IN THE FLORIDA SUPREME COURT

REINALDO AMOROS, :

Appellant, :

vs. : Case No. 68,848

STATE OF FLORIDA, :

Appellee. :

_____:

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Reinaldo Amoros, Appellant, was charged by an Indictment returned by the Grand Jurors of Hillsborough County on June 19, 1985 with first-degree murder (R617-618). Prior to trial, the State served a "Notice of Intent to Rely on Other Crimes, Wrongs or Acts" (R621). Appellant filed a Motion in Limine to exclude evidence and testimony from a prior homicide trial where he was acquitted (R622-623). At a pre-trial hearing, this motion was struck (R622,783).

Trial was before the Honorable Manuel Menendez and a jury on March 17-20, 1986 (R1-606). The jury found Amoros guilty of first-degree murder as charged (R544,642). In the subsequent penalty phase, the jury recommended that a sentence of death be imposed (R604,643).

Appellant's Motion for New Trial was heard and denied on April 7, 1986 (R803-809). At sentencing, held May 23, 1986, the court found two aggravating factors established, Section 921.141(5)(h) and (i)(R836,838). The court specifically found that several non-statutory mitigating factors were established but did not outweigh the aggravating factors (R843-844). A sentence of death was imposed (R844,658).

Written findings, entitled "Sentence", in support of the death sentence imposed were prepared by the trial judge on June 10, 1986 (R665-669, see Appendix).

Notice of Appeal was filed May 23, 1986 (R660). Court-appointed counsel was permitted to withdraw and the Public Defender

of the Tenth Judicial Circuit appointed to represent Amoros on appeal (R664).

Pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Fla.R.App.P. 9.030(a)(1)(A)(i), Reinaldo Amoros, Appellant, now takes appeal to this Court.

STATEMENT OF THE FACTS

A. Trial - Guilt or Innocence Phase

The State's case consisted entirely of circumstantial evidence. No testimony or evidence was offered by the defense.

State witness Veronica Simmonds was Appellant's ex-girl friend (R232). They had lived together for more than four years and had one daughter, three years old at the time of the trial (R232). In March of 1985, she broke off the relationship with Mr. Amoros (R233).

Ms. Simmonds had remained friendly with the Amoros family (R239). On May 31, 1985, she had dinner with the family and she encountered Appellant, Reinaldo Amoros (R239). He noticed that she was driving a different automobile (R240). She refused to tell him who owned this automobile (R240). According to the witness, Amoros said he was going to kill her (R241).

The next day, June 1, 1985, around 10 p.m., Ms. Simmonds went to the Tampa Police Department to report the threat (R241-242). She left her new boyfriend, Omar Rivero, inside her Kennedy Boulevard apartment (R242). She padlocked the rear door to the apartment at Rivero's request (R242-243)

At the police station, she told Detective Philip Saladino about the threat. Several police officers accompanied her to the Amoros family residence, but Appellant was not there (R245,365-366).

When Veronica Simmonds returned to her apartment, she found the police already there and was told that Omar Rivero had been shot to death (R245-246,368).

Two residents of Ms. Simmonds' apartment building, Bobby Fullwood and Amanda Dixon, testified for the State (R267-297,298-315). The two of them were sitting outside their apartment around 12:30 a.m. on June 2 (R268,299-300). A man approached them and asked if a lady and a little girl lived there (R272,301). Fullwood and Dixon replied "Yes" and pointed in the direction of Apartment No. 5 (R272,301). The man walked around the corner of the building in the direction of Kennedy Boulevard and the entrance to Apartment No. 5 (R276,292,301-302).

About two minutes later, the witnesses Fullwood and Dixon, heard two gunshots (R279-280,302-303). Something crashed against the inside of the rear door to Apartment No. 5 and Fullwood heard a man yell "Aw". (R280-281) While Ms. Dixon went inside their apartment (No. 3), Fullwood ran to a phone booth on Kennedy Boulevard to call the police (R280-281,302).

Later that night, Fullwood and Dixon were taken to the police station where Detective Saladino showed them a photopack (R282). Both Fullwood and Dixon selected a photo of Appellant and said that he was the man they saw just prior to the shooting (R282-283,304-305, 369-370). They also identified Appellant at trial as the person they saw (R278,304).

Tampa Police Sergeant John Cuesta was dispatched to the Kennedy Boulevard apartment (R319). He discovered an individual collapsed near the rear door (R321). The victim had a chest wound and showed no vital signs (R321).

Crime Scene Technician Herbert Bush retrieved three spent shell casings and two bullets from the apartment (R339).

Dr. Charles Diggs of the Hillsborough County Medical Examiner's Office performed an autopsy on the victim, identified as Omar Rivero (R346). Dr. Diggs indicated that Rivero suffered three gunshot wounds, two through the right arm and one to the chest (R347). The chest wound was lethal (R348). A projectile was removed from Rivero's chest (R352).

Around 7:00 a.m. on June 2, a pistol was found discarded in a residential neighborhood several miles from the homicide scene (R356). FDLE firearms identification analyst Joseph Hall gave an opinion that the bullet removed from Rivero's chest had been fired from the discarded pistol (R434).

Over defense objection that the evidence should be limited to showing that Appellant had possession of the pistol on a prior occasion, the prosecutor was allowed to bring in testimony from a prior trial where Amoros was acquitted of second-degree murder (R390-393). The court gave the jury a "Williams Rule" instruction that they should consider the testimony and evidence for the limited purpose of proof of identity (R393-394).

Shawn Jerry Dixon testified that on April 30, 1985, he accompanied Reinaldo Amoros to Paulette Suber's house (R396). Amoros referred to Paulette as his wife and the purpose of the visit was to give her some money (R396). They let themselves into her house and Amoros knocked on the bedroom door (R397). Eventually, Paulette came to the door and a man also came out of the bedroom (R399).

A fight erupted. While the witness Dixon was trying to control Paulette, Amoros and the other man were tussling (R400).

Dixon heard a shot and turned to see Amoros holding a pistol (R400-401).

As the other man stumbled back to the bedroom, Dixon and Amoros left and drove back to Ybor City (R402). Amoros was driving and he held the gun in his hand (R402). Dixon said the pistol in evidence looked like the one Amoros had on that day (R401). When Amoros dropped Dixon off at the Manila Bar, Dixon did not see the gun anymore. He was not sure whether Amoros had thrown the gun out the window (R402-404).

Assistant State Attorney Edward J. Page testified that he was the prosecutor at Amoros' trial where he was charged in the above-mentioned shooting homicide of Walter Coney (R406,411). At this trial, Amoros testified that Coney started the fight by striking him with a beer can (R408). As the two men struggled, Coney pulled a gun (R409). Amoros wrestled it away from him (R409). Coney struck Amoros causing the firearm to discharge into Coney's chest (R409). Amoros said he left the scene with the pistol but threw it out the window as he was driving away with Dixon (R410).

Prosecutor Page said he didn't have ample opportunity to properly investigate and prepare his case (R412-413). The jury found Amoros not guilty (R416).

The court read a stipulation to the jury that the bullet which the State was placing into evidence had been removed from the body of Walter Coney during an autopsy (R421-423,640). FDLE firearms examiner Joseph Hall testified to his opinion that the bullets removed from Coney and Rivero had both been fired from the pistol in evidence (R436).

Defense counsel moved for judgment of acquittal on the ground that the circumstantial evidence presented was insufficient to exclude a reasonable hypothesis of innocence (R438-443). The court denied the motion for judgment of acquittal (R443). After resting, defense counsel's renewed motion for judgment of acquittal was again denied (R445,447-448).

During the charge conference, defense counsel requested a special jury instruction on circumstantial evidence be given (R463, 641). The court then offered to give a different circumstantial evidence instruction (R468-469), but withdrew the offer when the State objected (R478). Defense counsel objected to the denial of both instructions on circumstantial evidence (R478).

The prosecutor's final argument featured extensive reference to the shooting of Walter Coney for which Amoros had been acquitted (R500,511,513-516). The prosecutor summarized:

> This gun, ladies and gentlemen, this gun right here was in the defendant's hand on April 30th, 1985, when Walter Coney was shot after he was in the bedroom with the defendant's girl friend, Paulette. This gun kills Omar Rivero where he lives with Veronica Simmonds, the defendant's former girl friend. Two men in the company of the defendant's former girl friends and they're both killed with the same gun.

(R516-517)

The jury returned a verdict finding Amoros guilty of murder in the first degree (R544).

B. Trial - Penalty Phase

When the trial judge announced his intention to take a short recess and then proceed with penalty phase if the State wished, defense counsel requested more time to prepare for the second phase (R546). Counsel requested an opportunity to put on evidence other than solely the defendant's testimony (R546). The court recessed at 12:35 p.m. and resumed proceedings at 2:05 the same day (R552-553).

The State presented no further evidence (R577). Amoros testified on his own behalf through an interpreter (R578-580).

Appellant said he was 29 years old and a native of Cuba (R578). He was a college graduate, employed in Cuba as a physical education teacher and a member of the Cuban national baseball team (R579). He had two daughters, ages 3 years and 18 months and always provided financial support for them (R579-580). He came to the United States in 1980 (R580). While in Cuba, he never had any criminal record (R580).

In his penalty phase argument, the prosecutor contended that the victim, Omar Rivero, was pounding on the door of the apartment "trying to get out" (R585). Saying that Rivero was in fear of his impending death, the prosecutor urged the jury to give the heinous, atrocious or cruel aggravating factor "considerable weight" (R585). The prosecutor also urged the jury to consider whether the victim would have preferred to spend his life in prison instead of being killed (R589). Since the victim was given no choice, the prosecutor argued that Appellant deserved death (R589).

The jury returned a recommendation that Amoros be sentenced to death (R604). The court ordered a pre-sentence investigation report and scheduled sentencing for a later date (R604).

C. Sentencing

At sentencing before the court, Appellant again testified under examination by defense counsel (R815-820). Amoros testified that he came to the United States in the Mariel boatlift because he thought he would be able to play professional baseball (R816). His uncle, Sandy Amoros, had played for the Brooklyn Dodgers in the 1950's (R819). Although Appellant had discussions with the Detroit Tigers, he was never signed to a contract (R816-817).

He never found work in this country equivalent to the physical education teaching he had done in Cuba (R818). His college degree from Cuba was not accepted in this country (R817-818). His main employment was with the Perfecto Garcia Cigar factory (R817-818).

Veronica Simmonds also testified as a defense witness (R820-821). She said that Amoros was the father of her three year old daughter and that he had always provided financial support and paternal contact (R820-821).

After arguments and defense counsel's assertion that he had reviewed the pre-sentence investigation for accuracy (R835-836), the court made findings that the aggravating factors of heinous, atrocious or cruel [§921.141(5)(h)] and cold, calculated and premeditated [921.141(5)(i)] were established by the evidence (R836-839). The written findings which appear in the Appendix to this brief track the oral findings made by the court at the sentencing

hearing. The court reviewed each of the statutory mitigating circumstances and concluded that none were applicable (R840-842). In regard to non-statutory mitigating circumstances, the court summarized the defense testimony and concluded that non-statutory mitigating factors were established and were considered by the court (R843). The judge found that these mitigating circumstances did not outweigh the aggravating circumstances and imposed a sentence of death (R844).

SUMMARY OF ARGUMENT

The trial court erred by admitting extensive evidence concerning the shooting by Amoros of another man in a prior incident. Amoros had stood trial for this offense and was acquitted. Consequently, it was a violation of fundamental fairness to allow the jury to hear testimony about this homicide and for the prosecutor to argue as proof of guilt that Appellant had a propensity to kill men who became involved with his former girlfriends.

Appellant's request for a jury instruction on the law applicable to circumstantial evidence was denied. Recognizing that this Court has held such an instruction to be discretionary, Amoros contends that this Court should limit or recede from prior authority in recognition of the enhanced burden of proof applicable in Florida state courts where the only proof of guilt is circumstantial. In any event, under the facts of this case, denial of a circumstantial evidence instruction was an abuse of discretion.

The testimony and evidence relating to the prior homicide for which Amoros was acquitted also prejudiced the penalty phase proceedings. The prosecutor had even inferred that Amoros was really guilty of the prior homicide, even though he was acquitted. Accordingly, the jury's death recommendation was tainted by impermissible considerations.

The prosecutor's closing argument in the penalty phase was improper. Not only did he misstate the evidence, but he also urged a sentence of death for irrelevant considerations.

The trial court's finding that the homicide was heinous,

atrocious or cruel was not supported by the evidence. The record does not support the conclusion that the victim was pounding the backdoor and moaning while dying. This shooting homicide was indistinguishable from others where this Court has reversed trial court findings of this aggravating circumstance.

The homicide was not cold, calculated and premeditated because all of the evidence pointed to passionate obsession as a motive. Indeed, the evidence of premeditation was not so strong as to rule out the possibility that a confrontation with the victim, rather than homicide, was planned.

A comparison of the facts at bar with other capital cases in which this Court has approved or disapproved sentences of death shows that a sentence of death is disproportionate in this case.

ISSUE I.

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF A COLLATERAL CRIME FOR WHICH APPELLANT WAS ACQUITTED.

Amoros was tried in Circuit Court Case No. 85-4426 for second degree murder in the shooting of Walter Coney (R621-623). After trial in December 1985, Amoros was acquitted of this offense (R412,416).

A. Evidence Admitted from Prior Trial Ending in Acquittal

In the case at bar, the State filed a "Notice of Intent to Rely on Other Crimes, Wrongs or Acts" (R621) which stated an intent to introduce as evidence:

> The same firearm was used to kill Walter H. Coney (victim in Case No. 85-4426) and Omar Rivero (victim in Case No. 85-5570)

(R621)

At trial, prior to calling Shawn Dixon as a witness, the prosecutor announced to the bench:

> Well, I intend to get into the same testimony he gave at the first trial. They went over there to Paulette Suber's house and what happened during the night. And that he saw this man with the gun.

(R390)

Defense counsel objected to introduction of any testimony broader than that necessary "to link the gun up with this defendant" (R390-391). Defense took the position that the prosecutor was limited to asking the witness if he saw Amoros "with the gun in his hand on the day in question" (R392).

The prosecutor contended that it was necessary to show that Coney was shot and a bullet removed from him (R392). A stipulation between the parties was later read to the jury stating that State's Exhibit 24 (a bullet) was removed during the autopsy of Walter Coney (R423,640).

In regard to the fact that Amoros had been tried and acquitted for the homicide of Walter Coney, the prosecutor represented:

> There's no problem with that. The fact that he's been acquitted, there's no bearing with the case law. He can be found not guilty, and you can use this instruction.

(R393)

At defense request, the court then gave the jury a slightly modified version of the standard "Williams Rule" instruction (R393-394). The jury was instructed to consider the evidence "for the limited purpose of proving identity on the part of the defendant" (R394).

The State proceeded to call Shawn Dixon to testify that he accompanied Appellant on April 30, 1985 to the house of Paulette Suber, referred to by Amoros as "his wife" (R396). Amoros went directly into the house and knocked on the bedroom door (R397). Eventually, Paulette came out of the bedroom and started "tussling" with Appellant (R399). Then, Walter Coney came out of the bedroom and the two men began to fight (R399). While Dixon was trying to keep Paulette out of the struggle, he heard a shot and turned to see Amoros with a gun in his hand (R400-401).

The witness and Amoros then left and drove back to Ybor City (R402). Dixon testified that the driver, Amoros, was holding the gun in his hand, "knocking it on the steering wheel" and saying

his wife "shouldn't have done him like that" (R402). When Amoros dropped him off at the Manila Bar, Dixon did not see the gun anymore (R403). The gun in evidence looked like the gun Amoros had on that day (401,404).

The assistant state attorney who had prosecuted Amoros for the shooting of Coney also testified. Edward J. Page said he prosecuted Amoros at a trial in December 1985 and recounted the testimony Amoros gave at this trial (R406-410). Page testified that Amoros said he was struggling with Coney when Coney pulled a gun on him (R409). They wrestled for the gun and Amoros grabbed it (R409). When Coney struck him again, the gun discharged (R409).

Page testified that Amoros said that the gun didn't belong to him (R410). Amoros admitted taking the gun from the scene of the shooting, but said he threw it out of the window as he and Dixon drove away (R410).

The jury in this prior trial found that Amoros was not guilty (R416).

B. Fundamental Fairness

In State v. Perkins, 349 So.2d 161 (Fla.1977), this Court considered whether evidence of crimes for which a defendant has been tried and acquitted may be admitted at a subsequent trial. The Perkins court noted a split of authority, but decided to follow the Fifth Circuit's position expressed in Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972). This Court wrote:

> We agree with Wingate that it is fundamentally unfair to a defendant to admit evidence of acquitted crimes. To the extent that evidence of the acquitted crime tends to prove that it was indeed committed, the defendant is forced to reestablish a defense against it. Practically, he must do so because of the prejudicial effect the evidence of the acquitted crime will have in the minds of the jury in deciding whether he committed the crime being tried. It is inconsistent with the notions of fair trial for the state to force a defendant to resurrect a prior defense against a crime for which he is not on trial.

349 So.2d at 163.

Accordingly, the Perkins court held that relevant evidence of collateral crimes otherwise admissible under the "Williams Rule" is barred where acquittal has been obtained.

In Holland v. State, 466 So.2d 207 (Fla.1985), this Court reaffirmed the holding in Perkins while declining to extend it to the situation where charges on the collateral offense were dropped without going to trial. The Holland court termed introduction of evidence of a crime for which the defendant has been acquitted "repugnant to notions of fair play." 466 So.2d at 209.

Applying these holdings to the case at bar, it is clear that evidence tending to prove that Amoros was guilty of the homicide of Walter Coney should not have been admitted because Amoros had stood trial for this homicide and was acquitted.

C. Proper Limitation of Similar Fact Evidence

At bar, it was certainly an essential part of the State's case for the prosecution to link Amoros to the gun which was retrieved after the shooting of Rivero. Crime laboratory analysis showed that this gun fired the bullet which killed Rivero and also the bullet which killed Coney (R433-436). Since there was no substantial evidence linking Amoros to the gun in relation to the shooting of Rivero, evidence linking him to the gun at any earlier time would be both relevant and inculpatory.

It does not follow, however that all of the evidence from the prior trial was necessary or admissible. Defense counsel correctly did not object to all of the evidence the State wanted to introduce; he asked the court to limit the evidence to that necessary to link the gun to Amoros (R390-392).

In Jackson v. State, 498 So.2d 406 (Fla.1986), the defendant had been acquitted of attempted first-degree murder when tried for an incident which occurred during her flight from the homicide of a police officer. At trial for first-degree murder in the death of the officer, the trial court specifically limited testimony about the incident such that:

> No testimony was allowed concerning the alleged shooting or concerning the facts of the alleged crime of which appellant was acquitted.

498 So.2d at 410.

The trial court's limitation of the testimony to facts which placed the defendant in the witness' cab with a handgun was approved by this Court because the evidence did not show a collateral crime.

If the trial judge at bar had been more heedful, it would have been possible to tailor the testimony to show no more than Amoros' possession of the gun at an earlier date. Even if the court found it necessary to show that Amoros fired the gun on the earlier date, it was unnecessary and excessively prejudicial to show that he shot Coney to death.

D. Improper Use of the Similar Fact Evidence in Closing Argument

Although the trial judge instructed the jury that they should consider the collateral crime testimony solely for the purpose of proving "identity on the part of the defendant" (R394,535), the prosecutor asked the jury to go beyond that. After extensive reference to the gun being in Amoros' hand when Coney was shot and killed (R500,505,511, 513,514,516), the prosecutor made his point directly:

> This gun, ladies and gentlemen, this gun right here was in the defendant's hand on April 30th, 1985, when Walter Coney was shot after he was in the bedroom with the defendant's girl friend, Paulette. This gun kills Omar Rivero where he lives with Veronica Simmonds, the defendant's former girl friend. Two men in the company of the defendant's former girl friends, and they're both killed with the same gun.

(R516-517)

Clearly the prosecutor asked the jury to regard the facts from the shooting of Coney as evidence of Appellant's propensity to kill new boyfriends of his former girlfriends. Propensity to commit crime is an impermissible use of any similar fact evidence. Section 90.404(2)(a), Florida Statutes (1985); Peek v. State, 488 So.2d 52 (Fla.1986).

The situation at bar is parallel to that in Williams v. State, 117 So.2d 473 (Fla.1960). In Williams, evidence of a collateral crime was admissible only because of its relevancy to the identity of the defendant and the weapon. However, the prosecution's use of this evidence transcended these bounds and turned into an assault on the character of the defendant. Noting that a sentence of death had been imposed, the Williams court reversed for a new trial because the testimony about the collateral crime was disproportionate to the issues to which the evidence was germane. Amoros should be given a new trial for this same reason.

ISSUE II.

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST FOR A JURY INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE.

At the outset, Appellant recognizes that this Court held in Williams v. State, 437 So.2d 133 (Fla.1983) that a specific jury instruction on circumstantial evidence is discretionary with the trial judge. The Williams court said a showing of palpable abuse of discretion was required in order to reverse the trial judge's denial of requested instruction on circumstantial evidence.

Appellant's argument here is two-fold. One, he asks this Court to recede from or limit the holding in Williams. Two, he argues that the trial judge did abuse his discretion when he denied Amoros' request for an instruction on circumstantial evidence.

A. Evidence at Trial and the Court's Offer to Give a Circumstantial Evidence Instruction Which Was Later Revoked.

It was undisputed that the evidence against Amoros was totally circumstantial. The prosecution relied upon Amoros': 1) Prior threat to Veronica Simmonds, 2) Presence at the homicide scene only minutes before Rivero was shot to death in Veronica Simmonds' apartment, and 3) Possession of the murder weapon during an incident occurring slightly over a month previous to the Rivero shooting. The defense emphasized that: 1) the high-crime skid row neighborhood where the shooting took place had dangerous characters on the street both night and day and 2) Amoros previously gave sworn testimony that he discarded the pistol over a month before the Rivero homicide.

In accordance with the Florida standard of proof applicable where a conviction is wholly based on circumstantial evidence, defense counsel requested that the jury be instructed:

> The Court instructs you that where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.

(R463,641)

When the State objected to this instruction, the trial judge indicated that he thought the jury should be told about circumstantial evidence (R464). The trial judge read a different circumstantial evidence instruction and proposed to give it to the jury (R468-469). Defense counsel agreed to accept the court's proposed instruction (R469).

The next morning, however, after objection from the State, the court declined to give either of the two proposed circumstantial evidence instructions (R478).

B. Proof of Facts by Circumstantial Evidence in Florida.

It is axiomatic that a defendant is entitled to have the jury correctly instructed on the law applicable to his theory of defense. See Smith v. State, 424 So.2d 726 (Fla.1982) and cases cited therein. At bar, the question for the jury to decide was whether the defense hypothesis of innocence was reasonable or unreasonable. Accordingly, the defense proposed instruction was a correct statement of Florida law. Jaramillo v. State, 417 So.2d 257 (Fla.1982).

The standards of proof applicable where the evidence of guilt is wholly circumstantial are different in federal courts and Florida state courts. See generally Hill, "Circumstantial Evidence in Criminal Cases in Florida", Florida Bar Journal, May 1987. As explained in Mr. Hill's article, the prosecution has a higher burden of proof in Florida state courts where proof of guilt is circumstantial.

The problem at bar is that the jury was never informed of this burden of proof applicable in Florida state courts. They were given only the same reasonable doubt instruction that a federal jury might receive. Indeed, when this Court deleted the circumstantial evidence instruction from the Standard Jury Instructions, it relied upon the absence of special treatment for circumstantial evidence cases in the federal courts and the United States Supreme Court's opinion in Holland v. United States, 348 U.S.121, 75 S.Ct.127, 99 L.Ed. 150 (1954). See In re Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla.1981).

Because the law of circumstantial evidence in Florida is that set forth in McArthur v. State, 351 So.2d 972 (Fla.1977) and its progeny, the defendant in a criminal case should be entitled to a jury instruction on this law when the sole question before the jury is whether the prosecution has satisfied its burden of proof. Amoros was denied his right to due process of law under Article I, Section 9 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution when the trial court denied both requested instructions on circumstantial evidence.

C. The Trial Court Abused His Discretion By Denying An Instruction On Circumstantial Evidence.

In Williams, supra, this Court specifically noted that a trial judge retained discretion to give an instruction on circumstantial evidence when the peculiar facts of a specific case made such an instruction necessary. 437 So.2d at 136. At bar, the trial judge recognized the need for a circumstantial evidence instruction:

> We've heard a lot of talk about circumstantial evidence here in the opening statements and in closing arguments. Maybe we ought to tell the jury something about circumstantial evidence.

(R464)

His retreat from this correct position under the repeated objection to such an instruction by the prosecutor constituted an abuse of discretion because the trial judge went against his better judgment in capitulating to the prosecutor.

Accordingly, Appellant's conviction and sentence should be vacated and this case remanded for a new trial.

ISSUE III.

ADMISSION OF THE EVIDENCE RELATING TO A PRIOR OFFENSE FOR WHICH APPELLANT WAS ACQUITTED DEPRIVED APPELLANT OF A RELIABLE SENTENCING DETERMINATION UNDER THE UNITED STATES CONSTITUTION, EIGHTH AND FOURTEENTH AMENDMENTS.

In Issue I, the testimony and evidence received regarding the shooting death of Walter Coney was presented. Appellant's argument in Issue I was directed entirely to the resulting prejudice in the guilt or innocence phase of his trial. Now, the spill over effect of this similar fact evidence will be considered in relation to the fairness of the penalty phase proceedings.

Although the shooting homicide of Walter Coney was not mentioned during the penalty phase of the trial, the jury nonetheless could not be expected to forget it. The guilt or innocence phase of the trial concluded March 20, 1986 when the jury returned its guilty verdict at 12:10 p.m. (R544). After a lunch break, the penalty phase proceedings commenced at 3 p.m. (R576) and were concluded at 5:45 p.m. the same day (R603). Therefore, this evidence must have been fresh in the jurors minds.

In Robinson v. State, 487 So.2d 1040 (Fla.1986), the trial court allowed the State to cross-examine defense witnesses at penalty phase regarding crimes the defendant had allegedly committed, but was never charged with. This Court stated:

> Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too far in this instance.

487 So.2d at 1042.

The same is true at bar. Although Amoros was acquitted of the shooting homicide of Coney, the prosecutor encouraged the jury to infer that the acquittal was unwarranted. In particular, the prior prosecutor Page testified that he didn't have ample time to prepare his case properly (R412-413). As noted in Issue I, the prosecutor's closing argument in the guilt or innocence phase suggested that Amoros had a propensity to kill the new boyfriends of his ex-girlfriends.[1/]

This prejudicial commentary may well have caused some jurors to conclude that Amoros had literally gotten away with murder in the shooting death of Coney. Their penalty recommendation of death might well have been tainted by these considerations.

In capital sentencing proceedings, an especially heightened degree of due process under the Fourteenth Amendment and scrutiny under the Eighth Amendment must be observed, California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). Where the Court cannot determine that an error had no effect on the sentencing decision, a sentence of death does not meet the Eighth Amendment standard of reliability. Caldwell v. Mississippi, __U.S.__,105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)(e.s.).

Because evidence of a crime for which Amoros had been acquitted may have impermissibly entered into the jury's penalty recommendation, the sentence of death should be vacated and a new penalty trial ordered.

[1/] See also Keen v. State, Case No. 67,384 (Fla.March 19, 1987) [12 F.L.W. 138].

ISSUE IV.

THE PROSECUTOR'S CLOSING ARGUMENT IN PENALTY PHASE MISSTATED THE EVIDENCE AND PUT OTHER IMPROPER CONSIDERATIONS BEFORE THE JURY.

In his closing argument during the penalty phase, the prosecutor was describing the shooting of Rivero:

> Dr. Diggs told you he was able to run after he was shot in the chest. He's pounding on the door trying to get out. Pounding on the door is a reasonable inference you can draw from what Mr. Fullwood heard that night. He's moaning after he pounds on the door.

(e.s.)

* * *

> Omar Rivero, as he was pounding on that back door, must have realized he was going to die. He was in fear of impending death. Nothing more heinous, nothing more atrocious, nothing more cruel than this man firing this weapon three times at Omar Rivero as Rivero ran for his life in his own apartment. This man, Omar Rivero, was not shot once and dropped down dead instantaneously. The evidence is abundantly clear that he made it through that house to that back door. He was in pain when he pounded on that back door. He moaned in pain.

(R584-585)

This dramatic account is an exaggeration and misstatement of Fullwood's testimony. "Pounding on the door" is not a reasonable inference to be drawn from the actual testimony of Bobby Fullwood, who testified:

> Q. What did you and Miss Dixon do after you heard the gunshots?
>
> A. It was close to her, I grabbed her and pushed her inside No. 3 apartment. And when I was going in to close the door, something ran up against the back door and fell up against the back door. There's some glass in that door; you can hear it loud and clear.

Q. You said something ran up against the back door. Which back door are you talking about?

A. The same back door that was padlocked.

(R280)

* * *

Q. Did you hear anything else coming from that apartment?

A. Yeah, I heard him holler. He goes, "Aw," like that.

Q. Was this a man's voice or a woman's voice?

A. A man's voice.

Q. Did you hear him holler like that before the -- before the banging on the back door or after the banging on the back door?

A. No. After something banged is when he hollered.

(R281)

Fullwood's account suggests that the shooting victim attempted to run out through the rear door. Because the door was padlocked, the victim collided with the door. His exclamation "Aw" probably resulted from the force of the collision. In no way is Fullwood's testimony suggestive of a man futilely pounding on a locked door while moaning in pain. See also Issue V for discussion of this unsupported inference in relation to the heinous, atrocious or cruel aggravating factor.

In the ABA Standards relating to prosecution conduct, Standard 3-5.8 (2d ed.1979) governs argument to the jury. It provides in part:

> (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

At bar, the prosecutor improperly distorted the evidence which could have misled the jury into recommending a sentence of death.

The prosecutor also encouraged the jury to make a death penalty recommendation for reasons outside of the statutory factors. In a variation of "golden rule" argument, the prosecutor asked the jury to speculate upon life in prison and whether the homicide victim would have chosen to go to prison for life rather than be killed:

> Well, what about the life in prison, ladies and gentlemen, life in jail? I don't think any of us would want to spend one day in jail. But what about life in jail? What do you do in jail? You laugh in jail; you eat in jail; you work in jail; you cry in jail; you participate in sports in jail; you make friends while in jail; you watch TV while in jail; you live to learn about the wonders that the future holds. In short, ladies and gentlemen, it's life, it's living.
>
> People want to live. If Omar Rivero had had a choice to go to jail for life rather than be lying at that back door with three bullets in him, what choice would Omar Rivero have made? People want to live. Omar Rivero did not have that choice. And we've already gone over that; we know why. Because that man decided for himself that Omar Rivero should die. And for making that decision, just as he deserved to be convicted, the State would contend, he deserves to die.

(R589)

This Court has consistently condemned similar prosecutorial argument which urges a death sentence for irrelevant sentencing factors. As this Court wrote in Bertolotti v. State, 476 So.2d 130 at 133 (Fla.1985);

> These considerations are outside the scope of the jury's deliberation and their injection violates the prosecutor's duty to seek justice, not merely "win" a death recommendation. ABA Standards for Criminal Justice 3-5.8 (1980).

The cumulative effect of the prosecutor's closing argument during penalty phase was to deny Amoros his Sixth Amendment right to a fair trial, his Fourteenth Amendment right to due process of law, and his Eighth Amendment right to a reliable sentencing determination in a capital case. This Court has recognized that a jury recommendation is critical where there is mitigating evidence and less than overwhelming evidence in aggravation because the Tedder standard restricts the ability of the sentencer to override a jury life recommendation. Valle v. State, Case No. 61,176 (Fla. January 5, 1987)[12 F.L.W. 51]. Since the prosecutor's improper argument may well have influenced the jury to recommend death, Amoros should be granted a new penalty trial before a new jury.

ISSUE V.

THE HOMICIDE WAS NOT ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The State's evidence at trial tended to prove that Rivero, the victim, was shot three times (R339,351). The location of shell casings and projectiles within the apartment indicated that the victim was probably wounded in one area and then fled from the killer (R333-334). The victim was found slumped near the padlocked rear door to the apartment (R321).

Although this killing was heinous like all murders, it was not the "especially heinous" sort of killing for which the legislature intended the aggravating circumstance of Section 921.141(5)(h), Florida Statutes (1985) to apply. The facts at bar are almost identical to those in Lewis v. State, 377 So.2d 640 (Fla. 1979)(victim shot in chest and several more times as he attempted to flee). This Court found the facts of Lewis did not set the homicide apart from the norm of capital felonies and consequently rejected the HAC aggravating circumstance.

In the written "Sentence" (R665-669, see Appendix) the sentencing judge concluded that the "victim did not experience an instantaneous death, but rather was forced to endure the terror and helpless anticipation of his impending death" (R666, see Appendix). This conclusion is not supported by the record. Indeed, the court's finding of the underlying facts was erroneous. The sentencing judge wrote:

> Witnesses heard the fatal gunshots, a man's moaning and finally futile pounding from inside of the apartment at the backdoor. (R665-666, see Appendix)

In fact, the sole witness to testify about any events following the gunshots specifically contradicted this dramatic account. Bobby Fullwood testified on direct examination:

> Q. What did you and Miss Dixon do after you heard the gunshots?
>
> A. It was close to her, I grabbed her and pushed her inside No. 3 apartment. And when I was going in to close the door, something ran up against the back door and fell up against the back door. There's some glass in that door; you can hear it loud and clear.
>
> Q. You said something ran up against the back door. Which back door are you talking about?
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> A. The same back door that was padlocked.

(R280)

* * *

> Q. Did you hear anything else coming from that apartment?
>
> A. Yeah, I heard him holler. He goes, "Aw," like that.
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> Q. Was this a man's voice or a woman's voice?
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> A. A man's voice.
>
> Q. Did you hear him holler like that before the -- before the banging on the back door or after the banging on the back door?
>
> A. No. After something banged is when he hollered.

(R281)

Fullwood's account suggests that the shooting victim attempted to run out through the rear door. Because the door was padlocked, the victim collided with the door. His exclamation "Aw" probably resulted from the force of the collision. Indeed, the

victim may have had his wind knocked out of him and lost consciousness at that moment. In any case, the fact that a shooting victim does not experience an instantaneous death is insufficient to establish the HAC aggravating factor. See e.g., Teffeteller v. State, 439 So.2d 840 (Fla.1983).

Another decision from this Court where parallel facts were presented is that of Tedder v. State, 322 So.2d 908 (Fla.1975). The defendant in Tedder was recently separated from his wife.

Approaching them while they were in the front yard Tedder began shooting at his wife and mother-in-law. They fled into their residence and he pursued them, shooting the mother-in-law. Tedder would not permit any medical assistance to be given to his victim and she eventually died almost a month later. The trial court found the crime especially heinous, atrocious or cruel.

On appeal, this Court found the aggravating factor was not established. The Tedder court quoted this Court's previous definition of the HAC aggravating circumstance:

> 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. 322 So.2d at 910, fn.3 quoting from State v. Dixon, 283 So.2d 1 at 9 (Fla.1973).

Applying this definition to the facts at bar, it is clear that the shooting of Rivero, while reprehensible, was within the "norm of capital felonies." There are no additional acts which could set this crime apart from the typical capital felony or this Court's decisions previously mentioned. Accordingly, the sentence of death imposed on Amoros must be vacated.

ISSUE VI.

THE HOMICIDE WAS NOT COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The sentencing judge found that the aggravating circumstance of Section 921.141(5)(i), Florida Statutes (1985) (cold, calculated, and premeditated) was applicable. In the written "Sentence", the court strongly relied upon Ms. Simmonds' testimony that Amoros had threatened her life on the previous day (R666, see Appendix). The court concluded that because the assailant was armed when he came to Simmonds' apartment the next night, he had already formed the intent to kill someone there (R666, see Appendix).

This conclusion rejects the possibility that the assailant came to the apartment to confront Simmonds and/or her boyfriend, without having formed deliberate intention to kill anyone. The victim, Omar Rivero, may have said something or otherwise provoked the shooting. Because aggravating circumstances must be proved beyond a reasonable doubt, the evidence to support application of the CCP factor is insufficient. Williams v. State, 386 So.2d 538 (Fla.1980).

Another reason why the CCP aggravating circumstance does not apply is the romantic triangle relationship existing between the parties. In McCray v. State, 416 So.2d 804 (Fla.1982), this Court said this aggravating circumstance:

> ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive. 416 So.2d at 807.

Personal animosity arising from jealousy does not fit within this description.

The facts at bar show that Veronica Simmonds had lived with Amoros for more than four years (R232). They had a three year old daughter together (R232). In March 1985 (two to three months before this homicide), Ms. Simmonds broke off the relationship with Amoros.

Simmonds testified that she did not tell Amoros whose car she was driving on May 31 because she knew "he was going to have problems with me if I told him" (R240). Evidently, Simmonds knew Amoros had a jealous and excitable temperment.

Even if the homicide at bar was planned in advance, there was nothing to characterize it as "cold". Moreover, when passionate obsession lies behind a killing, there is at least a "pretense" of moral or legal justification.

In comparable homicides, this Court has never applied the cold, calculated and premeditated factor. In Simmons v. State, 419 So.2d 316 (Fla.1982), the evidence showed that the accused was involved romantically with the victim's wife. He told two witnesses that he was planning to kill the victim and solicited their help. The accused then killed the victim by striking him twice with a hatchet in the victim's home. Neither the trial court nor this Court considered applying the CCP aggravating factor.

The case at bar also resembles Kampff v. State, 371 So.2d 1007 (Fla.1979). In Kampff, the defendant shot his ex-wife to death believing that she was romantically involved with another man. There

was evidence the murder was planned in advance and that the defendant stalked his ex-wife to her place of employment where he shot her. This Court concluded that none of the statutory aggravating circumstances were established.

Accordingly, the facts considered in relation to the prior decisions of this Court demonstrate that the CCP aggravating circumstance in inapplicable in the case at bar.

ISSUE VII.

A SENTENCE OF DEATH IS NOT PROPORTIONAL UNDER THE FACTS OF THIS CASE.

Comparing the sentence of death imposed on Amoros to cases where this Court has approved or disapproved death sentences show that death is a disproportionate punishment under the facts at bar. In Irizarry v. State, 496 So.2d 822 (Fla.1986), the accused murdered his ex-wife who had jilted him and caused serious injury to her new boyfriend while attempting to murder him. Although the jury recommended a life sentence for Irizarry, the trial judge imposed death. In reversing the sentence, this Court called the jury recommendation of life imprisonment "consistent with cases involving similar circumstances." 496 So.2d at 825.[2/]

The facts at bar show a similar crime of passion. Like Irizarry, Amoros had been jilted by a woman to whom he was attached. Amoros and Veronica Simmonds lived together for more than four years (R232). They had a three year old daughter together whom Amoros supported (R232,821). Indeed, all of the evidence presented leads to the conclusion that the murder of Rivero resulted from passionate obsession.

Accordingly, this Court should vacate the sentence of death as disproportionate.

2/ See the cases cited in the Irizarry opinion at 825-826.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Reinaldo Amoros, Appellant, respectfully requests this Court to grant him the following relief:

Issues I and II - Reversal of conviction and remand for a new trial.

Issues III and IV - Vacation of sentence and remand for a new penalty phase trial.

Issues V, VI and VII - Vacation of death sentence with remand for imposition of a life sentence or further proceedings.

Respectfully submitted,

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