IN THE SUPREME COURT OF THE
STATE OF FLORIDA

JOHN GARY HARDWICK, JR.

Appellant,

Vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 68,769

INITIAL BRIEF OF APPELLANT

Appeal from the Fourth
Judicial Circuit

Capital Case

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904/355-0805
Court Appointed Appellate
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STATEMENT OF THE CASE

This is an appeal from a sentence of death. John G. Hardwick, Jr. was charged by indictment with first degree murder(R 28). John Hardwick proceeded to jury trial before the Honorable Page Haddock, Circuit Judge, on March 11, 12 and 13, 1986.

Hardwick's trial was marked with three unusual and prejudicial events. First, less than a month before trial, trial counsel, Frank Tassone, filed a Motion to Withdraw, or alternatively, for appointment of co-counsel (R 129). A hearing was held and the appellant testified of irreconcilable differences with his defense counsel (T 64-67, R 130). Hardwick repeatedly denied that he was adequate to represent himself but would do so if the Court didn't grant the motion of defense counsel to withdraw (T 66, 68-69, 74, 75). The Motion was denied (T 69)(R 132). Appellant's ore tenus motion to be appointed co-counsel was also denied (T 78). Later, on the third day of trial, John Hardwick renewed his motion with a pro se motion to dismiss counsel. (R 145) (T 664). The appellant claimed that his counsel refused to ask state witnesses certain questions and refused to call certain witnesses for the defense. The motion was denied. (T 667, R 146). Second, James Pullum, a relative of the decedent, was ejected from the courtroom for making obscene gestures to Hardwick. (T 460). Pullum stated to the Court that he wanted to "let everybody know [that he

knew] that man that killed [Pullum]." (T 461). Later, Pullum was barred from the courthouse because of his contact with witnesses. Third, there were numerous violations of the witness sequestration rule. State witness Richard Jones testified that he spoke with other witnesses about the case, as to "who knows what, who did what, who was where." (T549, 551). Appellant's motion for mistrial was denied.

At the conclusion of the guilt stage of the trial, the jury returned a verdict finding John Hardwick guilty of murder in the first degree (R 167). At the penalty phase of the trial, the jury by a vote of seven to five recommended a death sentence (R 173).

The trial judge found five aggravating circumstances and no statutory or mitigating circumstances (R 183-187). The appellant was adjudicated guilty and sentenced to death by electrocution (R 181). Notice of appeal was timely filed (R 191) and undersigned counsel appointed for purpose of direct appeal (R 190).

STATEMENT OF THE FACTS

Appellant John Hardwick and his 16 year old pregnant wife, Darlene Hardwick, lived with his in-law Pete McCoy and Dan Dimaggio, among others, in the oceanway area of Jacksonville in December 1984. John Hardwick was unemployed; he occasionally sold drugs, such as cocaine, marijuana and quaaludes to a number of young people in the neighborhood, including Jeff Bartley and the decedent Keith Pullum. (T 322).

On the morning of Christmas eve, a retired Virginia farmer, Henry Honaker was fishing at a point where Haulover Creek empties into the St. Johns River. (T 349). He observed an object floating in the river and brought it to shore. (T 350). The police were called and in due course took possession of a clothed white male body without shoes or identification. (T 360). The police requested that the news media broadcast and print all information known at that time in order to identify the decedent. (T 362).

On Christmas Day, John Hardwick walked to a neighbor's house. (T 514). Michael Hyzer had purchased twenty-five quaaludes from Hardwick earlier in the week. (T 513). Hyzer, a friend of both the appellant and the decedent. (T 510), testified at trial that Hardwick stated that he shot and stabbed Keith Pullum and threw his body into the river for stealing his quaaludes (T 514-15). According to Hyzer,

Hardwick said that "we" took care of Pullum, but he would not identify the other party to the crime. (T 515). Later that morning, Hyzer called the police, informed the homicide detectives of his conversation with Hardwick, and subsequently identified the body of Keith Pullum. (T 516).

That afternoon, the appellant John Hardwick was arrested near his home. Jacksonville Detective Charles Kesinger interviewed Hardwick and testified over defense objection (T 623-25) of oral and written statements by Hardwick linking him to the homicide. Kesinger testified that Hardwick denied owning any guns; (T 628) volunteered that he was "missing some quaaludes but it's not a big deal;" (T 629) and denied making a statement of killing Pullum about drugs. (T 630). Detectives Christopher Robinson and D.L. Hill testified over defense objection (TX) that Hardwick stated "a man can't go around robbing dope dealers and not expect to get killed." (T 587, 595)

At the trial, a number of Hardwick's friends and drug customers testified of conversations and activities with Hardwick which linked him to the homicide. Jeffrey Showalter testified that on December 23, 1984, John Hardwick, Jeff Bartley and Keith Pullum purchased a number of quaaludes. (T 322). A few hours later that evening, after returning to his home, Showalter was visited by Hardwick, Bartley and Pullum. (T 313-14). Hardwick said that his quaaludes were missing and that Showalter and Pullum

were the only persons in the house. (T 313). Showalter denied stealing the quaaludes. Hardwick, accompanied by Bartley and Pullum, left. (T 313). [visit #1].

Showalter testified that between 11:00 and 11:30, Keith Pullum rode by the house on his bicycle. (T 314) (T 327). Showalter recalled that Pullum said he was going home to get something to eat and then return to Hardwick's house. (T 315). [visit #2].

Showalter testified that between 11:30 and 12:00 that same evening, Hardwick, Bartley and Pullum returned to Showalter's house in Hardwick's automobile. Hardwick again accused Showalter and Pullum of stealing his quaaludes. Hardwick also said that he would kill either Showalter or Pullum if he didn't get his quaaludes within an hour. (T 315). Hardwick and Bartley drove off leaving Pullum and Showalter. [visit #3]. Showalter urged Pullum to call the police but Pullum replied "they ain't gonna mess with me." (T 317). Pullum walked down the road. That was the last time Showalter saw Pullum. Hardwick's car stopped beside Pullum and after a moment drove off. (T 317).

Although several witnesses reported that Bartley accompanied Hardwick that fatal night, and listed by the state as a witness, Bartley was never called to testify.

Daniel Dimaggio also testified that on the Sunday before Christmas, December 23, 1984, Hardwick told him that his quaaludes had been stolen and that "he would take care

of the [individual] that took his quaaludes." (T 423). Dimaggio stated that Hardwick accused a couple of people, including Keith Pullum, of stealing the quaaludes. (T 423,

Dimaggio and Connie Wright testified that on Monday afternoon, December 24, 1986, Hardwick said "he took care of the [individual] that got his [quaaludes]." and that "if Keith Pullum walks through that door, he's got a ghost." (T 426). Joseph Delgross testified that Hardwick told him on Christmas eve that his quaaludes had been stolen and that he took care of one person by feeding him to the sharks and was looking for the other. (T 494).

Showalter and Daniel Dimaggio testified at trial that during this period of time, John Hardwick carried a .357 magnum pistol. (T 419). Dimaggio accompanied Hardwick to a wooded area off Alvin road and fired the magnum pistol at some cement blocks. (T 420). He testified that the empty .357 shells were left in the dirt road adjacent to a fire pit. (T 422). Police Officer Johns recovered some lead fragments and copper jackets from a fire pit that had some cement blocks in it in a wooded area off Alvin Road. (T710-12). Florida Department of Law Enforcement (FDLE) Crime Analyst Tom Pulley testified of searching the appellant's automobile and recovering a .357 magnum cartridge case. (T 720-21). FDLE Crime Analyst David Warniment compared the six .357 magnum shell casings recovered from the fire pit with the .357 shell casing

seized from the appellant's automobile. (T 731). He concluded that the shell casing found in the automobile and the shell casing found in the fire pit were fired from the same firearm. (T 733).

The cause of the victim's death was explained by Bonoflorio Floro, M.D., Chief Deputy Medical Examiner. Floro testified of three different injuries: a gunshot wound in the right lower back; stab wounds to the chest and back; and injuries to the head. (T 392). The gunshot wound commenced on the inside of the back of the left forearm, exited the right side of the midforearm, and continued with a wound to the right lower back of the victim. (T 369, 385). Dr. Floro recovered a .357 or .38 caliber bullet. (T 391). There were two stab wounds in the chest and another stab wound in the back. (T 369). One stab wound went through the lung and into the vena cava. (T 378). Dr. Floro opined that the stab wounds were inflicted by a small single edge knife (T 381).

Dr. Floro testified that the victim was stabbed first, shot, and then struck about the head. He opined that the victim became unconscious within five to six minutes of being stabbed (T 378). He also testified that blows to the head occurred immediately after his death. (T 408).

At the close of the state's case, appellant's motion for a judgment of acquittal was denied. (T 771).

The defense proffered the testimony of David Buettner,

a United States Navy seaman, who made a statement to his immediate superior officer, Chief Petty Officer Dombrowski, of accompanying two other individuals and killing an individual in Jacksonville. (T 773-74). Buettner testified that a marine, another sailor, and he took a young man to a wooded area off Heckscher Drive. The three military men physically beat the man; stabbed him in the back; and shot him with a .38 caliber pistol. (T 775). According to Buettner, the motive for the crime was the young man's affair with the men's respective wives and girl friends while the men were at sea. (T 795). On cross-examination, Buettner admitted that the statement was based on his imagination and not true. (T 777). On redirect, Buettner stated that the basis of his statement to Dombrowski was a conversation with an individual he identified as "Banana Man" (T 790). The state's objection to Buettner's testimony was sustained. (T 797).

The defense presented no other witnesses and rested.

The trial court heard arguments regarding jury instructions. The Court denied two jury instructions proposed by the defense: instruction on intoxication and specific intent (R 147) and knowledge of crime and guilt. (R 148).

The jury returned a verdict of guilty to first degree murder. (T 946).

At the penalty stage of the trial, the state did not

call any witnesses but introduced into evidence two prior convictions reflecting violent felonies. (T 964). The state did not offer evidence of any other aggravating factor. The appellant did not present any witnesses in support of mitigating factors.

The jury returned with an advisory sentence and by a vote of seven to five recommended a sentence of death. (T 1011). The trial court took the sentence under advisement and announced a date for argument of aggravation and mitigation to the court.

The trial court adjudicated the appellant to be guilty of first degree murder. (T 1034). The court, found five aggravating circumstances, no mitigating circumstances, and sentenced John Hardwick to death. (T 1034).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE ADMISSION OF EVIDENCE WHICH TENDED TO PROVE THE APPELLANT'S INNOCENCE

In the trial below, the State filed a Motion in Limine to prohibit any and all argument, testimony, or evidence regarding seaman D.L. Buettner and his immediate superior office, C.P.O. L.G. Dombrowski. The assistant state attorney "believe[d] that . . . the defendant will attempt to introduce evidence . . . that a "Banana Man"committed this murder [and] the prejudicial effect of such evidence or inference outweighs its probative value." (R 142). The trial court initially granted the motion in part because the testimony was insufficiently reliable. (T 107). After the defense proffered Buettner's testimony, the trial court granted the motion based upon Section 90.804(2)(C) and ruled that the testimony was untrue and not reliable. (T 797). In granting the state's motion, the trial court erred in preventing the defense an opportunity to raise a reasonable doubt by showing similar fact evidence that Buettner and not Hardwick committed the homicide.

A. Buettner's testimony was relevant and admissible Evidence.

The trial court misconstrued the Florida Evidence Code in denying the admission of Buettner's testimony. Sections 90.402, and 90.404(2) Florida Statutes, apply to

this cause: Section 90.402 provides that "All relevant evidence is admissible except as provided by law."Section 90.404(2)(a) proves that "Similar fact evidence of other crimes, wrongs or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, but it is inadmissible wherever the evidence is relevant solely to prove bad character or propensity."

In addition to statutory authority, a firmly established rule of criminal law is that one accused of crime may show his innocence by proof of the guilt of another. In Moreno v. State, 418 So.2d 1223, 1225 (Fla. 4th DCA 1982), the trial court denied a defense motion to admit relevant similar fact evidence which tended to exculpate the defendant. The appellate court found the denial of evidence which tends in any way, even directly, to prove a criminal defendant's innocence to be error:

> [S]imilar crime evidence is relevant, non-prejudicial, and not inadmissible by any rule of law, [and] should have been admitted. One accused of a crime may show his innocence by proof of the guilt of another. Lindsay v.State, 68 So. 932(1915); see, Barnes v.State, 415 So.2d 1280 (Fla. 2d DCA 1982); Pahl v. State, 415 So.2d 42 (Fla. 2d DCA (1982).

In Pahl v. State, supra, the appellate court found the trial court committed reversible error in denying the introduction into evidence of similar crime evidence by

which the accused could show his innocence by proof of the guilt of another. "Where the state relies substantially on circumstantial evidence to connect an accused with a crime, and there is independent evidence connecting another person with that crime, the defendant may also by circumstantial evidence attempt to prove that someone else committed the act in question." id., at 42. The testimony of Buettner was proof of guilt of someone other than John Hardwick. It was similar crime evidence which tended to prove the appellant's innocence. The Trial Court erred in denying relevant testimony by Buettner.

B. Buettner's Testimony was Admissible as an Exception to the Hearsay Rules: Statement against Penal Interest.

Buettner testified on proffer that with two other men, he killed a young man, or alternatively, heard the story from a man called "Banana Man". In granting the state's objection/motion in limine, the trial court found the Buettner's testimony to be untrue, reliable and against Buettner's interest to justify its admission as a Declaration against Penal Interest. This ruling ruling was error.

In Maugeri v. State, 460 So.2d 975 (Fla. 3d DCA 1984), the appellate court reviewed the requirements for admitting an inculpatory statement against penal interest:

> [I]t must be shown that (1) the declarant is unavailable as a witness, (2) the statement must

> so far tend to subject the declarant to criminal liability that a reasonable person would not have made the statement unless he or she believed it to be true, and (3) corroborating circumstances clearly indicate the trustworthiness of the statement. (citations omitted). Id. at 977.

Maugeri appealed the trial court's admission into evidence of testimony by the victim's girlfriend that the victim had informed her of stealing two kilograms of cocaine from Maugeri. The appellate court found the testimony was properly admitted as a statement against penal interest under the hearsay exception.

In the cause before the court, the declarant "Banana Man" was unavailable. His statement would have subjected him to criminal liability for homicide and was such that a reasonable person would not have made the statement unless he believed it to be true. In contrast to Card v. State, 453 So.2d 17 (Fla. 1984), there is corroborating evidence and assurances of reliability of the statement. Nine months after the homicide, Buettner admitted to murder. Buettner admitted to CPO Dombrowski that a marine, another sailor and he took a young man named Keith to an area off Heckscher drive in December. The three stabbed, shot with a .38 caliber pistol, and beat a young man to death. The body was left on a beach on Heckscher Drive. These facts mirror the facts of the crime: that a young man was stabbed, shot and beat to death off Hecksher Drive. Unlike Card, in the case before the court there is a confession to a specific crime.

Unlike Card, there is corroborating evidence and assurance of the reliability of the statement. The appellant was denied a fair trial by exclusion of the hearsay evidence. The judgment and sentence must be reversed and remanded for new trial.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO WITHDRAW OR APPOINT OF CO-COUNSEL

Less than a month before trial, Defense Counsel filed a Motion to Withdraw, or alternatively, for appointment of co-counsel. A hearing was held and the appellant testified of irreconcilable differences with his defense counsel. The appellant repeatedly reinstated that he was inadequate to represent himself but will do so if the court did not grant the Motion to Withdraw. The motion was denied. Subsequently, in the middle of trial, the appellant again renewed his motion to discharge counsel.

A. The Trial Court Denied Appellant His Right to Self-Representation

A criminal defendant has the right to represent himself. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed 2d.562 (1975); Jones v. State, 499 So.2d 253 (Fla. 1984), cert. den. 105 S.Ct. 269 (1984). The unreasonable refusal to accept appointed counsel is equivalent to a request for self-representation. Jones v. State, supra. In the absence of unusual circumstances, an accused who is mentally competent has the right to conduct his own defense without counsel. State v. Cappetta, 216 So.2d 749 (Fla. 1968). Upon receiving a timely motion to proceed, Faretta places the duty on the trial court to make the defendant aware of the benefits he must relinquish and the dangers and disadvantages of self-representation. Thereafter, the Trial Court must determine whether the

defendant has made his choice voluntarily and intelligently. Keene v. State, 420 So.2d 908 (Fla. 1st DCA 1982).

In Smith v. State, 444 So.2d 542 (Fla. 1st DCA 1984), the appellate court set the procedure which a trial court must follow before allowing an indigent defendant to discharge his court-appointed counsel and represent himself. First, the trial court must determine whether accurate grounds exist for replacement of defendant's counsel. Second, the trial court must make the defendant aware that this request is the same as the request for self-representation and explain to the defendant the dangers of self-representation. Third, the court must also determine whether unusual circumstances exist which would cause the accused to be deprived of a fair trial if permitted to conduct his defense. The court must inquire into the defendant's age, mental derangement, lack of knowledge, education or inexperience in criminal procedures to make certain that he is aware of the disadvantage under which he is placing himself by waiving counsel.

The appellant made an unequivocal request to act as his own counsel. In addition, counsel for the appellant informed the trial court of the appellant's desire to represent himself after hearing all the motion to withdraw. The appellant was faced with a Hobson's choice to proceed at trial with counsel that he felt incompetent and had

irreconcilable differences or represent himself. Based on these facts, the appellant sufficiently invoked his right to proceed per se and the trial court erred in denying appellant his constitutional right to represent himself. This constitutes reversible error.

B. The Trial Court Failed to Adequately Protect the Appellant's Right to Counsel

Appellant requested the trial court to discharge his court appointed counsel on the ground the counsel was not rendering effective assistance of counsel. The trial court conducted a hearing but denied the appellant's motion. In Nelson v. State, 274 So.2d 256, (Fla. 4th DCA 1973), the Fourth District Court of Appeal set forth the defendant's right to counsel and the procedures which a trial court should follow when a defendant request the discharge of his court-appointed counsel before the commencement of trial. There the court held that:

> If incompetency of counsel is assigned by the defendant as the reason or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his

> original counsel, the state may not thereafter be required to appoint a substitute. See also, Parker v. State, 423 So.2d 553 (Fla. 1st DCA 1982).

Although the trial court conducted a hearing to determine whether there was a reasonable basis for the appellant's claim, it failed to make a finding that a reasonable belief did not appear for a finding of ineffective representation. Moreover, the trial court erred in not appointing substitute counsel or stand-by counsel for the defendant, or not allowing the appellant to represent himself, the trial court, by forcing appellant to proceed to trial with counsel he believed to be ineffective, effectively denied appellant his constitutional right to effective assistance to counsel. The appellant's conviction and sentence must be reversed and remanded to the trial court for a new trial.

III. THE TRIAL COURT ERRED IN RESTRICTING DEFENSE COUNSEL'S CROSS-EXAMINATION OF PROSECUTION WITNESS DETECTIVE CHARLES KESINGER.

Facts

Detective Charles Kesinger was the lead homicide investigator. He interviewed all witnesses and the appellant; recovered copper and lead bullet fragments; and instigated laboratory tests such as a toxicological examination of Hardwick's clothes. (T 624-84). On cross-examination, defense counsel questioned Detective Kesinger as to whether there were other suspects to the homicide, and if so, whether they made any statements indicating that had committed the homicide. The purpose of such questioning was to cross-examine the detective as to sworn statement by Buettner that he and/or another individual known as "Banana Man" committed the crime. (T 690). The trial Court considered such questions to be hearsay and sustained the state's objection, although, it was to a question which had not yet been raised. (T 695-96).

Defense counsel objected to the ruling as an undue restriction of cross examination:

> [Detective Kesinger] didn't interview Banana Man; [the police department] didn't attempt to find him. I think I have a right to inquire into that. The Sheriff's office was aware of the conversation [between Buettner and Banana Man]. The state [attorney's office] at that time was aware of it and the state is not trying to force the defense and to ask the Court to preclude that statement from the jury. I think it unduly, as I indicated, restricting the Defendant's right to cross-examination. (T 697).

The trial court erred in sustaining the objection based on hearsay. In improperly restricting otherwise appropriate cross-examination, the trial court deprived Hardwick of his constitutional right of confrontation state witness. The confrontation clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him. "[T]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." Davis v. Alaska, 415 U.S. 308, 315 (1974). (quoting 5 J. Wigmore, Evidence Section 1395, p. 123 (3d ed. 1940) (emphasis in the original). The trial court's ruling that the inquiry was improper based on hearsay was not merely erroneous as being related to Kesinger's testimony regarding his investigation but was also prejudicial to the appellant's defense because it precluded the development of the defense theory that seaman Buettner and/or Banana Man killed Pullum. In Coxwell v. State, 361 So.2d 148 (Fla. 1978) (England, C.J.), this court held that reversible error occurred when the trial court unduly restricted the scope of the defendant's cross-examination of a key prosecution witness in a capital case regarding matters germane to that witness testimony and plausibly relevant to the defense. Similarly in Coco v. State, 62 So.2d 892 (Fla. 1953), this Court held that, the defendant in a capital case was denied the opportunity to elicit testimony from a key prosecution witness as to the

most critical factual issue in the case-identification. "We can only conjecture or surmise what the outcome would have been had the appellant been granted, rather than denied, his inalienable right of cross-examination." Coco v. State, 62 So.2d at 896.

The trial court misconstrued the Evidence Code by sustaining the objection based on hearsay. In Breedlove v. State, 413 So.2d 1,6 (Fla. 1982) the trial court admitted the testimony of the police detectives, which alluded a conversation with Defendant's mother and brother - neither of whom testified at trial - over objections of hearsay and violation of the confrontation clause. The Breedlove court, citing to Dutton v. Evans, 400 U.S. 74, 91 S..Ct. 210, 27 L.Ed.2d 213 (1970), found the trial court to have properly admitted the detectives' testimony because it came in to show the effect on Defendant rather than for the truth of those comments. "The informal statements, therefore, were not hearsay, and could be admitted into evidence." Breedlove,413 So.2d at 7. The testimony was not hearsay and not submitted for the truth of the statements.

In this case, the trial court prohibited all inquiry into the possibility that Kesinger had investigated Buettner and/or the Banana Man. By thus cutting off all questioning about an statement which the state conceded had taken place and that a jury might reasonably have found a plausible explanation for the crime, the trial court's erroneous

evidentiary ruling violated appellant's rights secured by the confrontation clause. The conviction and sentence must be reversed and remanded for new trial.

IV. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR MISTRIAL BASED ON VIOLATION OF THE WITNESS SEQUESTRATION RULE.

The Rule of sequestration is intended to prevent the shaping of testimony by witnesses. Geders v. United States, 425 U.S. 80, 87, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); Dumas v. State, 350 So.2d 464 (Fla. 1977). When violation of the court's sequestration rule has occurred, a court has three possible sanctions: the guilty party may be cited for contempt; opposing counsel may cross examine the witness as to the nature of the violation; and where the defendant has suffered actual prejudice, and there has been a connivance by witness or counsel to violate the rule, the court may strike testimony already given or disallow further testimony. United States v. Blasco, 702 F.2d 1315 (11th Cir.) (citing Florida law), cert. denied, 104 S.Ct. 275 (1983).

The test for excluding a witness or other sanctions is whether the testimony of the challenged witnesses was substantially affected by the testimony he heard, to the extent that his testimony differed from what it would have been had he not heard testimony in violation of the rule. Steinhorst v. State, 412 So.2d 332, 336 (Fla. 1982).

In the instant case, State witnesses Richard Jones was questioned because he laughed after giving his testimony. In exploring the reasons for his laughter, Jones stated:

[The witnesses] are standing out there, they

> have come in here and they have been intimidated. There has been words put in their mouths, like somebody has told me you weren't in a truck by yourself, and I don't think that's fair. (T 548).

Jones went on to say that he spoke with seven other witnesses about the case, "who knows what, who did what, who was there." (T 549, 551). Under cross-examination by the state, Jones stated that the witnesses were talking about television shows such as Perry Mason, Barney Jones and Colombo. Jones admitted to talking with James Pullum, the relative of the decedent barred from the courtroom for obscene gestures to the appellant in front of the jury. (T 556). James Pullum had previously been instructed by the trial court not to have any contact with jury members or witnesses. Jones was allowed to return to the courthouse hall, where the other witnesses were located, some five to ten minutes after being questioned regarding violation of the witness sequestration rule. From this, it is clear to see how the other witnesses could provide similar answers.

Defense counsel requested that the trial court conduct a hearing in order to inquire of the witnesses whether a violation of the rule occurred. (T 556). Instead, the trial court instructed counsel to inquire out of court during a recess as to any possible breach of the rule. (T 559). Both the defense counsel and the assistant state attorney made inquiry and reported to the trial judge. The motion was denied. (T 571). The following day, defense counsel brought the court's attention to substance of a telephone call from

an individual unrelated to any of the witnesses. Defense counsel reported that that an this individual stated that she was present when Jones announced the substance of his testimony to other witnesses in the courthouse hall. Moreover, she remembered the other witnesses talking about the case, their testimony, and other events regarding this cause. The trial court agreed to conduct a hearing of the witnesses after the jury recessed to render a verdict. (T 671).

After the jury retired for deliberations, Dimaggio and Wright were questioned by the Court. Dimaggio admitted to talking with Jones about Perry Mason but denied discussing the case with other witnesses. (T 938-89). Connie Wright admitted to overhearing Jones talking about a Perry Mason movie but denied discussing the case with any witnesses. (T 942). Bartley was not called for questioning by the court.

In the cause before the Court, the government's case was built in circumstantial evidence. Accordingly, the government's case was built upon the testimony of Hardwick's conversations by witnesses like Delgross and Wright. Delgrosso and Wright were ejected from the courtroom for violating the witness sequestration rule. Delgrosso and Wright sat outside the courtroom awaiting the call to give testimony for hours on end. From this, it is clear to see how the government witness provided similar answers. The trial court erred in denying the motions for mistrial. The

judgment and sentence must be reversed and remanded for new trial.

V. THE COURT ERRED IN DENYING APPELLANT REQUESTED JURY INSTRUCTION ON INTOXICATION

The indictment in this case charged John Hardwick with first degree murder. Defense counsel requested that the court give jury instructions on intoxication and knowledge of a crime. The Court refused to so instruct the jury and committed error.

Hardwick is entitled to an instruction on the law applicable to the effect of intoxication on criminal liability in a prosecution for murder in the first degree as there was evidence of the defendant's intoxication at the time of the offense. Byron v. State, 141 Fla. 676, 194 So.385 (194). See also, Bryant v. State, 412 So.2d 347 (Fla. 1982), Palmer v. State, 397 So.2d 648 (Fla. 1981).

A number of the state witnesses testified of extensive use of illegal drugs. The state witnesses and Harwick attended numerous parties for several days before Christmas. Hyzer - who admitted to buying quaaludes from the appellant - testified of having a party on December 22 and December 23, 1984 with quaaludes and alcohol. DiMaggio admitted to "partying" for three to four days before Christmas, 1984 with the appellant. (T 428,440). Showalter testified that Bartley took three quaaludes the night of December 23, 1984 (T 323). There is evidence of the victim's seeking and consuming illegal drugs. Detective Kesinger testified that the appellant went incoherent and had to be physically carried from the building soon after his arrest on account

of his consumption of illicit drugs (T 662). In summary, there was testimony of drug consumption and "partying" for days prior to and including the time of the homicide. The trial court erred in denying the jury instruction on intoxication. The conviction must be reversed and remanded for new trial.

VI. THE EVIDENCE OFFERED BY THE PROSECUTION WAS LEGALLY INSUFFICIENT TO SUPPORT THE CONVICTIONS AND/OR THE INTERESTS OF JUSTICE REQUIRE A NEW TRIAL

Appellant has received the ultimate penalty based upon his conviction for first degree murder. That conviction rested solely upon circumstantial evidence which did not exclude all reasonable hypotheses of innocence. There is a unique need for reliability where a life is at stake. Accordingly, this Court is committed to reviewing all the evidence in a capital case to determine whether the interests of justice require a new trial. Examination of the evidence offered by the prosecution in the present case demonstrates that it is so far from convincing as to require a new trial in the interests of justice.

The prosecution relied primarily on the testimony of Hyzer, Showalter, Dimaggio and Wright to obtain conviction. The evidence was entirely circumstantial regarding Appellant's involvement in the alleged offense. There was no direct evidence of the commission of the homicide. The following constitutes a brief summary of the relevant testimony.

The deceased was stabbed, shot with a bullet fired from a .357 or .38 caliber automatic weapon and beat. Delgross and Showalter testified that Appellant carried a pistol earlier that evening. (T 360, 442). .357 caliber cartridges were discovered not at the scene of the shooting but at a fire pit. A search of the Appellant's residence,

pursuant to a consent to search did not disclose any firearms or ammunition. FDLE crime analyst testified that based upon his examination of the three cartridges found at the fire pit and one found in the Appellant's car, his opinion was that they were all fired from the same weapon. No cartridges were recovered at the scene of the crime. No weapon was ever recovered.

The uniquely coercive nature of the death penalty has been noted often. See Green v. United States, 355 U.S. 184, 193 (1957)("incredible dilemma"); Fay v. Noia, 372 U.S. 391,440 (1963)("Russian Roulette"); Pope v. United States, 392 U.S. 651 (1968); Corbitt v. New Jersey, 439 U.S. 212 (1979); United States v. Jackson, 390 U.S. 570 (1968). In evaluating the trustworthiness of the testimonies, this Court must consider the unique power of the death penalty to coerce pleas and testimony and the life or death inducement for testifying falsely.

The State's sole theory of prosecution was murder for the theft of quaaludes. There were no eye witnesses to the crime. The state's case was made entirely on circumstantial evidence. The rule regarding circumstantial evidence is well settled and was succinctly enunciated by this Court in Davis v. State, 90 So.2d 629 (Fla.1956):

> "[O]ne accused a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required

> that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. Head v. State, Fla. 1952, 62 So.2d 41, Mayo v. State, Fla. 1954, 71 So.2d 899.
>
> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed a crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt.

The circumstantial evidence in the instant case was not inconsistent with other reasonable hypotheses of innocence.

First, Jeff Bartley could have shot the deceased. Like Appellant, he was with the deceased shortly before his death. Bartley also possessed quaaludes. Bartley was seen in the Appellant's car so the cartridges found in the automobile are just as probative of his guilt as Appellant's. If fact, the evidence presented by the prosecution which points only to Appellant is the boasting of Hardwick. Bartley did not testify. His absence of testimony highly suspect and should be rigidly scrutinized.

Secondly, even assuming for argument purposes, that Appellant did shoot the deceased, the most the evidence will support is second degree murder. There was evidence that the Appellant, a consumer of illegal drugs, was intoxicated with DiMaggio and others on drugs and liquor for several nights including the night of the crime. Thus, the evidence

presented by the prosecution does not exclude second degree murder or even self defense. The circumstances, taken as a whole, do not exclude ever reasonable hypothesis of innocence. The State has failed to meet its burden of legal sufficiency.

However, even if this Court finds the circumstantial evidence was legally sufficient, the weight of the evidence is so far from convincing as to require a new trial "in the interests of justice." Fla.R.App.P. 9.140(f); Fla.R.App.P. 6.16(b); Williams v. State, 117 So.2d 473 (Fla.1960). This Court has often held a new trial is warranted where the evidence is uncertain or insubstantial and thus the interests of justice demanded it. See e.g., Tibbs v. State, 337 So.2d 788 (Fla. 1976); Cordell v. State, 157 Fla. 295, 25 So.2d 885(1946); Council v. State, 111 Fla.173, 149 So.13(1933); Platt v. State, 65 Fla.253, 61 So.502(1913).

Because of the irreversible nature of the death penalty, this Court has recognized a correspondingly greater need for reliability in the requisite burden of proof before an individual may be convicted and sentenced to death. Examples of this unique need for reliability can be seen in several cases. In Taylor v. State, 294 So.2d 648(Fla.1974), this Court reversed the death sentence and remanded in part on "at least the possibility" that the defendant did not fire the fatal shot. id. at 652. The possibility of innocence was again weighed by this Court in Alford v.

State, 307 So.2d 433(Fla.1975). The evidence in the present case was certainly not "particularly strong", as was found in Alford v. State, supra, thus raising the possibility of an innocent man being sentenced to die. At the very least there are substantial doubts left unresolved by the evidence such that in the interests of justice Appellant should not be put to death.

The evidence as a whole is circumstantial and does not exclude very reasonable hypothesis of innocence. Appellant's conviction and death sentence cannot be upheld on the basis of such tenuous evidence. The circumstantial evidence presented by the State is not sufficiently reliable to deprive John Hardwick of life. At the very least, the interests of justice demand that Appellant be afforded a new trial.

VII. THE TRIAL COURT ERRED IN FINDING THE MURDER OF KEITH PULLUM WAS: COMMITTED WHILE ENGAGED IN A KIDNAPPING; COMMITTED FOR PECUNIARY GAIN; COLD, CALCULATED AND PREMEDITATED; HEINOUS, ATROCIOUS, AND CRUEL; IN RE THE EVIDENCE OF STATUTORY AND NON-STATUTORY MITIGATING CIRCUMSTANCES TO JUSTIFY THE IMPOSITION OF THE DEATH PENALTY

A. Aggravating Circumstances

The trial court found five (5) statutory aggravating circumstances to justify the imposition of the death penalty (R183-187). The burden is on the state in the sentencing portion of a capital felony trial to prove every aggravating circumstance beyond a reasonable doubt. Demps v. State, 395 So.2d 501 (Fla.), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981); Williams v. State, 386 So.2d 538 (Fla. 1980). Not even "logical inferences" drawn by the trial court will suffice to support a finding of a particular aggravating circumstance when the state's burden has not been met. Clark v. State, 443 So.2d 973 (Fla. 1983).

I. Previous Felony Conviction

The trial court properly found the aggravating circumstance of a previous conviction of a felony involving use or threat of violence to a person, F.S. 921,141(5)(b); King v. State, 390 So.2d 315 (Fla. 1980); Lucas v. State, 376 So.2d 1149 (Fla. 1979); c.f., Meeks v. State, 339 So.2d 186 (Fla. 1976).

II. The Trial Court erred in finding that the Homicide was Committed During the Commission of a Felony: Kidnapping

The trial court erred in finding as an aggravated circumstance under F.S. 921.141(5)(d), that the capital felony was committed while the Appellant was engaged in the commission of a felony: kidnapping. The trial court's finding is based upon the following reasoning:

> The capital felony was committed while the Defendant was engaged in a kidnapping. The Defendant killed his victim after having abducted him from his home neighborhood on the west side of Jacksonville, to an isolated location off of Hechscher Drive on the northeastern side of Duval County. According to Dr. Floro, the Medical Examiner, the victim was tied or held with his arms behind his back at the time he was killed. (R 184)(T 1029).

This aggravating factor is not supported by the record. The appellant was indicted for one count of murder in the first degree (R 28). He was not charged with kidnapping in this cause. In the adjudicatory phase of trial, the state did not establish and the record is silent as to any evidence that indicates a kidnapping on behalf of Keith Pullum by Defendant John Hardwick. In the guilt phase of the trial, the state did not argue in its closing arguments that the victim was kidnapped. (See, e.g., T 870). However, in the penalty phase, the state argued and advocated without a factual basis, that a kidnapping occurred (T 972-973).

The aggravating circumstance of kidnapping must be founded on sufficient evidence. Cooper v. State, 492 So.2d 1059 (Fla. 1986). In Atkins v. State, 452 So.2d 529

(Fla. 1984) this Court held the trial court's finding of sexual battery as an aggravating circumstance under F.S. 921.141(5)(d) error due to lack of proof of the crime. Although the defendant had confessed to both oral and anal intercourse, there was no physical evidence of anal sexual battery. The trial court entered a judgment of acquittal as to the sexual battery count but, nevertheless, found the commission of a sexual battery for the oral intercourse as an aggravating circumstance, based on the defendant's confession. On appeal, this court found the aggravating circumstances to be improper as not based on sufficient evidence from the record and vacated the imposition of death.

In the case at bar, the evidence is that the victim voluntarily returned to Hardwick's house twice that night. The testimony that the appellant's car stopped alongside the decedent, and that the decedent was not seen again alive, does not in itself support the aggravating circumstance of kidnapping. There was no indication of a fight or force utilized by the appellant. No tortuous manipulation of the facts can result in a finding that the homicide occurred following a kidnapping. The trial court's finding that the homicide occurred during a commission of a kidnapping does not comport with common sense and is not supported by the record.

III. Committed for Pecuniary Gain

The trial court erred in finding the homicide committed for pecuniary gain. The trial court's finding is based on the following reasoning:

> This was a capital felony committed for pecuniary gain. In support of that finding, the Court notes that the defendant was a drug dealer, who murdered his victim in this case because he believed the victim stole his drugs, thereby depriving him of a business commodity and a means of making money.
>
> Secondly, the Court finds that the defendant was motivated to kill his victim by his need to maintain or establish his reputation as a drug enforcer and collector of his drug business accounts. He announced his intention to murder his victim, and he bragged about it to his friends following the killing. His commercial success as a drug dealer depended upon his own publication of the brutal, calculated, and immediate death that would inevitably result from interference with his nefarious enterprises. (T 1030).

The evidence presented at trial is insufficient to support a finding of pecuniary gain. The trial court's findings of fact would be more plausible if directed to a marijuana/cocaine importation scheme with thousands of pounds of merchandise involved and millions of dollars. In the case at bar, there is no evidence that the appellant was motivated to murder Pullum or to maintain or establish a reputation. There is no evidence that the appellant's commercial success depended on publication of the homicide.

Furthermore, the aggravating circumstance of pecuniary gain usually arises when a robbery evolves into homicide. However, the homicide of Pullum was not committed during a robbery. C.f., Griffin v. State, 474 So.2d 777 (Fla. 1985). There was no testimony or evidence presented at trial which established that Hardwick received any money for the homicide or demanded any valuables from the decedent prior to his death. C.f., Amazon v. State, 487 So.2d 8 (Fla. 1986). Notwithstanding the absence or insufficiency of evidence to establish robbery as an aggravating circumstance under 921.141, Fla. Stat., this court has found on two occasions the aggravating circumstance of pecuniary gain.

In Parker v. State, 458 So.2d 750 (Fla. 1984), this Court refused to accept the trial court's finding that the murder was committed for pecuniary gain although the defendant admitted to robbery by taking the victim's necklace and ring from the body after killing the woman. Yet, this Court noted "in passing" that the aggravating circumstance of pecuniary gain was established by the defendant's "desire to establish a remunerative drug-dealing network and his need to establish a reputation as a collector of debts. " Id., at 754. Similarly, in Eutzy v. State, 458 So.2d 755, 758(Fla. 1984), a taxi cab driver was murdered by a customer. This Court noted the absence of material evidence to support a finding that a robbery occurred, and disallowed it as an the aggravating factor.

However, such evidence was nonetheless sufficient to support a finding that the murder was committed for pecuniary gain.

Parker and Eutzy are inapplicable to this cause. In Parker the facts reveal extensive drugs sales; vast quantities of drugs; and collection of numerous drug debts by the defendant and the codefendant. Eutzy clearly involved a robbery of the taxi driver. Moreover, the sufficiency of the evidence in Parker and Eutzy lends support for the aggravating factor of pecuniary gain.

In the case at bar, unlike Parker, the record is silent that the appellant was motivated to kill in order to establish or maintain a reputation. Although his drug customers may have maintained that Hardwick bragged about the homicide, there is no evidence of Hardwick's commercial success as a drug dealer, much less evidence that his commercial success depended on such action as a homicide. The trial court erred in its finding that the homicide was committed for commercial gain or maintenance of reputation.

IV. The trial court erred in finding as an aggravating circumstance under F.S. 921.141(5)(h) that the capital homicide was especially heinous, atrocious, or cruel.

The trial court's finding is based on the following reasoning:

> The first finding of fact within that finding, the evidence showed that the victim had been systematically and brutally tortured.
>
> The Medical Examiner found numerous

non-fatal stab wounds on the victim's chest, neck and back.

The Medical Examiner also found multiple bruises and evidence of beatings to the head, done while the victim was still alive.

The Medical Examiner then found that the victim had been stabbed through the heart. In his opinion, the victim remained alive for about ten minutes, and was conscious for five or six minutes of those ten. During this time period his hands were tied behind his back, he would have been gasping for air, feeling the pain, and probably aware that a mortal wound had been inflicted, and he was in fact going to die.

Thereafter, Mr. Hardwick shot the victim in the back.

Following this, Mr. Hardwick delivered a crushing blow with a hard object to the top of the victim's head, a blow delivered with such force that it caused the skull to go through into the brain.

Thereafter, Mr. Hardwick delivered a second identical blow to his victim's head.

In an effort to get back his drugs or to punish the person that he thought took them, Mr. Hardwick forced a 17- year-old boy to endure approximately five hours of being held prisoner, threatened at gunpoint, beaten, cut with a knife on his chest, neck, and back, stabbed in the heart, shot, and finally having his skull crushed in.

At what point Keith Pullum, the 17-year-old victim, became aware that he was in fact going to die, we can only speculate. But there is no doubt that the defendant told him he was going to kill him in one hour from the time he abducted him at gunpoint. Keith Pullum may not have believed Mr. Hardwick in the beginning, for this man was supposed to be his friend, but undoubtedly, some time during the next six hours, Keith Pullum became aware that he was helpless and in the hands of a person who was in fact going to relentlessly torture him and eventually kill

> him, and that no amount of begging for mercy was going to help. Whether this occurred immediately after getting in the car shortly after midnight, during the ride to Heckscher Drive area, when he was taken out of the car and forced to walk down to the river bank, when Hardwick first tied him up, when he began to beat him, or when he began sticking his knife into Keith Pullum's neck, back, and chest, we cannot say specifically. But there is no question that, whether it was for six hours, one hour, or 15 minutes, there was undeniably a period of time which must have seemed an eternity to Keith Pullum, during which he suffered not only the physical agony of being tortured, but also the excruciatingly horrible certainty of his own impending death. To put a 17-year-old boy through that much physical and mental pain, agony, and horror cannot be described any better than by the words "especially wicked, evil, atrocious, and cruel"." (T 1030 - 33).

The trial court's finding centers on the mental anguish suffered by the decedent. Mental anguish is not the sole controlling factor in determining whether the aggravating circumstance of heinous, atrocious and cruel applies. Jennings v. State, 453 So.2d 1109 (Fla. 1984). State v. Dixon, 283 So.2d 1,9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), sets the standard for establishing heinous, atrocious, and cruel:

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

While the stabbing of Keith Pullum was reprehensible, it was not "unnecessarily torturous" or so at variance with the "norm" of deliberate killing as to meet the Dixon standard.

It was not the type of killing to be conscienceless or pitiless type of killing which warrants a finding that the capital felony was especially heinous, atrocious or cruel. See, e.g., Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 103 S.Ct. 3129 (1983) (victims abducted, confined, sexually abused and killed execution style); Bolender v. State, 422 So.2d 833 (Fla. 1982) (victims held at gunpoint, stripped, beaten and tortured throughout the evening before killed), White v. State, 403 So.2d 331 (Fla. 1981) (six victims held at gunpoint, tied and gagged, separated then shot execution style).

The homicide does not fall within the Dixon standard. Moreover, the trial court's findings of mental anguish are not supported by the record. First, there is no evidence that the victim was acutely aware of his pending death. Furthermore, there is insufficient evidence to establish that the decedent was bound and rendered helpless. Finally, there is no evidence that the victim was shot before becoming unconscious. There is testimony of the sequence of the injuries: stabbing, shooting and beating. But there is no such evidence that the shooting occurred within the six minutes the medical examiner gives before the victim became unconscious. There is no eyewitness testimony of the killing. There is no evidence of torture or the victim pleading for his life. See, e.g., Kokal v. State, 492 So.2d 1317 (Fla. 1986). In the absence of direct evidence of

the events preceding the death, the aggravating circumstance cannot be maintained.

In Miller v. State, 373 So.2d 882, 886 (Fla. 1979), the Court pointed out "a large number of the statutory and mitigating factors reflected legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of mental illness, uncontrolled emotional state of mind, or drug abuse."(Emphasis added) See also Jones v. State, 332 So.2d 615 (Fla. 1976); Burch v. State, 343 So.2d 831 (Fla. 1977).

The trial record supports the appellant's limited mental capacity, drug dependency and drug abuse, but does not support the aggravating circumstance of heinous, atrocious and cruel.

V. The trial court erred in finding the homicide cold, calculated and premeditated.

The evidence does not support the trial court's finding that the homicide was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification. F.S. 921.141(5)(i). The trial court stated the following in support of his finding:

> The defendant told Dan Dimaggio at 11:00 a.m., on December the 23rd, 1984, that he believed Keith Pullum had stolen his drugs, and that he was going to kill the person who had stolen his drugs.

> On December 24th, 1984, at approximately 12:05 a.m., the defendant pointed a gun at Jeff Showalter and Keith Pullum, and told them if his drugs weren't returned in one hour he was going to kill one of the two of them.
>
> A few minutes later, he picked up Keith Pullum and took him to an isolated area beside a creek, where he tied him up, beat him, cut him, and then delivered four separate fatal wounds to his body: a knife stab to the heart, a shot in the back, and two skull-crushing blows to the head. Thereafter he threw the body in the river "to feed the shaks".[sic] The following day he bragged about the killing to members of the drug community, so that his purpose in killing would be fulfilled. "If Keith Pullum comes through that door, I'll believe in ghosts," were his words. There was an execution. (T- 1033-34).

The scope of this aggravating factor: cold, calculated, premeditated, has been limited in order to prevent this statutory factor from creating a mandatory death sentence in all premeditated murder cases. Simple premeditation is not sufficient to support a finding of the aggravating circumstance; the evidence must show beyond a reasonable doubt that there was a "heightened degree of premeditation, calculation, or planning." Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983); see also, White v. State, 446 So.2d 1031, 1037 (Fla. 1984); Preston v. State, 444 So.2d 939, 946-47 (Fla. 1984). Mere premeditation is not enough. Thus, Combs v. State, 403 So.2d 418 (Fla. 1981), described subsection (5)(i) as a limitation which inures the benefit of the defendant. Combs involved a plan and design to lure the victim to death in a remote area.

The cold and calculated aggravating factor "is not to be used in every premeditated murder prosecution and is reserved primarily for those murders which are characterized as execution or contract murders or witness-elimination murders". Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984). This clearly was not a contract murder or witness-elimination murder. The record is insufficient to state that it was an execution as there is nothing to show that the actual intent to kill was not developed at the scene of the crime.

The cold, calculated and premeditated aggravating circumstance is to focus not on the method of killing but in the perpetrator's state of mind to kill. Hill v. State, 422 So.2d 816 (Fla. 1982), cert. denied, 103 S.Ct. 1262 (1983). Although there was evidence of threats by a drug dealer to two of his drug customers, there was no preconceived plan to kill Pullum. A preconceived plan would not have included prior threats to the victim witnessed by others. A preconceived plan would not include offering the decedent a ride in front of his friend and witnesses. A preconceived plan would not have included a homicide by utilizing weapons which the appellant carried and exhibited.

B. Mitigating Factors

Mitigation is not limited to the statutory enumerated factors and need not be proved to any certain standard. All evidence in mitigation must be considered and

weighed. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Songer v. State, 365 So.2d 698 (1978); State v. Dixon, supra.

Appellant contends that one statutory mitigating factor was clearly present: The capital felony was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, F.S. 921.141(6)(f).

The trial court erred in not considering evidence of the appellant's impaired capacity. The testimony at trial revealed extensive use of quaaludes, a mood altering depressant. A number of the state witnesses testified of extensive use of illegal drugs. The state witnesses and Hardwick attended numerous parties for several days before Christmas. Hyzer - who admitted to buying quaaludes from the appellant - testified of having a party on December 22 and 23, 1984 with quaaludes and alcohol. DiMaggio admitted to "partying" for three to four days before Christmas, 1984 with the appellant (T 428, 440). Showalter testified that Bartley took three quaaludes the night of December 23, 1984 (T 323). There is evidence of the victim seeking and consuming illegal drugs. Detective Kesinger testified that the appellant went incoherent and had to be physically carried from the building soon after his arrest on account of his consumption of illicit drugs (T 622). In summary,

there was testimony of drug consumption and "partying" for days prior to and including the time of the homicide.

As this court stated in Mines v. State, 390 So.2d 332, 337 (Fla. 1980), cert. denied, 447 U.S. 1, 101 S.Ct. 1994, 64 L.Ed.2d 681 (1981):

> Under the provisions of section 921.141(6), Florida Statutes (1975), there are two mitigating circumstances relating to a defendant's mental condition which should be considered before the imposition of a death sentence: "(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance"; and "(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

The sentencing judge here, just as in Mines; misconceived the standard to be applied in assessing the existence of mitigating factors 921.141(6)(f). As evident from the sentencing order, the trial court did not consider or weigh this circumstance. This court in its review capacity must be able to ascertain whether the trial judge properly considered and weighed this mitigation factor. It is improper for the Supreme Court, in its review capacity, to make such a judgment. Accordingly, the death sentence must be vacated and the cause remanded to the trial court for the purpose of considering this mitigating circumstance and determining an appropriate sentence.

VIII. THE TRIAL COURT IMPROPERLY DOUBLED AGGRAVATING CIRCUMSTANCES BY FINDING THE HOMICIDE HEINOUS, ATROCIOUS AND CRUEL, AND, COLD, CALCULATED AND PREMEDITATED BASED ON THE SAME FACTS.

The trial court improperly doubled the aggravating factor of F.S. 921.141(5)(h) heinous, atrocious, and cruel, with the aggravating factor of F.S. 921.141(5)(i) cold, calculated, and premeditated manner without any pretense of moral or legal justification.

In Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), this Court recognized the impropriety of relying on two aggravating circumstances both based on the same evidence and the same aspect of the defendant's crime. Provence involved a robbery-murder and consideration of two aggravating circumstances, that the murder occurred in the commission of the robbery and that the crime was committed for pecuniary gain. In disallowing the doubling of these two factors, this Court stated:

> While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) are for two separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the same aspect of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged. Mindful that our decisions in death penalty cases must result from more than a simple summing of aggravating and mitigating circumstances, State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), we believe that Providence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case.

337 So.2d at 786 (emphasis in the original). Accord, Oats v. State, 446 So.2d 90 (Fla. 1984).

The principle enunciated in Provence applies to the instant case. The trial court relied upon the aspect of the crime to find the capital felony both heinous, atrocious, or cruel and cold, calculated, and premeditated. Both aggravating circumstances found in the instant case were based upon the single essential homicide: the stabbing, shooting and beating of the decedent. The trial court found the aggravating factor of heinous, atrocious and cruel based upon the stabbing, shooting and beating of the decedent (T 1031). The trial court found the aggravating factor of cold, calculated and premeditated upon the stabbing, shooting and beating of the decedent (T 1034).

The trial court may consider both these aggravating circumstances together as long as the findings in support of the death sentence are themselves separate and distinct and not mere restatements of each other. Echols v. State, 484 So.2d 568 (Fla. 1985). In addition, there must be sufficient and distinct proof of each aggravating factor. In Mills v. State, 462 So.2d 1075 (Fla. 1985), this Court permitted the consideration of the factors of heinous, atrocious and cruel and committed in a cold, calculated and premeditated fashion in a situation wherein the decedent was kidnapped from his home, taunted of being killed, tied and beaten with a tire iron, later escaped temporarily before

being chased down and killed with a shotgun blast at close range. Similarly, in Squires v. State, 450 So.2d 208 (Fla. 1984), this Court permitted both factors in a situation where the robbery and kidnapping victim was shot initially in the shoulder with a shotgun then, as he lay screaming in pain, the defendant completed the task by firing the remaining shots into the victim's head with a revolver. In Hill v. State, supra, this Court permitted both factors in a situation where the defendant previously informed friends of his intention to both rape and murder a twelve year old girl. Such doubling was permitted because of the underlying crime to the decedent prior to his/her death.

In the case at bar, there was no underlying crime prior to Pullum's death. The trial court's finding of kidnapping is tenuous. A review of the trial court's finding reveals the restatement of the manner of death: stabbing, shooting, beating in support of both aggravating circumstances (Compare T 1032 and T 1034). Moreover, there is insufficient proof of each aggravating factor.

The trial court's finding that the capital felony was especially heinous, atrocious and cruel and was committed in a cold, calculated and premeditated manner is an improper doubling of aggravating circumstances. Since this Court cannot determine the effect of these two circumstances, the case must be remanded for new penalty stage hearing.

CONCLUSION

For the foregoing reasons, Appellant John Gary Hardwick, Jr., respectfully requests this Honorable Court to vacate, reverse the judgment of conviction and sentence of death in the above styled cause, and remand for new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by United States Mail to the Attorney General's Office, Department of Legal Affairs, The Capital, Tallahassee, Florida 32301, this 13th day of November, 1986.

CLYDE M. COLLINS, JR.

A:HARDWICK.BRF