IN THE SUPREME COURT OF THE
STATE OF FLORIDA

JOHN GARY HARDWICK, JR., Appellant,	)	
v.	)	CASE NO. 68,769
STATE OF FLORIDA, **Appellee.**	)	

REPLY BRIEF OF APPELLANT

Appeal from the Fourth
Judicial Circuit

Capital Case

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904/355-0805
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ARGUMENT

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

At trial, the defense proffered Seaman's Buettner's confession of killing a young man by stabbing, shooting and beating the victim in an area off Hecksher Drive in Jacksonville. The State's objection to such testimony, by means of a motion in limine, was sustained. The trial court relied on Section 90.804(2)(C) Statement Against Interest. The trial court erred in denying the admission of exculpatory evidence. The court prevented the appellant an opportunity to raise a reasonable doubt by showing that Seaman Buettner and not Hardwick committed the homicide.

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

On appeal, the State of Florida admits that evidence which tends to show that a defendant did not commit the crime is admissible. (AB 10). Moreover, Appellee cites Welty v. State, 402 So.2d 1159, 1163 (Fla. 1981) for the proposition that "any fact relevant to prove a fact in issue is admissible unless its admissibility is precluded by some specific rule of evidence. The trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed." (citations omitted). Notwithstanding such authority, on one hand Appellee submits that the Buettner's confession to homicide is irrelevant, yet on the other hand, argues that it is relevant but inadmissible as its probative value is

outweighed by danger of prejudice, confusion or misleading the jury. Appellee's doublefisted argument will be addressed in turn.

The material fact issue in this cause is the identity of the murderer. Seaman Buettner confessed to the crime. Appellant John Hardwick did not confess to the crime. Any evidence tending to prove or disprove a material fact is relevant, Section 90.401 (Fla. Stat. 1981); Drayton v. State, 292 So.2d 395 (Fla. 3d DCA 1974), and any fact relevant to the issue is admissible into evidence unless precluded by a specific rule of exclusion. Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982), Section 90.402 (Fla. Stat. 1981).

Seaman Buettner's confession and testimony is relevant to the issue of identification of the murderer. Section 90.402 Fla.Stat. provides a basic rule of evidence: any evidence having a tendency to prove or disprove a material fact is admissible. See, e.g., Gard, Florida Evidence, Section 4.02 (1980 ed.). The State's argument addresses insignificant conflicts between Seaman Buettner's confession and the facts at bar. Those conflicts are inappropriate because they go to the weight or credibility of the evidence to be resolved by the trier of fact.

On one hand, the State argues that Seaman Buettner's testimony was irrelevant to any issue at trial; on the other hand, the State argues Seaman Buettner's confession was relevant but excluded because of prejudice and confusion. (AB 12). The State's reliance on the testimony being excluded as

prejudicial is misplaced. Such an argument was not raised at trial. More importantly, Section 90.403 is directed at evidence which inflames the jury or appeals improperly to the jury's emotions. Unfair prejudice means an undue tendency to suggest a decision on an improper basis, commonly though not necessarily, an emotional one. See, e.g., Westley v. State, 416 So.2d 18 (Fla. 1st DCA 1982). The conflict between Seaman Buettner's confession and the particulars of the crime scene is not evidence which would color the jury's perception of the facts or inflame the jury. The government has not articulated any reasons why such conflicting testimony is prejudicial. Any conflicts in the testimony of Seaman Buettner with other testimony at trial should be weight by the jury as trier of fact.

In addition to the prejudice argument, Appellee misleads the court by submitting that Seaman Buettner's confession was not admissible under Section 90.404(2)(a) Similar Fact Evidence, citing to Moreno v. State, 418 SO.2d 1223 (Fla. 3d DCA 1982). Seaman Buettner's testimony was not submitted at trial as similar fact evidence. Seaman's Buettner's confession was submitted as evidence which shows the defendant's innocence by proof of the guilt of another. Moreno and Pahl v. State, 415 So.2d 42 (Fla. 2d DCA 1982) indicates that evidence which shows the innocence of the defendant by proof of the guilt of another is admissible evidence under Section 90.402 Fla. Stat. :"All relevant evidence is admissible except as provided by law." As stated in Moreno,

and quoted by the State, "[B]ecause the similar crime evidence is relevant, non-prejudicial, and not inadmissible by any rule of law, it should have been admitted". Moreno, 418 So.2d at 1225.

In the case at bar, as in Moreno, the crime admitted by Seaman Buettner is so similar in its methods and circumstances to the events surrounding the crime charged to the appellant that it should have been submitted to the jury. Seaman Buettner confessed to having killed, or in the alternative of having been a party to a homicide. A young man was stabbed, shot and beatened off Hecksher Drive in Jacksonville before being dumped in a seaway. (T 793). The medical examiner testified of a young man being stabbed, shot and beatened in an area off Hecksher Drive before being dumped into a river leading to the ocean. Seaman Buettner's confession to a crime of a similar nature and in a similar method of operation casts doubt on the appellant as the person who committed the crime. The evidence should have been admitted as evidence showing the appellant's innocence by proof of the guilt of another.

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 motion in limine, the trial court found the Buettner's confession to be untrue, unreliable and against Buettner's interest to

justify its admission as a Declaration against Penal Interest. This ruling was error.

Section 90.804(2)(c) provides for the admissibility of a declaration against penal interest when it is offered by an accused only when "corroborating circumstances show the trustworthiness of the statement." Ehrhardt, Florida Evidence, Section 804.4 (2d ed. 1984) citing to, Jackson v. State, 421 So.2d 15,17 (Fla. 3d DCA 1982). The admissibility of a declaration against penal interest was reviewed in Card v. State, 453 So.2d 17 (Fla. 1984). This Court rejected Card's argument that a discussion prior to the crime about committing a similar crime was not admissible as a declaration against penal interest because there was no corroborating evidence and no assurances of the reliability of the statement.

In the case at bar, in contrast to Card, corroborating circumstances show the trustworthiness of the statement. Nine months after the homicide, Seaman Buettner admitted to murder and recited explicit details of the crime. A few days later, after realizing the consequences of his confession, Seaman Buettner admitted to his CPO Dombrowski that a marine, another sailor and he took a young man named Keith to an area off Hecksher drive in December. The three stabbed, shot with a .38 caliber pistol, and beat a young man to death. The body was left in the seaway off Hecksher Drive. These facts mirror the facts of the crime: that a young man was stabbed, shot, beat to death and left in the river 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, John Hardwick, was denied a fair trial by exclusion of this 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 would 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 and represent himself.

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 Johnston v. State, ___ So.2d ___ (Fla S.Ct. Case No. 65,525 Nov. 13,1986) [11 FLW 585,587], this Court reviewed the procedure when a defendant exercises his right to self representation: "In determining whether a defendant has knowingly and intelligently waived his right to counsel, a trial court should inquire into, among other things: defendant's age, mental status, and lack of knowledge and experience in criminal proceedings." (citation omitted). The Johnston Court found that the trial court made the proper inquiry and correctly concluded that the defendant's desired waiver of counsel was neither knowing and intelligent, in part, because of the reports of his psychiatrists and his past admissions into mental hospitals.

The Johnston inquiry is absent in the case at bar. The trial court made but a cursory examination of the appellant, John Hardwick. The record reflects the following:

Judge Haddock: For the record I am going to find Mr. Hardwick is not, although he does understand the dangers and disadvantages of self-representation, that he is not capable of adequately representing himself, and that he - I am not of the opinion that based on what I hear that he is actually asking to represent himself.

I will find the defendant is asking that [defense counsel] be relieved and another attorney appointed, which is not required. His statement if I do that that I'm forcing him to represent himself I think is nullified by the fact he says he is not competent to represent himself and he doesn't want to.

Hardwick: If the Court doesn't relieve [defense counsel] and if forcing me to represent myself because I do not want [defense counsel] was my counsel, I will represent myself before I accept [defense counsel] as my counsel.

Judge Haddock: Let the record show that I find Mr. Hardwick is not permitted to represent himself and I will deny such request. And I find that he is not competent to represent himself, especially in as serious a matter as a first degree murder charge. (T 74-75).

The trial judge did not make the proper inquiry in this case and incorrectly concluded that the desired waiver was not knowingly and intelligent.

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

Prior to trial, Appellant's Trial Counsel moved to withdraw. Moreover, 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 cursory 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.

Appellee, State of Florida, argues that the Appellant has failed to show an abuse of discretion in the trial court's total restriction of cross-examination of lead Detective Kesinger. The State also admits that the Appellant, John Hardwick, "would certainly be able to advance his theory of defense by the introduction of any competent evidence he may have possessed". (AB 21). The trial court ruled that Seaman Buettner could not testify and in addition, that any testimony by Detective Kesinger regarding Seaman's Buettner's confession or "Banana Man" would be excluded as hearsay. Such rulings are in error.

Appellee's reliance of Steinhorst v. State, 412 So.2d 332 (Fla.1982) is unsound. There, this Court reviewed the Sixth Amendment Rights of a criminal defendant to cross-examine adverse witnesses. The trial court limited the cross examination of a state witness; on appeal, the Florida Supreme Court found that the cross-examination was properly limited in that it was intended at trial to engage in a general attack on the character of the state's witness, and in addition, that the defendant was not deprived of the opportunity to develop a viable defense theory. "This case is not like Coxwell. In order to have developed the viable defense theory, now asserted, defense counsel would have had to go beyond the scope of direct examination. This is a case in which it would have been proper to require the defendant,

to develop this theory, to call his own witnesses as this theory was clearly a defensive matter well beyond the scope of direct examination." Steinhorst v. State, 412 So.2d at 339.

In contrast to Steinhorst, and similarly to Coxwell v. State, 361 So.2d 148 (Fla.1978), in the case at bar defense counsel attempted to cross-examine the key government witness in a capital case regarding matters germane to his previous testimony. In addition, it was completely relevant to the defense. The trial record reflects the following scenario at trial:

Defense Counsel : The other question I'm asking to follow up here, I plan on asking Detective Kesinger at some point in this case whether there were any other suspects to the particular homicide, and did anybody else make any statements to him indicating that they had committed this homicide.

Prosecutor: They had what?

The Court : Committed it.

Prosecutor: Judge, I don't think -- I think that is hearsay.

The Court : I don't think that is.

Prosecutor: All right.

The Court : Did anyone else make a statement who committed? I don't think that's hearsay because it's not asking what the statements are.

Prosecutor: Right. Well, I think it is. Anyone else making any statement that they had committed? The question implies -- or the statement states the answer.

The Court : Well, it's not hearsay. It's not -- well, let's see.

* * *

Defense Counsel : Wait a second. Mr. Buettner and this individual, Banana Man. I think I have the right, and I am going to bring up Banana Man, I want to know whether this detective as the chief detective is aware of any statements made by any individual indicating that they committed this homicide.

Prosecutor: Judge, can I respond to that?

The Court : Yes.

Prosecutor: I think that if he puts that before the jury it is incumbent upon him to put Buettner on the stand and have Buettner state he spoke to this defendant or made that admission. But to ask this detective did Buettner tell you he committed the crime, that's hearsay. He is getting before the jury an out-of-court statement.

Defense Counsel : I'm not going to ask him that.

Prosecutor: Well, --

The Court : Well, I thought you were talking about something Bartley may have said.

Defense Counsel : No, sir.

The Court : If it's Buettner and Banana Man I'm going to -- I'm inclined -- you are trying to get something in on the State's case, or if you can't get it in on yours --

Defense Counsel : Judge, what is the objection? It's not hearsay.

Prosecutor: it is hearsay.

The Court : Yes, I think it is.

Defense Counsel : I mean, but it's also -- I mean, isn't it also hearsay --

The Court : In other words, if you asked him if Bartley ever said he did it and his answer was no, that is not hearsay. But if you ask him if somebody else said they did it and they say yes and that

person is available to you to testify, -- I think that's really getting into the truth of the matter asserted, that is, that somebody else did.

Prosecutor: Judge, what is the difference between asking this witness did Buettner tell you A, B, C, and asking him, or did anyone else tell you A, B, or C? It's essentially asking for a hearsay response and answer that is based upon hearsay.

The Court's ruling is well founded that it is hearsay.

Defense Counsel : Judge, if I may, I think the Court is unduly restricting cross examination. This guy is the chief detective in the case. He is supposed to be aware about the entire case. I think I have a right to ask him if anybody made a statement to him about anything, if he is aware of any other suspects.

The Court's prohibiting the cross-examination essentially renders my examination of Detective Kesinger grossly unfair. I recognize that the State desires the defendant to put his case on in a certain way. I don't think that the defendant is bound by the State's wishes.

The Court : Yes.

Defense Counsel : But I certainly think that the Court should allow thorough examination of Detective Kesinger.

The Court : Well, I don't have any quarrel with the question are there any other suspects or were there any other suspects.

Defense Counsel : And he is going to answer no.

Prosecutor: All right. If there weren't any, so --

Defense Counsel : Well, just --

Prosecutor: I can't recall His answer.

Defense Counsel : I can understand that.

At this time I think I have the right to ask him the question as to whether anybody -- whether he is aware of anybody else admitting the commission of this crime.

Prosecutor: Judge, that is a statement that calls for hearsay. If he is aware of any other person who made an admission about this case, it is incumbent upon him to put the witnesses on, and if that witness denies making the statement, then he can put Kesinger on if he lays a proper predicate in rebuttal.

Defense Counsel : No. I just really disagree with that. That's unduly restrictive. And I can't find this particular individual. I can find one, but the government has not even attempted to find the other. I have the right to bring that to the attention of the jury.

The Court : Do we know he exists?

Defense Counsel : I don't know. But I think I have the right to inquire into it.

The Court : Well, I think you have the right to inquire into anyone that was a suspect.

I think you have the right to inquire -- now, this witness' idea of who is a suspect and who is not is, you know, his own perception.

Defense Counsel : I understand that.

The Court : If he thinks there was no suspect named Banana Man, that's all you can get out of him. People confess to crimeless all the time, you know, when they weren't in the city when the crime occurred.

Defense Counsel : I think the State can bring that out on redirect examination. But if this witness ---

The Court : I don't see how.

Defense Counsel : The Court is placing me in the position of forcing the jury to accept the State's witness' version of the offense.

The Court : Well, you can ask was -- what is the guy's name? Buettner. Was Buettner a suspect, was Banana Man a suspect. But their statements I think you need to get from them.

Defense Counsel : I understand that. I'm not trying to get their statement from him. All I want him to answer for me is -- not their statements, but isn't it true that an individual by the name of Buettner made a statement to you that is a statement against their interest indicating that he may have committed this crime.

Prosecutor: No.

The Court : That's hearsay.

Prosecutor: That's hearsay.

Buettner was not a suspect. It's offered to prove the truth of the matter asserted.

Defense Counsel : Judge, it's not offered to prove the matter asserted. All I want to know is whether that statement was made. I'm not offering it to prove the truth.

Prosecutor: It's hearsay. You have got to put one of them on and ask did you make that statement to Detective Kesinger. If they deny it, then you can call Detective Kesinger.

Defense Counsel : Your Honor, I'm not submitting it to prove the truth of the matter asserted. I don't think the defendant has to prove anything.

Prosecutor: Then why do you want it in?

Defense Counsel : The State has to prove everything.

But it's unduly restrictive of cross examination. I would ask the Court to reconsider, but I will abide by the Court's ruling.

The Court : Okay.

It's kind of ruling in advance. I will sustain the State's objection . . . as it hasn't been

made to the question which hasn't been asked yet.

I will allow him to ask about other suspects, so forth.

Defense Counsel : Your Honor, if I say didn't what's-his-name make a statement, is the Court saying I cannot ask that question?

The Court : You can ask him if he interviewed him and if he made a statement, yes, but not talking about the contents.

Prosecutor: If he interviewed him that may be proper.

Defense Counsel : George, your honor, --

The Court : I already said that.

Defense Counsel : Your Honor, --

The Court : It's just the contents of the interview.

Defense Counsel : I understand that. But what the Court is placing the defendant in the position of is if the government does not want to interview anybody the Court is saying -- or a particular individual or two individuals, the Court is saying the Defense cannot bring that out through the State's witnesses. I would submit they can. I think it's clear that -- I think the jury instructions say that reasonable doubt can arise from the evidence or lack of evidence.

The Court : Yes.

Prosecutor: But Judge.

Defense Counsel : I have a right to bring out exactly what the Jacksonville Sheriff's Office did not do.

The Court : No. You ought to bring out that they did do and you can do that, other than the contents of the statement.

Defense Counsel : Your Honor, I can bring out what they did and

just reaffirm the State's case. I don't want to do that. I want to bring out what they didn't do.

The Court : Which is what?

Defense Counsel : They didn't interview Banana Man. They didn't even attempt to find him. I think I have the right to inquire into that. The Sheriff's Office was made aware of the conversation. The State at that time was made aware of it and the State is now trying to force the Defense and -- to ask the Court to rule to preclude that statement from the jury. I think that's grossly unfair. I think it's unduly, as I indicated, unduly restricting the Defense's right to cross examination.

The Court : Okay. I will sustain the objection.

Defense Counsel : Thank you, Your Honor.

(Thus the side-bar conference ended).

Unlike Steinhorst, the Appellant was unable to develop his theory by calling his own witnesses. Appellant's trial counsel was not trying to get the statements made by Seaman Buettner or "Banana Man" but whether or not the detective is aware that another individual had confessed to the crime.

The trial court erred in restricting defense counsel's cross-examination of prosecution witness, Detective Charles Kesinger. The conviction 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.

Appellant relies on his Argument contained in his Initial Brief.

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

Appellant relies on his Argument contained in his Initial Brief.

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

Appellee, State of Florida, argues that the circumstantial evidence rule is inapplicable to the cause before the court citing to Mitchell v. State, 437 So.2d 138 (Fla.1983). In Mitchell, the defendant made two separate confessions of the homicide to two prison inmates. This court found that such confessions constitute direct evidence of the crime and render the circumstantial evidence rule inapplicable. The State points out that the Appellant's confession to Hyzer constitutes direct evidence of the crime. However, a review of Hyzer's testimony is inconclusive. At one point, Hyzer says: "he said, yeah, he ripped me off and I blew his shit away." (T 515). Such an admission did not constitute the caliber of evidence as in Mitchell to constitute direct evidence of the crime and make the circumstantial evidence rule inapplicable.

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).

The circumstantial evidence is 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 John Hardwick. If fact, the evidence presented by the prosecution which points only to Appellant is the boasting by Hardwick. Bartley did not testify. His absence of testimony is 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. The circumstances, taken as a whole, do not exclude every reasonable hypothesis of innocence.

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

I. Previous Felony Conviction

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

Appellee, State of Florida, submits at the trial court's findings that the murder was committed during the commission of a felony is supported by the record: "Dr. Floro, the medical examiner, testified that the victim's hands could have been tied behind his back. (T 414)." (AB 31). Yet, the trial court found as a matter of law that: "the capital felony was committed while the defendant was engaged in the kidnapping . . . 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).

In the case at bar, the evidence is that the victim voluntarily met with Bentley and Hardwick three times 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.

The State's reliance on Stano v. State, 460 So.2d 890 (Fla.1984), is misplaced. There, the Trial Court noted that "Stano struck both women, thereby stunning them, to keep them from leaving the car, drove to isolated areas (17-1/2 miles and some twenty-five minutes and twenty miles and 30-40 minutes in the respective cases) and then after ordering the women to leave the car, strangled one and shot the other in the head." In contrast, in the case at bar, there was no evidence of force by the appellant.

III. The trial court erred in finding as an aggravating circumstance that the capital homicide was committed for pecuniary gain

The State's reliance on Parker v. State, 458 So.2d 750 (Fla.1984) is unsound. First, 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, thee is no evidence of Hardwick's commercial success as a drug dealer, much less evidence that his commercial success depended on such action as homicide. The trial court erred in its finding that the

homicide was committed for commercial gain or maintenance of reputation.

Second, the finding that an action to maintain a person's reputation in the world of drugs and crime as an aggravating factor of pecuniary gain circumvents the statutory requirement that the aggravating circumstance of pecuniary gain be proven beyond a reasonable doubt.

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.

Appellee, State of Florida, submits that the crime was heinous, atrocious, and cruel because "the trial court's finding that the victim was aware of his impending death is supported by the evidence that his life is threatened by the appellant shortly before he entered the appellant's automobile. Unquestionably, after having been so violently threatened a few minutes before entering the car, the victim had to know that he was taking his last drive." (AB 33). Such an argument falls in face of the testimony adduced at trial.

The record reflects testimony by a number of witnesses that the appellant, John Hardwick, in the company of Jeff Bartley, had three visits with the deceased prior to his death. At the conclusion of the third visit, Hardwick and Bartley drove off leaving the deceased, Keith Pullum and Showalter. Showalter urged Keith Pullum to call he police but Pullum replied "the ain't gonna mess with me." Pullum walked down the road and eventually joined Hardwick and Bartley.

There is no evidence of any coercion or show of force which compelled Pullum to walk from the house down the road to meet with the appellant, John Hardwick and Jeff Bartley. From this, appellant, submits that the statement of Appellee that "the victim had to know that he was taking his last drive" (AB 33) is totally without merit and must be rejected by this court.

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

Appellee, State of Florida, argues that the prior threat by the appellant, John Hardwick, to Showalter and the deceased, Keith Pullum, and the communication of this threat to a third party, DiMaggio, is sufficient to constitute the aggravating circumstances of cold, calculated and premeditated. (AB 35).

The Appellee's argument is unsound. The record reflects that the appellant, John Hardwick, made threats not to a third party of killing Keith Pullum, but to taking care of the unknown individual that stole his quaaludes. (T 424). More importantly, the fact that the appellant contacted the deceased, Keith Pullum, three times prior to Pullum's voluntarily joining the appellant and Jeff Bartley in the automobile demonstrated that Pullum was not concerned about Hardwick's reported threats. Appellant, John Hardwick, points the Court's attention to the fact that Showalter urged the decedent, Keith Pullum, to call the police but that Pullum refused. There was no direct threat to kill Pullum which demonstrates that appellant's state of mind was such that he

intended to kill Pullum. 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 have included offering the decedent a ride in front of his friends and witnesses. A preconceived plan would not have included a homicide by utilizing weapons which the appellant carried and exhibited. The trial court erred in finding that the homicide was committed in a cold, calculated and premeditated fashion warranting the aggravating circumstances.

B. Mitigating Factors

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).

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 court erred in not considering evidence of the appellant's drug abuse. 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. 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.

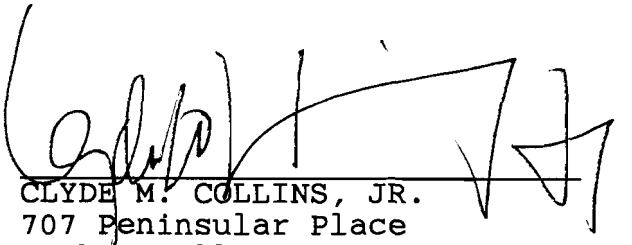
VIII. THE TRIAL COURT IMPROPERLY DOUBLED AGGRAVATING CIRCUMSTANCES BY FINDING THE HOMICIDE HEINOUS, ATROCIOUS AND CRUEL, AND, COLD, CALCULATED AND PREMEDITATED BASED ON THE SAME FACTS.

Appellant relies on his Argument contained in his Initial Brief.

CONCLUSION

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

Respectfully submitted,



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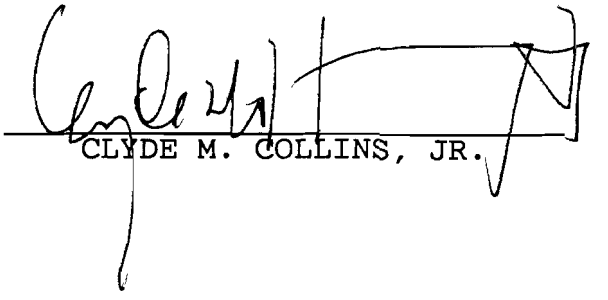
CERTIFICATE OF SERVICE

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 28th day of February 1987.



CLYDE M. COLLINS, JR.

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