IN THE SUPREME COURT OF FLORIDA

ARTHUR D. RUTHERFORD,

Appellant,

v.

CASE NO. 69,821

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. MCLAIN
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

FLORIDA BAR NUMBER 201170

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PRELIMINARY STATEMENT

References to the record on appeal are designated with the prefix "R." The supplemental record and the second supplemental record are designated with "SR" and "SSR" respectively. The first trial of this case is included in a supplemental record filed on January 29, 1988, and references to this prior trial transcript will be preceded with the prefix "PT." References to the appendix to this brief are preceded with an "A."

STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On September 11, 1985, a Santa Rosa County grand jury indicted Arthur D. Rutherford for the first degree murder of Stella Salamon and robbery with a deadly weapon.(R 1) Several motions and hearings were conducted concerning discovery problems.(PT 974-1194) Rutherford filed a Motion for Discovery and Statement of Particulars and Production of Documents.(R 2-9) The State filed an answer merely listing 30 witnesses.(R 11-12) Rutherford filed a motion to compel (R 13), and after a hearing (PT 974-1064), the trial court entered an order directing the State to comply with discovery.(R 16-20) The order described in detail the State's obligations and the items to be disclosed.(R 16-20) On October 30, 1985, defense counsel filed a certificate of compliance, as the discovery order required, indicating portions of the order with which the State had complied. (R 21) The State filed a motion for rehearing and clarification which the trial court granted with an extensive order.(R 25-34)(PT 1065-1136) This order again detailed the State's discovery obligations.(R 25-34) On January 6, 1986, Rutherford filed a motion for continuance or for imposition of sanctions because the State had belatedly filed an additional witness list.(R 48-50)

The case proceeded to trial.(PT 1-973) Two State witnesses, Sherman Pittman and Kenneth Cook, testified to incriminating statements Rutherford allegedly made to them before the

homicide.(PT 321-345) Although the witnesses' names had been furnished to the defense on the State's discovery answer, the fact that they would testify to incriminating statements was not disclosed.(R 106-111)(PT 384-398, 578-632) The prosecutor had knowledge of the substance of the testimony before presenting the witnesses to testify, but he did not give defense counsel notice.(R 106-111)(PT 384-398) Rutherford moved for a mistrial upon which the court reserved ruling until the conclusion of the trial.(PT 384-398, 578-632) The jury found Rutherford guilty as charged on January 31, 1986.(R 74) A recommendation of death was returned on February 1, 1986.(R 75) Rutherford filed a motion for new trial and renewed the motion for mistrial.(R 76-78, 83-98) Circuit Judge George Lowery granted the motion for mistrial on the ground of the prosecutor's knowing and willful violation of the discovery rules and the court's pretrial discovery order.(R 106-111) A new trial was scheduled in Walton County before Circuit Judge Clyde Wells.(R 113)

At the conclusion of the second trial, the jury again found Rutherford guilty as charged on October 2, 1986. (R 150-151) After hearing additional evidence in aggravation and mitigation, the jury recommended a death sentence by a vote of 7 to 5.(R 156) Judge Wells ordered a presentence investigation.(R 934) On December 9, 1986, the court adjudged Rutherford guilty and sentenced him to death for the murder and 30 years for the robbery.(R 158-162) In support of the death sentence, the court found three aggravating circumstances: (1)

the homicide was committed during a robbery and for pecuniary gain; (2) the homicide was especially heinous, atrocious and cruel; and (3) the homicide was committed in a cold, calculated and premeditated manner. (SSR 3-6) (A 1-4) The court found as a statutory mitigating circumstance that Rutherford had no significant history of prior criminal activity.(SSR 3-6) (A 1-4)

Rutherford timely filed his notice of appeal to this Court on December 23, 1986.(R 163)

Statement of the Facts--Guilt Phase

Stella Salaman lived alone in her Santa Rosa County home.(R.573) On August 22, 1985, she did some shopping between 9:30 and 10:30 a.m.(R 492-498) and had an appointment to take an evening walk around 6:30 with her neighbor, Beverly Elkins.(R 572-575) At 6:30, Elkins telephoned Salaman's residence but received no answer.(R 575) She walked outside, saw Salaman's car in her driveway and decided to walk over to her friend's house.(R 575-576) When no one answered the doorbell, Elkins walked to the rear of the house and peered in through the glass doors.(R 576-577) She noted that the television was playing in the living room and that Salaman's two small dogs were behaving in an unusual manner.(R 577) Elkins went to her home where she retrieved an extra key she kept to Salaman's house and returned.(R 577-578) By this time, Ann McWay, another walking companion, had joined her.(R 578) The two women used the key to enter through the carport door.(R

579) They immediately heard water running and followed the sound to the hall bathroom.(R 580) There, they found Stella Salaman's nude body floating in a bathtub full of water.(R 580-582) Elkins telephoned for assistance.(R 582)

David T. Nicholson, M.D., a pathologist, performed an autopsy on the following day.(R 558-560) He found that Salaman had suffered several injuries and that cause of death was a combination of blunt trauma to the back of the head, asphyxiation and drowning.(R 561-570) Three wounds to the head could have been caused by as many as three different instruments since each was slightly different.(R561-562) One was consistent with the head striking a hard, flat surface. (R 561) The second and third were produced by a blow from a blunt object, but one of these wounds had a puncture quality to it indicating the object was somewhat sharp.(R 561-562) These blows to the head would have caused unconsciousness.(R 566) There were also bruises and abrasions to the nose, chin and lips consistent with something having been held over her mouth.(R 560-561) Bruises were present on the right arm and the left arm was broken at the elbow.(R 563) The left knee had an abrasion.(R 563) Nicholson finally found fluid in the lungs and water in the circulatory system, leading him to conclude that drowning was involved in the death.(R 563)

Crime scene technicians processed Salaman's house for evidence.(R 343-351, 499-525, 532-551) They found what appeared to be blood stains on the wall and floor of the bathroom.(R 509-510) Additionally, 17 latent finger and palm

prints were developed and submitted to the laboratory for comparison.(R 549)

Four witnesses testified to alleged incriminating statements Rutherford made to them.(R 372,449, 476, 483) Harold Attaway testified first.(R 368) He said that on two occasions, two weeks and one week before Salaman's death, Rutherford talked about killing a lady for her money. (R 373-374) Rutherford allegedly stated that he would make it appear like an accident as a result of a fall in the bathtub.(R 374) Attaway thought Rutherford was joking.(R 373) On the day of the homicide, August 22, Rutherford came to Attaway's house at 6:30 a.m. and asked him to help pick up some glass doors at a lady's house where he had been performing carpentry work.(R 371) Attaway agreed to help, and after the men drank coffee at a convenience store, they proceeded to Stella Salaman's house about 7:00.(R 371) On the way, Rutherford allegedly said,"If I reach for that gun you'll know I mean business."(R 372) This frightened Attaway because he thought Rutherford really meant to kill the woman.(R 373) At Salaman's house, she and Rutherford had a normal conversation, the men loaded the doors in Rutherford's van and drove away. (R 375-376) Attaway returned home, and at 7:45 a.m., he went to work with A.J. Luker and Gerald Perritt removing trees. (R 377-379) Luker testified that Attaway was with him all day until 5 or 6 o'clock that evening.(R 388-390) Attaway admitted that he was incarcerated at the time of testifying awaiting trial on charges of possession of 50 pounds of marijuana.(R 380)

John Cook and Sherman Pittman also testified that Rutherford talked to them about obtaining money from a lady.(R 475-487) These conversations occurred one to two weeks before the homicide.(R 477,483) One week before the crime, Rutherford allegedly told Cook that he knew where they could make some easy money.(R 476) He then related how he could strike the lady in the head to obtain it.(R 477) The lady was not named in the conversation.(R 478) Pittman had a discussion with Rutherford two weeks prior to the homicide in which Rutherford allegedly mentioned the name "Salaman."(R 485) According to Pittman, Rutherford said he needed money and was going to force a woman to write a check as if for payment for construction work.(R 483) He said he would grab her by the arm to make her sign the check, and afterwards he would put her in the bathtub.(R 483) Pittman said that Rutherford offered no explanation concerning the bathtub remark.(R 484) Neither Cook nor Pittman took these statements seriously and did not call the police.(R 478, 488)

On August 22, 1985, Johnny Cecil Perritt talked to Rutherford two times.(R 448- 449) The first was around 8:00 in the morning and the second was between 1:00 and 2:00 in the afternoon.(R 448-449) During the afternoon, Rutherford allegedly said that he had killed a lady and had $1500.(R 449) He asked Perritt to hold $1400 for him.(R 449) Rutherford stated that he had hit the woman with a hammer, stripped her and placed her in the bathtub.(R 449) Perritt refused to hold the money.(R 450) Rutherford then said that he had not killed

anyone and that the money was borrowed.(R 450) Perritt told his parents about the conversation.(R 450,462,469) Later, upon hearing a news report about the homicide, Perritt's father called the police.(R 470) Rutherford talked to Perritt again the next morning between seven and eight o'clock. (R 451) He denied killing anyone and said the police had interrogated him most of the night trying to pin the murder on him.(R 451-452)

Mary Heaton obtained $2000 with a check drawn on Stella Salaman's account on August 22, 1985.(R 403-410, 435-442) The bank teller, Jamie Peleggi, first refused to cash the check because Stella Salaman's signature was missing.(R 437-438) About 40 minutes later, Heaton returned with the check signed, and Peleggi cashed it at 2:02 p.m.(R 439) Heaton received the funds in $100 bills.(R 440) Peleggi did not see Rutherford with Heaton.(R 442) Salaman's friend, Beverly Elkins, testified at trial that the signature on the check was not in Stella Salaman's handwriting.(R 584)

According to Heaton, she cashed the check at Rutherford's request. On August 22, 1985, Rutherford came to Heaton's home around noon.(R 399) He asked her father if he wanted two glass doors.(R 400) After that discussion, Rutherford then asked Heaton if she could write a check.(R 400) She can neither read nor write anything beyond her own name.(R 400-401) Rutherford said he wanted to pay her for past work as his baby-sitter and housekeeper.(R 399,401-402) Since Heaton could not write the check, Rutherford obtained assistance from Heaton's 14 year-old niece, Elizabeth Ward.(R 425-431) Ward filled out the check

for $2000 but refused to provide any of the signatures. (R 428-430) The check was made payable to Mary Heaton, and according to Ward, Rutherford endorsed the back of the check with her name.(R429-430) Heaton testified that Rutherford then drove her to the bank where her first attempt to cash the check was not successful.(R 402-405) She said the two of them went to a wooded area where Rutherford threw away a blue wallet and a checkbook.(R 407) When he returned with the check, it had the required signature.(R 408) They returned to the bank, Heaton cashed the check and Rutherford gave her $500.(R 410) The same day, Heaton used $350 as a down payment on a used car, telling the salesman the money was a tax refund.(R 411, 443-446) On cross examination, Heaton admitted that she was then hospitalized for mental illness, and during August 1985, she had difficulty distinguishing fact from fantasy.(R 411-412)

A fingerprint expert, Otis Garrett, compared the 17 latent prints found at the scene with the known prints of the victim and Rutherford.(R 532-551) He was unable to identify some of the prints.(R 549) However, three prints from the bathroom tile underneath the window proved to be Rutherford's. (R535-546) Rutherford's prints were not found on the check or checkbook.(R 550)

Rutherford testified in his defense at trial.(R 602) He stated that he had known Stella Salaman for several years and had assisted in building her house ten years earlier.(R 607) Since that time, Rutherford had performed various repair jobs for her.(R607-609) Shortly before Salaman's death, Rutherford

had repaired sliding glass patio doors and the sliding shower doors in her hall bathroom.(R 607-610) He said that he would have touched the tile under the bathroom window during the latter repair job.(R 609) Just before the homicide, Salaman had asked Rutherford to begin painting the trim on her house the following week.(R 612)

Rutherford denied killing Stella Salaman and denied ever having or discussing a plan to kill anyone.(R620-624,651-657) He related the details of his activities during the time of her death. On August 21, 1985, Rutherford worked at Salaman's house placing spacers in the new patio doors he had installed earlier with the help of Harold Attaway.(R 608) At that time, he also repaired the sliding shower doors in the hall bathroom.(R 609,628-629) Rutherford and Salaman agreed for him to take the extra patio doors and in exchange, he would reduce his bill for the future painting work by $75.(R 612) Around 7:00 a.m. on August 22, 1985, Rutherford returned with Harold Attaway to pick up the doors.(R 613) They left Salaman's house about 7:30 and Attaway returned to his home.(R 613) At 8:15 a.m., Rutherford arrived at Johnny Cecil Perritt's house to discuss a construction job.(R 614) Johnny was assisting Rutherford build a balcony for Johnny's uncle.(R 614, 634) Next, Rutherford drove to Frank Kolb's house, arriving between 8:30 and 9:00.(R 614) Kolb loaned Rutherford $10 at that time. (R 633, 661-663) Rutherford then drove to the Heaton residence where he asked Mr. Heaton, Mary Heaton's father, to store the glass doors for him.(R 615-616) Although Mary Heaton lived in

a trailer on her father's property, Rutherford denied seeing her or Elizabeth Ward that day.(R 638) He denied any knowledge about the check on Salaman's account.(R 616, 638) Leaving the Heaton residence between 11:00 and 11:30, Rutherford drove to a store and gasoline station where he stayed until 12:30.(R 616) Then he drove to Melvin's sawmill to check on lumber needed for the balcony job.(R 617) He stopped at Johnny Perritt's house again to tell him the lumber would be ready the following morning.(R 617-618) He left just before 2:00 p.m. and went home.(R 617-618) That afternoon, he and his wife shopped for school supplies for his children using $120 they had saved for that purpose.(R618) At 11:00 p.m., sheriff investigators picked him up for questioning about the homicide.(R 619)

Statement of the Facts--Penalty Phase

The State presented five additional witnesses during the penalty phase of the trial.(R 783-830) Two testified concerning physical evidence and three were friends of the victim's. An investigator, Chuck Sloan, testified to the necessary predicate to introduce two photographs of the victim taken at the morgue during the autopsy.(R 783-786) Over defense objections (R 786), these photographs were introduced as State's exhibits 20 and 21.(R 786-787) Exhibit 20 depicts the injuries to the victim's mouth and exhibit 21 shows the injuries to the head.(R 787) Janice Johnson, a crime scene analyst, testified to her conclusions concerning the blood stain patterns found in the bathroom.(R 788-803) She found blood stains on the west

wall of the bathroom which she characterized as medium velocity spatters.(R 791-792) These are produced by blood shed as the result of someone being struck as opposed to a gunshot wound which would produce high velocity stains.(R 791-792) She also found low velocity stains which are consistent with blood being cast off of an object.(R 792) Based on the location of these stains, she concluded that the victim would have been located below the towel bar area at the time of the blow.(R 792) The patterns of blood would not have been made if the victim had received the injuries in the bathtub.(R 793)

Friends of Stella Salaman's testified to hearsay statements Salaman allegedly made to them concerning her anxiety about Arthur Rutherford.(R 804, 819) Lois LeVaugh related a conversation she had with Salaman about Rutherford and a time when she saw him at Salaman's house.(R805-810) According to LeVaugh, Salaman told her that Rutherford's presence at the house made her nervous.(R 806-807) One day Salaman called and said that Rutherford was there and had been there quite awhile concerning the patio doors.(R 806) The LeVaughs and two of their friends who were visiting drove to Salaman's house.(R 807-808) They saw Rutherford sitting on the front porch.(R 808) After a discussion about the doors, Rutherford left.(R 808) Salaman then told her friend,"I sure am nervous, he scared me. He really made me nervous."(R 807) Beverly Elkins testified that Salaman made similar remarks to her about Rutherford. (R 822-825) Elkins and Richard LeVaugh, Lois LeVaugh's husband, also testified to the ongoing problems

Salaman experienced with the ill fitting patio doors.(R 814-817, 820-825)

Rutherford's father, A. E. Rutherford, and sister, Joyce Coleman, testified about his youth while growing up on a farm in Santa Rosa County.(R 832,838) He had five brothers and two sisters.(R 833) His father described him as "a typical country boy" who worked hard on the farm and liked to hunt and fish.(R 833-834) His sister said that Rutherford always got along well with the others in the family and helped care for his brothers and sisters.(R 840-843) She also described a troubled period in their lives when their father left them for awhile.(R 847-848) Their mother took in washing, and the boys worked the farm to support the family.(R 847-848) Rutherford liked school, particularly the agriculture program.(R 835) He had no disciplinary reports from school (R 836) and was not a trouble-maker.(R 841) After leaving school, Rutherford worked as a carpenter for a time and then voluntarily entered the Marine Corps.(R 836-837, 843) He served in combat in Viet Nam.(R 837,844) His father and sister said that Rutherford was nervous and jittery frequently after his return.(R 837,844)

Rutherford's wife of 14 years also testified.(R 849) They met and married shortly after he returned from Viet Nam.(R 850-851) For the first three years of marriage, Rutherford would frequently awaken during the night sweating, shaking and jerking, but he would never discuss his war experiences.(R 852) Rutherford was a good father to his five children.(R 851, 853-857) He helped care for them when they were infants.(R

854) He played with them and took the family on outings such as picnics, camping and fishing.(R 854) The family also attended the Bible Baptist Church.(R 856) Two of the children suffer from birth defects probably attributable to Rutherford's exposure to Agent Orange while in Viet Nam. (R 856-857) During his wife's testimony, a petition with nine pages of signatures from the people in the community was introduced in Rutherford's behalf.(R 857-858)

A long time family friend, Frank Kolb, testified in mitigation.(R 860) Kolb stated that Rutherford had a reputation for nonviolence and honesty in the community.(R863-864) He also said Rutherford was known as a good carpenter.(R 865)

Finally, Rutherford testified.(R 865) He related some of his experiences growing up on a farm, including the time when his father was gone and he and his brothers had to work the farm to help support the family.(R866-870) When he was 19, Rutherford joined the Marines.(R 872) Thirteen months of his military career was spent in combat in Viet Nam.(R 875) During that time, he was exposed to Agent Orange which is the suspected cause of the birth defects his three children suffer.(R 879-880) Rutherford was decorated for his service and received an honorable discharge at the rank of lance corporal.(R 881-884)

SUMMARY OF ARGUMENT

1. The trial court lacked jurisdiction to try Rutherford a second time for the homicide and robbery charged in this case. At the conclusion of the first trial, the court granted a defense motion for mistrial, which had been held in abeyance, on the express ground of prosecutorial misconduct in willfully refusing to comply with the court's discovery order. The prosecutor not only withheld information from the defense but also intentionally, and without notice, presented the material evidence at trial. This intentional prosecutorial behavior prompted the mistrial which acts as a double jeopardy bar to the second trial.

2. Rutherford's death sentence was unconstitutionally imposed because of errors the trial court made in finding improper aggravating circumstances and failing to properly consider existing mitigating circumstances. A finding that the homicide was heinous, atrocious or cruel was incorrectly based upon an unsupported and irrelevant finding that Rutherford lacked remorse for the crime. The court also incorrectly found that the homicide was cold, calculated and premeditated since the evidence proved nothing more than a premeditated murder during a planned robbery. A heightened form of premeditation was not established. Finally, the court failed to consider and weigh several nonstatutory mitigating factors proven during the penalty phase of the trial. These findings tainted the sentencing process and Rutherford's death sentence.

3. The trial judge used an incorrect legal standard in evaluating the aggravating and mitigating circumstances. Instead of performing a qualitative analysis of the factors as constitutionally mandated, the court used a counting process to arrive at its sentencing decision. The death sentence was imposed merely because the aggravating circumstances outnumbered the mitigating ones; no weighing process was used.

4. The first trial of this case resulted in a mistrial after the jury reached a verdict and recommended a death sentence by a vote of eight to four. At the conclusion of the second trial, the new jury recommended death by a vote of seven to five. In sentencing Rutherford to death, the trial judge considered both recommendations. Use of the mistrial jury's recommendation improperly skewed the sentencing process in favor of death. The recommendation the first trial jury made was no longer valid, and the court violated Rutherford's due process rights in considering it.

5. Because the State introduced irrelevant evidence of nonstatutory aggravating circumstances, the jury's recommendation of death is tainted. The State presented testimony from the victim's friends of hearsay statements the victim allegedly made to them concerning her anxiety when Rutherford was present at her house performing repairs. The victim never expressed a factual basis for her anxiety, and her statements concerned a time prior to the crime.

6. During the penalty phase, the court ordered that Rutherford be placed in leg irons. The court heard no evidence

or argument on the need for such security precautions. The judge merely said that the bailiff and the deputies in charge of the defendant had indicated some concern. This procedure was inadequate and violated Rutherford's due process rights. Shackling Rutherford destroyed the integrity of the court proceedings and tainted the jury's sentencing recommendation.

7. The trial court should not have read the standard penalty phase jury instructions without modifications stressing the importance of the jury's recommendation in the sentencing process. The standard instructions improperly diminish the role of the jury in violation of the Eighth and Fourteenth Amendments. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

8. The trial court erroneously imposed a thirty year sentence for the robbery without considering a sentencing guidelines scoresheet. No scoresheet appears in the record, and the court never mentioned having knowledge of one or the appropriate presumptive sentence.

ARGUMENT

I

THE TRIAL COURT LACKED JURISDICTION TO TRY RUTHERFORD'S CASE SINCE THE GRANTING OF THE MISTRIAL AT THE CONCLUSION OF THE FIRST TRIAL ON THE GROUND OF KNOWING AND WILLFUL PROSECUTORIAL MISCONDUCT ACTS AS A DOUBLE JEOPARDY BAR TO THE SECOND TRIAL.

Normally, the Double Jeopardy Clause does not preclude retrial after the granting of a mistrial at the defendant's request. McLendon v. State, 74 So.2d 656 (Fla. 1954). However, an exception to that general rule exists when intentional prosecutorial misconduct provokes the mistrial. Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982); State v. Dixon, 478 So.2d 473 (Fla. 2d DCA 1985); State v. Iglesias, 374 So.2d 1060 (Fla. 3rd DCA 1979); State v.Kirk, 362 So.2d 352 (Fla. 1st DCA 1978). This exception is applicable here, and the Double Jeopardy Clause prohibited Rutherford's second trial. The trial court was without jurisdiction to conduct the second trial, and Rutherford's judgments and sentences must be reversed with directions to the trial court to discharge him. Even though this issue was not raised before the second trial via motion or objection, the error is fundamental and can be litigated for the first time in this appeal. State v. Johnson, 483 So.2d 420 (Fla. 1986).

The United States Supreme Court in Oregon v. Kennedy clarified the standard to be used when deciding if the prosecutor's misconduct prompting the mistrial is sufficient to constitute a double jeopardy bar to retrial. After

acknowledging that its prior decisions had created some confusion regarding the standard to be employed, the Court stated the rule as follows:

> ...we do hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.

456 U.S. at 679. Explaining the manageability of the standard, the Court further said,

> It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system.

456 U.S. at 675; see, also, 456 U.S. at 679-680,(Justice Powell's concurring opinion emphasizing that the test for determining a prosecutor's intention is primarily objective rather than subjective). Applying the standard here demonstrates that the prosecutor's actions were intended to provoke Rutherford's motion for mistrial.

The trial court granted Rutherford's motion for mistrial because the prosecutor knowingly and intentionally violated his discovery obligations. (R 106-111) Two prosecution witnesses, Sherman Pittman and Kenneth Cook, testified about statements Rutherford allegedly made which had not been disclosed on the State's discovery answer.(R 106-111)(PT 321, 336) Defense counsel objected and moved for a mistrial, advising the court that he had no notice that the witnesses would testify to

incriminating statements.(PT 384-400) The State had listed the witnesses' names but had not indicated that they would testify to statements Rutherford allegedly made to them. (R 107)(PT 386-391) Defense counsel said he did not depose the witnesses because his investigation did not reveal they would testify to material information.(PT 390-398) None of the police reports given to counsel contained references to these statements, even though Pittman and Cook testified that they told law enforcement officers about the statements.(PT 327, 340-342) Pittman spoke to Sheriff Coffman and Cook spoke to Deputy Pridgen.(PT 327, 341) Pridgen did reveal during a defense deposition taken a few days before trial that Cook spoke to him about Rutherford once asking him to "pull a job on an elderly lady."(PT 392-391) The prosecutor admitted that this brief reference in the Pridgen deposition was the only possible notice counsel had of the statements.(PT 395) Furthermore, the prosecutor stated that he was not aware of the complete details of the statement Pittman related at trial until the day before he testified.(PT 397-398) However, the prosecutor failed to honor his continuing duty to disclose such information and presented the testimony without prior notice to defense counsel or the court.(PT 321-345, 397-398) Granting the motion for mistrial, the court found: (1) that the prosecutor knowingly and willfully violated the discovery rules (R 109); (2) that the impact of the violation was substantial since the witnesses' testimony was significant and the defense was deprived of the opportunity to

prepare for it (R 110); and (3) that the State failed to demonstrate that no prejudice accrued to the defense (R 109).

This is not a case of a prosecutor negligently omitting information from his discovery answer. Such negligence prompting a mistrial would be insufficient to constitute a double jeopardy bar to a second trial. See, State ex rel Gibson v. Olliff, 452 So.2d 110 (Fla. 1st DCA 1984); State v. Iglesias, 374 So.2d 1060 (Fla. 3rd DCA 1979). As the trial court found, the prosecutor's actions here amounted to willful and intentional misconduct. (R 106-111) The facts surrounding this discovery violation demonstrate that the prosecutor's intent was to provoke a defense motion for mistrial. A mistrial benefited the prosecution because the later second trial effectively cured the discovery problem and insured the admissibility of the critical testimony. Pittman's and Cook's testimony was important evidence of premeditation since it related admissions about a plan to rob and kill one to two weeks before the homicide.(PT 321-345) In fact, Pittman's testimony was the only evidence that Rutherford conceived a plan to obtain money from the victim's checking account and to cover up the homicide by placing the victim in the bathtub. (PT 324-326) Once realizing his failure to disclose the Cook and Pittman statements pretrial, the prosecutor was faced with the possibility of the exclusion of the testimony as a sanction. Fla. R. Crim. P. 3.220(j). If he had complied with his continuing duty to disclose in a timely fashion, the defense could have objected before the witness testified and asked the court

to exclude the testimony. By intentionally withholding the information and introducing the testimony without notice, the prosecutor was able to present the evidence to the jury. This placed him in a no lose situation. The court would either allow the testimony in spite of the discovery violation or declare a mistrial. Under either scenario, the prosecutor escaped the sanction of exclusion of the important evidence of premeditation. The prosecutor's knowing and intentional violation of his continuing duty to disclose information was aimed at prompting a mistrial which would cure his pretrial discovery violation and avoid the sanction of exclusion of important evidence. As a result, the mistrial acts as a double jeopardy bar to the second trial.

Rutherford's fundamental right to be free from double jeopardy has been violated. Amend. V, XIV, U.S. Const.; Art. I Sec. 9, Fla. Const. He asks this court to reverse his judgments with directions that he be discharged.

II

THE TRIAL COURT ERRED IN SENTENCING ARTHUR RUTHERFORD TO DEATH BECAUSE THE SENTENCING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES THEREBY RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A

The Trial Court Erred In Finding That The Homicide Was Especially Heinous, Atrocious Or Cruel

To support his finding that the homicide was especially heinous, atrocious or cruel, Sec. 921.141(5)(h) Fla. Stat., the trial judge relied upon the unsupported conclusion that Rutherford lacked remorse for the crime. In his written findings, the judge stated:

> While the Court cannot use the attitude of the defendant and his lack of remorse for this crime as an aggravating circumstance, the Court does find that the defendant's lack of remorse adds weight to the Court's determination that the crime was especially heinous, atrocious and cruel.

(SSR 4)(A 2) The trial court incorrectly relied on Sireci v. State, 399 So.2d 964 (Fla. 1981) which this Court overruled in Pope v. State, 441 So.2d 1073 (Fla. 1983).

In Pope, this Court recognized that lack of remorse is not an aggravating circumstance, accord, Patterson v. State, 513 So.2d 1263 (Fla. 1987); McCampbell v. State, 421 So.2d 1072 (Fla. 1982), and further held that "absence of remorse should not be weighed either as an aggravating factor nor as an

enhancement of an aggravating factor." Pope, 441 So.2d at 1078. This Court explained the rationale for the holding as follows:

> The new jury instruction on finding a homicide to be especially heinous, atrocious or cruel now reads: "The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." No further definitions of the terms are offered, nor is the defendant's mind set ever at issue. Thus, we find any consideration of defendant's remorse extraneous to the question of whether the murder of which he was convicted was especially heinous, atrocious or cruel.
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> * * * *
>
> [Use of lack of remorse] as additional evidence of an especially heinous, atrocious or cruel manner of killing only when the facts of the crime support the finding of that aggravating factor without reference to remorse is, at best, redundant and unnecessary. Unfortunately, remorse is an active emotion and its absence, therefore, can be measured or inferred only from negative evidence. This invites the sort of mistake which occurred the case now before us-- inferring lack of remorse from the exercise of constitutional rights. This sort of mistake may, in an extreme case, raise a question as to whether the defendant has been denied some measure of due process, thus mandating a remand for reconsideration of the sentence. For these reasons, we hold that henceforth lack of remorse should have no place in the consideration of aggravating factors.

Pope, at 1078.

The instant case exemplifies the problem recognized in Pope. Initially, no evidentiary support exists for the conclusion that Rutherford lacked remorse, and the trial court suggested none in its sentencing order.(SSR 4)(A 2) Rutherford, like the defendant in Pope, denied his guilt. The trial judge, like the judge in Pope, may very well have

inferred lack of remorse from Rutherford's exercise of this constitutional rights. Consequently, the enhancement of the heinous, atrocious or cruel aggravating factor based upon the improper use of lack of remorse requires a reversal of Rutherford's death sentence.

B

The Trial Court Erred In Finding That The Homicide Was Committed In A Cold, Calculated And Premeditated Manner Without Any Pretense Of Moral Of Legal Justification

It is well established that the premeditation aggravating factor provided for in Section 921.141(5)(i), Florida Statutes, requires more than the premeditation element for first degree murder. See,e.g., Hill v. State, No. 68,706 (Fla. Sept. 17, 1987); Floyd v. State, 497 So.2d 1211 (Fla 1986); Preston v. State, 444 So.2d. 939 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981). The evidence must prove beyond a reasonable doubt that a heightened form of premeditation existed--one exhibiting a cold, calculated manner without any pretense of moral or legal justification. Ibid. "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). In concluding that this factor applied, the trial judge made the following findings:

> The crime was committed in a cold, calculated, and premeditated manner without any pretense [sic] of moral or legal justification. This aggravating circumstance was proven by the witnesses whom the defendant told of his plan to kill the victim to get

> her money. The defendant discussed this crime with two or more people and stated to one of them that he would do the crime, but would not do the time. This was further established by the testimony at the penalty phase of the trial that indicated the victim was deathly afraid of the defendant and had expressed her fear of being alone with him.

(SSR 4-5)(A 2-3)

The court relied on two factors to support this finding: (1) that Rutherford had planned the crime in advance, and (2) that the victim was suspicious and afraid of Rutherford prior to the homicide for no articulated reason. These factors do not establish the existence of the premeditation aggravating circumstance. Initially, the fact that the victim may have expressed anxiety to some of her friends about being alone in Rutherford's presence does not reflect on Rutherford's state of mind. It is the defendant's state of mind in question, not the victim's. See, Mason v. State, 438 So.2d 374, 379 (Fla. 1983). This point is more fully discussed in Issue V of this brief and that argument is incorporated by reference here. Second, the fact that the crime may have been planned in advance is also not enough to support this aggravating circumstance. The State's witnesses testified about Rutherford's alleged plan to rob and use force in its execution. A plan to rob, alone, does not establish the necessary mental state. Jackson v. State, 498 So.2d 906 (Fla. 1986); Hardwick v. State, 461 So.2d 79 (Fla. 1984). Moreover, even an intent to kill, alone, does not suffice. Brown v. State, 473 So.2d 1260 (Fla. 1985); Preston v. State, 444 So.2d 939 (Fla. 1984); Peavy v. State, 442 So.2d

200 (Fla. 1983). The plan to rob and potentially use lethal force simply does not include the lengthy reflection on the act of killing required for this aggravating circumstance. See, Middleton v. State, 426 So.2d 548 (Fla. 1982) The trial judge's sentencing decision based upon this improperly found aggravating circumstance must be reversed.

C

The Trial Court Erred In Failing To Properly Consider And Find Nonstatutory Mitigating Circumstances

The trial court addressed mitigating circumstances in the sentencing order as follows:

> The Court has also considered the mitigating circumstances presented in this case, including those listed in 941.141(6)[sic] and the possibility of mitigating factors other than those listed in the Statute. The Court finds mitigating factor "a" present in that the defendant had no prior significant history of criminal activity. The Court has considered the testimony of the defendant regarding his past, including his extensive testimony about his record in Vietnam. When his testimony is weighed against the credibility of the defendant on other matters where the Court was able to test his credibility, considered further in light of the total lack of any corroboration, the Court concludes that there were no other factors presented that constitutes mitigating factors.

(SSR 4)(A 3)

Evidence presented during the penalty phase established the existence of several nonstatutory mitigating circumstances. And, contrary to the trial court's conclusion, most were supported by more than Rutherford's testimony alone. His

father and sister testified about Rutherford's childhood and the fact that he was a good son and brother.(R 832-836, 838-849) His wife testified that he was a good husband and father to his five children.(R 849-858) See, Jacobs v. State, 396 So.2d 713 (Fla. 1981). His long time friend testified to his good character reputation in the community, (R 863-864), see, Washington v. State, 432 So.2d 44 (Fla. 1983), and the fact that he was a good, honest carpenter. (R 865) See, McCampbell v. State, 421 So.2d 1072 (Fla. 1982) Finally, each of his mitigation witnesses testified to some extent about his combat experiences in Viet Nam.(R 836-837, 843-846, 852-857, 861-862) See, Pope v. State, 441 So.2d 1073 (Fla. 1984).

Pursuant to the Eighth and Fourteenth Amendments to the United States Constitution, a sentencing judge in a capital case must consider and weigh all evidence in mitigation in determining the appropriate sentence. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Songer v. State, 365 So.2d 696 (1978). Failure to do so renders any death sentence invalid. Ibid. The trial judge did not comply with this requirement, and Rutherford now urges this Court to reverse his sentence.

III

THE TRIAL COURT ERRED IN SENTENCING RUTHERFORD TO DEATH BY USING A COUNTING PROCESS TO EVALUATE WHETHER THE AGGRAVATING CIRCUMSTANCES OUTWEIGHED THE MITIGATING CIRCUMSTANCES

Section 921.141 Florida Statutes provides for a sentencing scheme where the aggravating circumstances are weighed against the mitigating ones in order to determine the appropriate sentence. This "weighing process is left to the carefully scrutinized judgment of the jurors and judges," because the process is qualitative, not quantitative. State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). A death sentence cannot be imposed merely because the total number of aggravating circumstances exceeds the total number of mitigating ones. As this Court has stated,

> It must emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

Ibid., at 10. The constitutionality of the statute depends in part upon the faithful application of this standard. Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon. The trial judge did not apply this standard, and Rutherford's death sentence must be reversed.

At least three times, the trial judge expressed his use of a counting process in determining the sentence to be imposed.

During the oral pronouncement of the sentence, he said he imposed death because he found three aggravating circumstances and only one mitigating circumstance.(R 948) He further stated that he believed the law dictated a death sentence under those circumstances. His comments were as follows:

> THE COURT: All right. The Court has heard the trial, heard the penalty phase, considered the verdicts of the jury, has considered the aggravating and mitigating circumstances, and considered the Presentence Investigation that I had run, and it was my conclusion that in this case there were four mitigating-- excuse me, four aggravating circumstances present, two of which merged, D and F merged, leaving as a net of three aggravating circumstances in this case. From my examination of the evidence I could find only one mitigating circumstance, that being the fact that the defendant had no significant prior criminal history, leaving as a balance of three aggravating circumstances to one mitigating circumstance, and it is my understanding of the law that when that is the situation, that the law dictates that the defendant shall receive the ultimate penalty.

(R 948) The judge reiterated this same reasoning in his written findings of fact in support of the sentence:

> Balancing the aggravating factors against the mitigating factors, the Court determines that four of the aggravating circumstances exist but because "d" and "f" overlap, it leaves a net of three aggravating factors present.
>
> On the other hand the Court could find only one mitigating factor present leading the Court to the conclusion that the appropriate sentence in this case is the sentence that was recommended by the trial jury by a majority of seven and by the previous mistrial jury by a majority of eight.

(SSR 5-6)(A 3-4) Further evidence that the trial judge labored under a misunderstanding of the applicable law is the fact that

he denied a requested penalty phase jury instruction. The instruction would have advised the jury that a counting process was not the proper way to evaluate the aggravating and mitigating circumstances.(R 155)

The use of a counting process in imposing sentence renders Rutherford's death sentence unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution. This Court must reverse for resentencing.

IV

THE TRIAL COURT ERRED IN CONSIDERING AND GIVING WEIGHT TO THE SENTENCING RECOMMENDATION OF THE JURY FROM THE PRIOR TRIAL WHICH RESULTED IN A MISTRIAL

In his sentencing order, the trial judge specifically considered and gave weight to the first jury's sentencing recommendation. He stated,

> ...the appropriate sentence in this case is the sentence that was recommended by the trial jury by a majority of seven and by the previous mistrial jury by a majority of eight.

(SSR 5-6)(A 3-4) The mistrial jury's recommendation has no place in the sentencing process. Once the mistrial was granted and the case retried, the recommendation of the first jury had no validity for any purpose. Rutherford's death sentence, which is based in part upon consideration of the jury's recommendation from the first trial, violates the Eighth and Fourteenth Amendments.

This Court addressed a similar problem in Huff v. State, 495 So.2d 145 (Fla. 1986). The trial judge in Huff took judicial notice of the entire proceedings in the first trial of Huff's case which this Court had reversed for a new trial. Huff v. State, 437 So.2d 1087 (Fla. 1983). Based on the evidence adduced during that first trial, the trial court found the aggravating circumstance that the homicide was committed for pecuniary gain and the mitigating circumstance that the defendant had no significant history of prior criminal activity. 495 So.2d at 152. Concluding that the prior trial proceedings had

no place in the sentencing process of the second trial, this Court struck the aggravating and the mitigating circumstances based on the first trial evidence. Ibid. This Court's reasoning was based on the premise that the granting of a new trial requires that the second trial proceed as if the first trial had not occurred. Ibid.; see,also, Fla.R.Crim.P. 3.640(a) This same rationale applies in the instant case; a new trial after a mistrial must likewise proceed as if the first trial had not transpired. Therefore, the first jury's sentencing recommendation should not have been considered.

Lucas v. State, 417 So.2d 250 (Fla. 1982) also demonstrates the trial court's error in relying on the prior jury's sentencing recommendation. In Lucas, this Court had remanded the defendant's sentence for a reweighing because the judge had considered nonstatutory aggravating circumstances. On remand, the record did not demonstrate that the trial judge performed the reconsideration task, and the judge specifically said that he believed that the mandate only required him to clean up the language in the original order. The second sentencing order was only slightly different from the first. This Court again reversed noting that the trial judge had the responsibility to use reasoned judgment in imposing the new sentence because "it is this sentence and not any prior one which may be carried out." 417 So.2d at 251. Reliance on the original sentencing process was improper. Reliance upon a prior jury's recommendation after a second one has been obtained in a second trial is also improper.

The circumstances of the instant case are even more egregious that those in Lucas. Where Lucas involved a sentencing judge relying on his own prior sentencing determination and order, this case involves a judge giving weight to a sentencing recommendation of a jury from a prior trial over which he did not preside and which involved different evidence. The sentencing judge had no basis to evaluate and assign weight to the prior jury's recommendation, because he had no knowledge of the evidence upon which it was based.

Use of the mistrial jury's sentencing recommendation in the sentencing process has tainted Rutherford's death sentence. This Court must reverse for resentencing.

V

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT HEARSAY EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL THEREBY TAINTING THE JURY'S RECOMMENDATION AND RENDERING RUTHERFORD'S DEATH SENTENCE UNCONSTITUTIONAL

During the penalty phase, the prosecutor introduced the testimony of three of the Stella Salaman's friends. (R 804, 814, 819) Much of their testimony consisted of hearsay statements the victim allegedly made concerning her anxious feelings when Rutherford was present. (R 806-808, 822-828) Lois LeVaugh related a time when Salaman telephoned and asked for her to come to her house because Rutherford had been there for some time.(R 806) Salaman said to her, "I am quite nervous right now. A.D. Rutherford is here." (R 806) LeVaugh, her husband and two of their friends drove to Salaman's house. (R 806-807) Rutherford was sitting on the front porch when they arrived.(R 807) After he and Salaman had a conversation about the patio doors, Rutherford left.(R 807) Salaman then told her friends, "I sure am nervous. He scared me. He really made me nervous." (R 807) Beverly Elkins testified that Salaman later told her about this event.(R 823) Salaman said, "I just wish they would quit coming to the house. I get very upset and they act like they are casing the joint."(R 823) Elkins stated that Salaman told her that she was frightened of him.(R 823) Elkins and Richard LeVaugh also related comments Salaman made concerning the problems she had with the repair of the patio doors.(R 815-817, 821-823)

None of this evidence was relevant to prove any of the aggravating circumstances enumerated in Section 921.141 Florida Statutes. The victim's state of mind at a time prior to the commission of the crime has no place in evaluating the circumstances of the crime for aggravating factors. In his sentencing order, the trial judge used this evidence as partial support for finding the homicide to be cold, calculated and premeditated.(SSR 3-6)(A 1-4) This reliance was misplaced, however, because this evidence did not shed light on Rutherford's state of mind which is the pertinent consideration when assessing the premeditation aggravating factor. Mason v. State, 438 So.2d 374, 379 (Fla. 1983). The reasons for Salaman's statements about her anxiety were speculative at best. She was suspicious, but no evidence of Rutherford's behavior provided a foundation for that suspicion. Consequently, the evidence had no bearing on Rutherford's state of mind.

Assuming for argument that Salaman's statements had foundation, they were still irrelevant to prove the premeditation aggravating circumstance. Her alleged suspicion was that Rutherford was "casing the joint."(R 823) Evidence that a perpetrator is planning a theft or robbery is not a proper consideration in determining if the homicide was cold, calculated and premeditated. Jackson v. State, 498 So.2d 906 (Fla. 1986); Hardwick v. State, 461 So.2d 79 (Fla. 1984) As this Court said in Hardwick, "The premeditation of a felony cannot be transferred to a murder which occurs in the course of that

felony for purposes of this aggravating factor." 461 So.2d at 81. The jury should not have heard this evidence.

The evidence was also irrelevant to the heinous, atrocious or cruel aggravating circumstance. Sec. 921.141(5)(h), Fla. Stat. Although the state of mind of the victim can be relevant for this factor, it must be mental state immediately prior to or contemporaneous with the homicide. See, Routly v. State, 440 So.2d 1257 (Fla. 1983); Knight v. State, 338 So.2d 201 (Fla. 1976). The victim's mental anguish as the result of knowledge of impending death is the key consideration. Ibid. The evidence in question tended to show the victim's state of mind at a time well before the commission of the homicide. Her anxiety was not due to knowledge of impending death. It was merely the product of her own speculation which was not based upon any evidence of imminent threat of death.

This testimony was also inadmissible hearsay, even if relevant. While hearsay is admissible in penalty phase, it must be of a character which affords the defendant a fair opportunity to rebut. Sec. 921.141(1) Fla. Stat.; Dragovich v. State, 492 So.2d 350, 355 (Fla. 1986). Perri v. State, 441 So.2d 606, 608 (Fla. 1983) The evidence here did not meet that requirement. In stating that Rutherford made her nervous, the victim was expressing her opinion that Rutherford was acting in a suspicious manner. She never stated specific behaviors which prompted her reaction. Consequently, the substance of the hearsay was nothing more than the victim's opinion without any foundation expressed. This is analogous to the reputation testimony this

Court deemed inadmissible hearsay in Dragovich because it was impossible to fairly rebut. Just as Dragovich could only introduce reputation evidence that he was not known as an arsonist, Dragovich, at 355, Rutherford would be forced to introduce evidence that he did not act suspiciously. Furthermore, characterizing behavior as suspicious involves the perception of the one drawing the conclusion. To fairly confront such conclusions, cross-examination of the one making it is essential. The victim made the speculative conclusions here, and no amount of cross-examination of the witnesses who related her bare statement of these conclusion will be helpful in rebutting them.

Since the jury heard this irrelevant evidence of nonstatutory aggravating circumstances, its recommendation of death is tainted. Rutherford's sentence based upon this tainted recommendation violates the Eighth and Fourteenth Amendments to the United States Constitution. This Court must reverse his death sentence.

VI

THE TRIAL COURT ERRED IN PLACING RUTHERFORD IN LEG IRONS DURING THE PENALTY PHASE OF THE TRIAL WITHOUT CONDUCTING A HEARING AND REQUIRING A SHOWING OF A SECURITY NEED FOR SUCH MEASURES.

Shackling a criminal defendant is "an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct.1057, 1061, 25 L.Ed.2d 353 (1970). A criminal defendant may not be compelled to stand trial wearing shackles, see, Estelle v. Williams, 425 U.S. 501, (1976); Shultz v. State, 131 Fla. 757, 179 So. 764 (1938), unless there is a bona fide need to insure security or prevent disruption of the proceedings. See, Jones v. State, 449 So.2d 253 (Fla. 1984); Zygadlo v. State, 341 So.2d 1053 (Fla. 1977). Even where a genuine security need exists, shackles should rarely be used to meet that need. Illinois v. Allen. Such an infringement cannot be based on the mere suggestion of law enforcement or on speculation. Specific evidence supporting the need must be articulated on the record at a hearing before the court is permitted to order the shackles. Elledge v. Dugger, 823 F.2d 1439 (11th Cir.),modified on rehearing, 833 F.2d 250 (11th Cir. 1987); Zygaldo v. Wainwright, 720 F.2d 1221 (11th Cir. 1983); Woodards v. Cardwell, 430 F.2d 978 (6th Cir. 1970). Furthermore, shackles can be used only when no other less restrictive security measure will suffice. See, Illinois v. Allen; Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). These requirements apply equally to the guilt and penalty phases

of a capital trial. Elledge v. Dugger, 823 F.2d at 1450-1452. The trial court failed to require such evidence and should not have ordered Rutherford shackled upon the mere speculative concerns of the bailiff and deputies.(R 895)

Just prior to closing arguments during the penalty phase of the trial, the trial judge ordered that Rutherford be placed in leg irons.(R 895) As a justification, the court stated,

> The bailiff has expressed and the deputies in charge of the defendant have expressed concern about the defendant's conduct, security, and based on his conviction for the ultimate crime of first degree murder and facing a possible recommendation of death, the court has ordered that he be placed in leg irons.

(R 895) Immediately after this announcement, the prosecutor added that Rutherford had threatened him when he left the witness stand.(R 895) The court, however, said that the incident was not a point of concern. (R 895) The court overruled defense counsel's objection to the use of leg irons.(R 895) No evidence was taken on the issue, and no foundation for the security concerns was established.

Elledge v. Dugger is on point. Before Elledge's penalty phase trial, the trial judge ordered him to be placed in leg irons. The judge said that a law enforcement official told him that Elledge had threatened to assault a bailiff and that while in jail, Elledge had become proficient in karate. The court held no hearing and received no evidence on the allegations and the need for such security measures. Defense counsel's objections were overruled. The Eleventh Circuit Court of Appeals

reversed a denial of habeas corpus relief holding that the shackling decision denied Elledge due process in his sentencing proceeding. Two flaws were noted: (1) the trial court failed to hold a hearing to test the allegations submitted as a reason to require shackles; and (2) the State failed to make a showing of a legitimate security need which could not be met with a less restrictive alternative. 823 F.2d at 1451-1452. The same two flaws exist in this case. Announcing that Rutherford would be shackled, the trial judge merely referred to some unspecified concerns of the bailiff and deputies. (R 895) No evidence was presented to justify the alleged security needs, and no alternatives to shackling were explored. (R 895) Rutherford, like Elledge, is entitled to a new penalty phase proceeding before a new jury.

Rutherford's right to due process was violated. Amends. V, XIV, U.S. Const.; Art. I, Sec. 9, 16 Fla. Const. He should not have been placed in leg irons without the benefit of an evidentiary hearing to establish the need for such restrictions. This Court must reverse with directions that a new penalty phase trial be conducted.

VII

THE TRIAL COURT ERRED IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTION WHICH DIMINISHES THE RESPONSIBILITY OF THE JURY'S ROLE IN THE SENTENCING PROCESS.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments. The Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

> [An] uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell, 472 U.S. at 333. Although a Florida jury's role is to recommend a sentence, not impose one, the reasoning of Caldwell is applicable. See, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987). A recommendation of life affords the capital defendant greater protections than one of death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, the jury's decision is critical, and any diminution of its importance violates Caldwell. Adams; Mann v. Dugger, 817 F.2d 1471, 1489-1490 (11th Cir.), vacated for rehearing, 828 F.2d 1498 (11th Cir. 1987).

The trial court read the standard penalty phase jury instructions to the jury. In part, those instructions stated:

> The final decision as do[sic] what sentence shall be imposed rests with the Judge of the Court but the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.
>
> * * * *
>
> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge...

(R 783, 920) Although not a misstatement of Florida law, the instruction is incomplete and misleading. It fails to advise the jury of the importance of its recommendation. There is no mention of the requirement that the sentencing judge give the recommendation great weight. Additionally, there is no mention of the special significance of a life recommendation under Tedder. The instruction violates Caldwell. Rutherford realizes that this Court has recently ruled unfavorably to this position. Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987). However, he asks this Court to reconsider this ruling and reverse his death sentence.

VIII

THE TRIAL COURT ERRED IN SENTENCING RUTHERFORD TO THIRTY YEARS FOR ROBBERY WITHOUT THE BENEFIT OF A SENTENCING GUIDELINES SCORE SHEET OR KNOWLEDGE OF THE PRESUMPTIVE SENTENCE UNDER THE GUIDELINES

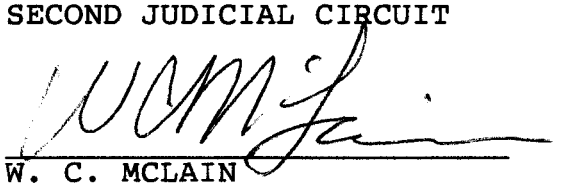
On the robbery conviction, the court sentenced Rutherford to thirty years imprisonment to run concurrently with the death sentence imposed for the murder.(R 161-162,949) Contrary to the requirements of Fla.R.Crim.P. 3.701(d)(1), no sentencing guidelines score sheet was prepared on the robbery count and nothing in the record demonstrates that the court was aware of the presumptive sentence at the time of sentencing. Rutherford's robbery sentence must be reversed. See, Uptagrafft v. State, 499 So.2d 33 (Fla. 1st DCA 1986); Barr v. State, 474 So.2d 417 (Fla. 2d DCA 1985); Newsome v. State, 473 So.2d 709 (Fla. 2d DCA 1985); Sanchez v. State, 480 So.2d 704 (Fla. 3d DCA 1985). Reversal is mandated even though the robbery sentence runs concurrently with the sentence on the capital charge, Uptagrafft,at 34., and no objection to the absence of the score sheet was lodged below. State v. Rhoden, 448 So.2d 1013 (Fla. 1984).

CONCLUSION

Upon the reasons and authorities presented in Issue I, Rutherford asks this Court to reverse his judgments and sentences with directions that he be discharged. For the reasons expressed in Issues II through VII, he asks that his death sentence be reversed should relief not be granted on Issue I. Finally, in Issue VIII, Rutherford asks that his robbery sentence be reversed for resentencing with the benefit of a sentencing guidelines score sheet.

Respectfully Submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

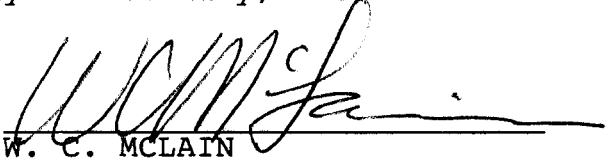


W. C. MCLAIN
ASSISTANT PUBLIC DEFENDER

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have hand delivered a copy of the foregoing to the Attorney General's Office, The Capitol, Tallahassee, Florida on this 17 day of February, 1988.



W. C. MCLAIN