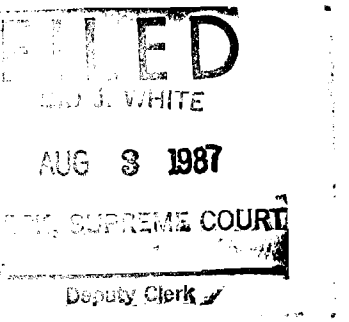
DMR:822

IN THE SUPREME COURT OF FLORIDA



CASE NO.: 69,259

ROBERT JOE LONG,
a/k/a BOBBY JOE LONG,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

On Appeal from the Circuit Court of the Thirteenth Judicial Circuit, In and For Hillsborough County, Florida

---

APPELLANT'S INITIAL BRIEF

ELLIS RUBIN LAW OFFICES, P.A.
265 N.E. 26th Terrace
Miami, Florida 33137
305/576-5600 (Miami)
305/524-5600 (Ft. Laud.)

BY: DAVID M. RAPPAPORT

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct coy of this Appellant's Brief was mailed to: James Young, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, Suite 804, Tampa, Florida 33602; this 1st day of August, 1987.

ELLIS RUBIN LAW OFFICES, P.A.
Attorneys for Defendant/Appellant
265 N.E. 26th Terrace
Miami, Florida 33137
305/576-5600 (Miami)
305/524-5600 (Ft. Laud.)

BY: _____
DAVID M. RAPPAPORT
For the Firm

STATEMENT OF THE CASE AND FACTS

1. Procedural Progress of the Case

On November 28, 1984 the Appellant, Robert Joe Long, was indicted in Hillsborough County, Florida, Case No. 84-13346B, for the Kidnapping, Sexual Battery and First Degree Murder of Michelle Denise Simms. (R 1216) Pursuant to a Plea Agreement with the State, the Appellant proceeded to a sentencing phase trial by jury on July 14, 1986. By a vote of eleven to one, the jury advised and recommended to the Court that it impose the death penalty upon Robert Joe Long. (R 1201) On July 25, 1986, Circuit Judge John P. Griffin entered the sentence of death as to Count III, the First Degree Murder of Michelle Denise Simms and entered life sentences as to Counts I and II, Kidnapping and Sexual Battery. (R 1748-1749) (R 1496-1497).

Appellant filed his Notice of Appeal on August 20, 1986. (R 1511).

2. Facts

The Appellant was arrested on November 16, 1984 for the sexual battery and kidnapping of [redacted] (A-1) Detectives Price and Latimer of the Hillsborough County Sheriff's Department advised the Defendant of his Miranda rights and he signed a form waiving said rights. The Defendant was not advised that he was a suspect in any murders and the waiver and consent forms stated only the charges of sexual battery and kidnapping for the [redacted] case. (A-2)

After obtaining the Defendant's confession on the [redacted] case, the Detectives changed the subject to the recent prostitute murders in Hillsborough County, Florida. (A-2) As the Detectives began to lead into questioning on the subject of the murders, the Defendant stated, "I'd rather not answer that." (A-3) Detective Latimer nevertheless began questioning the Defendant about the murders with no break in the interrogation. (A-3) After being handed photographs of the various murder victims, the Defendant replied, "The complexion of things sure have changed since you came back into the room. I think I might need an attorney." (A-3) Nevertheless, the Detectives did not cease the interrogation of the Defendant nor provide him with an attorney. In light of this obvious Miranda violation, the Defendant confessed to eight murders in Hillsborough County, Florida and to one murder in Pasco County, Florida.

On September 23, 1985, the Appellant entered into a written Plea Agreement with the State. (R 1252-1255) In effect, it provided that the Defendant would be entering a plea of guilty to eight counts of First Degree Murder, eight counts of Kidnapping and seven counts of Sexual Battery in Case Nos. 84-13343-84-13350. The Plea Agreement also provided for a plea of guilty to the Six Count Information in Case No. 84-13310C involving the sexual battery and kidnapping of [redacted]. Pursuant to the written Plea Agreement, the Defendant was to receive life sentences on every count of each case with the exception of Case No. 84-13346B involving the murder of Michelle

Denise Simms and Case No. 84-4213E for which the Defendant received a five-year sentence for revocation of probation.

The Plea Agreement also provided for a withholding of the imposition of sentence on all three counts in Case No. 84-13346B until the completion of the sentencing phase where after an advisory sentence would be recommended by the jury as to whether the Court would impose a sentence of either death or life without the possibility of parole for 25 years as to Count III of the Indictment. (R 1253)

Pursuant to the Plea Agreement and crucial to the issues pertaining to this appeal, the Defendant waived his right to contest the admissibility of any statements that he had given law enforcement with such statements being admissible at the sentencing hearing. (R 1254) Defendant also waived the right to contest the admissibility of evidence seized from his car or his apartment and specifically waived his right to contest the admissibility at the sentencing hearing of a knife found in a wooded area near his apartment. (R 1254)

On September 23, 1985, a hearing was held on the Defendant's entry and execution of the Plea Agreement. (R 1778-1797) During the recitation of the plea on the record, the Defendant never specifically entered a plea of guilty on the record. Instead, the Court merely asked the Defendant, "Do you feel it's in your best interest at this time to enter into this plea agreement effecting the cases that are now before you as the numbers are typed on that Plea Agreement?" The Defendant

replied, "Yes." The Defendant did state that he understood that he was waiving his right to a jury trial (R 1782) and that there would be a sentencing phase in Case No. 84-13346B where the victim was Michelle Denise Simms. (R 1788) The Defendant, however, never stated at the hearing or anywhere in the record on this appeal that he was pleading guilty to the Michelle Denise Simms case or any of the cases mentioned in the written Plea Agreement.

At the hearing held on the Plea Agreement, the Court adjudicated the Defendant guilty and pronounced sentence on each case with the exception of Case No. 84-13346B. (R 1790-1793) The written Plea Agreement nor the Court, however, informed the Defendant as to what specific crimes the Defendant was being adjudicated guilty upon or the specific crimes that sentence was being entered upon.

On December 11, 1985, the Defendant moved to withdraw from the Plea Agreement. (R 1587-1538). In support of the Motion To Withdraw The Guilty Pleas, the Defendant testified that there were two reasons why he desired to withdraw his plea of guilty. First, the Defendant testified that he had entered a plea of guilty with the understanding that Dr. Morrison would be available to provide expert testimony at the sentencing phase, however, she had recently become unavailable. (R. 1588-1591).

Secondly, the Defendant testified that when he entered the plea of guilty, he did not realize that he was giving up his right to appeal the confession's admissability. (R 1592)

Robert Norgard, the attorney who represented the Appellant in a First Degree Murder trial in Pasco County, also testified at the hearing on the Motion To Withdraw The Plea. (R 1609-1617) Mr. Norgard related to the Court his conversation with the Appellant a few days after the plea was entered regarding the Appellant's failure to understand his waiver of the right to appeal the confession. "Specifically, during that discussion, I questioned him about the confession and pointed out that by entering a plea, he would not be allowed to appeal. And he indicated to me that it was his understanding that as a part of the plea agreement there could be an appeal." (R 1611).

In granting the Defendant's Motion To Withdraw The Guilty Pleas, the Trial Court relied on the two points raised by the Defendant. As the Court stated, "One, which I think was supported, as I said, by Mr. Norgard's comments, that he was under the mistaken belief that he was preserving his right to appeal on the matter of the confession. The second point was the point regarding Dr. Morrison or someone of her stature to appear on her behalf." (R 1636)

At the hearing held on December 11, 1985, Assistant Public Defender, Charles O'Conner on behalf of the Defendant presented a Motion To Withdraw as Counsel. The basis for the Motion was that according to the Defendant the Plea Agreement had been entered inadvisedly with ineffective assistance of counsel. (R 1621)

The next day on December 12, 1985 the Defendant elected

not to withdraw his plea of guilty. (R 1757-1766) The Trial Court informed the Defendant that his reiteration of the plea was not contingent upon a guarantee of a forensic psychologist being one of the expert witnesses at the penalty phase. (R 1765). Nevertheless, due to the failure to secure the attendance of Dr. Morrison, the Court continued the sentencing phase. (R 1770 -1771). In support of granting the continuance, the Trial Court stated as follows,

> I think it would be gross error to proceed at this point, because I believe what Mr. Long said and what his attorney said, that as Mr. O'Conner so colorfully put it, she was the keystone and the arch of this defense.
>
> And I believe with their comments along that line, I think it would be gross error to proceed with a hearing at this time. (R 1770)

On July 8, 1986, new counsel for the Appellant, Ellis S. Rubin, Esquire, moved to set aside the Plea Agreement. (R 1667). Counsel for the Appellant reiterated that he had come into the case after the Plea Agreement had already been entered into and that the Plea Agreement was neither fair nor in compliance with the Constitution of the United States. (R 1667). Counsel for the Appellant further objected to the Plea Agreement's provision that the Defendant waive any objection to statements given to law enforcement at the sentencing phase. The basis of the objection was that there were defects in the admissibility and voluntariness of such statements and that the statements were obtained in violation of the Constitution of the United States and F.S. §921.141. (R 1668-1669). The Trial

Court denied Defendant's Motion To Exclude the statements of the Defendant and the Motion To Set Aside the Plea Agreement. (R 1672-1673).

On July 10, 1986, Appellant presented a Motion For Continuance based upon the unavailability of Dr. Morrison for her refusal to testify and the fact that defense expert witness Dr. Dorothy Lewis needed additional time to complete her evaluations of the Defendant in order to render a reasonable medical opinion at the sentencing phase regarding mitigating circumstances. The Trial Court denied the Motion For Continuance. (R 1718-1730).

At the commencement of the sentencing phase, the Appellant renewed his Motion For Continuance based upon the previous grounds raised at the July 10, 1986 hearing. In addition, the Appellant renewed the objection to the Plea Agreement and renewed all previously denied motions. The Trial Court denied the renewal of all these motions. (R 4-5).

At the sentencing phase, the first witness to testify on behalf of the State was Detective Randy Latimer who testified as to the statements that the Defendant had given with regards to the Michelle Denise Simms and Virginia Johnson murders. (R 578-585). During the course of this testimony, the State introduced the knife that had been recovered in the Michelle Denise Simms murder. Counsel for the Appellant objected to the introduction of this evidence as being obtained from the "fruit of the poisoned tree as a result of the confession." Appellant

also renewed his objection to the admissibility of the confession. (R 581-582). The Trial Court overruled the objection. (R 582).

Dr. Arturo Gonzalez testified as a psychiatrist for the State. (R 637-729) Dr. Gonzalez conducted an evaluation of Long in two hours and forty-five minutes and testified that the Defendant was suffering from a personality disorder and not a mental illness. (R 650) Dr. Gonzalez further testified that at the time the Defendant killed Michelle Denise Simms, he was not under the influence of an extreme mental or emotional disturbance nor was his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law substantially impaired. (R 653-654)

Dr. Gonzalez, however, on cross-examination admitted that he was aware that the Defendant had an abnormal electroencephalogram (EEG). (R 660) Dr. Gonzalez testified that every time the Defendant killed one of his victims he was unconsciously killing his mother by extension. (R 690)

Dr. Dorothy Lewis testified that based upon a reasonable psychiatric certainty, the Appellant had committed these series of rapes and murders while under the influence of extreme mental or emotional disturbance. (R 807) The doctor testified that the Defendant was under an extraordinary neurological and psychological mental disturbance. (R 807)

Dr. Lewis reiterated to the jury the numerous head injuries that the Defendant had received since the age of four

including the serious head injury that the Defendant received in an automobile accident in 1974. (R 779-781) Furthermore, Long had severe brain damage with symptoms of uncontrollable feelings. (R 809).

Dr. Lewis also testified that based upon a reasonable psychiatric certainty, the Defendant did not have the capacity to conform his conduct to lawful conduct and was substantially impaired. As Dr. Lewis stated, "...I think somehow, he realized he couldn't stop himself, and he didn't want to do this. So he wanted other people to stop him." (R 811)

Dr. Robert Berland testified as an expert in psychology that based upon his testing of Long, there was evidence that the Defendant was psychotic, suffering from a character disorder and brain damage. (956, 957, 960, 962, 963) Furthermore, Dr. Berland stated that based upon a reasonable psychological certainty, Long was under the influence of an extreme mental or emotional disturbance at the time of the murders and was unable to conform his conduct to the requirements of the law or was substantially impaired. (R 968)

Dr. Cathleen Heidi testified as an expert in criminology and psychology. (R 993-1078) Dr. Heidi also confirmed that Long was operating under an extreme mental or emotional disturbance at the time he killed Michelle Denise Simms and he did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law and that he was substantially impaired. (R 1053) Dr. Heidi also expanded

upon the unstable, abusive and promiscuous environment that the Defendant was raised in. (R 1009-1022) She also testified that the killing of Michelle Denise Simms was a result of the Defendant's loss of control due to a subconscious rage with his mother. (R 1039-1041)

Dr. Walter Afield testified as an expert in the field of psychiatry that the Appellant was under the influence of extreme mental or emotional disturbance when he committed the acts of violence and that he was brain damaged. (R 1096)

In rebuttal, the State called Dr. Daniel Sprehe as an expert in psychiatry who testified that in his opinion the Defendant was not under the influence of an extreme mental or emotional disturbance and that at the time the Defendant killed Michelle Denise Simms, his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law were not substantially impaired. (R 1114)

On July 18, 1986, a majority of the jury by a vote of eleven to one advised and recommended to the Court that it impose the death penalty upon Robert Joe Long. (R 1201)

On July 25, 1986, Circuit Judge John P. Griffin entered the sentence of death as to Count III, the First Degree Murder of Michelle Denise Simms. (R 1492-1497; R 1738-1750) In support of the death sentence, the Trial Judge found four aggravating circumstances:

1. A previous conviction for a capital felony or of a felony involving the use of threat of violence to the person;

2. The capital felony was committed while the Defendant was engaged in the commission of the kidnapping of Michelle Denise Simms;

3. The capital felony was especially heinous, atrocious or cruel;

4. The capital felony was committed in a cold, calculated and premeditated manner without any pretence of moral or legal justification;

The Court also found two mitigating circumstances:

1. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance;

2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired. Nevertheless, the Court found the aggravating circumstances to outweigh the mitigating circumstances and affirmed the jury's advisory sentence of death.

SUMMARY OF ARGUMENTS

1. The Plea Agreement was entered into under mistake, misapprehension, fear and circumstances directly affecting his constitutional rights. Based upon the Public Defender's allegations that were asserted in the Motion To Withdraw as Counsel, the Court was on notice that the Plea Agreement had been entered into inadvisedly. Therefore, the Trial Court should not only have granted the Motion To Withdraw as Counsel, but refused to accept the Defendant's re-entry of the guilty plea one day after it had been withdrawn. Moreover, when new counsel for the Appellant moved to set aside the Plea Agreement, the Trial Court committed error in denying the Motion since the Plea Agreement provided for the introduction of a confession and evidence that was unconstitutionally obtained.

2. The Trial Court committed error in introducing the Defendant's confession and the knife stemming from that confession at the sentencing phase. The confession as to the Michelle Denise Simms murder and Virginia Johnson murder that were introduced at the sentencing phase were obtained after the Defendant invoked his right to remain silent and the right to have counsel present. The detectives failed to honor these requests in violation of Miranda and its progeny. Furthermore, the introduction of the knife at the sentencing phase constituted, "the fruit of the poisonous tree".

3. The Appellant presented a Motion For Continuance

based upon the unavailability of a crucial defense expert (Dr. Morrison) and the fact that defense expert witness, Dr. Lewis, needed additional time to complete her evaluations of the Defendant in order to render a reasonable medical opinion at the sentencing phase regarding mitigating circumstances. The Trial Court's failure to continue the sentencing phase hearing, constituted error since it deprived the Defendant of his Sixth and Fourteenth Amendment rights to adequate preparation time and effective assistance of counsel.

4. The Trial Court erred in imposing the death penalty since it improperly applied two aggravating circumstances: (1) that the homicide was especially heinous, atrocious or cruel; and (2) that the homicide was committed in a cold, calculated and premeditated manner. These two aggravating circumstances should not have been applied since there was a causal connection between the Defendant's extreme mental disturbances and the homicide. The misapplication of the sentence weighing process renders the Appellant's death sentence unconstitutional under the Eighth and Fourteenth Amendments.

ISSUE I.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SET ASIDE THE PLEA AGREEMENT WHICH WAS INADVISEDLY ENTERED INTO AND WHICH PROVIDED FOR THE ADMISSION OF UNCONSTITUTIONALLY OBTAINED STATEMENTS AND EVIDENCE AT THE SENTENCING PHASE.

Fla. R. Crim P. 3.170(f) provides that, "The Court may in its discretion and shall upon good cause at any time before a sentence permit a plea of guilty to be withdrawn." The burden is upon the Defendant to establish a showing of good cause under the rule. Use of the word "shall" under the rule, indicates that a showing of good cause entitles the Defendant to withdraw the plea as a matter of right. However, the use of the word "may" under the rule, suggests that a withdrawal of the plea is in the discretion of the Court upon a lesser showing than good cause. Yesnes v. State, 440 So.2d. 628, 634 (Fla. 1st DCA 1983).

Fla. R. Crim. P. 3.170(f) should be liberally construed in favor of the Defendant since the policy of the law is partial to a trial on the merits. Adler v. State, 382 So.2d. 1298 (Fla. 3rd DCA 1980); Canada v. State, 144 Fla. 633, 198 So. 220 (1940); Eckles v. State, 132 Fla. 526, 180 So. 764 (1938); Pope v. State, 56 Fla. 81 47 So. 487 (1908); Banks v. State, 136 So.2d. 25 (Fla. 1st DCA 1962).

A Defendant should be permitted to withdraw a plea, "If

he files a proper motion and proves that the plea was entered under mental weakness, mistake, surprise, misapprehension, fear, promise, or other circumstances affecting his rights." (Emphasis supplied). Baker v. State, 408 So.2d 686, 687 (Fla. 2d DCA 1982).

It is obvious from a review of the September 23 and December 11, 1985 hearings, that the Defendant entered into the Plea Agreement under mistake, misapprehension, fear, or other circumstances affecting his rights. As to the unavailability of Dr. Morrison, the Defendant testified at the hearing:

> Dr. Morrison was the key to this thing as far as I was concerned. She was the main ingredient to the defense when I pleaded, with this plea bargain that took place a month or so ago. (R 1589)

The Appellant also testified,

> My counsel advised me that she would be here. And I went on what my counsel told me. They were mistaken. They were wrong. I don't know. But I know that they told me something that has not come about. I have no faith in anything in this thing now. I have no faith in my counsel. I have no faith in the doctors. (R 1591) I don't know what to do.

As to the Defendant's failure to realize that he had waived his right to appeal the confession, he testified:

> Back before this thing, before I pleaded, I was under the impression that further appeals as to my confession would not be jeopardized, that I was not giving up the right to appeal that suppression of the confession. I found out Monday, just this past Monday, that, indeed, that was a part of the deal with the plea. That I was giving up all appellate rights to challenge this confession. At the time I made the plea agreement, I was not aware of this. (R 1591-1592)

In granting the Defendant's Motion To Withdraw The Plea of Guilty, the Court ruled that the Defendant entered into the Plea Agreement with a "...misapprehension based on two key points that cannot come into existence as we sit here today: the appearance of Dr. Morrison or his right to appeal." (R 1636) The next day on December 12, 1985 when the Defendant elected not to withdraw his plea of guilty, it is extremely doubtful that the misapprehension based on these two key points that could not have come into existence the previous day could in fact come into existence the following day.

Furthermore, on December 11, 1985, the Defendant stated that he had no faith in the Plea Agreement or his counsel. (R 1591) It is thus also extremely doubtful that within twenty-four hours the Defendant's faith in the Plea Agreement and counsel could be restored.

There is a strong showing on the record that the Plea Agreement was entered into inadvisedly. In Roberts v. State, 142 So.2d 152 (Fla. 3rd DCA 1962) the Court held that a, "Defendant should be allowed to withdraw a plea of guilty, given inadvisedly, when application is duly made in good faith and sustained by proofs, and proper offer is made to go to trial on a plea of not guilty." Id. at 155.

As stated in Harper v. Wainwright, 334 F.Supp. 1338 (M.D. Fla. 1971), "Florida Courts have consistently held that the law favors the withdrawal of a guilty plea given unadvisedly where good cause is shown. Keesee v. State, 204 So.2d. 925 (Fla.

4th DCA 1967); Banks v. State, 136 So.2d. 25 (Fla. 1st DCA 1962); Pope v. State, 56 Fla. 81, 47 So. 487 (1908)."

Mr. O'Conner, Assistant Public Defender, stated on December 11, 1985 in his Motion To Withdraw as Counsel that,

> As the Court has heard in testimony before, obviously, he has lost faith in my ability to effectively represent him because he attributes to me and perceives in me one of the reasons that Dr. Morrison is not available to take up the cause in his behalf.
>
> He has also indicated to the Court that he feels that I either rushed him or coerced him or in some manner, species, or form caused him to enter into a written agreement with the Court in which he give up substantial rights and entered a plea of guilty. The Court heard him say I was inattentive in spending time with him. I was less than thorough and conclusive in presenting the facts and circumstances of the written plea agreement. And that he felt that I had rushed him into making a major decision.
>
> That coupled with the absence of Dr. Morrison at this proceeding, I would submit, he has materially in his mind undermined and skuttled any kind of report [rapport] that is an absolute must in a matter of this importance. And I would respectfully urge the Court to allow me to withdraw as counsel for Robert Joe Long and for the Court to appoint independent private counsel of sufficient experience, bearing in mind the nature of these allegations. (R 1621-1622)

The Court denied Mr. O'Connor's Motion To Withdraw. (R 1623) Based upon these representations, the Court was on notice that the Plea Agreement may have been entered into inadvisedly and with ineffective assistance of counsel. Therefore, the Trial Court should have not only granted the Motion To Withdraw but refused to accept the Defendant's re-entry of the guilty

plea the following day under these allegations.

The Public Defender knew or should have known that the wavier to contest the admissibility of the confession and evidence was inadviseable particularly in light of the viable confession issue in the pending appeal of the Pasco County murder case. (Appeal Case No. 67,103).

Therefore, when new counsel for the Appellant, Ellis S. Rubin, presented the Motion To Set Aside the Plea Agreement on July 8, 1986 it should have been granted since the Plea Agreement was entered into inadvisedly and the Defendant could not possibly receive a fair sentencing phase trial under the Plea Agreement.

Even if it can be argued that the Defendant's reiteration of the plea on December 12, 1985 cured any mistakes or misapprehensions as to the Plea Agreement, there was still another key element under the case law that could not be satisfied: "That the plea was entered under circumstances effecting his rights." Baker v. State, 408 So.2d 686, 687 (Fla. 2d DCA 1982); Yesnes v. State, 440 So.2d. 628 (Fla. 1st DCA 1983). On July 8, 1986 new counsel for the Appellant moved to set aside the Plea Agreement based upon circumstances directly affecting the Defendant's rights, i.e. that the Plea Agreement provided for a waiver of the right to contest the admissibility of unconstitutionally obtained statements and evidence. Counsel for Long informed the Court that he had come into the case after the Plea Agreement had been entered into; that he did not agree

with it and that it was not in compliance with the Constitution of the United States nor F.S. §921.141.

The Plea Agreement was in direct violation of the United States Constitution as interpreted by Miranda v. Arizona, 384 U.S. 436 (1966) and its progeny. See also, Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d. 441 (1963). The Plea Agreement also directly effected the Appellant's rights to a fair trial as provided by F.S. §921.141 which provides, "However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or the constitution of the State of Florida."

ISSUE II.

THE TRIAL COURT ERRED IN ADMITTING THE DEFENDANT'S CONFESSION AND THE KNIFE AS THE FRUIT OF THE POISONOUS TREE SINCE THE CONFESSION WAS OBTAINED AFTER THE DEFENDANT INVOKED HIS RIGHT TO REMAIN SILENT AND REQUESTED AN ATTORNEY.

In Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 2561 L.Ed. 2d 197 (1979), the Supreme Court referred to Miranda's "rigged rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment Rights requiring that all interrogation cease." In Michigan v. Mosley, 423 U.S. 96, 105-106, 96 S.Ct. 321, 327, 46 L.Ed. 2d. 313 (1979) the U.S. Supreme Court stated that the rule requiring termination of questioning upon an accused's invocation of his right to silence prevents police from "persistant and repeated efforts to wear down the accused's resistance and make him change his mind."

Robert Joe Long was arrested only on the kidnapping and sexual battery of [redacted]. (A-1) The detectives concealed from the Defendant the fact that he was the primary suspect in a series of recent murders in the Hillsborough County area. Although the Defendant waived his Miranda rights, the waiver and consent form designated only the charges pertaining to the abduction of [redacted] (A-2)

Ultimately, the detectives obtained a confession on the [redacted] case and then began to change the subject to the murders without advising the Defendant that he was a murder suspect or securing a waiver of his Miranda rights pertaining to any murder charges. Detective Latimer began subtly changing the focus to the murders by asking the Defendant if he ever picked up prostitutes. (A-3) The Appellant replied that he did while he lived in Miami, Florida. (A-3) When asked about the Tampa area, Long stated, "I'd rather not answer that." (A-3) Rather than honoring the Defendant's request by terminating questioning, the detective began confronting him about the murders by handing the Defendant photographs of the Hillsborough murder victims who were prostitutes and asked the Defendant if he knew them. (A-3) After seeing the photographs, the Defendant stated:

> The complexion of things sure have changed since you came back into the room. I think I might need an attorney. (A-3)

Instead of honoring Long's request for an attorney or clarifying the request, Detective Price stated, "Nothing has changed. I am still being honest with you." (A-3) Detective

Price admitted that he was lying to the Defendant and that his response was to prevent Long from thinking about an attorney and to keep the interrogation going. (A-3) Ultimately the Defendant confessed to nine murders including the murder of Michelle Denise Simms.

The Appellant's confession was obtained in violation of his rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution; Art. 1, Sections 9, 16 of the Florida Constitution; Miranda v. Arizona, 384 U.S. 436 (1966) and its progeny. All questioning should have ceased when Long invoked his right to remain silent and asked to have counsel present.

In Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979), the Court held, "Whenever even an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one subject only. Further questioning thereafter must be limited to clarifying that request until it is clarified." See also, Thompson v. Wainright, 601 F.2d 768 (5th Cir. 1979); Valle v. State, 474 So.2d. 796 (Fla. 1985).

Thus, even assuming arguendo that the Appellant's request for an attorney was equivocal,[1] the detectives nevertheless violated his constitutional rights by not limiting their questions to clarifying the request.

---

[1] See, Waterhouse v. State, 429 So.2d. 301, 305 (Fla. 1983); but see, Singleton v. State, 344 So.2d. 911, 912 (Fla. 3rd DCA 1977) ("Maybe I better ask my mother if I should get me [an attorney]."); People v. Traubert, 608 P.2d 342, 346 (Colo. 1980) ("Although the Defendant's statement 'I think I need to see an attorney' was neither 'sophisticated' nor, perhaps in a 'legally proper form', it was sufficient... to put the police officers on notice that the Defendant intended to exercise his constitutional rights to counsel.")

A valid waiver "cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation." Edwards v. Arizona, 451 U.S. 477, 484, 101 S.Ct. 1880, 1885, 68 L.Ed. 2d 378 (1981) "Using an accused's subsequent responses to cast doubt on the adequacy of the initial request itself is even more intolerable." Smith v. Illinois, 469 U.S.. _____, 105 S.Ct. 490, 495, 83 L.Ed. 2d. 488 (1983).

The Trial Court erred in permitting the introduction of the Defendant's unconstitutionally obtained confession as to Michelle Denise Simms and Virginia Johnson at the sentencing phase. F.S. §921.141 which provides for the sentencing phase of capital felonies states that, "this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or the constitution of the State of Florida."

In Alvord v. State, 322 So.2d. 533 (Fla. 1975) the Florida Supreme Court stated, "there should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or any other matter except illegally seized evidence." (emphasis provided)

Furthermore, the Trial Court erred in allowing the introduction of the knife that was recovered in the Michelle Denise Simms case since such evidence constituted the "fruit of the poisonous tree." See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963). At the sentencing

hearing, Detective Latimer testified that Long told him in his confession that he threw the knife in a wooded area near his apartment a couple of days prior to giving the confession. (R 580-581) The knife was recovered by Detective Gary Nelms and introduced at the sentencing hearing over objection of defense counsel.

The tainted "fruit" doctrine has its genesis in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). There, the Court held that,

> The essence of a provision forbidding the aquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed. Id. at 392

In Nix v. Williams, 104 S.Ct. 2501, 81 L.Ed. 2d. 377 (1984) the United States Supreme Court held, "Although Silverthorne and Wong Sun involved violations of the Fourth Amendment, the fruit of the poisonous tree doctrine has not been limited to cases in which there has been a Fourth Amendment violation. The Court has applied the doctrine where the violations were of the Sixth Amendment, See United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d. 1149 (1967), as well as of the Fifth Amendment." See Murphy v. Waterfront, Comm'n of New York Harbor, 378 U.S. 52, 79, 84 S.Ct. 1594, 1609, 12 L.Ed. 2d 678 (1964).

In the instant case, the knife would not have been found but for and as a direct result of the detectives exploiting the Appellant's illegally obtained confession. Furthermore, it cannot be argued that knowledge of the knife would have been gained from an independent source. Thus, the Trial Court committed reversible error in permitting the introduction of such evidence in violation of the Defendant's constitutional rights and in violation of Fla. Stat. 921.141.

ISSUE III.

THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR CONTINUANCE CONSTITUTED A DEPRIVATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL WHERE A CRITICAL DEFENSE PSYCHIATRIST HAD NOT BEEN GIVEN ADEQUATE TIME IN WHICH TO EVALUATE THE DEFENDANT IN ORDER TO PRESENT COMPLETE MITIGATING TESTIMONY AT THE SENTENCING PHASE.

In Valle v. State, 394 So.2d. 1004 the Florida Supreme Court reversed the Defendant's First Degree Murder conviction and held that, "The Trial Court should have allowed defense counsel time to interview the additional witnesses and to present evidence on his pre-trial motions." Significantly, the Florida Supreme Court also held, "The Trial Court should also have allowed the opportunity for a mental examination, given the evidence of Appellant's industrial accident and consequent intracranial surgery." Id. at 1008

The Valle Court also cited Scott v. State, 101 Fla. 250, 253-54, 134 So. 50, 51-52 (1931) where the Florida Supreme Court stated,

> The defense of one charged with murder in the first degree or other high crime, is a serious undertaking, and should not be considered lightly. This Court does not take the position that one charged with crime, capital or otherwise, may not be tried promptly after the indictment is presented, but when the Defendant, in due season, asks for a reasonable time in which to prepare his defense the time should be granted unless there is a showing to the contrary.

In the instant case, it is certainly notworthy that on December 12, 1985 the Trial Court granted the Defendant's Motion For Continuance due to the failure to secure the attendance of Dr. Morrison to present psychiatric testimony in support of mitigating circumstances. As the Trial Court stated,

> I think it would be gross error to proceed at this point, because I believe what Mr. Long said and what his attorney said, that as Mr. O'Conner so colorfully put it, she was the keystone and the arch of this defense. And I believe with their comments along that line, I think it would be gross error to proceed with the hearing at this time. (R 1770)

Thus, the Trial Court realized and admitted how crucial Dr. Morrison was to a fair trial for the Appellant.

On July 10, 1986, Appellant presented a Motion For Continuance based upon the unavailability of Dr. Morrison for her refusal to attend the sentencing hearing and the fact that defense expert witness, Dr. Dorothy Lewis, needed additional time to complete her evaluations of the Defendant in order to render a reasonable medical opinion at the sentencing phase regarding mitigating circumstances. (R 1719-1730)

As Dr. Lewis testified at the sentencing hearing, she was not permitted to evaluate the Defendant for more than three

hours, review some old records and speak to the Defendant's parents for four hours on the same day that she testified in order to arrive at a preliminary assessment. (R 761-763)

In Marshall v. State, 440 So.2d. 638 (Fla. 1st DCA 1983) the Court held that the Trial Judge abused his discretion in denying the Defendant's Motion For Continuance in order to allow psychiatric examination to determine the Defendant's competency to stand trial where the Court-appointed experts required more information and further observation in order to determine the issue of competency. Id. at 640.

Marshall is analogous to the instant case. The Trial Court was informed that due to Dr. Morrison's refusal to attend the sentencing hearing, the Defendant had lost a valuable part of his defense. Dr. Lewis was the only expert who could have filled that void. The Trial Court's failure to continue the case in order to allow Dr. Lewis additional time in which to evaluate Long deprived the Defendant of his Sixth and Fourteenth Amendment rights to adequate preparation time and effective assistance of counsel.

ISSUE IV.

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY WHERE THE SENTENCING PROCESS IMPROPERLY INCLUDED AGGRAVATING CIRCUMSTANCES WHICH THUS RENDERS THE DEATH SENTENCE UNCONSTITUTIONAL.

Florida's sentencing statute §921.141 must be strictly applied to because the Trial Court's discretion must be, "guided and channeled" by requiring an examination of specific factors

that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition. Proffitt v. Florida, 428 U.S. 242, 258 96 S.Ct. 2960, 49 L.Ed. 2d. 913 (1976); See also Miller v. State, 373 So.2d. 882, 885 (Fla. 1979).

A.

THE TRIAL COURT ERRED IN APPLYING F.S. §921.141(5)(h) IN FINDING AND WEIGHING THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

In Miller v. State, 373 So.2d. 882, 885 (Fla. 1979), there was a causal connection between the Defendant's mental condition and the heinous nature of the offense. There, the Florida Supreme Court held, "It appears likely that at least one of the aggravating circumstances proven at the sentencing hearing, the heinous nature of the offense, resulted from the Defendant's mental illness. Id. at 886. This Court has previously recognized in other capital cases that those mitigating circumstances involved in the present case may be sufficient to outweigh the aggravating circumstances involved even in an atrocious crime. Huckaby v. State, 343 So.2d. 29 (Fla. 1977); Burch v. State, 343 So.2d. 831 (Fla. 1977); Jones v. State, 332 So.2d. 615 (Fla. 1976); Swan v. State, 322 So.2d. 485 (Fla. 1975)." Id. at 886.

In Miller, the Defendant had been committed to mental hospitals on several previous occasions. He had a severe hatred for his mother and planned to kill her after his release from the jail prior to the murder that he committed. On several

prior occasions, Miller suffered hallucinations in which he saw his mother in other persons, in a "yellow haze." On at least one prior occasion, he had assaulted another women during such hallucinations. He testified that at the time of the murder he saw his mother's face on the victim in a "yellow haze" and proceeded to stab her to death. Id. at 885, n.4.

The instant case is analogous to Miller based upon the causal connection between Long's extreme mental disturbances and the crimes he committed. Dr. Lewis, Dr. Berland, Dr. Heidi and Dr. Afield all confirmed that the Defendant was under the influence of an extreme mental or emotional disturbance when he committed the murder of Michelle Denise Simms and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired. In addition, the Court itself found these two mitigating circumstances to be present.

Also analogous to Miller is the Defendant's disturbed motivation behind the homicides. As in Miller, Long was acting out unconsciously in fits of rage against his mother. Dr. Gonzalez stated that every time the Defendant killed one of his victims, he was unconsciously killing his mother by extention. (R 690) Dr. Heidi testified that the killing of Michelle Denise Simms was a result of the Defendant's loss of control due to a subconscious rage with his mother. (R 1039-1041)

In Huckaby v. State, 343 So.2d. 29 (Fla. 1977), the Florida Supreme Court found that although there was insufficient

proof of legal insanity, the evidence nevertheless showed that Huckaby's mental illness was a motivating factor in the commission of the crime. The Florida Supreme Court reversed the trial court's imposition of the death penalty and held that the mitigating circumstances outweighed the aggravating circumstances. As the Court stated:

> Our decision here is based on the causal relationship between the mitigating and aggravating circumstances. The heinous and atrocious manner in which this crime was perpetrated, and the harm to which the members of Huckaby's family were exposed, were the direct consequence of his mental illness, so far as the record reveals.

In the instant case, there was overwhelming testimony in support of the causal connection between the Defendant's mental disturbances and the violent crimes. Therefore, the Trial Court erred in finding and weighing as an aggravating circumstance that the homicide was especially heinous, atrocious or cruel.

B.

THE TRIAL COURT ERRED IN APPLYING F.S. 921.141(5)(i) IN FINDING AND WEIGHING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

In Mason v. State, 438 So.2d. 374 (Fla. 1983) the Florida Supreme Court stated that F.S. §921.141(5)(i), "relates more to the killer's state of mind, intent and motivation." Id. at 379.

As already stated, there was overwhelming testimony that Long was under the influence of extreme mental or emotional

disturbance and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired. Thus, Long lacked and was incapable of having the requisite frame of mind to commit the homocide in a cold, calculated and premeditated manner.

As Dr. Lewis testified, the Defendant could not stop himself in committing the crimes of violence. (R 811) Furthermore, Dr. Heidi testified that the killing of Michelle Denise Simms was a result of the Defendant's loss of control due to a subconscious rage with his mother. (R 1039-1041) There was substantial testimony from Dr. Lewis, Dr. Berland and Dr. Afield that the Defendant was suffering from brain damage. (R 809, 962-963, 1096)

Therefore, the Trial Court erred in finding and weighing as an aggravating circumstance that the homocide was committed in a cold, calculated and premeditated manner.

Thus, the Trial Court erred in finding and weighing two of the four aggravating circumstances. Even assuming arguendo that the remaining two aggravating circumstances[2] are valid, they would not outweigh the two mitigating circumstances found by the Court. The errors and misapplications of the sentence weighing process renders the Appellant's death sentence unconstitutional under the Eighth and Fourteenth Amendments.

[2] The Trial Court found two elements in applying F.S. §921.141(5)(b), (that the Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person). The first element was based upon Robert Joe Long's previous conviction of the first degree murder of Virginia Johnson in Pasco County, Florida. This Court should note that there are very viable issues on appeal pending in the Pasco County Case. Should that case be reversed, then obviously this would vitiate this element as to the Court's finding of the aggravating circumstance under §921.141(5)(b).

CONCLUSION

Based upon the reasons presented in Issues I through IV Robert Joe Long asks this Court to set aside the Plea Agreement and reverse this case for a new trial. Alternatively, for the reasons expressed in Issue IV Robert Joe Long asks this Court to reduce his death sentence to life imprisonment.

Respectfully submitted,

ELLIS RUBIN LAW OFFICES, P.A.
Attorneys for Appellant
265 N.E. 26th Terrace
Miami, Florida 33137
305/576-5600 (Miami)
305/524-5600 (Ft. Laud.)

BY: _____
ELLIS S. RUBIN

and

BY: _____
DAVID M. RAPPAPORT
For the Firm