IN THE SUPREME COURT OF FLORIDA

DANIEL E. REMETA,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

CASE NO. 69,040

APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE AND FACTS

On July 1, 1985 a Grand Jury empaneled in Marion County, Florida, indicted Daniel E. Remeta for the first degree murder of MEHRLE W. REEDER (R2259). 1/ The murder of Reeder occurred at a gas station/convenience store in Ocala, Florida in the early morning hours of February 8, 1985. Mr. Remeta was apprehended in Kansas five days later on February 13, 1985 following a shootout with Kansas police officers. Mr. Remeta was extradited from Kansas to Florida and the Office of the Public Defender was appointed (R2263-2269).

Before trial defense counsel sought to have Sections 921.141 and 775.072(1), Florida Statutes declared unconstitutional

1/ (R) refers to the Record on Appeal of the instant cause, Supreme Court Case No. 69,040.

in that, for specific reasons delineated in the motions, the statutes violate the Eighth and Fourteenth Amendments to the United States Constitution (R2295-2302). The state filed a Notice of Intent to Offer Evidence of Other Crimes (R2378-2379), to which the defense counsel objected (R2373-2375). The Williams Rule evidence was introduced at trial following a timely objection and proffer (R1657-1695).

Trial commenced May 19, 1986. Defense counsel, after consulting off the record with the defendant who was being held outside the courtroom in a holding cell, waived the defendant's presence during preliminary questioning of the jury venire (R10). The waiver was not personally ratified by the defendant when he was brought to the courtroom.

Following trial Mr. Remeta was found guilty of first-degree murder on the basis of premeditation (R2535). The jury thereafter recommended a sentence of death (R2536). Accordingly, the trial court adjudicated Mr. Remeta guilty of first-degree murder and sentenced him to death (R2552-2554). Findings of fact were made by the trial judge to support imposition of the death sentence, wherein 4 statutory aggravating and at least 4 mitigating circumstances were found to exist (R2548-2551). The Office of the Public Defender was appointed to represent Mr. Remeta for the purpose of his appeal (R2553,2590), and a timely Notice of Appeal was filed July 2, 1986 (R2592).

The evidence presented at the trial and penalty proceedings establish that Daniel Remeta is 28 years old, but his

mental functioning is that of a 13 year old (R2151,2153). He is is one-fourth Indian (R2160), and one of four children born to a family whose gross income was $175.00 a month (R2119,2122). The family first lived in a ramshackle, broken down home in rural Kansas (R2165,2173). The home had no running water, many of the fixtures were broken and the neglected children "pretty much ran wild" (R2165,2173-2174,2176). They later moved into a small community that openly displayed hatred toward Indians generally, and the Remeta family specifically (R2126,2166).

Daniel Remeta's parents were alcoholics. Mrs. Remeta at one point was drinking two fifths of Seagrams a day (R2124), and Daniel witnessed fights between his mother and police (R2126) and court officials (R2175). On one occasion Mrs. Remeta, with her young children in the car, parked in front of the courthouse and drank a fifth of vodka, apparently just to antagonize the social workers observing her (R2165). The father used to physically abuse Daniel (R2122). Daniel's uncles, while intoxicated, used to come to the Remeta home in the middle of the night, awaken Daniel and his brother and make them fight, often with weapons; the uncles would bet on the outcome (R2143). Thereafter the uncles and Daniel's father and mother would go into town to drink, leaving the children alone (R2143-2144).

When he was thirteen Daniel Remeta stole two bicycles and fishing poles to give to his brothers because they had none; consequently he was sent to the boys reformatory school (R2127). Since that time the longest period of time that he spent outside a correctional facility was six months (R2149). He became a

"very, very heavy drinker", and "used almost every possible drug, including drugs that he injected as well as some heavier drugs, and marijuana, and consistently has abused drugs all his life" (R2147).

Daniel Remeta was in Florida visiting friends in February, 1985. With him were Lisa Dunn and Mark Hunter. They were on I-75 heading north near Ocala and pulled into a newly opened Tenneco gas station/convenience store (R1524). Daniel Remeta gave many versions of what happened; the following is the version most consistent with the physical evidence at the scene:

> Q.(Investigator King) I would like the whole truth, to be frank with you. I would like it, if you're willing to give it.
>
> A.(Daniel Remeta) Okay. Well, say if I was just an accessory, could I still get the death penalty in your state or not, though?
>
> Q. I -- I don't want to answer that because all I am is a fact finder. I'm -- I'm looking for the -- you know, as I said, the truth to this thing.
>
> A. Okay. Well, I was back here. I was teasing Mark when we was comin' to this place.
>
> Q. Um-hum.
>
> A. 'Cause I didn't think he had enough balls to kill anybody, and when we got inside the store, he kept bragging that he would. He was back -- we was both back here. The man was standing here then, and he asked us if we needed any help and I said no, and I kept asking Mark, "Do you want me to do it?" I said, "Cause I know you, you know, you're too chicken shit to do it." He says, "No, I'll do it," so I gave him the gun. I knew he wasn't gonna do it. He went up there and I just -- I went up

-- then I followed him up there. He had the gun out and I stole two cartons of cigarettes. They was right over here. I walked back to the beer counter and got a twelve-pack and a six-pack. The twelve-pack was Budweiser and the six-pack was Stroh's. When the door wouldn't shut, that's when he was shooting. I had dropped the beer 'cause it kind of -- I thought the guy had shot him 'cause -- because I didn't think he would ever kill anybody.

Q. Um-hum.

A. After that happened I ran over there -- I think I dropped a carton of cigarettes either here or outside. Then he came out and we just took off.

Q. Okay, you handed him the gun?

A. Right, a .357.

Q. And he did the shooting?

A. Right. That's why the beer got -- 'cause I thought the guy had shot him at first.

Q. Okay, you're telling me that you did not do the shooting?

A. No, I didn't. I didn't do the shooting there.

Q. Okay, and that's the truth?

A. That's the truth. I'll take a polygraph or whatever on it.

Q. Okay, did you observe Mark do the shooting?

A. No, I can't say that I seen him pull the trigger, no. I seen the guy when -- when -- after the second shot the guy kind of hit back or something and I told Mark, I says, "Shoot him," and I didn't -- that I didn't know what all was going on or what, so Mark ran behind the counter, kind of. I don't know if he kneeled down or what. Then I heard one or two more shots.

Q. But you gave Mark --

A. The gun.

Q. -- the gun?

A. Right.

Q. And did you tell him to kill him?

A. After I heard the shots, yeah, 'cause I thought the guy was -- uh -- see, Mark was the kind -- I didn't think he was -- I didn't think it was Mark shooting at first.

Q. Now, get this clear in your mind. Did you -- when you pulled the gun out of your pocket -- was that where it was?

A. Right.

Q. And you handed it to Mark?

A. Right.

Q. Did you tell Mark to kill the clerk?

A. No, not then, 'cause we was just going to do the robbery and leave.

Q. Okay, when did you tell Mark to kill the clerk?

A. After the clerk was shot, Mark -- 'cause I was thinking that the clerk had shot at Mark, so I told Mark, I says, "Shoot the mother-fucker."

Q. Okay.

A. And that's when he went behind the counter and said, "He's already dead." I says, "Well, shoot him anyways." Then that's when he shot him.

Q. Okay. All right, after the shooting --

A. Uh-huh.

> Q. -- what did you do then?
>
> A. Mark ran out and I was standing there. I was trying to decide whether I should pick up the beer, wipe off the fingerprints, or what, and I just said, "Fuck it," and ran out.

(R1520-1523).

On February 8, 1985, just after 1:35 a.m., a woman pulled into the newly opened Tenneco gas station in Ocala, Florida, purchased $5.00 worth of gas from Mehrle Reeder, and left (R1465-1468). Minutes later Robert Gulich stopped at the Tenneco station to purchase cigarettes (R1273-1276). As he stepped into the store he noticed a broken six-pack of Stroh's Light Beer that had been dropped on the floor (R1277). Thinking that the attendant was in back getting a broom, Gulich waited a few minutes and then proceeded to the counter, where he observed Mehrle Reeder lying on the floor under an opened cash register (R1277-1278). Gulich ran outside, drove across the street and called the police (R1280).

The Ocala police received Gulich's call at 1:53 a.m., and a car was immediately dispatched (R1285-1287). When the police arrived they found that the attendant had been shot four times, twice in the chest through the aorta and pulmonary arteries, and twice in the head after the gunman had moved around the counter (R1436-1437,1451,1462-1464). Reeder's death was caused by the second shot fired as he was falling; it was described by the pathologist as "immediate" (R1437). The bullets recovered from the body of the attendant were from a double-action, .357 Smith and Wesson pistol with a 2½ inch

barrel (R1636-1638). The pistol was recovered in Kansas five days later in the snow at the scene of Daniel Remeta's apprehension (R1592).

An audit indicated that $50.00 was missing from the cash register (R1404). The last purchase indicated on the cash register tape was for $.73, the price normally charged by the attendant for Bubble Yum Bubble Gum (R1293,1409). A pack of Bubble Yum was found on the counter of the Tenneco station (R1332). A one dollar bill was visible on top of the attendant's body (R1404). Only small change was left in the cash register (R1295), but over $130.00 was left undisturbed in an unlocked drawer just under the cash register (R1404).

Remeta's apprehension in Kansas occurred after Larry McFarland, the manager of a Stuckey's gas station situated along I-70 in Kansas, was shot and killed with the .357 Smith and Wesson on February 13, 1985 (R2073). [In reference to this incident Daniel Remeta pled guilty to charges of homicide and aggravated robbery and received two consecutive life sentences (R2073-2074)]. Sheriff Albright began following Remeta's vehicle on Interstate 20; he signalled for Remeta to pull over after the occupants of the car acted suspiciously (R2114-2115). Remeta pulled over on an exit ramp (R2115). Though Daniel Remeta has also claimed responsibility for this shooting (R2105), the sheriff positively identified J.C. Hunter as the fully-bearded person who exited the passenger's side of the automobile and shot him twice (R2115-2117). The same .357 pistol used in Ocala to shoot Reeder was used to shoot Albright (R2083). When J.C.

Hunter, Mark Walter, Lisa Dunn and Daniel Remeta drove off, Sheriff Albright called for assistance on his police radio (R2117,2097-2098).

Remeta's group went to a grain elevator, abducted two men and took their truck (R2105-2108). The men were later made to lay down in the roadway and shot once in the back of the head with the .357 pistol and killed (R2097-2098). [Daniel Remeta pled guilty to these offenses and received two consecutive life terms of imprisonment, with no eligibility for parole for 85 years (R2081)]. The pick-up was later chased into a farmyard by Kansas police and surrounded. In the ensuing shootout, Mark Walter was shot in the head and killed as he was firing at police officers with the .357 pistol (R1595,1826,1854,1892-1895). Daniel Remeta was shot in the lower back during the shootout (R1623-1625). Lisa Dunn had been shot earlier, apparently when Sheriff Albright was wounded (R1623-1625,2106-2107). J.C. Hunter was apprehended as he ran from the scene (R1857-1858).

Camillia Carroll was employed as a cashier at a Mobile Station in Waskom, Texas (R1701-1702). On February 10, 1985 at approximately 4:00 p.m., Daniel Remeta and Mark Walter entered her store and robbed her at gunpoint (R1703-1705). She was made to accompany them away from the store for a distance of 200-300 feet, where she was shot five times by Daniel Remeta with the same pistol used to shoot Reeder in Ocala (R1705-1711). She testified to the above facts at Remeta's trial over objection. Remeta has not been tried for this incident.

SUMMARY OF ARGUMENT

POINT I: The right to testify in your own behalf is a fundamental, personal right guaranteed to every defendant by the First, Sixth and Fourteenth Amendments. As such a knowing, voluntary, and intentional relinquishment of the known right must be demonstrated on the record before an effective waiver can be said to have occurred. The instant record does not establish such a waiver by the defendant at either the trial or the penalty phase of trial. Because the error cannot be considered harmless, a new trial is required; alternatively, because the error is not harmless as it pertains to the penalty proceeding, a new penalty proceeding is required.

POINT II: The state established that Mehrle Reeder was unlawfully shot and killed on February 8, 1985; the state then introduced two statements made by the defendant in which he admitted guilt for the murder of Reeder. Over objection, the state then presented the cumulative, irrelevant testimony of a young woman who claimed to have been shot five times by the defendant during a convenience store robbery in Texas. Thereafter the state presented yet another confession by the defendant.

Testimony concerning collateral crimes became a feature at trial. It was established that the defendant pled guilty to committing two murders and kidnappings in Kansas, another murder and aggravated robbery in Kansas, and an attempted murder in Kansas. Further, the incident of the defendant's apprehension,

which involved a shootout with police in Kansas, was presented. Testimony of the woman from Texas was cumulative and irrelevant and, even assuming relevance, the marginal probative value of such testimony was substantially outweighed by its prejudicial effect. Because the testimony deprived the defendant of a fair jury recommendation, a new penalty proceeding is required.

POINT III: The right to be present during voir dire of the jury is guaranteed to the defendant in the Sixth Amendment as an element of due process. This Court has held that an attorney may waive his client's presence during critical stages of trial if the defendant subsequently ratifies that waiver either expressly or through acquiescence with actual or constructive notice. Assuming that such a waiver of the right to be present is legitimate, which is not conceded, the waiver in the instant case by counsel is insufficient because the questioning of the court during voir dire exceeded the topics of which the defendant had knowledge. Accordingly, a new trial is required.

POINT IV: The death penalty in Florida is being arbitrarily and capriciously applied as a result of vague and inspecific statutory language. Decisions of this Court have not provided consistent results under the same or substantially similar facts. Moreover, this Court has applied the wrong standard in considering the presence of mitigating circumstances. Instead of providing plenary review this Court considers itself bound to an abuse of discretion, sufficiency of evidence standard. Thus, the death

penalty statute in Florida, as applied, violates the Sixth, Eighth, and Fourteenth Amendments. The death sentence must be reversed and a sentence of life imprisonment imposed.

POINT V: The proof does not establish that the dominant or sole motive for shooting the service station attendant was to eliminate him as a witness. Other reasons were advanced for Reeder being killed, all of which were plausible. The statement given by Remeta to the effect that he tried to take out all the witnesses does not establish that Reeder was killed for that purpose, because it was not proved that Remeta was the gunman. The aggravating circumstance is invalid and a new sentencing proceeding is required due to the presence of numerous valid mitigating circumstances that were found and weighed by the trial court against an erroneous aggravating circumstance.

POINT VI: The "cold, calculating and premeditated" aggravating circumstance pertains to enhanced deliberation in the killing of another person. The record in the instant case does not establish enhanced premeditation. The trial court's finding of enhanced premeditation to kill the attendant to eliminate him as a witness is already factored into another aggravating circumstance found to exist. Accordingly, further consideration of the same factor constitutes impermissible doubling of aggravating circumstances, making it necessary to vacate the death penalty and order a new sentencing proceeding.

POINT VII: It is unnecessary that a jury sentence a defendant. However, Due Process requires that the jury determine the defendant's guilt or innocence of the crime for which the sentence is imposed. If the verdict does not include elements that define an offense, an increased sentence for that offense cannot be imposed. Further, it is the prosecutor's burden to secure a jury verdict for all elements of the offense. The jury convicted Remeta of first-degree premeditated murder, but not of an offense punishable by the death penalty, as those offenses are defined by the legislature and viewed by this Court. This follows because the death penalty cannot be statutorily imposed without the existence of aggravating circumstances. These aggravating circumstances, limited solely to those specifically provided by statute, actually define the crime of capital first-degree murder that is punishable by death. The aggravating circumstances thus become elements of the crime before the increased sanction of death may be lawfully imposed that must be passed upon by the jury in determining the guilt or innocence of a capital felony.

POINT VIII: The trial judge imposed the $200.00 court cost against Daniel Remeta (R2552), yet found that Remeta was indigent. (R2555). The cost provision must be vacated because it was imposed in contravention of §27.3455.

POINT I

THE TRIAL COURT ERRED IN FAILING TO SECURE FROM THE DEFENDANT PERSONALLY A KNOWING, VOLUNTARY AND INTENTIONAL WAIVER OF THE CONSTITUTIONAL RIGHT TO TESTIFY AT TRIAL.

"The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, (citation omitted), and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or a privilege.' Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed.2d 1461, 1666, 58 S.Ct. 1019, 146 ALR 357." Brookhart v. Janis, 384 U.S. 1, 4, 86 S.Ct. 1245, 16 L.Ed.2d 314, 317 (1966).

The Fifth Circuit Court of Appeals has addressed this issue, albeit not in the form of a capital case. See Wright v. Estelle, 572 F.2d 1071 (5th Cir.), cert. denied 439 U.S. 1004, 99 S.Ct. 617, 58 L.Ed.2d 680 (1978)(Godbold, J., dissenting). That court found that error occurred, but the majority concluded it was harmless under the principles set forth in Chapman v. California, 386 U.S.18 (1967). The dissenting three judges concluded by stating "I would recognize that the right of the defendant to testify in his own behalf is embraced in our Constitution, that it is fundamental and personal to the defendant, and that it is beyond the reach of the harmless constitutional error rule." 572 F.2d at 1084. (emphasis added).

Though holding that the requirement would not be retroactive, the Supreme Court of Colorado similarly held in

People v. Curtis, 681 P.2d 504 (Colo. 1984) that henceforth in criminal cases the record must demonstrate a knowing, voluntary and intelligent waiver by the defendant personally of his right to testify. That Court stated:

> Several consequences follow from the determination that procedural safeguards are necessary to preserve the right to testify. A waiver is an intentional relinquishment of a known right or privilege. The courts do not presume acquiescence in the loss of fundamental constitutional rights, and therefore indulge every reasonable presumption against waiver. (citations omitted). Waiver of a fundamental right must be voluntary, knowing and intentional.
>
> In order for an accused to make his decision in a voluntary, knowing and intentional manner, he must be aware that he has a right to testify, he must know of the consequences of testifying, and he must be cognizant that he may take the stand notwithstanding the contrary advice of counsel. (citations omitted).

Curtis at 514. (emphasis in original).

The minimal requirements of constitutional due process include the right of affected persons to testify. See Gagnon v. Scarpelli, 411 U.S. 778, 786, 93 S.Ct. 1756, 1761, 36 L.Ed.2d 656, 664 (1973)(probation revocation); Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593 2604, 33 L.Ed.2d 484, 499 (1972)(parole revocation); Goldberg v. Kelly, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287, 299-300 (1973)(termination of welfare benefits). As stated by the United States Supreme Court, "when a defendant wishes to speak, whatever the consequences to his case, it is fundamentally wrong to allow his conviction 'by a jury which never heard the sound of his voice.'" See, McGautha v.

California, 402 U.S. 183, 220, 91 S.Ct. 1454, 1474, 28 L.Ed.2d 711 (1971). Not only are considerations of procedural due process present in this respect, but also the freedom of speech guaranteed under the First Amendment is implicated. For that reason alone the harmless error analysis is inappropriate, in that a form of censorship can be said to have occurred when the defendant is involuntarily denied his right to address the finder of fact which, in the capital context, will participate in sentencing him.

> The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than other Sixth Amendment rights that we have previously held applicable to the States. This Court had occasion... to describe what it regarded as the most basic ingredients of due process of law. It observed that; "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense - a right to his day in court - are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." (citation omitted).
>
> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecutor's to the jury so it may decide where the truth lies. Just as an accused has a right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. The right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 18-19 (1967). The rights contained in the Sixth Amendment, plainly said, are the minimal rights that are essential to due process of law, as defined by the Constitution.

In the context of a capital trial, due process requirements are the most stringent, primarily due to the uniqueness (severity and finality) of the penalty imposed. "We are satisfied that the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604, (1978). By way of example, in Harris v. State, 438 So.2d 787 (Fla. 1983), this Court held that a defendant in a capital trial can waive his right to have the jury instructed on necessarily lesser included offenses, "[b]ut, for an effective waiver, there must be more than just a request for counsel that these instructions not be given. We conclude that there must be an express waiver of the right to these instructions by the defendant, and the record must reflect that it was knowingly, and intelligently made." Harris at 797 (emphasis in original). In Jones v. State, 484 So.2d 577 (Fla. 1986) this Court clarified that the foregoing right only pertains to the defendant in a capital case because of the more stringent due process requirements that type of proceeding requires. Id at 579.

In the capital context, if the defendant is initially convicted of the crime of first-degree murder, a bifurcated proceeding is had wherein the appropriate punishment is recommended by the jury. What this means is that, in the capital

case, a defendant is afforded an additional opportunity to exercise his right to testify. There is no reason to treat this Sixth Amendment right any differently than other Sixth Amendment rights. These fundamental, personal rights require a knowing, voluntary and intelligent waiver before they can be effectively waived. See Brookhart v. Janis, supra (right of cross-examination); Faretta v. California, 422 U.S. 806, (1975)(right to assistance of counsel); Beck v. Alabama, 447 U.S. 625, (1980)(right to instruction on lesser included offenses); Patton v. United States, 281 U.S. 276 (1930)(right to jury trial).

With present social concern focusing on inordinate delay between sentencing and imposition of sentence, the most expeditious manner by which to carry out a sentence is to foreclose potential issues at trial. "When a waiver is required of the defendant as to any aspect or proceeding of the trial, experience clearly teaches that it is the better procedure for the trial court to make inquiry of the defendant and to have such waiver appear of record. The matter would thus be laid to rest." Amazon v. State, 487 So.2d 8, 11 (Fla. 1986)(footnote 1). The purposes of advisement by the court on the record are to ensure that waivers of fundamental constitutional rights are intelligent, intentional and knowing, it precludes post-conviction disputes between defendants and counsel over the issue, and it facilitates appellate review of the matter. See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The ideal procedure in the interest of fairness, time and judicial economy is to simply address the issue of waiver of this

constitutional right when it occurs. It is respectfully submitted that the record in this case fails to demonstrate a knowing, voluntary and intentional waiver by the defendant of his right to testify, either during the trial stage or the penalty phase. It is further submitted that this error cannot be considered harmless, and that in any event it was not harmless. It is impossible to tell what effect the defendant's testimony would have had upon the trier of fact, especially as that testimony would pertain to the determination of what would be the appropriate recommendation, life or death. It is also respectfully submitted that Article 1, Sections 4,9,16 and 22 of the Florida Constitution require that a knowing, voluntary and intentional waiver of the right to testify be made by the defendant personally. For these reasons this Court is asked to reverse the defendant's convictions and to remand for retrial.

POINT II

THE TRIAL COURT ERRED IN ALLOWING OVER TIMELY OBJECTION THE INTRODUCTION OF TESTIMONY CONCERNING COLLATERAL CRIMES ALLEGEDLY COMMITTED BY THE DEFENDANT WHERE THE TESTIMONY WAS IRRELEVANT AND WHERE THE PROBATIVE VALUE OF THE TESTIMONY WAS SUBSTANTIALLY OUTWEIGHED BY ITS PREJUDICIAL EFFECT, THEREBY DENYING THE DEFENDANT A FAIR TRIAL GUARANTEED BY ARTICLE 1, SECTION 16, FLORIDA CONSTITUTION, THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"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 when the evidence is relevant solely to prove bad character or propensity." Section 90.404(2)(a), Florida Statutes. The testimony of Camillia Carroll, introduced at the instant trial following a timely objection and proffer (R1657-1695), was not relevant to prove any material fact in issue.

Stated in summary form, Carroll testified that two days after the incident in Ocala, Daniel Remeta and Mark Walter entered her store in Waskom, Texas around 4:00 p.m.; Mark Walter purchaseda candy bar to get Carroll to open the cash drawer; Remeta pulled the same firearm that was used in Ocala and ordered Carroll to move away from the cash register; money and two cartons of cigarettes were taken; Carroll was taken 200-300 feet away to a wooded area and told to run; she was shot five times by Daniel Remeta; she played dead after the second shot; as soon as Remeta left she was able to crawl to a highway and get help.

Prior to Carroll's testimony at trial the state established that a robbery and murder had occurred in Ocala, and that Daniel Remeta had twice confessed to committing the crimes (R1385-1396,1494-1550). After Carroll's testimony the state presented yet another video-taped confession by Daniel Remeta given to a news reporter in Kansas (R1780-1792). In light of those confessions, it cannot reasonably be contended that Carroll's was offered to accomplish anything other than show propensity and/or bad character, and to inflame the jury.

Even assuming relevance, such testimony is not necessarily admissible. Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. §90.403, Fla. Stat. (1985). As the Eleventh Circuit Court of Appeals said in construing the equivalent federal rule:

> Probity in this context is not absolute; its value must be determined with regard to the extent to which the defendant's unlawful intent is established by other evidence, stipulation, or inference. It is the incremental probity of the evidence that is to be balanced against its potential for undue prejudice. (citation omitted). Thus, if the Government has a strong case on the intent issue, the extrinsic evidence may add little and consequently will be excluded more readily. (citation omitted).

United States v. Beechum, 482 F.2d 898, 914 (5th Cir. 1978)(en banc).

There is little if any incremental probative value to the testimony of Carroll, but its damning effect as a raw appeal

to juror emotion and bias cannot be denied. From a legal standpoint all of the adverse considerations set forth in Section 90.403, Florida Statutes are clearly present. Carroll's testimony is needlessly cumulative. The jury was subjected to witness after witness who testified about collateral crimes committed by Daniel Remeta. His apprehension in Kansas involved a shootout with police; there was a separate shooting of another police officer; there was a separate robbery and murder of a gas station attendant at Stuckey's; there was a separate kidnapping of two men at the grain elevator and their subsequent murder. The emotional testimony of Carroll describing how she was repeatedly shot by Daniel Remeta was but cumulative frosting on the cake for the state. Her cumulative testimony was wholly unnecessary; it proved nothing.

Her testimony was subject to confusion of the issues and was misleading to the jury. The defendant had pled guilty to and been sentenced for all the crimes mentioned in the foregoing paragraph except for those involving Carroll and, accordingly, the jury could properly consider the facts surrounding those convictions in applying Section 921.141(5)(b), Florida Statutes [previous conviction of felony involving the use of violence to the person]. Daniel Remeta was not convicted for any offense involving Carroll, yet the jury could not help but apply Carroll's testimony to that aggravating circumstance. The jury, notwithstanding limiting instructions, could not reasonably be expected to disregard such testimony in reference to one issue and to apply it solely to prove identity, common scheme or plan,

etc. Moreover, the shootings were too dissimilar for the jury to lawfully infer that the same person shot both attendants.

The danger of prejudice substantially outweighs the probative value of Carroll's testimony. The prejudice does not center on the determination of Remeta's guilt of first-degree murder, for his guilt in light of three separate confessions is a foregone conclusion based either on premeditation or felony-murder. Rather, the prejudice that attends Carroll's testimony impacts directly on the penalty stage, where the jury is to recommend an appropriate sentence based upon reasoned judgment instead of inflamed emotion. There were numerous mitigating circumstances present in this case that warranted serious consideration by a jury untainted by detailed testimony from a person claiming that Daniel Remeta marched her outside and shot her five times with a .357 magnum pistol. That testimony did not belong before the jury because Daniel Remeta was not convicted of that crime. The testimony was irrelevant and unduly inflammatory of human emotions to the extent that Daniel Remeta was denied a fair penalty proceeding as guaranteed by the Sixth and Eighth Amendments to the United States Constitution and Article 1, Section 16 of the Florida Constitution. Accordingly, the death penalty must be reversed and a new penalty proceeding ordered.

POINT III

THE TRIAL COURT ERRED IN CONDUCTING CRITICAL PORTIONS OF THE TRIAL IN THE ABSENCE OF THE DEFENDANT, THEREBY VIOLATING THE SIXTH AND FOURTEENTH AMENDMENT RIGHTS CONCERNING CONFRONTATION, PRESENCE OF THE ACCUSED, ASSISTANCE OF COUNSEL AND DUE PROCESS.

In Francis v. State, 413 So.2d 1179 (Fla. 1982) this Court recognized that jury selection constitutes a critical stage of trial at which a defendant has a fundamental, constitutionally protected right to be present and participate. This Court held that Francis' silence when his counsel and others retired to the jury room did not establish a knowing, voluntary and intentional waiver of his right to be present. Francis at 1178. In holding that the error was not harmless, this Court explained that "[the exercise of peremptory challenges] is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action, such as the race, religion, nationality, occupation or affiliations of people summoned to jury duty. (Citation omitted)." Francis at 1179.

In Peede v. State, 474 So.2d 808 (Fla. 1985) this Court held that a defendant in a capital trial can, with permission of the court, waive his presence during critical stages of trial provided that the waiver is knowing, voluntary and intentional.

"In this case, the trial court took every precaution to ensure that Peede's waiver was knowing and voluntary and not due to illness or coercion of any nature. It carefully instructed the jury as to Peede's absence so as to avoid any prejudice to Peede for his having made the voluntary decision to absent himself from the courtroom." Peede at 815. This Court has also held, however, that it is not an abuse of discretion to deny a defendant's request to absent himself during voir dire of the jury because of the importance of the defendant's presence during the voir dire of prospective jurors. Hooper v. State, 476 So.2d 1253 (Fla. 1985).

Most recently, in Amazon v. State, 487 So.2d 8 (Fla. 1986), this Court held that trial counsel can waive a defendant's presence during critical stages of trial "provided that the client, subsequent to the waiver, ratifies the waiver either by examination by the trial judge, or by acquiescence to the waiver with actual or constructive knowledge of the waiver." Amazon at 11. In Amazon this Court found it necessary to relinquish jurisdiction to establish on the record the circumstances surrounding the defendant's waiver.

In the instant case, Daniel Remeta's presence was twice waived, once by counsel during the initial voir dire of the prospective jurors and again during the penalty stage when the defense presented the testimony of the defendant's mother. Specifically, at the beginning of voir dire, the following transpired out of the hearing of the prospective jurors:

> MR. GILL: For the record, we have asked Mr. Springstead, the attorney for Mr. Remeta, to affirmatively waive the defendant's presence in the courtroom during the general qualifications of the jury.
>
> MR. SPRINGSTEAD: Your Honor, I went back and advised my client what it was. He's in the holding cell right now and I told him that these were just general questions that the Court asked with respect to the age of the prospective jurors and family status, and if they had any illness and had nothing to do with the specific questions we asked. He agreed to waive his presence at that proceeding.

(R10-11)(emphasis added). The Court in fact asked the general questions covering age, governmental positions, and past criminal records of the venire (R1173). The judge then informed the jury that there was a possibility that the trial would extend for three weeks and that, if that would be an extreme hardship, the jurors should come forward and let him know (R14-15). Thereafter, over twenty jurors came forward and asked to be excused for various reasons. Some of the jurors were transferred to a different courtroom where a shorter trial was anticipated (R24,27,27,53,54,57); some jurors were excused (R22,57,63-64); one juror was excused for cause by joint stipulation because he had in the past been an informant with the Marion County Sheriff's Department (R15), and at least eight prospective jurors' requests to be excused were denied while the defendant was not present (R44-45,49,56,62,65,69,70-71,74).

The defendant was present afterward in the courtroom when individual voir dire of the prospective jurors commenced, but no inquiry of the defendant was conducted by the trial court

concerning the defendant's previous waiver of his right to be present. The subject matter covered by the initial voir dire questioning exceeded that to which Remeta agreed through counsel, and the record does not establish a knowing waiver of the defendant's presence for the questions that were actually asked.

An inquiry of the defendant was made of the defendant by the trial judge when the defendant left the courtroom before presentation of the testimony of the defendant's mother (R2117-2119). No admonitions were given the jury (R2119), and no in-depth inquiry of the defendant was made. It is respectfully submitted that a defendant is incapable of waiving his presence during critical stages of his capital jury trial with permission of the trial court. See Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984) and Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), mod. on reh'g, 706 F.2d 311 (11th Cir. 1983). Assuming that a waiver can occur, a valid waiver is not demonstrated on the record in this case. A new trial is required.

POINT IV

THE FLORIDA DEATH PENALTY STATUTES VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, IN THAT THE STATUTORY AGGRAVATING AND MITIGATING CIRCUMSTANCES, AS APPLIED BY THE TRIAL AND APPELLATE COURTS, DO NOT GENUINELY LIMIT THE CLASS OF PERSONS THAT ARE ELIGIBLE FOR THE DEATH PENALTY, THEREBY RENDERING THE DEATH PENALTY SUSCEPTIBLE TO UNDUE ARBITRARY AND CAPRICIOUS APPLICATION.

The bete noire of capital punishment is a procedure enabling arbitrary and capricious imposition of the death penalty. It was in response to the condemnation of arbitrary and capricious imposition of the death penalty in Furman v. Georgia, 408 U.S. 238 (1972) that the state legislature enacted death penalty legislation embodying statutorily defined aggravating and mitigating circumstances that must exist before the death penalty is authorized. The aggravating/mitigating circumstance requirement passed constitutional muster in Gregg v. Georgia, 428 U.S. 153 (1976).

The Court subsequently explained why the necessity of consideration of specific aggravating/mitigating circumstances prior to authorization of imposition of the death penalty affords sufficient protection against arbitrariness and capriciousness:

> This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself. For a system "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur."

> 428 U.S., at 196, n 46, 49 L.Ed.2d 859, 96 S.Ct. 2909. To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, 462 U.S. 862, 877 (1983)(footnote omitted). The aggravating circumstances must be sufficiently definite to provide consistent application, and aggravating circumstances that are too subjective and non-specific to be applied even-handedly are unconstitutional. See Godfrey v. Georgia, 446 U.S. 420 (1980)(aggravating circumstance of "substantial history" of "serious assaultive history" too subjective).

Florida's death penalty system utilizes nine statutory aggravating circumstances. It is respectfully submitted that when the nine circumstances are considered in pari materia the class of first-degree murderers who are eligible for the death penalty is not sufficiently restricted to preclude capriciousness and arbitrariness in the imposition of the death penalty. Specifically, Section 921.141(5), Florida Statutes provides only one aggravating circumstance that is truly objective in nature; "The capital felony was committed by a person under sentence of imprisonment". §921.141(5)(a) Fla.Stat.

The other eight aggravating circumstances are replete with highly subjective language, as follows:

> (5) AGGRAVATING CIRCUMSTANCES - Aggravating circumstances shall be limited to the following:
> (a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

§921.141(5), Fla.Stat. (1985). The statutes provide no definition of the subjective terms found in either the aggravating or mitigating circumstances, so the courts and the juries are left to fend for themselves insofar as determining when the factors exist.

The facial constitutionality of Florida's death penalty statute was determined in 1976 by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 253 (1976). The Court further ruled that the statutes and procedures were being constitutionally applied at that time. Id at 927. It is respectful-

ly submitted that the definitions of the statutory aggravating and mitigating circumstances have since proved to be too broad to comport with constitutional requirements of specificity and consistency in application, and that the vagaries denounced in Furman v. Georgia, 408 U.S. 238 (1972) have returned in full force, especially when the death penalty statutory scheme is considered on the whole.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), which is perhaps the one most important Florida case relied on by the United States Supreme Court in Proffitt, this Court rejected the contention that the statutory aggravating and mitigating circumstances were impermissibly vague, stating, "review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under circumstances in another case." Dixon at 10. Indeed, this language is specifically cited by the United States Supreme Court in approving the death penalty system in Florida. Proffitt at 251.

It is respectfully submitted that this Court has failed to consistently apply the statutory aggravating and mitigating circumstances. By way of example, in Raulerson v. State, 358 So.2d 826 (Fla. 1978) this Court approved the trial court's finding of a murder committed in an especially heinous, atrocious or cruel manner. After resentencing was ordered by the federal court for the middle district of Florida, Raulerson v. Wainwright, 408 F.Supp.381 (M.D. Fla. 1980), this Court struck the finding of a heinous, atrocious or cruel murder stating, "We have held that killings similar to this one were not heinous,

atrocious, and cruel. (citations omitted)." Raulerson v. State, 420 So.2d 567,571 (Fla. 1982).

Another striking example of inconsistency in application of a statutory aggravating circumstance is found in Caruthers v. State, 465 So.2d 496 (Fla. 1985) and Johnson v. State, 465 So.2d 499 (Fla. 1985). In Johnson this Court disallowed a finding of a cold, calculated and premeditated murder where a robber shot a clerk three times, stating "the cold, calculated and premeditated factor applies to a manner of killing characterized by a heightened premeditation beyond that required to establish premeditated murder." Caruthers at 498 (emphasis added). Eight pages later in the next reported decision this Court approved the factor, stating, "This factor focuses more on the perpetrator's state of mind than on the method of killing" Johnson at 507. See also Provenzano v. State, 11 FLW 541 (Fla. October 16, 1986)("...as the statute indicates, if the murder was committed in a manner that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable.")(emphasis in original).

Another statutory aggravating factor receiving inconsistent application is Section 921.141(5)(c), Florida Statutes, which provides "[t]he defendant knowingly created a great risk of death to many persons." In Kampff v. State, 371 So.2d 1007 (Fla. 1979) this Court held that the trial court improperly found this factor where five shots from a .38 caliber pistol were fired inside a store located at a heavily traveled intersection in Ft. Pierce. Four people were present during the shooting and others

were inside the building. In Jacobs v. State, 396 So.2d 713 (Fla. 1981) this Court again rejected this factor where two police officers were shot at a rest area on I-95; two children were sleeping in the defendant's automobile, and the defendant's accomplice and at least three eyewitnesses were also present in the rest area. However, in Suarez v. State, 481 So.2d 1201 (Fla. 1985) this factor was approved by this Court because "the record shows that Suarez fired in the area of a migrant labor camp, and that his accomplices were also present at the time." Suarez at 1209 (emphasis added). The distinction between firing shots at a rest stop on an interstate highway or in a store at a busy intersection in a city versus "in the area" of a migrant labor camp is no distinction at all. Indeed, this statutory aggravating factor can now be found in virtually any case involving arson or a fire because a defendant should foresee that setting a fire poses a great risk of death to neighbors and/or firemen. See King v. State, 390 So.2d 315 (Fla. 1980); Welty v. State, 402 So.2d 1159 (Fla. 1981).

As previously noted, this Court rejected the contention that the aggravating and mitigating circumstances are impermissibly vague, stating "review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under circumstances in another case." Dixon at 10. The foregoing examples demonstrate that this Court needs to reconsider whether the statutory death penalty procedure in Florida continues to comport with constitutionally required consistency and specificity.

Furthermore, Appellant feels constrained to point out that the guarantee of consistency between the same penalty for the same facts in different cases is suspect on at least two bases over and above vagueness, those being limited exposure by this Court to other murder cases and the use of an improper standard to review the presence of mitigating circumstances. Specifically, this Court simply does not have the benefit of the facts and circumstances of other murder cases in which the death penalty was not imposed other than by review of such cases on a discretionary basis pursuant to certified questions or decisions in express and direct conflict with other decisions. In that respect the spectrum through which this Court views the facts determining the proportionality of imposition of the death penalty is geared solely to first-degree murder cases in which the death penalty was actually imposed, rather than the wider range of facts of other murder cases wherein lesser sanctions are imposed. Because the perception of this Court is as a matter of procedure unduly restricted an adequate proportionality analysis cannot be performed.

Further, the guarantee of consistency is suspect because this Court now considers itself bound to an abuse of discretion discretion standard insofar as determining the presence vel non of mitigating circumstances. See Pope v. State, 441 So.2d 1073,1076 (Fla. 1983). The election of this Court not to provide plenary review to determine the existence of mitigating circumstances effectively defeats the guarantee of consistent application of the death penalty. Specifically, this Court has

held that the trial judge is in as good a position as is the jury to apply the aggravating and mitigating circumstances, in that "the trial judge does not consider the facts anew. In sentencing a defendant, a judge lists reasons to support a finding in regard to mitigating or aggravating factors." Provenzano at 544. Thus, this Court is in as good a position as is the trial judge to apply aggravating and mitigating circumstances. If appellate courts will provide plenary review to determine for themselves the voluntariness of a statement, which also involves a legal determination, certainly the same degree of scrutiny must apply to a matter as grave as imposition of the death sentence. See Miller v. Fenton, 474 U.S.__, 38 Cr.L. 3025 (1985).

For these reasons it is respectfully submitted that, as now applied, the statutes governing imposition of the death penalty in Florida are impermissibly vague and are otherwise subject to unfair and discriminatory application. The arbitrary and capricious application violates the Sixth, Eight, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16 and 22 of the Florida Constitution. Accordingly, the death penalty must be vacated and a sentence of life imprisonment imposed.

POINT V

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST, IN THAT THE FINDING IS SPECULATIVE AND OTHERWISE UNSUPPORTED BY THE EVIDENCE.

The burden is on the state in the sentencing portion of a capital felony trial to prove every aggravating circumstance beyond a reasonable doubt. Clark v. State, 443 So.2d 973 (Fla. 1983). In order for a witness elimination motive to support finding the avoidance of arrest circumstance when the victim is not a law enforcement officer, "[p]roof of the requisite intent to avoid arrest and detection must be very strong." Riley v. State, 366 So.2d 19, 22 (Fla. 1978). "We have also said that an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for murder was the elimination of witnesses." Clark at 977 (emphasis added).

The findings of fact made by the trial judge in the instant case to justify imposition of the death penalty specify two portions of the evidence at trial that demonstrated the motive of witness elimination; the similar shooting of Camillia Carroll in Texas 38 hours after the Ocala murder, and; the video-taped interview of the Defendant in which he discussed both murders. (R2549).

The interview of the defendant provided the following:

> Q. [By Reporter] Then you went to the gas station place in Ocala?
>
> A. [By Defendant] Right.

Q. Okay. What were you thinking when you started there, you needed money, you needed -- what was the thought behind that?

A. I wasn't thinking anything, and anything I did, really, I was just doing it.

Q. All right, a sixty-year old guy was killed there?

A. I know, that's what I heard.

Q. Who killed him?

A. I don't want to make that statement. See, the whole thing is, if Lisa wasn't involved and if she wasn't innocent, then I could just confess to whatever I did. What certain states are going to have to -- that's like Florida, they ain't got no witnesses. Anytime I seen a witness, I took him out, or at least shot him.

Q. You didn't always succeed?

A. Huh?

Q. You didn't always succeed?

A. True, I didn't always succeed.

Q. What about the woman who got shot, oh, at least a half a dozen times, the one you said, 'Walk to the paper. Walk to that piece of paper over there'?

A. What piece of paper?

Q. No, the one that -- as I get the story third hand, that you told her -- she told the cops that a guy told her to walk to a piece of paper down the road, and then she was shot at?

A. No, she wasn't told to walk to a piece of paper. I told her to walk into the woods. Then after we got in the woods off the road, that's when I shot her.

Q. And take her in?

A. She was a witness.

Q. Okay. The idea then is to kill all the witnesses and you won't have a problem?

A. Right.

Q. Okay.

A. I'm saying that it had a lot to do with a lot of things I did.

Q. Okay. Okay, why don't you -- I don't know the game that well.
Okay, why don't you give me a little bit of -- I know it's complicated. Give me an idea of what events are linked to the role playing of Dungeons and Dragons.

A. I don't think I could. I can answer any other questions, but I don't think I can answer questions about Dungeons and Dragons, really.

Q. Is it just something that influences the way you --

A. It has a lot to do with people getting shot, where they get shot, I'll just say that much; the way they get shot, put it like that.

Q. In the back of the head?

A. Right.

Q. The game says they have to get shot in the back of the head?

A. I didn't say that. I'm just saying it has a lot to do with that, the way they are shot.

Q. What about the one that got shot in the face?

A. Where?

Q. Ocala, the sixty-year old guy.

A. What about him?

Q. He wasn't shot in the back of the head?

A. Maybe it couldn't be done like that or something. You're sure he was shot in the face?

Q. That's what they told me.

A. Hum.

Q. I thought you shot him?

A. Hum?

Q. I thought you shot him. You should know.

A. I didn't say I shot the guy.

Q. You didn't say you shot the guy in Florida?

A. Hum-uh.

Q. Okay, you are the person who was responsible for everything that happened between Traverse City and Kansas that you have heard is attributed to you?

A. Yeah.

(R1789-1792)(emphasis added). Significantly, Daniel Remeta did not admit shooting Reeder, and it appears that Reeder was shot as part of a "Dungeons and Dragons" game rather than to just eliminate witnesses.

In the statement given to Investigator King the main reason given by Remeta for telling Walter to shoot the clerk was that Remeta believed that the clerk was shooting at them (R1522-1524). This is consistent with the beer being dropped by Remeta when the first shots were fired (R1277). Remeta also advanced at least four other reasons for Reeder being shot, none of which pertained to witness elimination (R1389).

Moreover, it is significant that Remeta disavows being the actual gunman. Notwithstanding that he may be guilty of first-degree murder on a principal theory, inasmuch as he admits giving Mark Walter the pistol and goading Walter to commit the robbery (R1522-1523), there is simply insufficient proof to establish that Reeder was killed solely to eliminate him as a witness. Walter could have shot Reeder solely to prove to Remeta that he was capable of shooting someone.

Accordingly, this Court is asked to strike the finding that the murder was committed to prevent a lawful arrest, to reverse the death sentence and to remand for a new sentencing proceeding.

POINT VI

THE AGGRAVATING CIRCUMSTANCES OF A COLD, CALCULATED AND PREMEDITATED MURDER IS INVALID, IN THAT THE FINDING IS UNSUPPORTED BY THE RECORD AND OTHERWISE CONSTITUTES IMPERMISSIBLE DOUBLING OF AGGRAVATING CIRCUMSTANCES.

The aggravating circumstance of murder committed in a cold, calculated manner without any pretense of moral or legal justification applies only to crimes which exhibit heightened premeditation greater than is required to establish premeditated murder, and it must be proven beyond a reasonable doubt. Gorham v. State, 454 So.2d 556 (Fla. 1984), cert. denied 105 S.Ct. 941. "This aggravating factor 'is not to be utilized in every premeditated murder prosecution,' and is reserved primarily for 'those murders which are characterized as execution or contract murders or witness elimination murders.' (citation omitted)." Bates v. State, 465 So.2d 490, 493 (Fla. 1985). "This factor focuses more on the perpetrator's state of mind than on the method of killing." Johnson v. State, 465 So.2d 499 (Fla. 1985).

To support this aggravating circumstance the trial court found that "it is clear that from the time of the planning of the robbery, Daniel Eugene Remeta planned to kill the clerk to eliminate any witness. Merhle [sic] Reeder was not only shot twice in the chest from across the counter of the convenience store, but DANIEL EUGENE REMETA then changed positions in order to have a clear shot a [sic] Mr. Reeder in order to shoot him a third and fourth time in the head area. The record shows that

DANIEL EUGENE REMETA intended to kill the clerk, Merhle [sic] Reeder, and had made this decision before the robbery." (R2550).

The record does not show that Remeta was the gunman, or that the decision to kill the attendant was made prior to the robbery. Remeta said in his statement to Investigator King that all they planned to do was the robbery (R1523). In a different statement he gave four or five other reasons about why the clerk may have been killed, none of which pertained to witness elimination (R1389-1392). See point V, supra. Assuming that Reeder was killed to eliminate him as a witness,and assuming that Daniel Remeta was the gunman, the same factor is addressed in the aggravating circumstance of a murder to avoid apprehension or a lawful arrest.

Specifically, the heightened reflection that it takes to consciously decide that a witness is to be eliminated is necessarily the same heightened premeditation needed to support a cold, calculated and premeditated killing. Planning to commit the robbery cannot automatically be transferred to support heightened premeditation of murder. Hardwick v. State, 461 So.2d 79,81 (Fla. 1984). The same mental gymnastics are present when a conscious decision is made to kill someone because he is a witness. Accordingly, the same factor is in this instance being improperly doubled. If witness elimination can be used at all it may only be used once. Because an improper aggravating circumstance was weighed by the trial court against four mitigating circumstances, the sentence must be vacated and a new penalty proceeding ordered.

POINT VII

THE DEATH PENALTY WAS IMPOSED IN CONTRAVENTION OF THE RIGHTS TO DUE PROCESS AND A JURY TRIAL GUARANTEED BY THE CONSTITUTION OF FLORIDA AND THE UNITED STATES, IN THAT IN RENDERING ITS VERDICT THE JURY DID NOT CONSIDER THE ELEMENTS THAT STATUTORILY DEFINE THE CRIME FOR WHICH THE DEATH PENALTY MAY BE IMPOSED.

For the sake of continuity and ease of understanding, this point will specifically address application of a single aggravating circumstance that was found by the trial court to apply in this case. The overall theme of this point is that the aggravating circumstances define the substantive crime for which the death penalty may be imposed, and as such those elements must be determined by the jury in rendering its verdict. Jury sentencing is not the issue. Rather, it is whether in rendering its verdict the jury considered substantive, statutory elements that define the crimes in Florida for which the death penalty may be imposed. The fact that the legislature deigns to label all first-degree murders "capital offenses" does not withstand the strict scrutiny necessary to satisfy Due Process requirements when the death penalty is imposed by the state; the term "capital crime" is but a convenient label, placing form over substance.

Two penalties are not available when a person is convicted of first-degree murder. Rather, a sentence of life imprisonment with no eligibility for parole for 25 years is the only sanction necessarily available. A crime for which the death penalty may be imposed is sui generis, and it is defined exclusively through the statutory aggravating circumstances set forth

in Section 921.141(5), Florida Statutes. Without at least one of these statutory elements being present the death penalty cannot be imposed. These elements thus define the crime for which the death penalty may be imposed. As such, the aggravating circumstances must be considered by the jury in returning the verdict, if a defendant is to be sentenced for that crime.

More specifically, the judge in this case determined that the murder was committed in a cold, calculated, or premeditated manner, without any pretense of moral or legal justification. The finding that the murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification, "focuses more on the perpetrator's state of mind than on the method of killing." Johnson v. State, 465 So.2d 499, 507 (Fla. 1985). The cold, calculated, and premeditated component of this aggravating circumstance "requires some sort of heightened premeditation, something in the perpetrator's state of mind beyond the specific intent required to prove premeditated murder." Brown v. State, 473 So.2d 1260, 1268 (Fla. 1985)(emphasis added); see also Scott v. State, 11 FLW 505 (Fla. Sept. 25, 1986). If, as stated by this Court, the aggravating circumstance requires heightened premeditation over and above that required for a conviction of first-degree premeditated murder, it follows that a jury finding of guilt of premeditated murder does not necessarily include a factual finding to support this aggravating circumstance.

This Court has recognized, as an element of Due Process, the necessity for a factual determination to be made by the

jury to authorize imposition of a more serious sanction based on factual elements of a crime. State v. Overfelt, 457 So.2d 1385 (Fla. 1984). As stated by the Third District Court of Appeal, "It is axiomatic that a verdict which does not find everything that is necessary to enable the court to render judgment cannot support the judgment." Streeter v. State, 416 So.2d 1203, 1206 (Fla. 3d DCA 1982).

All aggravating circumstances in the capital context must be proved beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). This is acknowledgement of their importance as elements of the crime. In re Winship, 397 U.S. 358 (1970). Thus the aggravating circumstances substantively define the crime of capital first-degree murder, that is, the crime of first-degree murder punishable by death.

> The aggravating circumstances of Section 921.141(6), Florida Statutes actually define those crimes, when read in conjunction with Florida Statutes 782.04(2) * * * to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

State v. Dixon, 283 So.2d 1,9 (Fla. 1973)(emphasis added). This theme has consistently been adhered to by this Court, and correctly so.

> In contending that the capital felony sentencing law regulates practice and procedure, appellant relies upon Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), and Lee v. State, 294 So.2d 305 (Fla. 1974). The critical issue in those cases was the legality of applying Florida's new death penalty law to persons who had committed a murder before the law had taken effect. In

> holding that the law could be applied to such persons, the United States Supreme Court and this Court referred to the changes in the law as procedural. Those references concerned the manner in which defendants who had committed murder before the new law took effect should be sentenced. They were not meant to be used as shibboleths for deciding whether the new law violates article V, section 2(a) of the Florida Constitution by regulating the practice and procedure in the Florida Courts. By delineating the circumstances in which the death penalty may be imposed, the legislature has not invaded this Court's prerogative of adopting rules of practice and procedure. We find that the provisions of section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty. The appellant's contention that the statute improperly attempts to regulate practice and procedure is without merit. [Citations omitted.]

Vaught v. State, 410 So.2d 147, 149 (Fla. 1982)(emphasis added).

The Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the substantive elements of the crime. Patterson v. New York, 432 U.S. 197, 210 (1977). A conviction of first degree murder, even first-degree premeditated murder, as held by this Court, does not form the presumption that the murder was committed in a cold, calculated or premeditated manner without any pretense of moral or legal justification. If, as repeatedly held by this Court, the aggravating circumstances effectively "define" the crime for which the death penalty can be imposed, it is incumbent on the state to secure jury findings of these substantive elements. Overfelt, supra; Perkins v. Mayo, 92 So.2d 641 (Fla. 1957); Harris v. State, 53 Fla. 37, 43 So. 311 (1907); Streeter v.

State, 416 So.2d 1203 (Fla. 3d DCA 1982); Duncan v. Louisiana, 391 U.S. 145 (1965).

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to a higher voice of authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the compliant, biased, or eccentric judge.

Duncan at 155-156 (emphasis added).

The increased reliability needed for Constitutional requirements of Due Process in the capital penalty context militates heavily toward a procedure whereby the jury provides as much protection against arbitrariness as is possible. The United States Supreme Court has held that jury imposition of sentence is not constitutionally mandated. Spaziano v. Florida, 468 U.S.__ 104 S.Ct. ____, 82 L.Ed.2d 340 (1984). This is not to say, however, that the jury must not determine the elements of the offense. See McMillan v. Pennsylvania, 477 U.S.__, 106 S.Ct.__, 91 L.Ed.2d 67 (1986). Since the jury in this case did not determine the defendant's guilt of an offense punishable by death, the death penalty must be vacated and a sentence of life imprisonment imposed.

POINT VIII

THE TRIAL COURT ERRED IN IMPOSING $200.00 COURT COSTS ON AN INDIGENT DEFENDANT RATHER THAN A TERM OF COMMUNITY SERVICE AS SPECIFIED BY SECTION 27.3455, FLORIDA STATUTES.

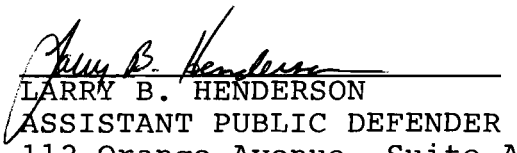
Section 27.3455, Florida Statutes imposes a $200.00 cost against all defendants convicted of a felony, and goes on to provide in pertinent part "[t]he court shall sentence those persons whom it determines to be indigent to a term of community service in lieu of the cost prescribed in this section, and such indigent persons shall be eligible to accrue gain-time and shall serve the term of community service at the termination of incarceration." The trial judge imposed the $200.00 court cost against Daniel Remeta (R2552), Remeta was found indigent by the trial court (R2555). The cost provision must be vacated in that it was imposed in contravention of §27.3455. See Butler v. State, 11 FLW 2533 (Fla. 5th DCA December 4, 1986); Skinner v. State, 11 FLW 2543 (Fla. 1st DCA December 5, 1986); Hughes v. State, 11 FLW 2361 (Fla. 1st DCA November 13, 1986); Slaughter v. State, 11 FLW 1948 (Fla. 1st DCA September 9, 1986).

CONCLUSION

This Court is respectfully requested to reverse the conviction and remand for a new trial based on Points I and III; to vacate the death penalty and to remand for a new penalty proceeding based on Points II, V, and VI; to vacate the death penalty and remand with directions to impose a sentence of life imprisonment based on Points IV and VII; and to strike the assessment of $200.00 costs based on Point VIII.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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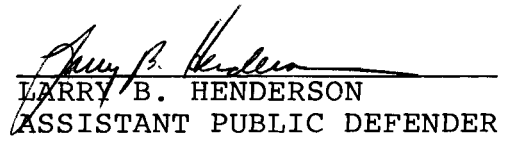
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, 4th floor, Daytona Beach, Florida 32014, and to Mr. Daniel E. Remeta, Sebastian County Detention Center, 315 Parker St., Fort Smith, Arkansas 72902 on this 22nd day of December 1986.



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