jury recommendation.

The jury had every piece of evidence available to the judge, with the exception of Parole Officer Rhodes' belief that appellant did not deserve the death penalty; this jury knew that appellant was on parole for a previous murder; this jury was death qualified (R 598-99; 781; 805-806); this jury contained eight whites and four blacks; and this jury was a cross-section of a small, rural, North Florida county, whose only prior experience with capital cases resulted in a death recommendation. Johnson v. State, 442 So.2d 185 (Fla. 1983). This jury also came from a circuit in which every previous capital case before this Court contained a recommendation of death: Meeks v. State, 336 So.2d 1142 (Fla. 1976) (Taylor County); Meeks v. State, 339 So.2d 186 (Fla. 1976) (Taylor County); Manning v. State, 378 So.2d 274 (Fla. 1980) (Columbia County); Foster v. State, 387 So.2d 344 (Fla. 1980) (Columbia County); Foster v. State, 436 So.2d 56 (Fla. 1983) (Columbia County); Brumbley v. State, 453 So.2d 381 (Fla. 1984) (Taylor County); Bundy v. State, 471 So.2d 9 (Fla. 1985) (Columbia County); Livingston v. State, No. 68,323, pending (Taylor County); and Williamson v. State, No. 68,800, pending (Dixie County).

Numerous factors justify the life recommendation in this case. First, Buddy was intoxicated at the time of the crime. Second, Buddy was suffering from extreme mental and emotional disturbance, within the meaning of Section

921.141(6)(b), Florida Statutes. Third, Buddy was suffering from impaired capacity, due to his intoxication, within the meaning of Section 921.141(6)(f), Florida Statutes. Fourth, Buddy was a model prisoner during his previous commitment. Fifth, Buddy was a model parolee. Sixth, Buddy was a hard working man who supported his children. Seventh, Buddy was well liked by all in the community.

Since the sentencing judge made no attempt to explain why he could not follow the jury's life recommendation, or why it was unreasonable, or why he could not give it great weight, or why it had no rational basis, or what clear and convincing facts justified its rejection, it appears from his own language that he completely ignored it. This Court must correct the error and reduce appellant's sentence to life.

C. Sentencing judge totally ignored the expert testimony regarding statutory mental mitigation.

As previously noted, the court-appointed psychiatrist found that appellant's mental condition, as a result of his alcohol intoxication, fit two statutory mental mitigating circumstances. Even if this case did not have a jury recommendation of life, this Court would have to reverse, since the sentencing judge, as evidenced by his oral and written comments, did not listen to any of the psychiatrist's testimony:

> Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such from their consideration.[10]
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> * * *
>
> 10. We note that the Oklahoma death penalty statute permits the defendant to present evidence "as to any mitigating circumstances" ...Lockett requires the sentencer to listen.

Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982) discussing Lockett v. Ohio, 438 U.S. 586 (1978) (emphasis in original).

This Court has previously held that evidence of mental mitigation may be an entirely proper basis for a jury recommendation of life, and that when the sentencing judge ignores such evidence, the sentence must be reduced to life. Jones v. State, supra, 332 So.2d at 615: "Appellant had a paranoid psychosis which was undenied and unrefuted, the degree of which no one can fully know.... [T]his mental illness contributed to his strange behavior. Extreme emotional conditions of defendants in murder cases can be a basis for mitigating punishment."; Burch, supra, 343 So.2d at 831: conflicting evidence that defendant was temporarily psychotic; and Cannady, supra, 427 So.2d at 731: although mental mitigation not found by sentencing judge, this Court found it to be a reasonable basis for the life recommendation. In Amazon, supra, the

trial judge found four aggravating circumstances and nothing in mitigation. The jury recommended life. This Court reduced the sentence to life, finding that the jury's recommendation was based upon Amazon's mental condition:

> However, we are persuaded that the jury could have properly found and weighed mitigating factors and reached a valid recommendation of life imprisonment. We believe there was sufficient evidence for the jury to have found that Amazon acted under extreme mental or emotional disturbance. The defense theory in the guilt phase was that Amazon had acted from a "depraved mind," i.e. committed second-degree murder. There was some inconclusive evidence that Amazon had taken drugs the night of the murders, stronger evidence that Amazon had a history of drug abuse, and testimony from a psychologist to indicate that Amazon was an "emotional cripple" who had been brought up in a negative family setting and had the emotional maturity of a thirteen-year-old with some emotional development at the level of a one-year-old.
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> * * *
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> In light of these mitigating circumstances, one may see how the aggravating circumstances carry less weight and could be outweighed by the mitigating factors.
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> * * *
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> In other words, the jury could have found the crimes sufficiently serious to warrant first-degree murder convictions, but the combination of the "depraved mind" defense and the possible mitigating factors discussed supra mitigated against a recommendation of death. The facts

> are not so clear and convincing that no reasonable person could differ that death was the perfect penalty.

Amazon, supra, at 13. The same is true with regard to the instant case, where the psychiatrist's testimony concerning Buddy's alcohol-induced mental state remained unrebutted, and where Buddy's defense during the guilt phase, like that of Amazon, was lack of premeditation and specific intent to commit first degree murder.

This Court has frequently reversed a life override where the jury could have found alcohol or drug abuse as a mitigating circumstance: Chambers, supra, 339 So.2d at 208 (Justice England, concurring); Buckrem, supra, 355 So.2d at 113: Defendant "was obviously disturbed, as well as intoxicated"; Phippen, supra, 389 So.2d at 993: "Defendant was drunk, and he sometimes said things when drunk that he did not mean"; Cannady v. State, supra, 427 So.2d at 731: "Extensive drug usage"; Norris v. State, supra, 429 So.2d at 690: Defendant "claimed to have been intoxicated at the time of the crimes"; Ross v. State, infra (death recommendation); and Amazon v. State, supra. This Court must reduce appellant's sentence to life on authority of these cases.

D. Sentencing judge improperly gave little weight to the voluminous non-statutory mitigation.

As noted above, the lower court merely conceded from the bulk of Buddy's presentation at the penalty phase that

"he was a good worker and responsible employee for many years" (R 523). This, as far as it goes, is true. However, the court then found "that this mitigating circumstance has almost no weight" (R 524). This was reversible error, not only because of the quoted language from Eddings v. Oklahoma, supra, but also because it is contrary to prior cases from this Court which hold that such non-statutory mitigation as Buddy presented constitutes a valid basis for a life recommendation: Neary v. State, supra, 384 So.2d at 886-87: Defendant "was a slow learner and needed special assistance to keep up in school, and he grew up without a father and was reared by his mother and another woman"; Welty v. State, supra, 402 So.2d at 1164: "Although the trial court found no mitigating factors, there was evidence introduced by Welty relative to non-statutory mitigating factors which could have influenced the jury to return a life sentence"; and Gilvin v. State, supra, 418 So.2d at 999: "There was evidence of non-statutory mitigating factors, however, upon which the jury could have based its life recommendation even though the trial court, in its judgment, was not necessarily compelled to find them". See especially McCampbell v. State, supra, 421 So.2d at 1075-76:

> From an objective review of the record, it appears the jury could have been influenced in its recommendation for life imprisonment by the following factors: (1) appellant's exemplary

> employment record; (2) appellant's prior record as a model prisoner; (3) the positive intelligence and personality traits detailed through the testimony of Dr. Yarborough which showed the appellant's potential for rehabilitation; (4) appellant's family background....

See also Washington v. State, supra, 432 So.2d at 48 ("Non-statutory mitigating factor of appellant's character"); Thompson v. State, supra, 456 So.2d at 447-48 ("Uncontradicted testimony of Dr. Merin, an expert psychologist, as to appellant's mental capacity and attendant personality characteristics.... [T]estimony of appellant's mother and wife that he was a good son, husband, and father who attempted to provide for the welfare of his family".); Rivers v. State, supra, 458 So.2d at 765 ("Substantial evidence offered in mitigation which the jury could reasonably have relied upon in reaching its advisory verdict"); and, Huddleston v. State, supra. See also Rembert v. State, 445 So.2d 337, 340 (Fla. 1984), a case in which the jury recommended death and the trial court found no mitigation at all, but in which this Court reduced the sentence to life, because "Rembert introduced a considerable amount of non-statutory mitigating evidence ...." Because the judge in the instant case totally ignored the non-statutory mitigation, appellant's death sentence must be vacated.

E. The sentencing judge improperly found that appellant had committed the crime of possession of a firearm by a convicted felon.

In his sentencing order, the judge, apparently attempting to negate the large amount of non-statutory mitigating evidence just referred to above, found that appellant "was clearly violating Section 790.23, Florida Statutes, a felony of the second degree, by being in possession of a firearm while on parole as a convicted felon". (R 523) This was error, because appellant had apparently never been charged with this crime. This was also error because appellant waived reliance on the mitigating circumstance of no substantial criminal history, Section 921.141(6)(a), Florida Statutes. See also Maggard v. State, 399 So.2d 973 (Fla. 1981); and Fitzpatrick v. Wainwright, No. 65,785 (Fla. June 26, 1986). This was also error because the judge has relied upon a crime for which no conviction was obtained, and because the judge has, in effect, created a non-statutory aggravating circumstance.

This Court has consistently held that such a finding in a sentencing order creates reversible error: Provence v. State, supra, 337 So.2d at 786 (Use of mere arrests as non-statutory aggravation); Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977) (Defendant confessed to another murder); Mikenas v. State, 367 So.2d 606, 609 (Fla. 1978) (Unstated prior criminal activity used as non-statutory aggravation); Spaziano v. State, 393 So.2d 1119, 1123 (Fla. 1981) ("Convictions for non-violent

offenses and misdemeanors and charges for which there was no conviction must be excluded as aggravating factors"); Perry v. State, 395 So.2d 170, 174 (Fla. 1980) (Pending criminal charges); Odom v. State, supra, 403 So.2d at 942 ("Mere arrests and accusations"); Barclay v. State, supra, 470 So.2d at 695 (Extensive record used as non-statutory aggravating factor rather than to negate mitigating circumstance); and Fitzpatrick v. Wainwright, supra, slip opinion at 2: "Juvenile arrest record...including descriptions of the conduct leading to the arrests"). See especially Dragovich v. State, No. 65,382 (Fla. May 29, 1986), in which this Court found error in the use of hearsay evidence of other crimes, and stated:

> Whatever doctrinal distinctions may abstractly be devised distinguishing between the state establishing an aggravating factor and rebutting a mitigating factor, the result of such evidence being employed will be the same: Improper considerations will enter into the weighing process. The state may not do indirectly that which we have held they may not do directly.

Slip opinion at 8. This Court must reverse the death sentence.

F. The death sentence is not appropriate for this domestic homicide.

Historically, this Court has reversed death sentences where the defendant has killed another person in a domestic situation, whether the victim was a wife, girlfriend, ex-wife, mother-in-law, parent, or the husband of the

defendant's lover. This is especially true when the jury has recommended life, or when the defendant is emotionally disturbed, or when drugs and alcohol have contributed to the crime, even though valid aggravating circumstances have been found to exist. This Court has the obligation to conduct proportionality review as a matter of state law. See Sullivanv. State, 441 So.2d 609 (Fla. 1983) and compare Pulley v. Harris, 465 U.S. 37 (1984).

In Tedder v. State, supra, the defendant shot his mother-in-law. Although the trial court found three aggravating circumstances, this Court held that the jury's life recommendation should have been followed. In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the defendant killed his lover's husband in a violent rage, beating him mercilessly with a 19 inch breaker bar. Although the jury recommended death, this Court reduced the sentence to life because the defendant was under emotional strain from his relationship with his lover.

In Chambers v. State, supra, the defendant beat his girlfriend severely and she died five days later. This Court held that one aggravating circumstance was not sufficient to overcome the jury's life recommendation and the defendant's mental state. In Kampff v. State, 371 So.2d 1007 (Fla. 1979), the defendant shot his former wife three times with a pistol, the last being a direct shot to her head. Although the jury recommended death, this Court reversed for a life sentence, citing

Halliwell, because the defendant had committed the murder under extreme duress, having brooded over his divorce for three years.

In Phippen v. State, supra, the defendant repeatedly stated to others that he was going to kill his mother and stepfather. He borrowed a pistol and used it to shoot the former four times and the latter six times. The jury recommended life for both murders. This Court cited Tedder and held that the recommendation should have been followed because the defendant was drunk at the time of the crimes. In Blair v. State, 406 So.2d 1103 (Fla. 1981), the defendant decided to murder his wife, bought a gun and ammunition, shot her, and buried her in the back yard. The jury recommended death. This Court reversed, citing Halliwell.

In Herzog v. State, supra, the defendant strangled his girlfriend in a drug frenzy. The jury recommended life. The sentencing judge found four aggravating circumstances and no mitigating. This Court approved only one aggravating circumstance (prior convictions for robbery and assault) but also approved the absence of any statutory mitigating circumstances. However, this Court held that the life recommendation should have been followed, because of the"domestic relationship that existed prior to the murder". Id. at 1381.

Most recently, in Ross v. State, 474 So.2d 1170 (Fla. 1985), the defendant had been drinking; he argued

with his wife; he beat her head with a hammer then dumped her into a lake. The jury recommended death. The mitigating evidence showed that the defendant was an alcoholic, and that he was intoxicated at the time of the crime, although the defendant denied the latter. This Court reversed for a life sentence, even though the murder was extremely heinous, atrocious, and cruel, because:

> It is apparent that the trial judge did not consider as mitigating factors the sentencing phase testimony of the appellant's family members relating to the appellant's drinking problems, the testimony of the state's key witness, Harwood, that the appellant confessed he had been drinking when he attacked the victim, or the evidence that the killing was the result of an angry domestic dispute in which the victim realized the appellant was having difficulty controlling his emotions. We find the trial court erred in not considering these circumstances collectively as a significant mitigating factor.

Id. at 1174. This Court must follow Ross and the previously-cited cases and reduce J. C. Fead's sentence to life. For any or all of the foregoing reasons, J. C. Fead's death sentence cannot be upheld.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, appellant requests that this Court vacate his death sentence and remand for entry of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand delivery to Mr. John Koenig, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Appellee; and, a copy has been mailed to appellant, Mr. J. C. Fead, #039429, Post Office Box 747, Starke, Florida, 32091, this 17 day of July, 1986.

P. DOUGLAS BRINKMEYER