IN THE SUPREME COURT OF FLORIDA

GARY L. TILLMAN, :

Appellant, :

vs. : Case No. 68,506

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The Grand Jurors of Hillsborough County returned a two-count indictment on September 14, 1983, charging GARY LEONARD TILLMAN, Appellant, with First Degree Murder and Armed Robbery. (R995-6) Pursuant to plea negotiations, Tillman entered a plea of guilty to both charges January 8, 1986. (R1383-99)

A jury was impaneled to recommend the appropriate punishment for the capital felony. After hearing testimony and argument on January 13 through 17, 1986, the jury recommended that a death sentence be imposed. (R1329)

The Honorable F. Dennis Alvarez imposed sentence on February 28, 1986. (R955-79) Finding that aggravating circumstances were established which were not outweighed by evidence in mitigation, the court imposed a sentence of death on Count I and a consecutive sentence of 99 years on Count II. (R977-8;1338-42)

A written memorandum entitled "Sentence" was signed by Judge Alvarez on May 13,1986. (R1352-7, see Appendix) The court found that the aggravating circumstances of Section 921.141(5)(a), Florida Statutes (1985)(defendant on parole), and Section 921.141(5)(h)(especially heinous, atrocious or cruel) were proved. (R1352-3, see Appendix) The court considered each of the statutory mitigating circumstances of Section 921.141(6), Florida Statutes (1985), and concluded that none were established by the evidence. (R1353-4, see Appendix). The court also found that nonstatutory mitigating circumstances presented to the jury "do not apply to this case." (R1355, see Appendix)

Appellant filed a timely Notice of Appeal March 19, 1986. (R1345) Court-appointed counsel was permitted to withdraw and the Public Defenders of the Tenth and Thirteenth Judicial Circuits were appointed to represent Tillman on appeal. (R1351)

Pursuant to Article V, Section 3(b)(1) of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(1)(A)(i), Tillman now takes appeal to this Court.

STATEMENT OF THE FACTS

A. Jury Selection

In his opening remarks to the jury venire, the trial judge emphasized the advisory nature of the jury penalty recommendation and stressed that the sentencing decision would be his alone. (R6) Two prospective jurors questioned the rationality of seating a jury where the decision would eventually be made by the judge. (R130,170) They were told that this is the law and "you don't have to understand." (R130) They were asked if they would follow the law. (R130,170)

After the State had exercised a total of three peremptive strikes against prospective jurors who were black, defense counsel asked that the record reflect this conduct of the State's. (R567) The State denied systematic exclusion on the basis of race. (R569) The trial judge then stated that if he were counsel in the case, he would not have kept any of the excluded blacks because of their "educational background." (R570-1) The judge ruled that the three blacks were not systematically excluded. (R572,576)

Subsequently, the State excluded another black prospective juror by peremptory strike. (R626) Defense counsel renewed the objection. (R626-7) The prosecutor then listed his reasons for striking this particular prospective juror. (R627) Defense counsel noted that of the five blacks who were prospective jurors, the State had excused four (or 80%) by peremptory strike. (R628) The Court announced that a ruling on the "Neal [sic] matter" would be made for the record the next morning. (R635)

The next morning, the State offered testimony from the two deputies who had been escorting Appellant to and from the courtroom during the trial. (R637) Hillsborough County Sheriff's deputies Mark Yost and Richard Wigh testified they were discussing the comments made by the trial judge when he upheld the State's use of peremptories on the black prospective jurors. (R643-5) The deputies were expressing their agreement with the judge's comments when Appellant exclaimed that he was happy the prospective jurors had been struck. (R639-41;643-44) The Court found Appellant's statement was not the product of interrogation by the deputies. (R650)

B. Penalty Phase Evidence

Prior to commencement of the State's case, defense counsel stated that the prosecutor had shown him the questions he intended to ask the State witnesses. (R716) Defense counsel complained that some of the questions were beyond the scope of the plea agreement. (R715-7) The Court ruled that one prospective question would violate the plea agreement (R722), and further began to read aloud a note to the State witness specifying facts which could not be divulged. (R723) Defense counsel requested the Court to read no further because by terms of the plea agreement, the Court was also strictly confined to the facts presented in court. (R723)

Sergeant John Clamon of the Hillsborough County Sheriff's Office testified that he investigated the death of Marjorie Shannon on August 31, 1983. (R728-9) He recovered a

knife which had traces of human blood on it 40 feet from Appellant Tillman's residence. (R730-1) His investigation showed that a robbery or attempted robbery was perpetrated on the homicide victim, Marjorie Shannon. (R731)

When Deputy Sheriff Richard Kennedy arrived at the scene, the victim was bleeding from the neck, but still conscious. (R732-33) When he spoke to her, she could respond with movements of her hand. (R734)

An employee of Hillsborough County Medical Services, Michael Strickland, testified that he transported the victim to University Community Hospital. (R735-6) She told the witness that she was 22 and allergic to penicillin. (R736)

A physician at University Community Hospital, Dr. Larry Simpson, first treated Marjorie Shannon shortly after midnight on September 1, 1983. (R738) The doctor said Shannon was in obvious pain while he was attempting to resuscitate her. (R738) Defense counsel moved for a mistrial on the basis that the plea agreement forbid reference to medical procedures performed on the victim. (R739) The court denied the motion for mistrial. (R739)

Dr. Simpson went on to testify that the victim was conscious when he asked her some questions, but was unable to respond because she could not speak. (R740) The victim was suffering pain from her injuries. (R740)

Dr. Peter Lardizabal, Chief Medical Examiner of Hillsborough County, performed an examination on the body of Marjorie Shannon. (R745) He described individually the 59 cutting and stabbing injuries suffered by the victim. (R747-61) Most of the

wounds were in the neck region, but 21 were inflicted on the victim's hands, indicating an attempt to defend against the attack. (R759)

Autopsy photos were introduced into evidence and published to the jury. (R749,751,757,759) Dr. Lardizabal said the knife marked as an exhibit was consistent with the type of wounds inflicted. (R760)

In addition, the victim suffered one significant injury to the head caused by a blunt object and 9 superficial abrasions. (R761-64) The cause of death was sanguination (loss of blood). (R764-65) The victim was finally pronounced dead at 4:35 a.m. on September 1, 1983. (R765) Dr. Lardizabal gave an opinion that the victim would have experienced pain for 15 to 20 minutes before slipping into a state of shock. (R766)

Tillman's parole officer, James Sommercamp, testified that Tillman was released on parole on February 8, 1983. (R771-72) He had been imprisoned for burglary of a structure. (R772) After resting its case in front of the jury (R775), the State was permitted, over defense objectin, to reopen and elicit from Sommercamp testimony that Tillman was still on parole when the homicide occurred. (R780-84)

Defense witnesses recounted Tillman's background. His father died when he was 4 years old. (R867) Tillman was raised, along with 6 brothers and sisters (4 by different fathers), by his mother who worked long hours in sewing factories to support her family. (R868-69)

Starting when he was 11 or 12, Appellant worked at part-time jobs after school such as picking oranges and working

at the Kash n' Karry supermarket. (R803-4,870) While in tenth grade, Tillman got a position as a cook at the Holiday Inn. (R804,870-71) He worked after school and on weekends for about 1 1/2 years. (R871)

Tillman dropped out of school in the twelfth grade and, shortly thereafter, married Lynette. (R804-5;872-73) Lynette already had a son, Frederick Gaines, at the time of the marriage. (R805,873) After their marriage, they had a daughter, Anquesha. (R805,873) Witnesses said that Appellant was very close to his family and treated the two children with equally great affection. (R793,881,883)

When Appellant was released from prison on parole, he was unable to secure any steady employment. Witnesses testified how he would go out almost every morning in search of employment, only to return tired and frustrated in the afternoons. (R791-92, 807,876-79) Tillman attributed his lack of success in finding work to listing his criminal record on job applications. (R792, 807-8) The stress was compounded by Lynette and their friends who talked of having automobiles, separate living quarters for their family, and general economic betterment. (R809-10,835)

Tillman had admitted the stabbing to defense witnesses. (R883,885) However, he could only recall stabbing the victim two or three times. (R833) Dr. Sidney Merin, a psychologist, conducted a psychological evaluation and tests on Tillman. (R823-25) Dr. Merin described a behavioral abnormality called automatism which is characterized by performance of acts without intent to perform them. (R828-32) The behavior occurs outside the realm of

consciousness, and an individual suffering from this abnormality does not recall the acts. (R832-33) Dr. Merin concluded that automatism caused Tillman to be unable to stop stabbing the victim once he had begun. (R833-38)

Dr. Merin also testified that Tillman scored 105 on an I.Q. test he administered with a potential between 112 and 115. (R836) This is the bright average range. (R836) While in prison, Tillman had completed his high school G.E.D. (R836,881-82) Dr. Merin stated that if Tillman was incarcerated for a long term, it would be likely that he would pursue his education. (R839)

In Dr. Merin's opinion, Tillman would be cooperative rather than violent while in prison. (R839) Tillman's mother, Betty Shepherd, said her son could be rehabilitated. (R889) Both witnesses said Tillman had expressed great remorse about the killing. (R840-41,885) 1/

In rebuttal, the State presented Melvyn Jack Gardner, a psychiatrist. (R895-916) Dr. Gardner said he interviewed Tillman for 90 minutes at the Hillsborough County Jail. (R897) In Dr. Gardner's opinion, automatism was not a factor in Tillman's behavior. (R899-900) While Tillman expressed remorse to him, Dr. Gardner, over objection, was permitted to give an opinion that it was not authentic remorse. (R900-03) Dr. Gardner said Tillman could not be rehabilitated. (R903)

1/ Tillman's age at the time the offense was committed (21) was also argued as a mitigating factor. (R935)

On cross-examination, Dr. Gardner admitted that he had not conducted any tests on Tillman. (R906) He did not know that Tillman had completed his high school equivalency diploma because he did not "think that was relevant." (R907)

The prosecutor, in closing argument, asked the jury to close their eyes and picture the horror the victim experienced during the attack. (R929-30) He paused for one minute, asking the jury to envision the crime. (R930) Then he asked the jury to respond to criticism of the legal system by speaking out loudly with a recommendation of death. (R930)

After the judge instructed the jury, defense counsel objected to the judge's closing remarks which were not part of the written instructions. (R948-49) The judge explained that his final instruction was taken from the Standard Jury Instruction given when submitting a case to the jury. (R948) Defense counsel further moved for a mistrial on the ground that this standard instruction was not appropriate in a penalty proceeding. (R949) The motion for mistrial or curity instruction was denied. (R949)

The jury returned a recommendation of death by a 10 to 2 vote. (R951-52,1329)

C. Sentencing

At sentencing, held February 28, 1986, the judge announced on the record that he had not viewed any presentence investigation or considered anything beyond the written plea agreement. (R956) Defense counsel presented letters and petitions from the community for the judge to peruse. (R957-58,1222-1325)

Betty Shepherd and Appellant briefly addressed the court. (R959-60)

The prosecutor, in urging the court to impose death, stated that Tillman was on probation for a strong-armed robbery in Palm Beach County. (R968) Defense counsel objected to mention of this fact because it violated the plea agreement. (R969) Motions for mistrial and to recuse the judge from sentencing were denied. (R971,975)

The court imposed a sentence of death on Count I and a consecutive sentence of 99 years on Count II (armed robbery). (R977-78) The judge said he would later file written findings detailing the factors in aggravation and mitigation. (R979)

SUMMARY OF ARGUMENT

As part of the written plea agreement, the State was precluded from introducing evidence of Tillman's prior criminal record other than his burglary conviction for which he was on parole. This provision was applicable both to the jury and the sentencing judge. The prosecutor violated this provision of the plea agreement when he told the sentencing judge that Tillman was on probation for a strong-armed robbery in another county. There were other violations of the plea agreement which were less prejudicial, but which violated the maxim that the State must be bound to the literal terms of any plea agreement.

When Tillman entered his plea of guilty, the court did not sufficiently admonish him concerning the constitutional rights he was waiving by pleading guilty. Neither did the court explain the terms of the plea agreement to Tillman, nor did the court ask Tillman to acknowledge his guilt of the offenses to which he pled.

In his remarks during voir dire, the trial judge emphasized the advisory nature of the jury's role in capital sentencing and stressed that the final decision on sentencing was his. Two of the prospective jurors expressed feelings that the jury's role was meaningless. Instead of correcting their understanding, they were merely asked if they could follow the law. A sentence of death imposed where the jury's sense of responsibility has been diminished does not meet the Eighth Amendment standard of reliability.

After the prosecutor had exercised peremptory strikes on three black prospective jurors, defense counsel objected and

alleged an exclusion on the basis of race alone. The court did not require the prosecutor to answer, but instead, voiced an opinion that the excluded prospective jurors lacked an adequate educational background. This finding is not supported by the record. When the prosecutor exercised a fourth peremptory strike against a black prospective juror, the court asked the prosecutor to explain. Although the prosecutor probably gave at least one valid reason for this particular strike, he should have been required to explain the three prior peremptories exercised against blacks.

Defense counsel objected to the trial judge's oral instructions to the jury which went beyond what was stipulated to in the written instructions. In particular, objection was made to the comment "no one of us has a right to violate the rules we all share." A reasonable juror could have understood this instruction as a comment on Tillman's admitted murder, particularly in light of the prosecutor's highly improper closing argument. Alternatively, the instruction may have been interpreted as an anti-jury pardon instruction. Such an interpretation would be unconstitutional under the Eighth Amendment bacause it may have influenced the death recommendation returned by the jury.

The prosecutor's cross-examination of defense witnesses was improper because it put irrelevant and improper considerations before the jury. In particular, the prosecutor mentioned the work release program on cross-examination with the insinuation that Tillman could have obtained employment in this program had he wanted to work. The prosecutor also used cross-examination to

create a speculation that Tillman might be violent again if released on parole.

The trial judge's written sentencing order was defective. It does not show that the court considered all of the mitigating evidence presented by Tillman. Also, the order reflects that the court considered an aggravating factor which was specifically excluded by the written plea agreement.

ARGUMENT

ISSUE I

BECAUSE THE PROSECUTOR BREACHED THE WRITTEN PLEA AGREEMENT, TILLMAN'S SENTENCE OF DEATH MUST BE VACATED AND HE SHOULD BE ALLOWED TO WITHDRAW HIS GUILTY PLEA.

In Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), the United States Supreme Court wrote:

> when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

404 U.S. at 262.

At bar, when Tillman entered his plea of guilty, it was pursuant to an extensive written "Stipulation and Plea Agreement." (R1383,1205-12, see Appendix) In pertinent part, this plea agreement provided:

> (5) During the proceeding referred to in Paragraph 3 hereof:
>
> (a) The State shall only present evidence that the capital felony was especially heinous, atrocious, or cruel, and that the capital felony was committed by a person under a sentence of imprisonment, in accordance with Chapter 921.141(5)(h) and (a), Florida Statutes.
>
> (b) The State shall not allude to or make any argument upon any aggravating circumstances contained in Chapter 921.141(5), Florida Statutes, except for those referred to in Paragraph 5(a) above.
>
> (c) The State shall not elicit or attempt to elicit any testimony of "probative value," as that phrase is used in Chapter 921.141(1), Florida Statutes, from any witness upon any such aggravating circumstances except for those referred to in Paragraph 5(a) above.
>
> (d) The State shall not present or attempt to present any evidence of "probative value," as that phrase is used in Chapter

> 921,141(1), Florida Statutes, upon such aggravating circumstances except for those referred to in Paragraph 5(a) above.
>
> (R1205)
>
> . . .
>
> (p) In sentencing the Defendant upon the conviction and adjudication for the crime charged in Count I of said Indictment, the Court may only consider
>
> (1) Those of the aggravating circumstances referred to in Paragraph 5(a) hereof, which have been proven by the State beyond a reasonable doubt.
>
> (R1207)

Tillman's reasonable understanding of these provisions was that the prosecutor could not present any evidence or argument relating to any aggravating factors other than Section 921.141(5)(a)(on parole) and Section 921.141(5)(h)(especially heinous, atrocious or cruel) before either the penalty phase jury or the sentencing judge.

At the sentencing hearing, prior to imposition of sentence, the prosecutor stated about Tillman:

> He is on probation for a case that was transferred from Palm Beach County, which has a docket number of 81-4343-Y-A02, where he is on probation for a strong-armed robbery....
>
> (R968)

Defense counsel then made a motion for mistrial on the basis that the prosecutor abrogated the plea agreement by mentioning a prior strong-armed robbery probation (R968-9) The prosecutor contended that he mentioned the strong-armed robbery only in the interest of judicial economy because he wanted the judge to revoke probation and sentence Tillman on this charge also. (R969-79) The court agreed with defense counsel's contention that he would not exercise jurisdiction over charges from another county. (R972-3)

However, the court denied Tillman's motion for mistrial and his subsequent motion for recusal of the sentencing judge. (R971)

Defense counsel further represented that, pursuant to the plea agreement, the sentencing court was not supposed to know about any of Tillman's prior crimes or probations other than specified. (R973-5) The court again denied remedy and stated:

> What you all have argued to the Court is not evidence. I have not considered it as such nor which are arguments or were statements made to me will influence this court's sentencing [sic]....(R975-6)

Although the judge did not specifically find that the plea agreement was violated, his statement was tantamount to saying that it was, but that he would not be affected by it.

The questions posed when a plea agreement is violated is not whether the sentencing judge was influenced by the violation. In Santobello, supra, the sentencing judge also denied that he was influenced by the breach of the plea agreement, yet the U.S. Supreme Court required the judgment and sentence vacated.

A plea bargain is not merely a contract between an accused and the state because it also induces the accused to waive important constitutional rights. Smith v. Blackburn, 785 F.2d 545 (5th Cir. 1986). When the defendant pleads guilty in return for a promise, breach of that promise taints the voluntariness of his plea. Id. Therefore, Tillman's plea of guilty was rendered involuntary by the prosecutor's subsequent breach of the agreement. He should now be allowed to withdraw his plea. See Lee v. State, Case No. 68,306 (Fla. January 29, 1987)[12 F.L.W. 80]; Lollar v. State, 443 So.2d 1079 (Fla. 2d DCA 1984).

In addition to the above breach of the plea agreement, there were several others which prejudiced Tillman. When Dr. Simpson testified on direct examination, his testimony was supposed to be limited by the plea agreement which provided:

> 2. L. Simpson, M.D. who will:
>
> b. Not testify about or concerning any medical diagnosis of the victim or any medical treatment or procedures rendered to or performed upon the victim. (R1209, see Appendix)

Under examination by the prosecutor, Dr. Simpson testified, "We were attempting resuscitation and attempting to start intravenous..." (R738), when defense counsel objected and moved for a mistrial because the testimony violated the plea agreement. (R739) The Court denied the motion for mistrial. (R739)

Later, the prosecutor, in cross-examination of defense psychologist, Dr. Merin, asked:

> Have you ever spoken, Dr. Merin, to individuals in like position of Mr. Tillman, with criminal records.... (R849)

Defense counsel moved for a mistrial on the basis that the term "criminal records" indicated that Tillman had been convicted of more than one offense. (R850) The plea agreement limited evidence of Tillman's prior criminal history to his conviction of burglary for which he was on parole. (R1205-6,1209) The court again denied the motion for mistrial and a request for curative instruction. (R850-1)

Finally, a dispute arose over interpretation of paragraph 5(j) of the plea agreement which provided:

> (1) In the event the Defendant presents any experts of the type referred to in Paragraph 5(i)2/ the State may, in rebuttal only, elicit testimony from a psychologist or psychiatrist. (R1206)

Tillman's mother, Betty Shepherd, had closed her direct testimony with:

> I do think that he can be rehabilitated, and that he could help society, and that his kids need him. (R889)

The prosecutor declined to cross-examine Mrs. Shepherd (R889), but announced that he would ask his rebuttal expert psychiatrist, Dr. Gardner, to give his opinion on whether Tillman could be rehabilitated. (R889-90) Defense counsel contended that paragraph 5(j)(quoted above) should be read to limit the State to rebuttal of opinions voiced by the defense expert, Dr. Merin. (R890-2) The court interpreted the language of the plea agreement as permitting the State psychiatrist to rebut any witness. (R892-3) Accordingly, Dr. Gardner testified on direct examination, "In my opinion, he cannot be rehabilitated." (R903) The prosecutor referred to this opinion in his closing argument. (R924)

Although some of the above violations of the plea agreement may seem to be minor, the State should be held to a meticulous standard in performance of a plea agreement. In United States v. Garcia, 519 F. 2d 1343 (9th Cir. 1975), the court vacated a defendant's conviction, ruling that the government was

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2/ Paragraph 5(i) limited the defense to calling psychologists or psychiatrists as expert witnesses.

held to the literal terms of the written plea agreement. The same result should obtain at bar, and Tillman should be allowed to withdraw his plea of guilty.

ISSUE II

THE COURT FAILED TO PROPERLY ADVISE TILLMAN OF THE CONSTITUTIONAL RIGHTS HE WAS WAIVING BY PLEADING GUILTY AND THE FULL CONSEQUENCES OF ACCEPTING THE PLEA BARGAIN IN VIOLATION OF THE FEDERAL CONSTITUTION, EIGHTH AND FOURTEENTH AMENDMENTS.

In Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the United States Supreme Court wrote:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. (Citation omitted) Second, is the right to trial by jury. (Citation omitted) Third, is the right to confront one's accusers. (Citations omitted) We cannot presume a waiver of these three important federal rights from a silent record. 395 U.S. at 243.

At bar, the court did advise Tillman that he was waiving his right to a jury trial (R1392), but failed to mention the other two constitutional rights specifically addressed in Boykin. 3/ Such failure was a violation of the Due Process Clause of the Fourteenth Amendment as held by the Boykin court.

In Florida, Florida Rule of Criminal Procedure 3.172 governs acceptance of a guilty plea. Subsection (c)(iii) specifically addresses the record waiver of constitutional rights required under Boykin. The Rule reads:

> (c)...the trial judge should, when determining voluntariness, place the defendant

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3/ To these should be added the right to have process to obtain witnesses on his own behalf. Tillman was not advised of this right either.

> under oath and shall address the defendant personally and shall determine that he understands the following:
>
> * * *
>
> (iii) That he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to compel attendance of witnesses on his behalf, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself.

Subsection (c)(vii) further requires that the defendant understand:

> (vii) The complete terms of any plea agreement, including specifically all obligations the defendant will incur as a result.

At bar, the trial judge asked Tillman if he had read the agreement, had opportunity to discuss it with his lawyers and whether there was anything in the plea agreement he did not understand. (R1389-90) However, the trial judge did not advise Tillman of "the complete terms" of the plea agreement as contemplated by the Rule. Rather, the court description was too general and vague to be in compliance:

> There will be certain evidence that will be given, certain witnesses the State will call and certain witnesses that you have a right to call if you so choose.... (R1392)

This statement was insufficient to advise Tillman that his right to call witnesses in his own behalf would be restricted by paragraphs 5 (h) and (i) of the plea agreement. (R1206, see Appendix)

Finally, Tillman was not even asked the standard inquiry as to whether he was entering a guilty plea because he was, in fact, guilty. Fla.R.Crim.P. 3.172(d) makes this inquiry mandatory:

> (d) Before the trial judge accepts a guilty or nolo contendere plea, he must determine that the defendant either 1) acknowledges his guilt, or 2) acknowledges that he feels the plea to be in his best interest, while maintaining his innocence.

In Williams v. State, 316 So.2d 267 (Fla. 1975), this Court noted that taking a plea of guilty "is an extremely important step in the criminal process and should not be hurried or treated summarily." 316 So.2d at 271. Because the trial judge at bar did not give the plea colloquy the attention it deserved, the record is insufficient to show that Tillman was aware of all of the consequences of his plea. Since a sentence of death was later imposed, that sentence is vulnerable under the Eighth Amendment as applicable to the States by the Fourteenth Amendment.

The hallmark of the United States Supreme Court's interpretation of the Eighth Amendment in the context of capital punishment is that uncertainty and unreliability cannot be tolerated when a sentence of death is imposed. This principle applies to both the guilt determination and the sentencing process. See generally, Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

The same teaching should apply where the guilt determination arises from the defendant's plea to a capital offense. It is not enough that the defendant be advised of some of the consequences of his plea. Unless he is advised of all of the

consequences of his guilty plea, a sentence of death imposed upon this plea must be vacated because the plea is unreliable when measured by the heightened standard of the Eighth Amendment.

Accordingly, Tillman's plea of guilty, and his sentence of death should be vacated.

ISSUE III

THE TRIAL JUDGE'S STATEMENTS TO THE JURY WHICH DIMINISHED THE IMPORTANCE OF THEIR ADVISORY SENTENCE DEPRIVED APPELLANT OF A RELIABLE SENTENCING DETERMINATION.

In Caldwell v. Mississippi, __U.S.__, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Court held that the Eighth Amendment requirement of heightened reliability in capital sentencing was violated where the sentencing jury was led to believe that the responsibility for determining the propriety of a death sentence rested elsewhere. Noting that its capital punishment decisions were premised on the assumption that a capital sentencing jury was aware of its "truly awesome responsibility," the Court found this sense of responsibility was indispensible to the constitutionality of capital sentencing. The Caldwell court wrote:

> ...the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role. 4/
> 105 S.Ct. at 2641-2.

Subsequently in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), the Eleventh Circuit determined that the Caldwell holding was applicable to the Florida capital sentencing scheme although the Florida jury's penalty verdict is advisory in nature. Because a Florida defendant receives enhanced protection when the Tedder standard of appellate review attaches following a jury recommendation of life 5/, the jury's role is critical in all

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4/ Cf. Pait v. State, 112 So.2d 380 (Fla. 1959).
5/ Valle v. State, Case No. 61,176 (Fla. January 5, 1987)[12 F.L.W. 51].

cases except those where a life recommendation would be irrational. The jury's role in Florida capital sentencing is "so crucial that dilution of its sense of responsibility for its recommended sentence constitutes a violation of Caldwell." 804 F.2d at 1530.

At bar, the trial judge in his opening remarks to the jury venire stated:

> ...Your job and your job only, if you are selected as a juror, would be for the second phase to recommend to me, the Court, an advisory opinion as to the sentence to be imposed on Mr. Tillman.
>
> Again, I would remind you -- and I will make this as clear as possible -- your recommendation is only advisory. The final decision on the judgment or the sentence of Mr. Tillman is my job. That is my duty to impose to sentence. (R6)

Later the court continued:

> ...All of you would be involved in, if you are selected, is that you would be involved in advising, recommending a sentence to me to impose on Mr. Tillman. That is going to be your duty if you are selected. (R36)

and

> THE COURT: You are not deciding. All you are doing is recommending to the Court a sentence. So, the sentence is my job; that is my duty. All your duty would be is to recommend a sentence for the Court to impose. Do you understand that? (R38)

The record shows that at least two of the prospective jurors interpreted the court's remarks to indicate that the jury's role in sentencing was insignificant. Prospective juror No. 16 inquired of the prosecutor:

> JUROR NO. 16: Why go through this, though, if it is the Judge's decision?
>
> MR. OBER: Well, because that is also the law, and we have all sworn to follow by being

> citizens. And your obligation is to hear the law, and it is given great weight. What you determine and what this voice of the community determines is given great weight.
>
> JUROR NO.16: But if this is a trial by jury, why is this the Judge's decision? I don't understand that.
>
> MR. OBER: You don't have to understand. My question is: Can you follow it?
>
> JUROR NO. 16: Yes, I can follow it.
>
> (R130)

Prospective juror No. 39 expressed similar concerns when questioned by the prosecutor:

> A. It is still not up to what I would say whether he is guilty or not guilty. It would be up to that man right there.
>
> Q. No, no. Maybe we are talking semantics. He has admitted his guilt.
>
> A. We are aware of that.
>
> Q. We are not talking about his guilt. We are talking about the penalty and your vote.
>
> A. My vote would be one or the other, let's say, being on the negative side, and it is still not a true -- The process is not being true, because it is still up to the man in the robe.
>
> Q. Well, it is being true, because that is the process that we have to go through. The question is: Can you follow the law? (R170)

Clearly, securing a commitment from prospective jurors to follow the law is an inadequate remedy to cure the sense of less-than "awesome responsibility" present in the prospective jurors. The trial court should have explained to the jurors that they were not engaged in a meaningless ritual. Indeed, telling the jurors that the law simply required this process probably only served to further diminish their role.

In this context, the standard jury instruction given by the court:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of this Court. However, it is your

> duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence.... (R943)

only reinforced the perception that the sentencing decision rested with the judge and the jury merely performed a ceremonial duty required by law.

This Court has recognized that a capital defendant has the right to a jury advisory opinion unimpaired by inadequate or misleading instructions from the court. Floyd v. State, Case No. 66,088 (Fla. Nov. 20, 1986)[11 F.L.W. 594]. At bar, Tillman was further denied his right under the Eighth and Fourteenth Amendments to the United States Constitution to a reliable sentencing determination. As the Caldwell court stated:

> Because we cannot say that this effort [to minimize the jury's sense of responsibility] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. 105 S.Ct. at 2646.

The facts at bar must be distinguished from those present in Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), where this Court rejected an argument based on similar comments about the advisory role of the jury. The difference at bar is that two prospective jurors actually voiced their misunderstanding of the significance of the jury's role and the court failed to correct their impressions. The Pope court specifically noted that although the jurors were told of the advisory nature of their role, the significance of their recommendation was adequately stressed. The trial judge at bar failed to stress the importance of the jury recommendation.

Also, the distinction drawn in Pope between a "true sentencing jury" and Florida's advisory jury as it relates to a Caldwell claim appears to conflict with the Eleventh Circuit's approach in Adams v. Wainwright, supra. If the appropriate test is whether a sentence of death would have been affirmed even if the jury had returned a life recommendation, then Appellant's sentence clearly requires reversal with remand for a new penalty trial.

ISSUE IV

THE TRIAL JUDGE DID NOT CONDUCT A PROPER INQUIRY INTO APPELLANT'S OBJECTION THAT THE STATE UTILIZED PEREMPTORY STRIKES AGAINST PROSPECTIVE JURORS SOLELY ON THE BASIS OF THEIR RACE.

In State v. Neil, 457 So.2d 481 (Fla. 1984) this Court held that prospective jurors cannot be rejected solely because of the color of their skin. If a party complains that the other party is exercising peremptory strikes on racially motivated grounds, the Neil court held that the trial judge must decide whether there is a substantial likelihood that the peremptory strikes were racially motivated. If the trial judge finds this likelihood, the party who exercised the strikes must give valid non-racial grounds for their exercise. Subsequently, the United States Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment prohibits exercise of peremptory challenges based solely on a juror's race. Batson v. Kentucky, __ U.S.__, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

At bar, during the jury selection the prosecutor exercised a peremptory challenge against prospective juror Reba Colvin, who like the defendant, is black. (R515) Defense counsel did not object at this point, nor when the State struck another prospective black juror, Frances Price. (R516) When the State exercised yet another peremptory challenge against a prospective black juror, Harold Bolden, defense counsel asked the court to note for the record that it appeared the State was "systematically striking blacks."(R567-8) The court then expressed reasons why he

would have challenged these jurors had he been either the prosecutor or defense counsel. (R570-71) The trial judge concluded that the three black prospective jurors had not been systematically excluded. (R572,576)

Subsequently, the State challenged prospective juror Charleston Randolph, a 26-year old black male. (R626) Defense counsel renewed his motion based on the Neil decision. (R626) The court then asked the prosecutor to respond. (R627) The prosecutor gave the following reasons for exercising a peremptory strike on prospective juror Randolph:

> 1) At first, he did not understand the terms "aggravating" and "mitigating."
> 2) He indicated he was opposed to the death penalty.
> 3) He is on probation for a crime.
> 4) He comes from a broken home and is not certain whether his father is alive.

The court excused prospective juror Randolph as a State peremptory strike. (R629) The court announced regarding the Neil motion:

> I didn't rule, but I will make a ruling on it for the record tomorrow morning before we start. (R635)

However, the trial judge did not make this promised ruling on the record.

At the outset, it must be recognized that the trial judge did, in fact, deny Appellant relief when he allowed the State to exercise its peremptory strike against prospective juror Randolph. Evidently, the trial judge contemplated a formal denial of the Neil motion which would give specific reasons for the denial. Furthermore, at least some of the reasons given by the prosecutor for exercising a peremptory strike against prospective

juror Randolph appear to be valid ones. The error at bar is that when the trial judge asked the prosecutor to state reasons for his peremptory strike of prospective juror Randolph, the prosecutor should also have been required to place his reasons for striking the three previous black prospective jurors on the record.

As this Court wrote in State v. Neil, supra:

> To recapitulate, a party's peremptories cannot be examined until the issue is properly presented to the court and until the trial court has determine that such examination is warranted. If such occurs, the challenged party must show that the questioned challenges, but no others, were not exercised solely on the basis of race. (Emphasis added). 457 So.2d at 488.

The Fifth District, in Rose v. State, 492 So.2d 1353 (Fla. 5th DCA 1986) has interpreted this language to mean that once a party is required to give a non-racial explanation for exercise of a peremptory strike, all prior peremptory challenges which were objected to must also be explained. 6/

Applying this reasoning to the case at bar, when the prosecutor was asked to give reasons for striking prospective juror Randolph, he should also have been required to give reasons for the peremptory strikes against prospective jurors, Colvin, Price and Bolden. It is not enough that the trial judge gave his own reasons for concluding that prospective jurors Colvin, Price and Bolden were unsuitable jurors.

In any case, the trial judge's reason for concluding that the black prospective jurors were unsuitable was not supported by the record. The trial judge stated:

6/ See particularly Judge Sharp's dissent in Rose.

> And as a prosecutor, I do not think, or as a Defense lawyer, I do not think I would have kept either one of the three blacks that have been excused by the State, basically for no reason but their educational background. To me, they are very slow. They did not seem to understand the proceedings, did not seem to understand the difference between aggravating or mitigating circumstances. And all three of them basically gave two answers. They gave an answer to the State, and they gave an answer to the Defense, which showed me that they really did not understand the proceedings. To me, that is justifiable. That would be my reason. (R570-71)

The record shows, however, that prospective juror Bolden was a high school graduate (R237-38), and prospective juror Colvin had completed one year at Montgomery Business Institute in addition to the twelfth grade. 7/ (R240)

The trial judge's remarks bring to mind another "Neil" decision, that of Neal v. Delaware, 103 U.S. 370, 26 L.Ed.2d 567 (1881). There, the United States Supreme Court rejected the State of Delaware's contention that blacks were not excluded from juries because of their race, but because they were disqualified "by want of intelligence, experience or moral integrity to sit on juries." 26 L.Ed.2d at 574. The reasons given at bar similarly cannot pass scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

Accordingly, Tillman's death sentence should be vacated and this cause remanded for a new penalty phase proceeding.

7/ The record does not show the educational background of prospective juror Price.

ISSUE V

THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT "NO ONE OF US HAS A RIGHT TO VIOLATE THE RULES WE ALL SHARE" DENIED TILLMAN HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING DETERMINATION.

Immediately prior to giving the case to the jury, the trial court instructed the jury as follows:

> In closing, let me remind you that it is important that you follow the law spelled out in these instructions. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For centuries we have agreed to a Constitution and to live by the law. No one of us has a right to violate the rules we all share. (R948)

Defense counsel objected on the ground that the trial court's final comment was beyond what was agreed to in the written jury instructions (R948,1326-7) and was prejudicial.

The trial judge identified the comments as Standard Jury Instruction 2.09. (R948-9) Defense counsel contended that this instruction was appropriate only in the guilt or innocence phase of a capital trial, not in penalty phase. (R948) Following up on his objection, defense counsel moved for a mistrial or curative instruction. (R949) The court denied both. (R949)

A. A Reasonable Juror Could Have Interpreted the Instruction in a Manner that Would Make it Unconstitutional.

Certainly the judge and prosecutor were correct in their assertions that the intention of Standard Jury Instruction 2.09 is to admonish the jurors to follow the law as given by the trial court. (R949) The question for constitutional analysis, however, is what a reasonable juror could have interpreted the instruction

to mean. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). In other words, could a reasonable juror have interpreted, like defense counsel, the court's comment, "no one of us had a right to violate the rules we all share," as a comment on Tillman's admitted crime. (R948)

At the outset, Appellant recognizes that in Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), this Court rejected a claim that Standard Jury Instruction 2.09 could be taken as a judicial comment on the defendant's guilt. 496 So.2d at 802, fn.2. However, there is a vast difference between the possible impact of this instruction when given during guilt phase (Pope) and when given in the penalty phase (the situation at bar). Indeed, the Model Charge for Use in Capital Cases includes Std. Instruction 2.09 only in the guilt phase of a capital trial. 8/

The principal distinction lies in the prejudice which would ensue to the defendant if a juror interpreted the instruction "no one of us has a right to violate the rules we all share" as meaning that the jury should not acquit the accused if they find that the accused has violated "the rules we all share." Such an anti-jury pardon interpretation is probably still constitutional when measured by the Fourteenth Amendment due process applicable to a guilt or innocence trial. Where, however, the only decision before the jury is whether to recommend death or life, an anti-jury pardon interpretation of the instruction implicates the Eighth Amendment. The Eighth Amendment requires a

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8/ Florida Standard Jury Instructions in Criminal Cases, 2d edition 1985, p.xlix,l.

heightened degree of scrutiny in capital sentencing decisions. California v. Ramos, 463 U.S. at 998, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). Where the court cannot determine that an error had no effect on the sentencing decision, the decision does not meet the Eighth Amendment standard of reliability. Caldwell v. Mississippi, __U.S.__, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)(e.s.)

It is probably sufficient to note that a reasonable juror could have construed the court's comment "no one of us has a right to violate rules we all share" as an emotionally charged expression of the trial court moral reaction to crime. But in the context of the improper prosecutorial argument which proceeded the instruction 9/, it is even likely that the jurors actually did interpret the instruction as urging a death recommendation.

B. The Prosecutor's Closing Argument Was Highly Improper and Tainted the Jury Recommendation.

In Bertolotti v. State, 476 So.2d 130 (Fla. 1985), this Court condemned a prosecutorial argument which invited the jury to imagine the victim's final pain, terror and defenselessness. The prosecutor at bar carried this improper line of argument to the nth degree to inflame the jury. Quoting from the prosecutor's closing argument:

> And I ask you to now simply look at these pictures, this knife, the chart, Mr. Tillman and Marjorie Shannon in a vacuum. But please close your eyes a minute. Graphically picture the darkness, the red terror, the helplessness

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9/ See California v. Brown, 55 U.S.L.W. 4155 at 4157 (Jan. 27, 1987)(O'Connor, J., concurring)(jury instructions should be considered in combination with the prosecutor's closing argument).

> of a five-foot-four, hundred-four-pound woman as this weapon repeatedly takes away her very existence.
>
> Time is a very relative factor. We are all so concerned about time. When I tell you, "I will just be a minute," you think, "Ober won't be gone long. He will be back in a minute." Fifty-nine wounds. Could an individual inflict fifty-nine wounds in one minute? How long is a minute under those circumstances? Shut your eyes and think of the picture that I have painted; and I will tell you how long a minute is.
>
> (Pause) That is one minute. That is one minute of terror, of suffering, of pain and fear. That minute for a twenty-two-year-old petite woman was forever. (R929-30)

This argument clearly violates ABA Standard 3-5.8(c)(2d ed. 1979)("The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.") Because this argument is so outrageous, it really amounts to an independent basis for reversal of Tillman's sentence.

However, the prosecutor did not stop here. He went on to argue:

> We hear too often criticism of our legal system and its treatment of violent crimes. You, the members of the jury, are now the system. It is time that you speak out and speak out loudly. Should Mr. Tillman receive life in prison with the possibility of parole in twenty-five years? That cannot happen. (R930)

and

> ...You have but one lawful choice, for it is time for you and for this society to now be concerned for all the other Marjorie Shannons. (R931)

This argument violates ABA Standard 3-5.8(d)(2d ed. 1979)("The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the

accused under the controlling law, or by making predictions of the consequences of the jury's verdict.") See also, Bertolotti, supra.

But the prejudice to Tillman was not limited to the improper argument itself. The jury may well have considered the trial judge's instruction "no one of us has a right to violate the rules we all share" in combination with the prosecutor's plea to "speak out loudly" about the legal system's treatment of violent crimes. A reasonable juror who had heard the prosecutor's exhortation to speak out for the legal system by sentencing Tillman to death could well have interpreted the court's instruction as approval for the prosecutor's remarks.

Because the jury's recommendation of death was not a reliable sentencing determination but was tainted by inflammatory argument from the prosecutor and ambiguous instruction from the court, Tillman's sentence of death was unconstitutionally imposed. U.S. Const. Amends. VIII and XIV. This court should vacate the sentence and remand for a new penalty proceeding before a new jury.

ISSUE VI

THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTOR TO PLANT MISLEADING AND IRRELEVANT CONSIDERATIONS BEFORE THE JURY ON CROSS-EXAMINATION OF DEFENSE WITNESSES.

The general rule about questions on cross-examination is that they must either be germane to the testimony on direct examination or relate to credibility of the witness. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). It has been held reversible error where the prosecutor was permitted "to lay an illusory foundation for an imaginary impeachment." Marsh v. State, 202 So.2d 222 at 223 (Fla. 3d DCA 1967). Where prosecutors have made false or highly prejudical insinuations under the guise of cross-examination, convictions have also been reversed. See e.g., Von Carter v. State, 468 So.2d 276 (Fla. 1st DCA 1985); Thorpe v. State, 350 So.2d 552 (Fla. 1st DCA 1977).

A. The Prosecutor's Mention of the Work Release Program Was Irrelevant and Highly Prejudicial to Appellant.

Defense witness Thomas Hills Jr. testified that he lived across the street from Tillman and frequently talked with him. (R806-7) Hills said that Tillman was very concerned with trying to get employment and frustrated by his failures to land a job. (R807-8) Tillman told Hills that he thought his chief obstacle was telling prospective employers that he had a criminal record. (R808)

On cross-examination, Hills was asked, "Are you familar,

Mr. Hills, with the Hillsborough County Work Release Program?" (R813) Defense counsel objected on relevancy grounds; the court overruled the objection. (R813-14) Accordingly the prosecutor continued:

> Q. Mr. Hills, what do you know about the Work Release Program?
> A. No specifics. In general, I think it is a program where they allow prisoners to, I guess, go out and get a job. I just know whatever general information anyone knows about it.
> Q. Isn't it a fact, Mr. Hills, that Mr. Tillman, instead of being unable to find employment because of whatever reason he chose to tell you, that he just didn't care to work? (R815)

As defense counsel explained and the prosecutor admitted, the Work Release Program only places prisoners in work situations, not parolees like Tillman. Yet the prosecutor was allowed to insinuate before the jury that if Tillman had wanted a job, all he had to do was contact the Work Release Program. This was clearly prejudicial to the non-statutory mitigating factor proposed by the defense; Tillman's willingness to work and efforts to secure employment. The court should have sustained the objection.

Later the prosecutor proposed to ask defense witness Dr. Merin on cross-examination whether he knew of individuals who were, like Tillman, on parole, yet had found employment. (R851) Defense counsel objected on two grounds. First, Dr. Merin had not testified relative to Tillman's employment efforts, so the proposed cross-examiantion was beyond the scope of direct. Secondly, Dr. Merin, a psychologist, had no expertise to give an opinion on vocational possibilities. (R852) The court overruled Appellant's

objections (R853) and the questioning was permitted.

While it was certainly appropriate for the prosecutor to bring in evidence relating to any employment counselling or placement available to parolees like Tillman, cross-examination of Appellant's defense witnesses was not appropriate. In particular the jury was encouraged to accept the misleading questions relating to the Work Release Program as authoritative fact coming from the State Attorney's Office.

B. The Court Erred by Denying Tillman's Motion for Mistrial After the Prosecutor Mentioned the Possibility that Tillman Would be Violent Again if Paroled in 25 Years.

On direct examination, Dr. Merin testified to his opinion that he anticipated Tillman to be cooperative rather than violent if imprisoned for a long term. (R839) On cross-examination, the prosecutor explored Dr. Merin's speculation that Tillman would not commit any future acts of violence while incarcerated. (R854-55) Then the prosecutor asked:

> So, you are saying, if he were paroled in twenty-five years, he would again have those--
> (R855)

Defense counsel objected that the possibility of parole is not a proper consideration for the jury in penalty phase. (R855) The objection was followed by a motion for mistrial based on the prosecutor's inference that Tillman might be paroled in 25 years and commit another violent crime. (R856) The court responded that Dr. Merin's testimony was speculative; therefore the State was entitled to ask a speculative question. (R856) The defense objection was overruled. (R857)

This Court has held that a defendant's ability to behave in a prison environment is a proper consideration for the jury in deciding whether the death penalty is warranted. McCampbell v. State, 421 So.2d 1072 (Fla. 1982). See also, Skipper v. South Carolina, __ U.S.__, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Thus, Dr. Merin's testimony was relevant evidence in mitigation.

The prosecutor's cross-examination, on the other hand, went too far. In Miller v. State, 373 So.2d 882 (Fla. 1979), this Court wrote:

> The legislature has not authorized consideration of the probability of recurring violent acts by the defendant if he is released on parole in the distant future.
>
> 373 So.2d at 886.

Moreover, in Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert.den., 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984), this Court condemned without reservation a prosecutorial argument which suggested that the defendant would kill again if released on parole. See also Grant v. State, 194 So.2d 612 (Fla. 1967).

Tillman's motion for mistrial should have been granted because the jury was encouraged to consider an inappropriate non-statutory aggravating circumstance (possible release on parole) when deciding the penalty recommendation. This Court should now reverse for a new penalty phase trial.

ISSUE VII

THE WRITTEN SENTENCING ORDER SHOWS THAT THE COURT GAVE INADEQUATE CONSIDERATION TO THE MITIGATING EVIDENCE AND THAT AN AGGRAVATING CIRCUMSTANCE BARRED BY THE PLEA AGREEMENT ENTERED INTO THE WEIGHING PROCESS.

The trial court imposed a sentence of death on Tillman at the sentencing hearing held February 28, 1986. (R977) The written order entitled "Sentence" was later prepared and signed by the sentencing judge on May 13, 1986. (R1352-57, see Appendix)

A. The Written "Sentence" Reflects a Constitutionally Inadequate Consideration of the Mitigating Evidence.

As construed by the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Eighth Amendment requires that a capital sentencer hear all relevant evidence in mitigation and actually consider this evidence before determining that death is the appropriate penalty. This Court has stated:

> So long as all the evidence is considered, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion. Pope v. State, 441 So.2d 1073 at 1076 (Fla. 1983).

Applying these standards to the case at bar, it is clear that the sentencing judge's finding of no applicable mitigating factors will stand if, but only if, the judge considered all of the evidence.

At the penalty trial, as requested by Tillman, the court instructed the jury on the statutory mitigating circumstance of age and eight non-statutory mitigating circumstances. (R1326) The written "Sentence" considers all of the statutory mitigating circumstances despite Appellant's admission that only age was applicable. (R1353-55, see Appendix). In rejecting Tillman's age of 21 as a mitigating factor, the judge wrote:

> There is no per se rule which pinpoints a particular age as an automatic circumstance in mitigation of sentence. From the evidence adduced at trial and the sentencing hearing, the court concludes that the age of the Defendant at the time of the commission of the capital felonies and at the time of sentencing is not a mitigating circumstance. (R1354, see Appendix)

Although the sentencing judge supported this statement with an extensive list of citations to prior decisions of this Court, the judge's finding is inadequate because it does not specify any facts pertaining to Tillman's character which would justify rejecting age as a mitigator. The summary conclusion "from the evidence adduced at trial and the sentencing hearing" cannot discharge the court's obligation to consider the evidence. Rather, the court should list specific facts supporting its conclusion.

The same flaw was magnified when the sentencing judge purported to consider the non-statutory mitigating evidence. The written "Sentence" does not mention even one of the eight factors placed before the jury. The court merely wrote:

> the non-statutory mitigating circumstances which are contained in the instructions to the jury do not apply to this case. (R1355, see Appendix)

Clearly, a sentencing judge must make a more specific indication of what mitigating evidence was considered and should state why it was rejected. Cf., Eddings v. Oklahoma, supra.

B. The Written "Sentence" Reflects that the Court Considered an Aggravating Circumstance Which Was Barred by the Plea Agreement.

In the written "Sentence," the trial judge listed under "MITIGATING CIRCUMSTANCES," all of the statutory mitigating factors and his conclusions with regard to their applicability. (R1353, see Appendix). In the consideration of whether the mitigating factor "no significant history of prior criminal activity" was applicable, the sentencing judge stated:

> Accordingly, the court has determined that the aggravating circumstance set out in Fla.Stat. §921.141(5)(b) has been established and is applicable herein. (R1353, see Appendix)

The written findings continue:

> the Defendant has had a history of prior criminal activities wherein he was placed on felony probation.... (R1353,see Appendix)

The court concludes:

> The Defendant has been found to have been previously convicted of a "felony involving the use or threat of violence to the person pursuant to Fla.Stat. 921.141(5)(b). Inasmuch as this aggravating circumstance has been found to have been established, logically the mitigating circumstance of §921.141(6)(a). [sic.] (R1353, see Appendix)

Inasmuch as Tillman never requested a jury instruction on the mitigating circumstance of no significant prior criminal history, the sentencing judge's comments serve no needful purpose. However, they do reveal that the sentencing judge noted the

aggravating circumstance of prior conviction for a violent felony. This aggravating circumstance was, of course, to be barred by the plea agreement. (R1207, see Appendix and Issue I, supra)

It is also clear that the prosecutor's mention of Tillman's felony probation (discussed in Issue I, supra, as violative of the plea agreement) of which the sentencing judge was supposed to be unaware, was directly noted in the written "Sentence." From the language of the order, it is reasonable to conclude that these matters, which went beyond the plea agreement, actually were weighed when the judge decided what sentence to impose.

Accordingly, Tillman's sentence of death was imposed in violation of the Eighth Amendment and of the written plea agreement. The sentence should now be vacated.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, GARY L. TILLMAN, Appellant, respectfully requests this Court to grant him the following relief:

Issues I and II - Vacation of his sentence of death with permission to withdraw his plea of guilty.

Issues III through VI - Vacation of his sentence of death with remand for a new penalty trial.

Issue VII - Vacation of his sentence of death with remand for a proper weighing of the aggravating and mitigating circumstances.

Respectfully submitted,

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