IN THE SUPREME COURT OF FLORIDA

JOHNNY PERRY,)

Appellant,)

Vs.)

STATE OF FLORIDA,)

Appellee.)

CASE NO.: 68,482

DIRECT APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE FACTS AND THE CASE

On March 13th, 1985, between 12:30 p.m. and 1:00 p.m. a bus driver in the southwestern portion of Dade County saw a wallet along the side of an expressway (R.807). He gave this wallet to his supervisor (R.809). His supervisor looked through the wallet and determined it belonged to one Katherine Miller (R.814-815). The supervisor was able to reach Katherine Miller's husband, Anthony Miller, by telephone at his place of business by 2:00 p.m. the same day (R.817-818). During the same general time span, two other people found a purse containing certain papers and a coin purse with about twenty-five ($25.00) dollars in it both belonging to the same Mrs. Miller in the roadways of southwest Dade County (R.821; 835; 898).

Mr. Miller went home shortly after receiving the 2:00 p.m. telephone call and discovered his wife on the floor of a hallway, deceased (R.842). The medical examiner later determined that the victim sustained at least six (6) stab wounds to the chest (R.768). Death was caused by stab wounds to the chest and strangulation (R.774).

A crime scene technician unit, called to the scene to obtain physical evidence, discovered that the property had a cabana in the backyard. At a table in the cabana were two glasses which contained a cool liquid (R.690). Fingerprints were lifted from the two glasses (R.690) and those on one glass were the victim's (R.957) and on the other glass were the Appellant's (R.941). Inside the home, a partial palm print was found on a hallway wall above

where the victim was found and about three and one-half feet above the floor (R.658). Later, it was determined that this palm print matched the palm of the Appellant (R.942). There was no blood on the palm print (R.659). It was, also, discovered that two people in the neighborhood saw a green volkswagon "bug" in the victim's driveway at about noon (R.878; 886).

The police detective assigned to the case discovered that the Appellant had lived next door to the victim in the past (R.1006) and that he drove a green volkswagon "bug". On March 15, 1985, the Appellant became the focus of the police investigation (R.305, 331, 332). On March 18th, 1985, the police detectives went to the Appellant's house and questioned him regarding his whereabouts on March 13th, 1985 to which he responded that he had been with his wife all day packing and moving (R.974, 980). The Appellant also stated that he had never been in the Miller house and had not touched any of her papers (R.978). The dectectives asked the Appellant to go to the police station the next day to which he agreed (R.981-2).

On March 19th, 1985 the Appellant arrived at the Metro Dade Police Department with his mother and wife at about 10:30 a.m. (R.982-3). The security desk on the first floor called the detective who took the Appellant to the homicide office on the second floor (R.280). The Appellant's mother and wife remained in a waiting room on the first floor (R.280). The Appellant gave a sworn statement which was essentially the same as he had stated the night before (R.984). At that point the Appellant was not free to leave (R.282). The detectives had determined that they were going to

arrest the Appellant (R.317). However, instead of doing that, at 11:30 a.m. the detectives confronted the Appellant and told him that they knew he had been lying (R.285). Thereupon, the Appellant made a second statement in which he confessed to killing the victim on March 13th, 1985 (R.285-290). At noon, the Appellant was arrested for murder and was read his "Miranda" rights for the first time (R.291). The Appellant was requested to sign a written form indicating he had been read and understood his rights and was willing to waive them but refused to sign the form (R.294). Nevertheless, the detectives elicited another statement from the Appellant which was nearly identical to the statement elicited from the Appellant between 11:30 a.m. and 12:00 noon (R.311-313).

The contents of this statement were, basically, that the Appellant went to the victim's home and she opened the front door and let him in (R.992). The Appellant did not see her car in the driveway (R.992). The Appellant asked the victim if he could borrow some money (R.1036). She responded she didn't have any and the Appellant then asked her for some gold (R.1036). The victim began to run away and the Appellant panicked (R.992). He grabbed her by the hair and hit her with a shoe and then stabbed her (R.993). The Appellant then took the victim's purse and a silver tray and left (R.993). At times during the statement the Appellant said he was with another person who actually committed the murder (R.1034). The Appellant denied strangling the victim (R.1035) and stated he did not know how many times the victim had been stabbed because he had blacked out (R.993).

The Appellant was ultimately charged by Indictment with First

Degree Murder, Armed Robbery, and Armed Burglary (R.1-2). Prior to trial, the Appellant moved to suppress his confession (R.82-83; 86-88). The State conceded that the statement made between 11:30 a.m. and 12:00 noon would not be introduced at trial (R.371) and the Court ruled that this statement was inadmissable (R.926-7). However, the Court denied the remainder of the Motion and permitted all other statements to come into evidence (R.381). The Court further ruled that all statements were freely and voluntarily made (R.927).

The Appellant was convicted by the jury of First Degree Murder and Robbery (R.160-1). The Appellant was acquitted of Burglary (R.162). Thereupon, a penalty phase hearing was conducted in front of the same jury that heard the main case (R.1312-1487). The State produced a sworn statement of one Dyanne Gail Knight which was introduced into evidence over the objection of the Appellant (R.203-213). This statement was given to a police officer almost two months prior to the events in the instant case and purported to give evidence that the Appellant had committed an attempted sexual battery upon Ms. Knight. The police detective who took this statement was also produced and she testified that as a result of this prior incident, the Appellant had been convicted of a misdemeanor battery (R.1388-9).

The State also produced the testimony of the medical examiner. He stated that he was unsure in which order the victim sustained blunt trauma, strangulation or stab wounds (R.1383). He further testified that he did not know at what point the victim had lost consciousness and that an unconscious person would not suffer pain

(R.1384).

The Appellant, twenty one years of age (R.1086), produced six witnesses who were neighbors, friends and family of the Appellant (R.1390-1405; 1448-1450). They all testified that to their knowledge the Appellant had always been a kind, compassionate person who was a loving son and brother. They all testified that the Appellant exhibited no signs of violent behavior in his past. Additionally, the Appellant produced an Assistant State's Attorney who testified that the Appellant had been a witness in a separate homicide case and that the Appellant had been completely cooperative and truthful in assisting the State in its prosecution (R.1406-1414). The Appellant also produced the testimony of an attorney who had known the Appellant and his family a few years earlier (R.1415-1447). He testified that the Appellant had been a highly motivated individual (R.1420) with goals and aspirations who had failed in those hopes (R.1428). He said that the Appellant was always soft spoken, respectful and never exhibited any violence or belligerence (R.1421). He finally stated that the Appellant had changed in the past few years and that he now saw a person who appeared defeated and a failure (R.1445).

The jury deliberated and returned an advisory sentence recommending that the Appellant be sentenced to life imprisonment without possibility of parole for twenty-five years (R.1484). The jury was polled and all jurors acceded to the recommended verdict (R.1485).

Thereafter, the cause was set for sentencing. At the sentencing, the State produced the victim's husband who told the Court that

the jury's recommendation was by a split vote (R.1497). The Appellant objected to this testimony (R.1498), but the Court expressed interest in this matter and inquired of the Assistant State Attorney whether this was true and whether the Assistant State Attorney had spoken to any jurors (R.1498). The Court then entered its judgment and sentence overriding the jury recommendation and imposing the death penaltyon the First Degree Murder conviction and one-hundred, thirty-four years imprisonment on the Robbery conviction (R.235-242).

This Appeal followed.

SUMMARY OF ARGUMENT

GUILT PHASE

The Appellant moved, prior to trial, to suppress certain statements he made. The Court granted the Motion in part but denied the Motion as it pertained to a "confession" the Appellant made to police after his formal arrest. The Appellant claims herein that the confession should have been suppressed.

The subject confession came on the heels of an identical confession which was extracted from the Appellant while he was in police custody but without any "Miranda" warnings. Although the police had decided to arrest the Appellant, they questioned him in the police station, confronted him with their belief that he had previously lied, separated him from his mother and his wife, and illegally obtained a confession from him. That confession was suppressed. Ten minutes later, in the same place, but after having been read his "Miranda" rights, the police obtained the same confession from the Appellant again. This second confession was tainted by the first, illegally obtained confession, and should have been suppressed.

During the trial, and while the Appellant was testifying, one juror was overheard telling another juror that the Appellant was lying. The lower Court was made aware of this but made no inquiry as to whether any juror had formed a premature opinion. That event prevented the Appellant from receiving a fair trial.

The Appellant requested the Court to instruct the jury on the

crime of Third Degree Murder as a lesser included crime of First Degree Murder. The lower Court refused to give this instruction because there was no evidence of an underlying felony committed which would constitute Third Degree Murder. However, there was evidence of Armed Trespass (for which the Court read a jury instruction) and evidence of Grand Theft.

Each of these errors is independently sufficient to warrant a new trial.

PENALTY PHASE

The jury recommended a life sentence for the Appellant. The lower Court found five aggravating factors, no mitigating factors, and sentenced the Appellant to death. The Appellant claims herein that the lower Court improperly applied four aggravating factors, improperly failed to find mitigating factors, and improperly overrode the jury recommendation because there were sufficient facts in the record to support the jury recommendation.

First, the lower Court found that the contemporaneous, underlying felony of Robbery was a previous conviction. In fact, the Appellant had no previous felony convictions. Second, the lower Court found that the crime was committed to prevent a lawful arrest or detection. There was no evidence of that. Third, the lower Court found that the crime was cold and calculated. However, that factor normally applies to execution-style killings and this was a death which resulted when both the victim and the Appellant panicked during a so-called Robbery. Finally, the lower Court found that this crime

was especially heinous, cruel and atrocious. However, in comparison to other reported cases, the facts of this case do not support that finding.

The override of the jury recommendation ignored the ample evidence in the record of mitigating circumstances such as lack of significant prior history, youthful age, good character and undue pressures of life. The jury could have easily relied upon any of these.

Finally, the lower Court improperly relied upon unsworn, hearsay testimony regarding the split of votes on the jury recommendation. This tainted the Court's ultimate sentence.

The sentence should be reduced to life imprisonment.

ARGUMENT

I

THE TRIAL COURT ERRED IN FAILING TO GRANT A PRE-TRIAL MOTION TO SUPPRESS THE DEFENDANT'S STATEMENT WHERE THE STATEMENT WAS OBTAINED IN VIOLATION OF MIRANDA AND WAS INVOLUNTARY.

The custodial interrogation of a suspect to a crime by a police officer requires that the subject understand, among others, his rights to remain silent and to have an attorney. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). This guarantees the subject's rights under U.S. Const., Amend V. Additionally, the Government has the burden of showing that any statement charaterized as a "confession" made by a Defendant in a criminal case was made voluntarily and not due to coercive influences of the police. Nowlin v. State, 346 So.2d 1020 (Fla. 1977). These two issues are linked to a certain degree as stated in U.S. v. Burke, 613 F.Supp. 576 (N.D. Ga., 1985):

> The danger at which Miranda is aimed is that under the compulsive or coercive aspects of a custodial situation, an individual would be more likely to make incriminating statements involuntarily, without knowing his fifth amendment rights. (At 584).

Here, the Appellant filed two pre-trial motions seeking to suppress certain statements he allegedly made to police officers (R.82-83; 86-88). The Motions were based on the grounds of failure to advise the Appellant of his Miranda rights and on the grounds

that the statements were involuntary. After a hearing the Court denied the Motions (R.381). Later, during the trial, the Court sua sponte re-addressed the Motions and declared that the statements were free and voluntary but that the first "confession" would not be admissable at trial (R.926-927). The Court continued to deny all other aspects of the Motions (R.927).

Briefly, the relevant facts were that on March 18th, 1985, two police detectives questioned the Appellant at his home (R.273). They asked him to go to the police station and he made an appointment for the next day (R.279). On March 19th, 1985, the Appellant went to the police station with his mother and his wife and arrived at about 10:30 a.m. (R.279-280). He was taken to the second floor while his mother and wife remained in a waiting room on the first floor (R.280). At that time he was asked questions and gave the same answers as the night before (R.281). At that point, the police had decided that they would arrest the Appellant because they knew his statement was false based upon fingerprint evidence they had (R.317). However, instead of arresting the Appellant, they confronted him, told him they knew he was lying and continued to question him. The Appellant then made an inculpatory statement in responding to the questions of the police (R.286-290). During this time, the Appellant was not free to leave (R.282). (This is referred to as the first confession). This first confession ended at about 11:50 a.m. (R.290). Ten minutes later the Appellant was placed under arrest and, for the first time, was read his Miranda rights (R.291; 306). He was immediately requested to make another formal statement which he did and which followed, basically, the

same format as the first confession (R.311; 313).

The State conceded that the first confession was obtained improperly and did not seek to introduce it (R.217). The Court even ruled that it was inadmissable (R.927). It is the admission into evidence of the second confession that is of issue here. The Appellant claims that the second confession was a product of, and was tainted by, the illegally obtained first confession. The second confession was, thereby, involuntary and should not have been admitted into evidence.

In order to determine whether the second confession was voluntary, one must first examine the circumstances surrounding the first confession. It was conceded by the State that a reasonable person would have considered himself to have been in custody just prior to the first confession. Furthermore, the police had already formed the intent to arrest the Appellant (R.317). At that point he should have been read his Miranda rights. Even the interrogating officer testified that his conscious decision not to read said rights was an error (R.310). This first confession was obtained in a coercive atmosphere. The Appellant was in a secure portion of the police station, removed from his wife and mother, confronted by police officers with their belief that he had previously lied, and was not free to leave. A custodial interrogation itself creates a presumption of coercion. U.S. v. Burke, supra. "Indeed, common sense tells us that questioning of a suspect by police at the station house is inherantly coercive." Roman v. State, 475 So.2d 1228 (Fla. 1985) at 1232. Additionally, failure to give Miranda warnings is another factor to indicate coercion in obtaining a

confession. Roman v. State, supra. Thus, the first confession was obtained in violation of Miranda v. Arizona, supra. and in an extremely coercive atmosphere.

Given the circumstances surrounding the first confession, the relevant question to be determined is whether the second confession was voluntarily made. In doing so, the Court should be guided in its consideration by several factors: 1) the time between statements, 2) whether the place of interrogation changed and 3) whether the interrogators changed. State v. Madruga-Jimenez, 485 So.2d 462 (3rd DCA, 1986). Even if the first confession was voluntary, the determination of the voluntariness of the second confession should encompass several additional factors including the Defendant's contacts with friends or family members during the interrogation, the degree of police influence exerted over the Defendant, and whether the Defendant was advised that his previous statement could not be used against him. U.S. v. Wauneka, 770 F.2d 1434 (9th Cir., 1985). However, all these considerations should be viewed in the totality of the circumstances to determine the voluntariness of the confession. U.S. v. Wauneka, supra. The burden is on the State to prove that the confession was voluntary. Roman v. State, supra.

In the instant case, the facts uniformly establish that the second confession was entirely a product of the first, illegally obtained, confession. There were only ten mintues between the two confessions. Both confessions took place on the second floor of the police station. The interrogators were the same. The Appellant had no contact with his mother or his wife from whom he had been

separated. He saw no one but police officers after his arrival at the station. The Appellant was never advised that his first confession could not be used against him. The Appellant refused to sign a rights waiver form (R.322) which, although not dispositive, is another factor to be considered in determining whether the Appellant knowingly, intelligently and voluntarily waived his rights. Finally, the questions asked in the second confession were the same as those from the first confession. The facts of this case are indistinguishable from those in State v. Madruga-Jimenez, supra. wherein the Court affirmed the lower Court's order of suppression stating:

> The warned statements began immediately after the unwarned ones. Additionally, they were conducted in the same building, by the same officer from the same police agency... It is also clear that [the Defendant] spoke to no one besides the police during this period and was not informed that his intitial statements could not be used against him. (At 466).

The second confession was involuntary. It was the tainted product of the first, admittedly illegally obtained, confession. It should have been suppressed. Since the major evidence against the Appellant indicating any illegal activity was his confession, this Court should reverse his conviction and remand this case for a new trial.

II

IMPROPER CONDUCT BY THE JURY DENIED APPELLANT THE RIGHT TO A FAIR AND IMPARTIAL TRIAL.

Misconduct by a juror during a criminal trial which is potentially harmful is presumptively prejudicial. Amazon v. State, 487 So.2d 8 (Fla. 1986). It is the Defendant's burden, however, to make a prima facie showing that the conduct is potentially prejudicial. Amazon v. State, supra.

In the instant case, while the Appellant was testifying in his own behalf during the trial, one juror was heard by both counsel to tell another juror that the Appellant was lying (R.1103). The Court was made aware of this but did nothing and made no inquiry (R.1103).

It is clear that this juror not only formed a premature opinion in violation of the Court's instructions, but informed other jurors of that opinion in open Court. Moreover, that opinion was not about a non-consequential matter, but, rather, went to the very heart of the defense case: the veracity of the Appellant. Thus, the presumption of prejudice to the Appellant is firmly established and is even superceded by actual evidence of prejudice. The Court should, at least, have questioned the jurors to determine the amount of prejudice this comment caused. It is apparent that the Appellant could not have received a fair trial by an impartial jury. U.S. Const., Amend. VI. This case should be reversed and remanded for a new trial.

III

THE TRIAL COURT ERRED IN FAILING TO GIVE A JURY INSTRUCTION ON THIRD DEGREE MURDER WHERE THE DEFENDANT WAS CHARGED WITH FIRST DEGREE PREMEDITATED AND FELONY MURDER.

At the charge conference, the Appellant moved that the Court give the jury an instruction on Third Degree Murder as a lesser included offense of First Degree Murder (R.1187). The State objected and the Court denied the Motion (R.1187). The Appellant later renewed the Motion (R.1201) but the Court refused to give said instruction. The Appellant claims that this was error.

The Appellant was charged by Indictment with First Degree Murder by premeditation or by felony murder in violation of Fla. Stat. 782.04(1)(R.1). The Appellant was also charged, in Count II, with Armed Robbery in violation of Fla. Stat. 812.13 (R.1-2). Finally, the Appellant was charged in Count III with Armed Burglary in violation of Fla. Stat. 810.02 (R.2).

While it is true that Third Degree Murder is not a necessarily included lesser of First Degree Murder, it is a lesser included offense and the instruction should be given if there was any evidence in the record supporting such a charge. Green v. State, 475 So.2d 235 (Fla. 1985). The State argued that there was no evidence to support the commission of any underlying felony which would constitute Third Degree Murder (R.1187). The lower Court agreed and did not read the instruction. Third Degree Murder was, therefore, not included on the verdict form. However, there was

ample evidence of applicable underlying felonies.

First, there was evidence of an armed trespass in violation of Fla. Stat. 810.08(2)(c), a Third Degree felony. Not only was there evidence of this, but the lower Court instructed the jury on it (R.1278). The Appellant had previously requested that all lessers be given (R.1186).

Second, there was evidence of Grand Theft in violation of Fla. Stat. 812.014(2)(b)(1), a Third Degree felony. The Appellant's "confession" as related by the Detectives indicated that the Appellant had stolen a silver tray which he later sold for $100.00 (R.1037). The State contended, however, that since the indictment only alleged Petit Theft in Count II, that Grand Theft could not be applied to find the lesser of Third Degree Murder (R.1186-1187). This is insidious in its implications. If this were true, the State could always choose misdemeanors in its Robbery and Burglary counts to avoid the lesser of Third Degree Murder regardless of what the evidence showed. The Appellant urges this Court to hold that the determinative factor in whether the lesser of Third Degree Murder exists in situations like this is upon the evidence introduced at trial and not upon the charging document.

The Court improperly failed to give a jury instruction on Third Degree Murder. The Defendant was, thus, deprived of the opportunity to have the jury consider the lesser included violation. A new trial should be ordered. See State v. Barnes, 182 So.2d 260 (2nd DCA, 1966).

IV

THE LOWER COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE APPELLANT WAS PREVIOUSLY CONVICTED OF ANOTHER FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.

Fla. Stat. 921.141(5)(b) establishes as an aggravating circumstance to be considered by the Court in imposing sentence whether the Defendant was previously convicted of another felony involving the use or threat of violence to the person. The trial Court found this as an aggravating circumstance in the instant case. (R.238). The Appellant claims this was in error.

The "previous" felony the lower Court referred to and relied upon was the contemporaneous robbery for which the Appellant was charged and convicted (R.238). The Appellant, in fact, had no prior felony convictions.

It would appear on its face that this statute section is perfectly clear. This is the section in which the Defendant's violent criminal history is to be considered. The key word in the statute section is "previously". Websters Third New International Dictionary, Unabridged (1976) defines previously as: beforehand. Black's Law Dictionary (5th Ed. 1979) defines previous as: Antecedent; prior; before. In this case, the Appellant was not convicted of a violent felony before, prior or antecedent to his conviction for the capital felony. Thus, this factor should not apply.

However, the Appellant is not unmindful of this Court's decision

in Hardwick v. State, 461 So.2d 79 (Fla. 1984). This Court held there that contemporaneous convictions for acts of violence on one victim may be considered as previous convictions under this aggravating factor. The Appellant would urge this Court, first, to recede from the Hardwick ruling and, second, argues that the facts of his case are not applicable to that ruling.

The Court's position in Hardwick v. State, supra., ignores the automatic aggravating factor in Fla. Stat. 921.141(5)(d) which essentially states that anyone committing a felony murder shall have that aggravating circumstance applied. Thus, the character analysis which the Court was concerned with is factored in by subsection (d) and need not be added again in subsection (b). The Hardwick decision also ignores the clear definition of "previously". However, if this Court is not inclined to re-examine its ruling and recede therefrom, the Court should, at least, hold that where subsection (b) is being applied, it should be merged with subsection (d) and counted only as one aggravating factor.

A strict reading of Hardwick v. State, supra., reveals that a contemporaneous conviction only applies when 1) the evidence supports a premeditated murder or, 2) the violent felony relied upon was not a necessarily included element of felony murder. Taking these in reverse order, the Appellant was convicted of robbery which was, indeed, a necessarily included element of felony murder because he was acquitted of burglary.

Second, the record does not disclose any evidence of premeditation. The evidence discloses that the violence occured spontaneously as the result of panick during an attempted robbery.

Furthermore, the jury verdict does not indicate under what doctrine the jury found the Appellant guilty of First Degree Murder (R.160). It should not be the function of an appellate Court to make factual findings when the finder of fact was ambiguous. The jury could easily have decided that the Appellant was not guilty of premeditated murder but was guilty of felony murder. Any attempt, at this point, to guess as to what the jury's decision meant is just that: a guess, pure speculation. The record certainly fails to disclose much evidence of premeditation. Moreover, the trial Court made no finding that the record contained sufficient evidence of premeditation. Thus, this factor, even under the Hardwick doctrine was not proven beyond a reasonable doubt. State v. Dixon, 283 So.2dl (Fla. 1973). The trial Court was in error in considering this as an aggravating factor.

V

THE LOWER COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITED IN ORDER TO AVOID OR PREVENT A LAWFUL ARREST.

Fla. Stat. 921.141(5)(e) establishes as an aggravating circumstance to be considered by the Court in imposing sentence whether the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. The trial Court found this as an aggravating circumstance in the instant case (R. 239). The Appellant claims this finding was in error.

This Court has held that "the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement officer." Riley v. State, 366 So.2d 19 (Fla., 1979) at 22. The finding of this factor should be based upon either direct evidence of motive or upon very strong inferences from the facts. Rivers v. State, 458 So.2d 762 (Fla., 1984). Furthermore, the proof of motive or intent should be very strong. Riley v. State, supra.

In establishing that proof, this Court has held that merely because the accused and the victim had known each other prior to the murder, and the victim could thereby easily identify the accused, this did not automatically establish the factor of avoiding arrest. Rembert v. State, 445 So.2d 337 (Fla., 1984). Indeed, in Caruthers v. State, 465 So.2d 446 (Fla., 1985), this Court stated:

> The victim's recognition of appellant as a customer speaks to the question of whether he killed her to prevent a lawful arrest. The state does not without more

> establish this fact by proving that the victim knew her assailant, even for a number of years. (At 499).

In contrast to those cases holding that more than simply knowing the victim is necessary to establish this aggravating circumstance is the case of Johnson v. State, 442 So.2d 185 (Fla., 1983). In that case, the Defendant told an accomplice that he killed the victim because "dead witnesses don't talk." This Court held that statements and evidence such as that would be sufficient to avoid arrest.

In the instant case, the lower Court concluded that since the victim knew the Appellant, the sole purpose for the killing was to eliminate a witness. The Court stated that the victim was stabbed after she was beaten and strangled but that she was not sexually assaulted or robbed of personal jewelry (R.239). In fact, the record discloses that the medical examiner did not know in which order the victim was assaulted (R.1383). Furthermore, the record established that the victim and the Appellant were sitting in the back yard cabana having a glass of water (R.679; 941; 957). The Appellant was leaving the victim's home when he asked her for a loan (R.1036). Then he asked her for some gold at which point both the victim and the Appellant panicked resulting in an altercation during which the Appellant "blacked out" and the victim was killed (R.992-3). These facts, when compared to the above-cited cases, do not establish proof of motive or intent of the Appellant to commit the crime for the purpose of avoiding arrest. Since this factor must be established beyond a reasonable doubt,

the lower Court was in error in making this finding and considering it as an aggravating factor. State v. Dixon, 283 So.2d 1 (Fla., 1973).

VI

THE LOWER COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Fla. Stat. 921.141(5)(h) establishes as an aggravating circumstance to be considered by the Court in imposing sentence whether the capital felony was especially heinous, atrocious, or cruel. The trial Court found this as an aggravating circumstance in the instant case (R.239-240). The Appellant claims this finding was in error.

This Court, in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) defined the terms of the above-cited statute. Heinous is "extremely wicked or shockingly evil." Atrocious is "outrageously wicked and vile." Cruel is "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others."

This Court has found this aggravating factor to be applicable in a variety of situations. In Palmer v. State, 397 So.2d 648 (Fla. 1981), the victim's hands and feet were bound and his mouth taped shut. A garbage bag was placed over his head after which he was struck with a hammer and stabbed about eighteen times with all this taking place during a one-half hour period. In McCrae v. State, 395 So.2d 1145 (Fla. 1980), a sixty-seven year old woman was beaten about the head and chest so violently that blood splattered onto the ceiling, she was thrown on the floor and her ribs were crushed, and she was raped. In Dobbert v. State, 375 So.2d 1069 (Fla. 1969), a nine year old girl was beaten by her

father who kicked and hit her with his fists and other objects, she was scarred, bruised and tortured, and she was confined to her house and denied medical treatment until she finally died. See also, Washington v. State, 362 So.2d 659 (Fla. 1978); White v. State, 403 So.2d 331 (Fla. 1981). The common thread running through these horrible crimes was that they were conscienceless and unnecessarily torturous to the victim. State v. Dixon, supra. In contrast, this Court found in Bundy v. State, 471 So.2d 9 (Fla. 1985) that the murder committed there was not especially heinous, atrocious or cruel even though the victim, a twelve year old girl, was kidnapped and found unclothed in a hog pen, dead from violence to her neck area. This aggravating circumstance was not found because there was no evidence that the victim struggled, experienced extreme fear or was sexually assaulted.

The lower Court found that the victim in the instant case "lived through the agony of the infliction of all these wounds" (R.240) referring to blows to the head, strangulation and six stab wounds. It reasoned that this was especially heinous, atrocious or cruel. However, as terrible as it was, the medical examiner testified that he did not know in which order the injuries were sustained (R.1383). Furthermore, the medical examiner testified that even though the victim was alive at the time she was stabbed, he didn't know if she was conscious and that, if unconscious, the victim would not have suffered as much pain (R.1384). Finally, the Appellant's own statement showed that this fatal confrontation occurred spontaneously in a panick and happened quickly (R.992-993). There was no evidence that the victim suffered any undue

pain or torture, that she struggled, or that the Appellant derived any pleasure from the event. TheAppellant contends that the facts of this case simply do not support the finding that the capital felony was especially heinous, atrocious or cruel.

VII

THE LOWER COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Fla. Stat. 921.141(5)(i) establishes as an aggravating circumstance to be considered by the Court in imposing sentence whether the capital felony, if a homicide, was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The trial Court found this as an aggravating circumstance in the instant case (R.240). The Appellant claims this finding was in error.

In order for this aggravating factor to be applied, the facts must show a heightened premeditation more than what is normally necessary to show premeditated murder. Caruthers v. State, 465 So.2d 496 (Fla. 1985). Furthermore,

> [t]he premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. Hardwick v.State, 461 So.2d 79 (Fla. 1984) at 81.

It is, thus, clear that the proof of premeditation must not only be strong but must be of a character more calculating than that necessary to prove normal premeditation.

This Court has likened the "heightened" premeditation necessary to that associated with a "contract" murder. Jent v. State, 416

So.2d 1024 (Fla. 1981); Cannady v. State, 427 So.2d 723 (Fla. 1983). In fact, in McCray v. State, 416 So.2d 804 (Fla. 1982), this Court stated that this

> ... aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive. At 807.

In applying various fact patterns to this aggravating circumstance, this Court has consistently held that facts similar to those in the instant case do not fall into this category. For example, in Thompson v. State, 456 So.2d 444 (Fla. 1984), the Defendant demanded money from the victim. When the victim said he had none, the Defendant shot and killed him. This Court reasoned that

> [n]o evidence was produced to set the murder apart from the usual hold-up murder in which the assailant becomes frightened or for reasons unknown shoots the victim..." At 446.

In Caruthers v. State, supra., the Defendant intended to rob a store clerk. The Defendant shot the victim when she jumped and "he just started firing, shooting her three times" and killing her. This Court found that not to be of the cold, calculated type. Similarly, in Hardwick v. State, supra., the victim, a seventy-two year old widow, had been beaten about the face, raped and strangled. This Court held that this factor was not applicable.

In McCray v. State, supra., the Defendant approached the victim who was in a van, yelled, "This is for you, mother fucker," shot

the victim three times, and killed him. Even that was held not to consitute the requirements necessary for this factor to apply. See also, Rembert v. State, 445 So.2d 337 (Fla. 1984).

In contrast, this Court has applied the cold, calculated factor in the case of Stano v. State, 460 So.2d 890 (Fla. 1984). In that case the Defendant, in separate instances, kidnapped two women, struck them in order to stun them and, thus, prevent them from leaving the car, drove them about twenty miles away (taking about a half hour), ordered them out of the car, and then killed them. This was an example of the heightened premeditation needed to apply this factor. In Henderson v. State, 463 So.2d 196 (Fla. 1985), the Defendant picked up three hitchhikers, bound and gagged them rendering them helpless, then shot them each in the head, one by one, execution-style. Needless to say, that conduct also qualified under this aggravating factor.

In the instant case, the Appellant stated in his confession, and there was no evidence to the contrary, that after asking the victim for money and gold, she panicked causing him to panick resulting in the fatal altercation (R.992-993). The Defendant further stated in his confession that during the violent act he blacked out and could not even remember strangling the victim (R.893). The lower Court found that the Defendant, after first struggling and beating the victim, then went into the kitchen to retrieve a knife after which he stabbed her (R.240). However, that scenario was neither supported by the Defendant's confession nor by the medical examiner who could not tell in which order the violent acts took place. Even if that were true, it would not

constitute the "heightened" premeditation nor the cold and calculation this Court has consistently held is necessary for the finding of this aggravating factor. It certainly was not proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). Therefore, the lower Court erred in considering this as an aggravating factor.

VIII

THE LOWER COURT ERRED IN FAILING TO FIND THE MITIGATING CIRCUMSTANCE OF NO SIGNIFICANT PRIOR HISTORY OF CRIMINAL ACTIVITY WHERE THE APPELLANT HAD ONLY ONE PRIOR MISDEMEANOR.

Fla. Stat. 921.141(6)(a) lists as a mitigating factor to be considered by the jury and judge in their respective decisions as to penalty whether the Defendant had any significant prior history of criminal activity. The Appellant presented this as a mitigating factor but the lower Court refused to find it as such (R.240). The Appellant claims that the lower Court's failure to find this mitigating circumstance was error and that its method of doing so was error, also.

This Court defined the meaning of significant prior criminal history through use of, basically, a sliding scale in State v. Dixon, 283 So.2d 1 (Fla. 1973). There, the Court stated:

> As to what is significant criminal activity, an average man can easily look at a Defendant's record, weigh traffic offenses on the one hand and armed robberies on the other, and determine which represents significant prior criminal activity. Also, the less criminal activity on the Defendant's record, the more consideration should be afforded this mitigating circumstance. (At 9).

In the instant case an examination of the Appellant's record reveals only one prior conviction and that for a misdemeanor (R.240-1). The Appellant had no prior felony convictions (R.240-1). This

would appear insignificant to the average man. However, the lower Court considered not only unproved instances of alleged criminal activity but uncharged ones as well.

In refusing to find this mitigating circumstance, the lower Court stated that the Appellant had smoked marijuana (R.240). This not only was unproved but was never charged. This does not appear on Appellant's record and was improperly considered. The Court also permitted the State to introduce into evidence the statement of a person to a police officer over the objection of Appellant's trial counsel (R.1328). Fla. Stat. 921.141(1) permits the introduction at the sentencing phase of hearsay testimony but only when the Defendant has a fair opportunity to rebut said testimony. Here, defense counsel was not even made aware of said statement until just prior to its introduction (R.1328). He had no opportunity to question the Declarant or to reasonably rebut the hearsay testimony. Furthermore, the record seems to indicate that the Court only allowed the statement in because she thought it would not be used for its truth value (R.1330). Nevertheless, the lower Court considered its truth value as an important factor in failing to find a mitigating circumstance. Moreover, the substance of this hearsay testimony was never proved, but, instead the case for which it applied was reduced to a misdemeanor and resulted in Appellant's only previous conviction.

Finally, the lower Court relied upon the case of Demps v. State, 462 So.2d 1074 (Fla. 1984) in refusing to find this mitigating circumstance (R.241). This is further evidence of the Court's error because Demps v. State, supra., has absolutely nothing

whatsoever to do with this issue.

The lower Court should have found that the Appellant had no significant prior history of criminal activity. It's failure to do so and its reliance upon certain facts and law was error.

IX

THE LOWER COURT ERRED IN OVERRIDING THE JURY RECOMMENDATION OF A LIFE SENTENCE AND IMPOSING THE DEATH PENALTY WHERE THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH MITIGATING FACTORS.

Fla. Stat. 921.141(2) imposes upon a jury the responsibility of rendering an advisory sentence to the Court after considering various aggravating and mitigating circumstances. The jury may recommend either a life sentence or the death penalty. Fla. Stat. 921.141(3) places the ultimate responsibility of sentencing upon the trial Court. The trial Court may override a jury recommendation of life imprisonment and, instead, impose the death penalty.

The power of a Court to so override a jury recommendation is not unbridled. The test which this Court has consistently adhered to was stated in Tedder v. State, 322 So.2d 908 (Fla. 1975) as follows:

> 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 (At 910).

In this case, the jury recommended that the Appellant receive a life sentence (R.1484). This was reflected in the Court's Order Imposing Death Penalty (R.238). The Court, however, overrode that

recommendation and imposed the death penalty (R.235-242). In doing so the Court found five aggravating factors and no mitigating factors. The Appellant claims that this sentence was in error because the Court improperly considered four aggravating circumstances, the Court improperly failed to find mitigating circumstances, the record contains sufficient evidence upon which the jury could have relied in advising a life sentence, and because the evidence is not so clear and convincing that reasonable men could not differ. (The first two points are discussed in other sections of this brief).

When the record contains evidence of mitigating factors which could have reasonably influenced a jury to advise a life sentence, then an override is improper. Welty v. State, 402 So.2d 1159 (Fla. 1981); Huddleston v. State, 475 So.2d 204 (Fla. 1985); Rivers v. State, 458 So.2d 762 (Fla. 1984).

In the instant case, the Appellant presented evidence in mitigation that he had no significant prior history of criminal activity, his relatively youthful age, his good character, and other non-statutory factors. While the Court may not have found the evidence sufficient to establish these circumstances, the jury may very well have.

First, the only prior conviction for criminal activity on the Appellant's record was for a misdemeanor which occurred approximately seven weeks before the homicide involved here. Although the Court cited several instances of alleged illegal activity such as smoking marijuana (R.240) (which the Appellant voluntarily told the State when he voluntarily cooperated with the

State in the prosecution of another homicide which he was not involved in but was a witness), he had no prior felony convictions and only the one misdemeanor. The jury could easily and reasonably have found this to be a mitigating factor.

Second, the Appellant presented evidence of his youthful age, twenty one. There is no particular age which automatically requires the finding of this mitigating factor. Peek v. State, 395 So.2d 492 (Fla. 1981). However, this Court has held that the age of twenty one can be considered by the jury as a mitigating factor. Cannady v. State, 427 So.2d 723 (Fla. 1983). Thus, there was evidence before the jury that it could have considered in mitigation despite the Court's refusal to find this as a mitigating factor.

The Appellant also put into evidence susbstantial evidence of his good character. A neighbor of Appellant's who he had lived with once for two weeks, testified that the Appellant was a kind person and the she had never seen him exhibit any violent tendencies (R.1391-1393). A high school friend testified the Appellant was not violent but was, in fact, a kind, compassionate, sweet person (R.1395-1397). So, too, another high school friend (R.1398-9) and a family friend (R.1403). The Appellant's sister testified that he was always a loving brother to her and a loving son to their mother (R.1449). An Assistant State's Attorney testified that the Appellant had been cooperative and truthful in helping to prosecute another homicide for which the Appellant was a witness (R.1407-8). A jury could reasonably conclude from the evidence that the general, underlying character of the Appellant was normally that of a kind good-hearted person.

Additionally, there was evidence presented during both the sentencing phase and the guilt phase indicating that the Appellant was at a low point in his life at the time of this homicide. An attorney who knew the Appellant for several years, knew his family and had visited his home testified (R.1415-1446). He stated that the Appellant was always soft spoken and respectful (R.1421). The Appellant had never exhibited any violent or belligerent tendencies (R.1422). He stated that the Appellant, during high school and his first year of college was a highly motivated and ambitious individual (R.1420). However, he noted the Appellant had now appeared to be defeated, a failure (R.1445). The Appellant was a person who had had goals and aspirations but had failed (R.1428). He had reached the bottom of his life (R.1428). Other testimony revealed that just prior to the homicide the Appellant had no job, no money, and was under pressure from his pregnant wife to get a house (R.992). There was, indeed, sufficient evidence in the record for the jury to conclude that the Appellant was at an extremely stressful, mentally and emotionally anguished state in his life.

Using the accepted standard of Tedder v. State, supra., it is clear that the lower Court's decision to override the jury recommendation of life imprisonment was improper. The facts do not so clearly and convincingly support a sentence of death that reasonable men could not differ. The record clearly establishes several factors which the jury, and other reasonable men, could have relied upon in mitigation to recommend life. This Court should reduce the sentence to life imprisonment.

X

THE LOWER COURT ERRED IN PERMITTING AND ELICITING TESTIMONY REGARDING THE ACTUAL JURY VOTE TO RECOMMEND A LIFE SENTENCE.

Fla. Stat. 921.143 provides the method for allowing family members of the victim to make a statement to the sentencing Court prior to the actual sentencing. It mandates that all statements be under oath and that they relate exclusively to either the facts of the case or the extent of harm resulting from the crime. It further requires the Assistant State Attorney to advise the testifying family member of these restrictions.

In the instant case, the victim's husband made a statement to the sentencing Court (R.1494). Contrary to the aforecited statute he was not placed under oath. His statement went beyond the restrictions of the statute, but, most importantly, he twice stated that the jury vote which recommended life imprisonment was a split vote (R.1497). This was after the Court, again contrary to the aforecited statute, told the witness that he could say "anything you want to ..." (R.1495).

The Court expressed great interest in this information and specifically asked the prosecutor about the breakdown (R.1498). The defense counsel strenuously objected to this testimony (R.1498). Nevertheless, the Court proceeded to elicit this information from the prosecutor who informed the Court that he had been told what the jury breakdown was and that, additionally, those jurors who voted for a life sentence would have done so in any case (R.1499).

The Court also expressed great interest in that. Then, the prosecutor gratuitously stated that his purpose for stating these things was not to affect the lower Court's decision, but, rather, to let the appellate Court know what happened (R.1501-2). In other words, one supposes, to affect the Appellate Court's decision.

What happened, in fact, was that without any prior warning, the State informed the lower Court of unsworn hearsay statements and opinions of one juror which the Appellant had no opportunity to rebut or dispute. The fact was that the jury, upon being polled, all acceded to the recommendations of life imprisonment (R.1485). This was an improper factor for the Court's consideration in sentencing. The Court, obviously, considered those statements as evidenced by its continued questions relating to this matter. Thus, improper influences were exerted upon and utilized by the lower Court in rendering sentence upon the Appellant which requires that the case be remanded for sentencing by another judge.

CONCLUSION

The lower Court should have suppressed the Appellant's confession. The confession, obtained illegally, was the major evidence against the Appellant.

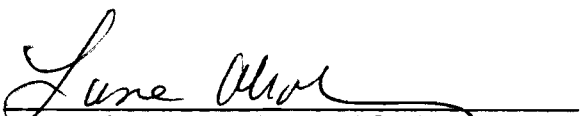
The lower Court should have made inquiry as to prejudice to the jury when one juror was heard to say to another juror in open Court that the Appellant was lying during his testimony.

The lower Court should have instructed the jury on Third Degree Murder as a lesser included charge of First Degree Murder. There was sufficient evidence in the record to warrant that instruction.

The lower Court improperly found four aggravating circumstances. These should be discarded and the propriety of the death sentence reviewed in light of the mitigating evidence in the record.

This Court should reverse the convictions and remand the case for a new trial. In the alternative, this Court should reduce the sentence from death to life imprisonment without possibility of parole for twenty five years.

Respectfully submitted,



LANE S. ABRAHAM, ESQUIRE

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this the 13th day of August, 1986, to: MARK BERKOWITZ, ATTORNEY GENERAL, at 401 N.W. 2nd Avenue, Suite 820, Miami, Florida, 33128.

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