IN THE SUPREME COURT OF FLORIDA

CASE NO.: 70,234

GEORGE MORRIS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

BRIEF OF APPELLANT

[On direct appeal from sentence of death imposed by the Circuit Court of the 17th Judicial Circuit, Patti Englander Henning, Judge]

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

This is an appeal from a death sentence imposed by the Circuit Court in Broward County on 4 March 1987. Due to problems with court reporters the record was not completed until mid-September 1988. The undersigned agreed to handle this matter in December of 1987 and filed his appearance 5 January 1988, and then made further designations to the court reporter.

The Initial Record prepared in this matter is contained in four volumes, the first three being testimonial, the fourth being pleadings. Reference to this record shall be by the letter "R" followed by the volume and page number where that item may be found.

The Supplemental Record is contained in five volumes and reference to this shall be by the letters "RS" followed by the appropriate volume and page number.

Emphasis shall be that of the Appellant unless otherwise noted.

STATEMENT OF THE CASE

By virtue of an Indictment returned by the Grand Jury sitting in Broward County, Florida on 19 June 1986, it was presented that GEORGE MORRIS, Appellant, on 28 May 1986, in Broward County Florida "did then and there unlawfully and feloniously and from a premeditated design to effect the death of a human being, Matthew Roberts, did kill and murder him, the said Matthew Roberts, by inflicting blunt trauma about his body, against the form of the statute pursuant to Section 782.04***" [R Vol. IV, p. 431]. To this Indictment the Appellant refused to plea and stood mute in open court [R Vol. IV, p. 431, side B].

After arraignment the Appellant filed numerous pre-trial Motions to Dismiss [R Vol. IV, pp. 432, 433; 434-441; 442-443; 444] all of which in various forms addressed the death penalty as did numerous other related motions similarly filed [R Vol. IV, pp. 445-4721.

The Appellant also filed a Motion to Suppress Confessions Admissions and Statements [R Vol. IV, pp. 480-4811.

Hearing upon the motions [save the Motion to Suppress] was had on 16 July 1986 [RS Vol. I, p. 4]; none were argued, reservation had upon the voir dire, and the rest denied.

Hearing upon the Motion to Suppress the several taped statements of the Appellant occurred on 6 January 1987 [RS Vol. 11, pp. 11-139] and the trial judge, in open court, denied the motion [RS Vol. 11, p. 139]. The Appellant, through counsel then announced that it would now accept a plea offer made by the

state to first degree murder with no death penalty which the Appellant had rejected a few weeks earlier. The Appellant's counsel made reference to the new version of facts, but that the Appellant wanted to plea to avoid a possible death sentence. The state then announced it decided to withdraw the plea offer [RS Vol. 11, pp. 140, 141]. The court also stated that since the Appellant would not admit he killed the child she would not take a "best interest" plea [RS Vol.II, pp. 141-144].

Thereafter, the matter came on for trial and the charge of the court to the jury is included at R Vol. IV, pp. 482-512. On 9 January 1987, after a two day jury trial, the Appellant was found guilty by the jury of Murder in the First Degree as charged in the Indictment [R Vol. IV, p. 513]. Judgment was entered thereon [R Vol. IV, p. 515], and thereafter the sentencing phase occurred.

Again, the court's remarks to the jury are included in the record [R Vol IV, pp. 516-5211, and after due deliberation, the jury recommended that the court impose a sentence of life imprisonment without possibility of parole for 25 years [R Vol., IV p. 522]. This occurred on 12 January 1987.

Sentencing was set by the court for 4 March 1987 and a pre-sentence investigation ordered. That pre-sentence investigation [R Vol. IV, pp. 523-5571 recommended a life sentence as did the investigating police detective and various members of the community who were acquainted with the Appellant.

The trial court had, before the final sentencing hearing, prepared a written order of death [R Vol. IV, pp. 559-563], and indeed overrode the various recommendations *of* life and sentenced the Appellant to death by electrocution [R Vol. IV, p. 558]. Notice of Appeal [R Vol. IV, p. 546] was timely filed.

STATEMENT OF FACTS

GEORGE MORRIS a then 22 year old and not particularly bright young man from Pompano Beach, Florida, was dating Adrianne Corley of Lauderdale Lakes, who had an 18 month son named Matthew Roberts [R Vol. I, pp. 4-61. She had known MR. MORRIS since the fourth grade [R Vol. I, p. 16] and was expecting to marry him as they had discussed [R Vol. I, pp. 16, 17].

Ms. Corley had already lost the child to HRS due to the actions of a previous boyfriend, and the child was returned only upon the stipulation that Ms. Corley live with her grandmother [R Vol. I, pp. 17, 18].

During the course of the relationship she and the child had stayed at the Appellant's home [he lived with his mother, father and several sisters and brothers] and Appellant at times contributed monies for the child as he was working both at McDonald's and for his father [R Vol I, pp. 18-20]. Appellant had a good relationship with Ms. Corley and the child and the mother never saw Appellant mistreat the child [R Vol. I, pp. 21-22].

During the afternoon hours of 28 May MR. MORRIS asked MS. CORLEY if he could take the child, Matthew, home with him to stay overnight, see a movie and generally have some fun [R Vol. I, pp. 7, 8].

That evening the child was brought to North Broward Hospital by the paramedics in what can be characterized as a clinically dead condition. Efforts were undertaken to bring the

child back to life; these efforts proved futile [R Vol I, pp. 47-55, testimony of Dr. Emuattana]. The Appellant was at the hospital for several hours while attempts were made to save the child [R Vol. I, pp. 10, 23]. Due to the fact that medical personnel saw various trauma, including a fractured skull [R Vol. I, p. 55], the Pompano Beach Police arrived at the hospital.

First to arrive at the hospital and, also, to have contact with Appellant was Detective Beimly, who in fact arrived about 10:30 p.m. on 28 May [R Vol. I, p. 25]. After the child expired, Appellant, with the detective, returned to the Appellant's home and there the Appellant gave an explanation of how the child obtained his injuries [fall off the bed, hit nightstand [R Vol. I, pp. 28, 29]]. Appellant, who was not under arrest, was then asked to accompany the detective to the police station where they met with Detective Braggs [R Vol. I, pp. 31, 32, 59-61], who read Appellant his rights, talked to Appellant and thereafter took a formal taped statement [R Vol. I, pp. 64-100]. This tape was, over several objections, including denial of the Motion to Suppress as renewed during trial [R Vol. I, pp. 66-68], played for the benefit of the jury.

Several days later, the Appellant gave the police another taped statement [R Vol. I, p. 107 et seq.], which was again the subject of several objections, including the denial of suppression previously requested and was again presented to the jury [R Vol. I, pp. 107-1111 as to objections].

In this statement [R Vol I, pp. 112 et seq.] the Appellant stated he may have opened a door that hit the child and knocked him to the ground on a concrete patio [R Vol I, pp. 114-116]. [NOTE: Numerous objectional matters occurred in these tapes, but shall be presented in argument upon the part addressed thereto and only the pertinent evidential content is included in this Statement of Fact.]

Several weeks later the Appellant decided to give the police a third statement as to how the child's injuries occurred. Again, this statement was the subject of pre-trial motions, and the same was renewed, together with other objections, during trial [R Vol. I, pp. 143-1451. In this statement the Appellant admitted perjury in the other statements [R Vol. I, p. 145] and stated that he was throwing the child in the air, that he missed the child who consequently hit the table and floor and didn't move as he was knocked out [R Vol. I, pp. 149-1521.

After the introduction of this evidence through Detective Braggs, medical examiner Ron Wright was called to the stand [R Vol. I, p. 160]. Dr. Wright stated that the cause of death was multiple injuries due to blunt trauma [R Vol. I, p. 160]. No external injuries to the child's body were evident, however there was, upon examination to the underlying tissue, trauma to the buttocks that was non-fatal but severe [R Vol. I, p. 168]. This injury occurred sometime within the previous 24 hours, and was at least four to five hours old at time of death [R Vol. I, p. 170]. The child also suffered a torn liver [R Vol.

I, pp. 171, 172], which implies a great degree of force to the area [R Vol. I, pp. 171-1721 although a fall, throwing in the air as well as attempted medical resuscitation could cause the injury [R Vol. I, pp. 172-1771. This injury was fatal [R Vol. I, p. 178].

The doctor also discovered older injuries in the head area of the child [R Vol. I, pp. 177, 1791 as well as recent injury. Among the recent head injuries was a skull fracture that may not have done much damage [R Vol. I, pp. 179, 180], as these can be "saved" [R Vol. I, pp. 181-1821 and need not be "life threatening" if one gets past the initial unconsciousness. The blood level around the brain was right at the level "at which one needs to, if one is going to save somebody's life, remove it surgically***" [R Vol. I, p. 181]. This injury could be likely from a fall to a patio and not likely from a fist [R Vol I, pp. 182, 183-184].

Neck injuries, possible strangulations, were also uncovered and again, these were four to twenty-four hours old [R Vol. I, pp. 186-189].

The age of the injuries, save the skull fracture was such that the same could have occurred before Appellant took the child [see i.e. R Vol. 11, pp. 202-2031. Although asserted by the police [see below re: statements] the medical examiner stated that there was no "rectal activity" to the child other than that of the pediatrician's examination in the emergency room [R Vol. 11, p. 204]. However, the child's penis was taped to his abdomen

and the Appellant in his early statements stated he did this to control the child's wetting, having observed the same on television. This was not an injury producing act [R Vol. 11, p. 200].

At the close of the state's evidence a Motion for Judgment of Acquittal was denied [R Vol. 11, p. 209].

As noted in the pre-sentence investigation and conceded and stated by Appellant's attorney in final argument, MR. MORRIS is not "one of God's brightest creatures", yet Appellant took the witness stand [see R Vol. 11, p. 216]. In spite of his several statements explaining the fall the child had at his residence, the Appellant brought forth a devastating new version on the witness stand.

Appellant testified he took the child so that Matthew's mother would not come looking for him when he went to a motel to see another girl, Lisa [R Vol. 11, pp. 218, 219].

Appellant took the child to a motel, saw Lisa, but then remembered that he had to complete a twenty-five ounce cocaine deal in Hallandale with several Jamaicans and a black Cuban [R Vol. 11, pp. 220-2231. Appellant was selling twenty-five ounces of cocaine for $5,000.00 [R Vol. 11, p. 224].

At the meeting place, where he took the child with him, Appellant testified that, in essence, the drug deal went sour and he didn't produce the rest of the cocaine. In response to this, he stated, the other parties to the drug deal took Appellant's gun, and then grabbed the child and began beating the child so as

to get the Appellant to "give over" the cocaine [R Vol. II pp. 225-2301. After a gun was placed to Appellant's head, he stated that he then gave up the cocaine, negotiated his way out and eventually took the child to his home where his mother told him that the child did not look well, and the child was then taken to the hospital [R Vol. II pp. 230-2373. Appellant again denied hitting the child and stated on cross-examination that the "dopers" put the tape on the child's penis [R Vol. II pp. 237, 272]. He admitted wanting to get a gun to go after those who hurt the child.

The cross examination by the prosecutor illustrated the farcical nature of the direct [R Vol. II pp. 242-2701, and this was also argued by the prosecutor in final argument.

Renewed Motion for Judgment of Acquittal was made after the Appellant rested his case [R Vol II pp. 265-2871. To what appears to be the singular surprise of the Appellant's trial counsel, the state attorney argued the matter was still a jury question "plus the fact he [Appellant] just confessed to a felony-murder by trafficking" [R Vol. II p. 287]. Over the objection of the Appellant just such a felony murder instruction was given, the trial court noting "It's just that your theory of defense also happens to be an admission to a homicide" [R Vol. II pp. 288-2901.

The jury found the Appellant guilty of first degree murder in a general verdict [R Vol. II p. 361].

POINTS INVOLVED ON APPEAL

POINT ONE

WHETHER THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS APPELLANT'S VARIOUS STATEMENTS AND EITHER OF THEM OR BY ALLOWING OVER FURTHER IN-TRIAL OBJECTIONS SAID STATEMENTS TO BE PUT BEFORE THE JURY.

POINT TWO

WHETHER THE APPELLANT WAS DENIED A FAIR TRIAL AND BASIC DUE PROCESS WHEN ALLOWED TO TAKE THE WITNESS STAND AND CONFESS TO FELONY MURDER BY A FELONY NOT ASSERTED BY THE STATE.

POINT THREE

WHETHER THE EVIDENCE, EITHER THEREAFTER OR PRIOR TO THE APPELLANT'S TESTIFYING IS SUFFICIENT TO SUSTAIN THE VERDICT RETURNED BY THE JURY.

POINT FOUR

WHETHER THE INDICTMENT SUFFICIENTLY APPRISED APPELLANT OF THE CHARGES AGAINST HIM TO SATISFY BASIC DUE PROCESS GUARANTEES.

POINT FIVE

WHETHER THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY AS SUCH WERE OBJECTED TO BY APPELLANT AS WELL AS IN THE VERDICT FORM PROVIDED BY THE JURY.

POINT SIX

WHETHER THE COURT ERRED IN IMPOSING THE DEATH PENALTY IN A CASE WHERE THE JURY, THE POLICE, THE PRE-SENTENCE INVESTIGATION AND NUMEROUS MEMBERS OF THE COMMUNITY HAVE RECOMMENDED LIFE IMPRISONMENT.

SUMMARY OF ARGUMENT

Argument upon POINT ONE is several fold. A number of statements were taken by the police over a several week period. Motions to Suppress these were denied, and argument to the propriety thereof shall be advanced. Of deeper concern, however, are the content of the statements, which are rampant with hearsay, innuendo, appeals and other matters, which were the subject of objection, prior to this admission, by trial counsel. Gross accusatory hearsay and case bolstering was allowed through "phantom witnesses" that were not called to the stand, as well as other egregious conduct. Appellant will argue that not only did error occur but also that the harmless error rule cannot be satisfied.

POINT TWO concerns Appellant's taking the stand and presenting testimony on his own "behalf" that allowed for the giving of a new felony murder jury instruction based upon the testimony. The Appellant, who was represented at trial by appointed counsel, will argue that basic due process of law requires more than a defense that as the trial judge in essence stated, is an admission and confession to felony murder, particularly in light of the status of the state's case at the close of the state's case in chief.

Argument in POINT THREE is addressed to the sufficiency of the evidence to sustain the charges at the time the Appellant made his Motion for Judgment of Acquittal at the close of the state's case.

Appellant will argue that at that juncture of the proceeding, the evidence was insufficient to sustain the felony murder [aggravated child abuse] theory of the state's case.

POINT FOUR relates to the sufficiency of the charging nature of the Indictment, which asserts premeditated murder by the infliction of blunt trauma. The Appellant will argue that particularly in light of the facts of this matter the Indictment was deficient.

POINT FIVE concerns the jury instructions delivered by the court, including felony murder by trafficking in cocaine as predicated upon the Appellant's testimony.

Lastly, **POINT SIX**, the imposition of the death penalty in this mater need be fully discussed. Over a recommendation of life imprisonment by the jury, the pre-sentence investigator, the police and the various members of the community questioned, the court imposed the death penalty. While, perhaps, based upon what trial counsel stated, he ought have sought to disqualify the trial judge from sentencing, it is clear that the trial judge ignored various mitigating circumstances and "stretched" to find an aggravating circumstance in a rather emotional sentencing order, The trial judge is indeed one of Broward's finer judges, however, it is clear the recent birth of her own child impacted upon her decision in this matter.

The Appellant will argue and suggest that this Court find that imposition of the death penalty was singularly inappropriate in the case at bar in light of this Court's

numerous decisions of what circumstances can sustain a judicial override of a recommended life sentence.

POINT ONE

THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS APPELLANT'S VARIOUS STATEMENTS AND EITHER OF THEM OR BY ALLOWING, OVER FURTHER IN-TRIAL OBJECTIONS, SAID STATEMENTS TO BE PUT BEFORE THE JURY.

A. SUPPRESSION OF THE STATEMENTS [CONSTITUTIONAL GROUNDS]

One of the pre-trial motions filed by Appellant's counsel was a Motion to Suppress Confessions, Admissions and Statements [R Vol. IV, pp. 480, 481].

Just prior to trial, hearing upon this motion was had and the three taped statements played to the court and transcribed by the court reporter. Testimony was also had regarding other oral statements not taped.

The Appellant's counsel announced after the state presented its case that it had no witnesses or argument [RS Vol.II, p. 139].

Thus the Appellant must proceed essentially on the basis of the state's case.

The police [Detective Beimly], prior to taking the Appellant to police headquarters on 29 April 1986, went to the Appellant's residence where, as noted, he lived with his parents. The police advised the Appellant's mother why they were there, that he was investigating the death of this child. The policeman also asked for her son and he came out [RS Vol.II, pp. 21, 22]. The Appellant talked with the police at his residence regarding the death of the child and its cause [RS Vol.II, pp. 22, 23, 24].

These statements were not taped, nor did the detective make notes of those statements [RS Vol.II, pp. 32, 22] although some mention of these is contained in the detective's report [RS Vol.II, pp. 33, 34]. These statements led to further untaped and taped statements and the same were essentially the basis of the state's case against Appellant.

The policeman did acknowledge that during the time he was at the Appellant's home questioning him, that Appellant was a suspect in the death of an infant caused by some blunt trauma [R Vol.II, p. 39, 401.

Neither Detective Beimly nor Detective Braggs, at the Appellant's home, advised the Appellant of his rights prior to talking with him "regarding what happened to the baby" [RS Vol.II, p. 40]. This, although he was in fact a suspect in the death [RS Vol. 11, p. 40], and was immediately thereafter told to come to the police station.

The Appellant's Miranda warnings were just given by Detective Braggs at the Pompano police station about 2:00 p.m. prior to the Appellant giving both an untaped and taped statement [RS Vol. 11, p. 13. NOTE: This was the first of several taped statements.]

On 31 May 1986 the police felt they had discovered other evidence and went to the jail to see MORRIS "to confront him, give him a chance to explain that new information I [the detective] had gotten" [RS Vol.II, p. 84]. The Appellant was

read his rights and waived his rights and gave another statement that was taped.

On 16 June 1986 a third statement was taken from the Appellant. The detective had received a call from the child's grandmother and she related to Detective Braggs that the Appellant had called her daughter and admitted responsibility for the death of the infant [RS Vol.II, p. 1251. Again MORRIS was advised of his rights and waived the same again [RS Vol.II, p. 125]. However, prior to being advised of his rights the following occurred:

> "Q: [By Detective Braggs] Okay, George, do you understand the meaning of the word perjury?
> A: Yes, sir.
> Q: Okay, prior to this statement I've taken two other statements from you. Now, did you tell the truth on both those statements?
> A: No, sir.
> Q: So you admit that you perjured yourself on two statements already?
> A: Yes, sir." [RS Vol. 11, pp. 128, 129]

Immediately after this, the Appellant was advised of his rights [RS Vol.II, pp. 129, 130], and gave another version of how the child died, although, as with the others, presenting a factual accidental death [R Vol.II, pp. 130 et. seq.].

As noted, the Appellant offered no witnesses or argument at the close of the motion, but did articulate that the first statement was invalid [RS Vol. II, pp. 81-82] for failure to give Miranda warnings.

Detective Beimly, the first detective involved, testified that when he first met the Appellant he already knew that the baby had a fractured skull and other trauma to the body and that he had been advised at the hospital that the baby had been in the Appellant's care and custody for that day up to the time of death [RS Vol.II, pp. 39, 40].

It is the Appellant's argument that although the Appellant was not under formal arrest at the time of the initial statements at his home, the same ought have been suppressed.

The Appellant would rely particularly upon the case of State v. Perez, 508 So.2d 488 (3 Fla. DCA 1987). In that matter the police responded to the defendant's apartment regarding a shooting, more particularly the defendant's report his wife shot herself.

Though considered a suspect but not read his rights or handcuffed, Perez was directed to the kitchen. The homicide detectives arrived later and the lead detective also considered the defendant a suspect but did not read the defendant his rights. The defendant made some statements and some testing was done at the defendant's house and he was thereafter transported to the police station. The trial court suppressed, inter alia, the statements and tests made in the kitchen. On the authority of State v. Delgado-Armenta, 429 So.2d 328 (Fla. 3 DCA 1983) and Dunaway v. New York, 44 2 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) the appellate court affirmed the suppression stating that:

> "The order suppressing all tests and statements made in the kitchen

> of the defendant's premises and at the time he was within the custody of law enforcement officers up until the time he was arrested and given his Miranda warnings is affirmed." State v. Perez, supra, at 489.

This matter thereby parallels the situation presented in State v. Perez. The police had been to the hospital and had obtained not only medical information that would indicate homicide, but also, due to inquiry made of witnesses, determined that Appellant was with the child and had custody and care thereof. The police obviously considered the Appellant a suspect and were actively pursuing the death of an infant who was diagnosed as having a fractured skull and suffering blunt trauma injuries. Immediately after this statement Appellant was asked to come to the police station where he was then given his Miranda warnings and eventually arrested.

The Appellant is not unmindful of this Court's decision in Roman v. State, 475 So.2d 1228 (Fla. 1985), [see also, Correll v. State, 13 FLU 35 (Fla. 1988)] regarding the necessity of some type of custody being implicated before the requirements of Miranda warnings arise. Too, the Appellant is aware that even questioning at the police station may not require Miranda. Mapp v. State, 13 FLW 474 (4 DCA 1988).

The Appellant would suggest, however, that the test ought be one of the circumstances surrounding the questioning. In Mapp, a child abuse murder case, wherein the defendant went to the police station a few hours after the child died and was

interviewed. No warnings were given. The court upheld the denial of suppression holding that:

> "The evidence supports a conclusion that the statement was voluntary and that a reasonable person would have felt free to leave the station. There was no coercion. **Defendant was not a suspect at the time of the initial questioning**, as the autopsy had not been conducted, **and the cause of death was not known. The police did not yet know that a crime had been committed**, but were attempting to determine the circumstances of death. **After the interview the defendant went home**." [Emphasis supplied, Mapp, supra, at 475.

The Appellant submits that under the facts presented in this case, including the fact that the Appellant was "requested" to come to the police station after he gave the statement at his home, coupled with what the police knew, required the giving of Miranda warnings, and that the failure to so do compelled the suppression of that statement.

After this statement, the Appellant was taken to the police station, Mirandized, questioned for some forty-five minutes and the first of the three taped statements were taken.

As noted, Appellant did not testify, cross examination was limited, at best, of the detectives and no argument was offered; however, the Appellant would suggest that the taking of the first statement which was in violation of Miranda provided information that created the giving of the other statements and as such the same were tainted and the proverbial "fruits of the poisonous tree" [see: Wong Sun v. United States; 371 U.S. 471, 88

S.Ct. 407 (1963), Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979); Brown v. Illinois, 442 U.S. 590, 95 S.Ct. 2254 (1975)] and ought have been suppressed.

Also subject to suppression, it is suggested, even if the other argument be rejected, is the offering before "Miranda" in the third statement that the Appellant committed perjury in the prior statements. Firstly, warnings were not given, and secondly, as more fully argued below, such comments and legal conclusions ought not have been allowed before the jury.

B. ERROR IN ADMISSION OF STATEMENTS, OVER OBJECTION, REGARDING CONTENTS THEREIN

The defense made mention of certain "problems" with the tapes during the Motion to Suppress [i.e., the Appellant having been in jail, and various remarks made by the police; see R Vol.II, pp. 77-81], and these objections were renewed at trial. Most fortunately the court reporter transcribed the tapes as they were played in court and it is abundantly clear that prejudicially erroneous matter was permitted to be heard by the jury when these tapes were played in their entirety before the jury.

It need be noted that the trial court heard all these tapes during the Motion to Suppress and immediately prior to trial, and hence was not ruling in a vacuum when she overruled defense objections to the introduction of hearsay and other prejudicial offerings contained in these tapes. (See R Vol.I, pp. 44-66, 66, 67, 110, 111, 144). Indeed, the contents are so egregious, it is submitted, that a new trial is mandated.

The first tape, made around the time of the Appellant's arrest, does contain objectionable matter, i.e. child abuse television shows [R Vol. I, pp. 87] and accusations of rectal injury [R Vol. I, pp. 87-88] that in fact were medically induced, and although agreed to be deleted by the state, also contained a reference to the Appellant's prior incarceration [R Vol. I, p. 89-91]. Rectal injury was repeated by the police [R Vol. I, pp. 103, 104] but the medical examiner cleared this matter. The error in this tape is apparent and the court erred in not sustaining Appellant's objections.

The second tape begins the harmful error that was put before the jury.

First, the policeman brought up another time the child fell and got hurt at Appellant's house [R Vol. I, pp. 125, 126]; then the detective asks regarding church, God and the truth [p. 126] and the Appellant denying having beat the baby. The tape [being played of course before the jury] continues:

> "Detective Braggs: I talked to some people who saw you walk Matthew down in the woods there. What was that purpose? Now see, you never told me you and him even walked in the woods.
>
> The Defendant: I didn't walk him in the woods." [R Vol. I, pp. 127, 128]

The detective continues on the tape:

> "Detective Braggs: See, I talked to some - - I talked to a person who said that they heard him crying and screaming. And you're sure he didn't do anything to upset

> you enough to spank him?" [R Vol. I, p. 129]

No such witness ever testified, and as noted, the Appellant's objections to the hearsay and other problems were overruled.

The detective next continued with hearsay from the mother and editorialized about the Appellant's convenient memory [p. 129]. The tape continues in this vein. See pp. 130, 132, 133, 134, 135 particularly again 136 regarding the hearsay of the baby crying and it being a lie if these people said that occurred. This tape also puts before the jury the fact that Appellant was arrested in the past [p. 141].

As noted, the entire tape was the subject of objection over and above that raised at the Motion to Suppress and was denied.

A third tape was offered by the state, and again objection was made by the defense [R Vol. I, p. 144] and overruled.

This tape contained the conclusion by the policeman that the Appellant's failure to be "truthful" on prior police statements constituted perjury and that legal conclusion was allowed before the jury [R Vol. I, p. 145].

Again in this statement the detective asks:

> "Detective Braggs: This is the third statement I am taking from you. Now, will you tell me why did your brother Tony give a statement saying that he had seen you open the door and the door struck the baby and knocked him down? Why did Tony tell me that?

The Defendant: I don't know***."

The colloquy and conclusions regarding Tony continued [pp. 152, 153] although Tony was never called as a witness.

The Appellant concludes the tape, in response to a question by the detective by saying that he loved the child, took care of the child as his parents knew, and that he would in essence never hurt the baby to which the detective prejudicially replied "you loved the baby but you lied in two statements already" [p. 156, 157].

By the admission of these tapes over the objection of the Appellant the state was allowed to put before the jury numerous hearsay and other prejudicial matters it could never adduce at trial, legal opinions and conclusions it could never adduce at trial, the Appellant's arrest record which it could never adduce at trial and various bits of non-verified supposition [i.e., rectal injury, child abuse television shows vis a vis the taping of the penis]. The Appellant would suggest and urge that the resort to a taped statement by the police does not obviate the rules of evidence so that whatever the police may hypothesize thereon becomes admissible.

Of possible great moment in this case, given the lack of evidence regarding the injuries, the causation and certainly intent are the hearsay statements by the policeman that he had witnesses telling him they heard the baby screaming and crying in the woods when no such witnesses were called or offered, or indeed, ever existed for all that is known. Yet it appeared as

truth and the jury was allowed to hear these hearsay statements, thus giving credence to the state's case by making it appear that there existed uncalled witnesses that could corroborate what the policeman was saying. If a prosecutor could not, without committing reversible error, suggest this to a jury [see particularly Thompson v. State, 318 So.2d 549 (4 Fla. DCA 1975)] then certainly a tape ought not allow the state to so do.

There is no doubt that the policemen would not have been allowed to recite before the jury the hearsay regarding the screaming in the woods [compare: Quiles v. State, 13 FLW 1050 (2 Fla. DCA 1988); Spears v. State, 301 So.2d 24 (Fla. 2 DCA 1974); see also Fla. Stats. 90.801, 803 et. seq.]. Too, one must seriously question whether the Appellant's exculpatory statements, in light of the evidence, ought have been admitted at all since such exculpatory statements are non admissible hearsay [while the Appellant did testify, such did not remotely testify akin to the events, and the statements were not offered for impeachment]. See: Moore v. State, 13 FLW 890 (1 Fla. DCA 1988); Watkins v. State, 342 So.2d 1057 (Fla. 1 DCA 1977); Logan v. State, 511 So.2d 442 (Fla. 5 DCA 1987); Fagan v. State, 425 So.2d 214 (Fla. 4 DCA 1983).

Also, the state would never have been permitted to put before the jury not only the fact that Appellant had prior arrests, but also the nature of the charges [Fulton v. State, 335 So.2d 280 (Fla. 1976); Quiles, supra], yet the objected to tape did just that.

A review of the tapes that were played to the jury illustrate highly irrelevant, prejudicial and gross hearsay evidence. The jury heard it all, and the Appellant asserts that it cannot be considered harmless error. The hearsay alone is devastating; coupled with what remained it was fatally overpowering. A new trial is compelled.

POINT TWO

APPELLANT WAS DENIED AS FAIR TRIAL AND BASIC DUE PROCESS OF LAW WHEN COUNSEL ALLOWED APPELLANT TO TAKE THE STAND AND CONFESS TO FELONY MURDER IN A MANNER NOT ALLEGED BY THE STATE.

The case at bar presents the unbelievable circumstance of Appellant, after the state's case [see sufficiency of evidence argument herein], taking the stand, offering testimony that he was a principal in a twenty-five ounce cocaine trafficking case that resulted in the death of the child, at the hands of his co-traffickers/purchasers of the cocaine that Appellant was selling. Appellant's counsel offered this version of the events that resulted in the death of the child during his opening statement [see RS Vol. V, pp. 415 et. seq.]

As noted, Appellant made several statements herein, and the mother of the child also testified that a month and a half or longer after the death of the child she received a phone call from Appellant wherein he related he went to Hollywood to either deliver a message or pick up a package [unknown "dope"] and he was attacked along with Matt [R Vol. I, pp. 14, 15].

Appellant suggests that the state's case, even in light of the Appellant's statements, when the medical testimony is considered, was at least defensible and arguable due to the potential times involved in the injury, the non-fatal nature of the skull injury and the contriteness of the Appellant as well as the fact that even the mother testified he <u>never</u> abused or mistreated the child was not at all overwhelming. In spite of

this Appellant took the stand, portrayed himself as an armed drug trafficker that "soured" on a deal resulting in the retaliatory death of the child in his care.

Needless to say the state, after the judge informed counsel that his defense happened to be a confession to felony murder, requested that the jury be instructed on felony murder by trafficking in cocaine. Of course, this instruction was given over the Appellant's objection, inter alia, that was not the state's theory of the case.

This case is not the situation presented to this Court in Spivey v. State, 13 FLW 445 (Fla. 1988) wherein it was clear

> "that Spivey's only hope of avoiding conviction as a contract killer under a premeditation theory, and a probable recommendation of death, was to persuade the jury that he did not intend to kill the victim and was not responsible for the murder. Accordingly, Spivey took the stand. Spivey's testimony was largely inculpatory and confirmed the state's theory that he was the principal actor in a felony robbery that caused the death of the victim." [at 447]

This Court found that the jury believed the testimony he was not a contract killer and in fact reversed his death sentence. Here, Appellant confessed to something certainly more heinous that anything contained in his statements and, in fact, as noted, confessed to a new felony murder. In final argument, after charge conference and the like, Appellant's public defender told the jury Appellant testified against his advise however, counsel

presented that version in opening as part of his defense. As noted, Appellant is of marginal intelligence and required the effective assistance of counsel to insure the Appellant's right to due process and fair trial, particularly as regards testifying. Such was not afforded the Appellant [see remarks occurring at R Vol. 11, p. 216] in light of the above recited facts.

While it is the general rule that claims as above argued are presented in motions for post-conviction relief, it is also recognized that the issue can be raised where "the facts giving rise to such a claim are apparent on the face of the record, or conflict of interest or prejudice to the defendant is shown" Gordon v. State, 469 So.2d 795 (Fla. 4 DCA 1985), citing to Whitaker v. State, 433 So.2d 1352 (Fla. 3 DCA 1983) and Stewart v. State, 420 So.2d 862 (Fla. 1982).

As the Gordon, supra, court stated:

> "The Sixth Amendment right to counsel exists in order to ensure the fundamental right to a fair trial."

The burden upon the defendant is a heavy one.

> "The defendant must show and identify the specific acts or omissions upon which his claim is based; he must show that the specific act or omission was a substantial and serious deficiency measurably below that of competent counsel and that the deficiency was so substantial as to probably have affected the outcome of the proceedings. The defendant must affirmatively show prejudice." Gordon, supra, at 797 citing to

Strickland v. Washington, ____ U.S. ____ - 104 S.Ct. 2052 (1984).

Counsel has a duty and must pursue the "...overriding mission of vigorous advocacy of the defendant's cause." Strickland, supra, at 2065.

Counsel was acutely aware that the state was proceeding on a theory of felony murder against Appellant, and indeed during the state's case raised all proper objections and in fact did a thorough and beneficial cross-examination of the medical examiner, Dr. Ronald Wright. Indeed, Mr. Gallagher [the Appellant's trial counsel] is an experienced attorney who had handled a number of capital cases throughout Florida.

One is therefore at a loss to understand how an attorney can conduct a direct examination of a client that results in the state requesting and the trial court granting (but see below) a felony murder instruction not based on what the state sought but by virtue of an entirely new first degree felony that comes to light through the Appellant's own mouth.

What compounds the tragedy of what occurred is that neither the state [R Vol. 11, p. 310] nor the defense really believed what the Appellant said yet an instruction was sought and, over objection, given. The Appellant's request for, in essence, an interrogatory verdict [R Vol. 11, pp. 292-2961 was denied so one does not know if the jury believed it, but most certainly it had a devastating effect on the case.

It was clear that the Appellant did not wish a death sentence and unlike Spivey, supra, his "story" certainly did

nothing to assist him. Indeed, the aspect of Appellant confessing to a whole new theory of felony murder during the direct examination by his public defender is beyond belief. Illustrative is the trafficking amount of cocaine brought out during direct:

> "Q: [By Mr. Gallagher] What was your purpose - - how much dope did you have with you at the time?
> A: 25 ounces.
> Q: 25 ounces of what?
> A: Cocaine.
> Q: And what were you going to do with that 25 ounces of cocaine?
> A: Sell it to [rest of answer omitted].

Then, at the charge conference [see Point Five below], inter alia, in objection to the jury charge on trafficking felony murder, which appears to have taken counsel by surprise [R Vol. 11, pp. 288 et. seq.], the Appellant's attorney argues that such cannot occur due to lack of cocaine [R Vol. 11, pp. 289, 290].

The Appellant submits that he did not receive basic due process of law or a fair trial due to the error of his counsel in, at the least, not doing or warning his client not to take the stand, but instead helping the Appellant, through the direct examination, confess to felony murder.

For this alone, a new trial ought be warranted.

POINT THREE

THE EVIDENCE WAS INSUFFICIENT TO WARRANT THE SUBMISSION OF THE MATTER TO THE JURY OR TO SUSTAIN THE VERDICT.

A. THE MOTIONS FOR ACQUITTAL

The Appellant questioned the sufficiency of the evidence both at the close of all the evidence through motions for judgment of acquittal made by his counsel.

Prior to sentencing the Appellant's public defender made an "ore tenus" motion for new trial, inter alia, arguing the insufficiency of the evidence to sustain either premeditated murder or felony murder at the conclusion of the state's case [R Vol. 111, pp. 412, 4131. Neither the state nor the court questioned the timeliness of the motion, and the same was denied [p. 413].

The Appellant, as noted, first moved for a judgment of acquittal at the close of the state's case. It was error, it is submitted, to deny the same. The state was, as the evidence illustrates, proceeding on the theory of felony murder by aggravated child abuse; there being absolutely no evidence or suggestion of any type of premeditation. Aggravated child abuse is statutorily defined, F.S. 827.03, and, obviously, is a specific intent crime. That is, the accused must intend to wilfully or maliciously or intentionally perform the act that constitutes the aggravated abuse.

The Appellant's three taped and other non-taped statements all contain one common thread, that he did nothing to

injure this child, and any injury must have been and was accidentally inflicted. The Appellant continually expressed his love for the child and the Appellant spent some three hour8 at the hospital with the infant. In fact, other than the hearsay suggestions of the interrogating detective, there was introduced not a single witness to shed any light on what occurred with this child.

There is no doubt, obviously, that the child was severely injured and that his injuries were not self inflicted. However, through cross examination the Appellant was able to demonstrate the plausibility of the theory that these injuries occurred prior to the child coming into his care. It need be remembered that the taping of the penis, for whatever reason, caused no injury at all.

The fatal injury to the child was the torn liver, which could have occurred in several ways [R Vol. I, pp. 171-1781 including resuscitation attempts [p. 1991. Various trauma was about the child; however, as noted, on cross examination it was established that other than the skull injury, which was a "new" injury that "didn't do much" [p. 180], all of these injuries could have occurred as early as the day before, and certainly within the time the child was with his mother before the Appellant took him. Too, a fall could have caused the head injury [p. 182-1841 as well as the injuries about the neck [p. 196] which was described as strangulation on direct examination.

Excluding Appellant's statements, considering the number of people that were with the child throughout the day, it is quite reasonable the Appellant might not have been charged in this matter. The Appellant submits, however, that even with the statements the evidence was such that a directed judgment of acquittal should have been granted at the close of the state's case. There certainly was not a prima facie showing of aggravated child abuse vis a vis the Appellant. While Appellant's counsel did not raise a corpus delicti objection to the introduction of his various statements, such is not waived, it is submitted, if the conviction is based solely upon that confession. Knight v. State, 402 So.2d 435, 436 (Fla. 3 DCA 1981). Thus, it is the duty of the court to direct a judgment of acquittal when the evidence fails to present a prima facie case of guilt.

While the evidence at bar establishes blunt trauma injuries to the child there was no prima facie showing that Appellant intentionally, wilfully or maliciously [see F.S. 827.031 committed acts resulting in those injuries. As noted above, the Appellant's statements were all exculpatory and suggested only accident and thus, it is submitted, were not admissible under the hearsay exceptions that allow for the reception of "admissions".

The Appellant renewed his motion for judgment of acquittal at the close of all the evidence, and of course the standard the court must now employ is higher than prima facie; it

has been stated to be whether the state has proven its case to the degree that a reasonable person could reach no verdict other than guilt. Compare Adams v. State, 189 So. 392 (Fla. 1939) and Brown v. State, 294 So.2d 128 (3 Fla. DCA 1974).

The problem here is that the Appellant testified to the "drug ripoff" scenario during his side of the case and brought a whole new dimension to the case that neither his attorney nor the state believed. However, the Appellant would urge that notwithstanding such testimony, a review of the case presented by the state, and weighed by the criteria necessary, compels reversal of the decision denying the motion.

Appellant believes this matter is governed by the court's recent decision in State v. Pennington, 13 FLU 678 (Fla. 1988).

The court stated:

> "The Florida rule (R.Cr.P. 3.380) expressly states that a defendant's motion for judgment of acquittal at the close of the state's case is not waived by the defendant's subsequent introduction of evidence if properly preserved by a motion at the close of all evidence."

While, arguably, deficiencies in the state's case as asserted were not cured by the Appellant's testimony, his confession to an entirely new felony for which felony murder would lie certainly gives one pause as to how to consider Pennington; although Pennington expressly overrules Adams v. State, 367 So.2d 635 which is most related to the occurrences at

bar. Appellant suggests that Appellant's testimony need be disregarded and the evidence measured by the applicable standard at the close of all the evidence. Measuring by this standard a judgment of acquittal ought have been granted. The evidence when juxtaposed to what need be proven to establish aggravated child abuse is based upon speculation at best and therefore, the matter should have been taken from the jury.

B. VERDICT

~~STATE'S CASE~~

The evidence establishes that Appellant had custody of the child for a period of time prior to his death. The evidence further establishes that all of the injuries to the child, save the non fatal skull injury, could reasonably have occurred while the child was with his mother prior to the Appellant picking up the child.

The evidence, as noted, needs to have proven beyond a reasonable doubt that the Appellant committed aggravated child abuse. This, the evidence did not do.

The Appellant submits the evidence is insufficient to sustain his conviction under the theory of first degree felony murder by aggravated child abuse.

The evidence against Appellant, even with his various statements, is at best circumstantial in nature. Indeed, the trial court instructed the jury on circumstantial evidence as that instruction appeared in the "old" standard instructions.

As this Court has stated, to prove a case by circumstantial evidence, the circumstances must be inconsistent with any reasonably hypothesis of innocence. Ross v. State, 474 So.2d 1170 (Fla. 1985).

In McArthur v. State, 351 So.2d 972 (Fla. 1977) where the only proof of guilt was circumstantial, the court held that no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.

The evidence, including the Appellant's three, four or five statements of accidental infliction of a head injury, together with the time element applicable to all other injuries [which Appellant denied inflicting], is consistent with a reasonable hypothesis of innocence and for such, the verdict of the jury cannot stand.

C. THE APPELLANT'S CONFESSION

Appellant requested an interrogatory verdict of the jury regarding which felony [abuse or trafficking] they were relying upon were they to convict.

This was denied and hence, the Appellant's counsel, despite the comments of the prosecutor that it probably wasn't true, is unable to determine if in fact the jury may have thought that the child was killed in a drug deal gone wild. Too, it is most difficult to present this point, as it is rare indeed that a defendant takes a circumstantial case away from the state by confession on the witness stand to a separate first degree felony

in which he was a principal that results in a death [see F.S. 782.04(1)(a)(2).

The facts as presented began with Appellant engaging in a drug trafficking scenario; however, it was converted to a robbery by the co-traffickers as the testimony presented by Appellant illustrates and hence, ought not have warranted any instruction on this felony murder [R Vol. 11, pp. 227-2341. The Appellant's trial version of the facts, if believed, ought to not have rendered him liable for felony murder by drug trafficking in that, it is suggested, the robbery-beating of the child was not within the crime that the Appellant purportedly contemplated by trafficking.

While this was not argued by defense counsel, the Appellant requests that the Court examine the Appellant's story; as felony murder is not supported thereby.

POINT FOUR

THE INDICTMENT FAILS TO COMPLY WITH DUE PROCESS OF LAW IN LIGHT OF THE OCCURRENCES AT TRIAL

This point must be considered, of course, in conjunction with both the sufficiency of the evidence argument as well as that of the jury instructions; particularly in light of the occurrences at trial vis a vis the Appellant's testimony.

The Indictment returned by the Grand Jury charged that Appellant on 28 March 1986, did commit first degree murder by

> "***unlawfully and feloniously and from a premeditated design to effect the death of a human being, Matthew Roberts, did kill and murder him, the said Matthew Roberts, by inflicting blunt trauma about his body."

The Indictment charged premeditated murder; the state, through its case in chief, knowing it had no proof of premeditation actually proceeded upon first degree felony murder by aggravated child abuse.

This Court has held that the state need not charge felony murder in an indictment but may prosecute a charge of first degree murder under a theory of felony murder even then the indictment charged premeditated murder. State v. Pinder, 375 So.2d 836 (Fla. 1979); Bush v. State, 461 So.2d 936 (Fla. 1984).

The court has allowed this phenomenon to occur because, even though premeditated is charged and felony murder is proven, the liberal reciprocal discovery rules in Florida permit a defendant to have full knowledge of the charges and evidence the

state will submit at trial. O'Callahan v. State, 429 So.2d 691 (Fla. 1983).

The Indictment did not assert any underlying felony as a second count or charge.

This Court has, as noted, upheld this procedure over repeated challenge and Appellant, without lengthy argument, challenges the same again. A defendant accused of a serious offense has a right to know from the charging document the "essential facts constituting the offense charged". R.Cr.P. 3.140(d)(1). Indeed, as classically stated, an information must contain a statement of facts relied upon as constituting an offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is intended. State v. Mena, 471 So.2d 1297 (3 Fla. DCA 1297). See also Aaron v. State, 284 So.2d 673 (Fla. 1973). The Appellant submits his due process rights were violated fundamentally by the deficiencies of the Indictment.

More perplexing, and perhaps more cogent to the arguments made, is what later occurred. The Appellant became a witness on his own behalf and according to the state and trial judge, confessed to felony murder by trafficking in cocaine. Of course, a prosecutor cannot amend an indictment, but in the instant case since only premeditated murder was asserted, and no count was presented with any underlying felony, the state sought and received a jury instruction on felony murder by trafficking in cocaine [R Vol. IV, p. 490]. Thus, because of the broad based

nature of the Indictment the state was allowed to depart from its announced and "discovered" [O'Callahan, supra] felony murder and, after the close of all the evidence, seek a felony murder conviction on an entirely new underlying first degree felony.

Aside from whether the allowance of such violates this Court's recent teachings in State v. Pennington, 13 FLW 679 (Fla. 1988), as will be addressed below, the Appellant would suggest that the Court never intended so broad based a usage of the felony murder exception to precise pleading.

Basic due process of law mandates that a defendant be provided notice of what charge need be defended against. Florida Rule of Criminal Procedure 3.140(d)(1) compels such.

This Court has, as noted, held that the requisite intent for premeditated murder is presumed from proof of felony murder, and in line with this "alternative theory" of intent analysis, an indictment which charges only premeditated murder has been held to comply with due process Knight v. State, 338 So.2d 201 (Fla. 1976), compare State v. Jones, 377 So.2d 1163.

The due process violation in the case at bar is that the state never though or sought to proceed on this felony murder by drug trafficking; it was the Appellant's defense even though they had some inkling of such a statement made by the Appellant to the mother of the child, as well as a complete outline during defense opening. However ridiculous it was [i.e., the state and the public defender assert they did not believe it], it certainly could not provide the basis for a jury instruction.

An analogy comes to mind. There have been cases where a person has been accused of a serious crime and as his defense employs the alibi of being somewhere else engaged in a lesser crime. Since, as the jury instructions were recited, the Appellant is not on trial for any conduct not charged in the charging document, the court or state could not attempt to have the jury convict for the lesser crime. The state in this case used the Appellant's testimony to amend, in essence, its Indictment. Due process of law prohibits the same. This conduct was not charged and reversal ought occur. If it be fundamental error to fail to charge a jury at all on the elements of the underlying felony the state asserts occurred [State v. Jones, supra], it ought be no less fundamental error to charge the jury on a felony the state never asserted and also, even after testimony was offered, never really believed occurred. Due process of law was egregiously violated.

POINT FIVE

THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY AS OBJECTED TO BY THE APPELLANT.

Juries are continually informed that what the attorneys tell them is not evidence nor are they to consider the statement of the lawyers as evidence. Generally, the first time they hear this is just before opening statements.

During the opening statement for the prosecution, after remarking on the numerous statements the Appellant made regarding what occurred, Mr. Coyle [the prosecutor] made reference to the story the Appellant told the child's mother about going to Hallandale to deliver a package and a problem broke out with the other people [RS Vol. V pp. 403-4101, while adhering to this theme of aggravated child abuse.

Appellant's counsel, during his opening statement elaborated to the jury on how the evidence would show exactly what MR. MORRIS would later testify happened [RS Vol. I, pp. 414-417].

Appellant made but some slight reference to this purported drug deal in the last of several explanations he tried to give the child's mother [R Vol. I, pp. 14, 15], which the mother alluded to in her testimony. It was no focal point nor did it give rise to the level of proof of "trafficking in cocaine" resulting in a death.

The entire focus of the state attorney's case was directed toward felony murder by aggravated child abuse.

MORRIS's statement regarding a package to the mother was to be but a comment evidencing a "guilty conscience".

True to the opening statement, the defense let the evidence show what the Jamaicans did to the child, straight from the Appellant's mouth, and while this asserted drug trafficking deal became a robbery [see above regarding sufficiency of the evidence] both the state and the judge thought it of such monument as to instruct the jury on felony murder by trafficking in cocaine.

The defense objected to this instruction on two grounds, one being that it was not the state's theory of the case and two, that there was no corpus delicti of the underlying felony of trafficking [see R Vol. 11, pp. 288, 289, 290]. The court agreed to instruct, as requested by the state, stating to defense counsel that the trafficking testimony was "your theory of the case. It's just that your theory of the defense also happens to be an admission to a homicide" [pp. 289, 290].

The Appellant has already argued that the failure of the Indictment to allege particularly the conduct that constituted the murder denied Appellant due process of law and he would renew that argument instantly.

The simple issue is whether the state, when it is obvious that it has proceeded on felony murder by aggravated child abuse, directs all evidence thereto, and clearly is taking that route throughout the prosecution, may use felonious admissions by a defendant during **his** case as to how a death

occurred as an alternative theory of prosection by the avenue of jury instruction.

The Appellant would suggest no, and would once again rely on this Court's decision in State v. Pennington, supra.

If it be that the failure of the state to present a sufficient case cannot be "saved" when the missing elements are provided during the defense [assuming proper motions], it would logically follow that a defendant's testimony that creates an entire new "crime" ought not be able to be employed to secure a jury instruction on felony murder; particularly where the state has already rested its case and does not seek to reopen or, if possible, amend the charge. The giving of the instruction over the objection of Appellant on the "theory of the case" argument was prejudicial harmful error.

In that same vein, Appellant urges this Court to uphold the corpus delicti argument presented by the Appellant. Other than the testimony of the Appellant, which is worlds apart from his other statements, there is not one scintilla of evidence to suggest or support the underlying crime of trafficking in cocaine. What seems to have been forgotten in the trial court, the Appellant's testimony notwithstanding, is that the state had the burden of proof. It sought an instruction on felony murder by trafficking in cocaine, therefore, as the trial court instructed [see R Vol. IV, pp. 490, 491] the state had the burden to prove the crimes beyond a reasonable doubt.

The only proof, if it be such, for the crime of trafficking in cocaine was the Appellant's statement. Before a defendant's admission to a crime may be admitted as substantial evidence against that defendant the state has the burden of proving the "corpus delicti" of the crime, herein the crime of trafficking in cocaine [see Schwebel v. State, 201 So.2d 881 (Fla. 1967) and the numerous cases cited in footnote two].

As the court noted in Knight v. State, 402 So.2d 435 (3 Fla. DCA 1981):

> "Sufficient evidence of corpus delicti is not only a predicate to the admission of a confession, see State v. Allen, 335 So.2d 823 (Fla. 1976); Ruiz v. State, 388 So.2d 610 (Fla. 3d DCA 1980); Ussery v. State, 382 So.2d 880 (Fla. 3d DCA 1980); McQueen v. State, 304 So.2d 501 (Fla. 4th DCA 1974), but is, as well, a sine qua non of conviction Tucker v. State, 64 Fla. 518, 59 So. 941 (1912). Accord, Smith v. United States, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 (1954); State v. Allen, supra; Lambright v. State, 34 Fla. 564, 16 So. 582 (1894); Ruiz v. Stage, supra. Thus, Knight's failure to object to the introduction of his confession on the ground that the corpus delicti was not established is not fatal to his present claim that he was entitled to judgment of acquittal on the robbery count if, as he contends, conviction were rendered on the confession alone. The distinct rule of sufficiency upon which Knight relies is founded on
>
> > '... a long history of judicia1 experience with confessions and in the realization that sound law enforcement requires police

> investigation which extends beyond the words of the accused. Confessions may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confession from consideration by the jury [citations omitted], further caution is warranted because the accused may be unable to establish the involuntary nature of his statements. Moreover, though a statement may not be 'involuntary' within the meaning of this exclusionary rule, still its reliability may be suspect if it is under the pressure of a police investigator - whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the courts, the police and the medical profession recount a number of false confessions voluntarily made [citation omitted]. These are the considerations which justify a restriction on the power of the jury to convict, for this experience with confessions is not shared by the average juror. I Smith v. United States, 348 U.S. at 153, 75 S.Ct. at 197."

Whether or not the jury employed the trafficking evidence and instructions to convict the Appellant will never be known. Appellant's counsel requested what is in essence an interrogatory verdict, that is if the Appellant be guilty of first degree murder the jury ought specify which underlying felony it employed.

The state objected, the trial court refused, and the harmful prejudicial nature of the trafficking instruction can now only be erased by this Court granting a new trial.

Not objected to by defense counsel but further error of a fundamental nature, it is submitted, are deficiencies in the trial court's instructions relating to the aggravated child abuse felony murder [R Vol. IV, pp. 492, 4931.

In the definition of aggravated child abuse [p. 493] the court set forth two elements disjunctively that comprise aggravated child abuse. However, as to the second the court charged the jury as follows:

> "George Morris committed a battery against Matthew by intentionally touching or striking Matthew Roberts against his will."

This is the classic statutory definition of a simple battery (Fla. Stat. 784.03, Battery).

The aggravated child abuse statute recites the "battery" standard to be aggravated child abuse committed by one who:

> "commits aggravated battery on a child" (Fla. Stat. 827.03(1)(a)).

The court continued from "against his will" with:

> "OR
>
> caused bodily harm to Matthew Roberts and in committing the battery George Morris intentionally and knowingly caused Matthew Roberts great bodily harm"

[R Vol. IV, p. 493] which is part of the battery statute, except the court omitted intentionally causing bodily harm [see F.S. 784.03, Battery] and part of the aggravated battery statute.

Thus, the jury was advised and instructed that were GEORGE MORRIS to have committed but a simple battery on the child he was guilty of first degree murder.

This Court held in State v. Jones, 377 So.2d 1163 (Fla. 1979) that it was fundamental error for a trial court to not give any instructions on the underlying felony that was the gravamen of the felony murder theory. The Court observed that the instructions need not be with the same particularity that would be required "if that offense were the primary crime charged" but, concluded, "It is essential to a fair trial that the jury be able to reach a verdict based upon the law and not be left to their own devises..."

The trial court instructed the jury so erroneously that even in the absence of an objection by the Appellant's counsel, fundamental fairness and due process of law compels reversal for a new trial.

POINT SIX

THE COURT ERRED IN OVERRIDING THE RECOMMENDED LIFE SENTENCE AND IMPOSING THE DEATH SENTENCE IN APPELLANT'S CASE

There are cases of recent origin, from both State and Federal Supreme Courts permitting the state, after allowing a plea to a life sentence, to seek the death penalty when the terms of the plea are violated by the recipient thereof. [See Ricketts v. State, ____ U.S. ----- 107 S.Ct. 2680 (1987)]. Courts do not take these matters lightly, and, for that matter, neither does the state. The state controls the penalty and has the discretion to seek or not seek death. See i.e., Mann v. Dugger, 2 Fed. Law Weekly, 548 at 551 (11 Cir. 1988). It is not akin to seeking an extra five years for "going to trial".

In the case at bar the state offered the Appellant a plea to a life sentence [RS Vol 11, p. 141] which, apparently, due to the Appellant's concerns with admitting guilt, the state "decided" to withdraw. Life and death ought not be so cavalierly approached and counsel for Appellant would suggest and urge that if the prosecutor indeed felt the case was in fact a "life" case up to the day of trial, hesitancies of an accused ought not raise the matter to a death sentence. As shall be pointed out below, death is reserved for that certain category of case where, really, no reasonable person could disagree with the death sentence under the facts.

If, as here, the prosecutor himself was offering life

until the eve of trial, that factor alone ought, absent the most extreme of circumstances, bar imposition of the penalty.

Appellant would address two other matters before addressing the main issue. As pointed out before, the jury, pre-sentence personnel, police personnel and various others recommended life for MR. MORRIS.

It also appears in the record that counsel had reviewed this report with his client [R Vol. 111, p. 413].

From the comments of the defense counsel it is apparent he was well aware the trial court would impose the death sentence. During his comments on behalf of his client, including the numerous mitigating circumstances, Mr. Gallagher felt compelled to say the following:

> "And I want the court to know at this time I have nothing but the greatest admiration and respect for this court, but I do feel that the court's possible sentence in this case is somewhat clouded by the fact that the court itself does have a child of the age or close to the age of the child that was involved in - the victim in this case, and I know the court's feelings that the death of a child in the court's eyes is almost automatically an imposition of the death penalty." Emphasis supplied, [R Vol. 111, p. 410]

The defense counsel continued with the plea for MR. MORRIS 1 fe, and concluded:

> "Again, I realize its very tragic judge, but I don't think that the court should allow any sentence that the court may impose to be clouded by the fact that the

> court itself does have a child and I know that that plays, in this court's mind, a very important role in this sentencing.
>
> "But again, I must emphasize strongly, judge, that's not the law of the state. Twelve intelligent people recommended a sentence of life. Again, a very thorough and exhaustive pre-sentence investigation recommended a sentence of life." [R Vol. 111, pp. 418, 418].

The trial court promptly read an already prepared, highly emotional death sentence into the record.

In all candor, the undersigned is second to non in his respect, admiration and genuine liking of the trial judge and were this attorney possessed by the knowledge of the court's feelings that the Appellant's counsel had, a motion to disqualify would have been filed in a heartbeat. Indeed, Appellant suggests that, based upon the comments of counsel as to what he knew regarding the trial judge, seeking a disqualification was mandatory. If an attorney knows that because of certain facts a trial judge cannot be completely detached during the course of a proceedings, Appellant submits that attorney has an obligation to seek to have the matter before another judge since a defendant is entitled to nothing less than the cold neutrality of an impartial judge. Compare State ex rel. Davis, 194 So.2d 613 (Fla. 1940) and more particularly Heath v. State, 450 So.2d 588 (Fla. 3 DCA 1984), wherein that court noted that given the trial judge's strong personal views regarding a particular crime she ought have disqualified herself from the matter and sent it to a judge who

was able to "rule with an open mind as to what sentence, if any, should be imposed" Heath, at 590, emphasis added.

Counsel's failure to do so denied the Appellant due process of law;that this occurred is apparent, the sentencing hearing was quite for naught, the trial judge had already made up her mind and indeed comment at the actual sentencing were obviously wasted as a written sentencing order was already drawn and made a part of the record. In that same vein, the trial judge ought to have recognized this herself even if the absence of objection and disqualified herself from further proceeding in the matter and deferred to another judge for sentencing. Fundamental fairness and due process of law compel such action. Reversal must occur.

A pre-sentence investigation report was prepared in this case as is required. The bulk of the relevant material will be discussed shortly, however, contained within that document [which the trial court, perforce read and mainly rejected] is a victim impact statement wherein the mother speaks of her fear of the Appellant due to her prosecuting him and strongly recommends he receive the death penalty [R Vol. IV, p. 529]. Also contained within the P.S.I. is a statement from the decedent's grandmother also requesting the death penalty.

What need be remembered and will be shown is that every person, save the above two, contacted by the investigators recommended, as did the jury, that Appellant receive a life sentence. The trial judge who, in her order of death, states she

reviewed the P.S.I., rejected, sub silencio each recommendation save the mother and grandmother's wish for death.

The penalty phase in this case was held in January 1987. Actual sentencing occurred in March 1987. Booth v. Maryland, _____ U.S. _____, 107 S.Ct. 2529 (1987), holding in essence that a victim impact statement cannot be employed in a capital sentencing procedure was not decided until 15 June 1987, although argued 24 March 1987, still some twenty days after sentencing herein and hence there was no objection to the introduction of the victim impact statement.

This Court has touched upon the Booth issue, Grossman v. State, 525 So.2d 833 (Fla. 1988); Scull v. State, 13 FLW 545 (Fla. 1988), and has noted that "it is error for a sentencing judge to consider those statements as evidence of aggravating circumstances" Scull, supra at 548.

The Appellant is not unmindful that this Court has allowed that a harmless error standard [Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) may be employed in reviewing a Booth claim. Grossman, supra at 845.

The Grossman court also noted the fundamental error exception and held that "by his failure to make a timely objection Appellant is procedurally barred from claiming relief under Booth. Id. at 842.

In this case, of course, counsel cannot be faulted, Booth was four months from decision; however, given the fact that

all, save the two relatives, sought life, the introduction of the statements ought be considered to constitute fundamental error.

In Grossman this Court concluded "beyond a reasonable doubt that the sentencing judge would have imposed the death penalty in the absence of the victim impact evidence" id. at 845.

It is clear and convincing, but not beyond a reasonable doubt, that Judge Henning, based upon her personal feelings, would have imposed death no matter what was presented or recommended. However, the considering of the victim impact statement is the sole aspect that speaks of death. In the rare circumstance of the instant case it was fundamental error that cannot be said to be harmless beyond a reasonable doubt.

The Appellant will lastly address the error of the trial court's overriding of the jury recommended life sentence, and instead, imposing a death sentence.1

The jury in this matter heard three taped statements of the Appellant that, while of course denying culpability, also illustrates his sorrow at the death of the child as well as his love for the child. Too, the mother corroborated not only this but also that he at times contributed towards the child, and was never abusive towards the child. The jury learned that MORRIS went to the hospital where the baby was for over three hours to be near the child. Indeed, even during the farcical drug deal defense, the jury heard the Appellant testify about his feelings

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1 The defense counsel did not poll the jury but both the prosecutor and defense counsel indicated that they seemed to recall the vote was unanimous.

regarding the child, and they were also able to judge his demeanor and candor. The jury also heard that the Appellant worked two jobs, and that he was close to his family.

Too, during the sentencing hearing, George Morris, Sr. testified on behalf of his son. He related to the jury that some two months before the incident herein Appellant's little sister died of cancer and Appellant was "really upset". He also told the jury that Appellant and the child were like father and son, and that his son was hysterical over the death of Matthew Roberts [see R Vol. 111, pp. 376].

The state argued to the jury that the mitigating factors were inconsequential to the one aggravating factor, to-wit: "That the crime that the defendant committed was especially wicked and atrocious or cruel" [R Vol. 111, p. 377]. The bulk of the prosecutor's presentation was to minimize various mitigating factors that the state felt would be presented [R Vol. 111, pp. 378-3881.

Appellant presented in his argument various circumstances including telling the jury, which he felt they could observe "he's not one of God's brightest creatures, no he's not... but George Morris is not an evil man. He didn't lead his life in an evil way." [R Vol. 111, p. 393]. As counsel also put to the jury "The evidence in this case shows you that George Morris went to the hospital. That doesn't forgive him, but it shows that he cared for the child and he didn't want that child

to die. Why else would he spend three and one-half hours at that hospital***" [R Vol. 111, p. 398].

The jury also heard of the Appellant's lack of any significant criminal activity [a conviction for stealing a box of mean], and an argument that the one aggravating circumstance the state sought to have the jury find did not apply.

The court then instructed the jury, telling the jury that grand theft was not an aggravating circumstance, and listing the statutory mitigating circumstances as well as the fact that they could find mitigation from "any other aspect of the defendant's character or record and any other circumstance of the offense" [R Vol. 111, p. 402]. The jury recommended life. The court ordered pre-sentence investigation was conducted. It revealed that Appellant "was always found to be in the borderline range of intelligence functioning between being educationally mentally retarded and having a severe learning disability [I.Q. of 74-76] [R Vol. IV, p. 534].

The Appellant's special education teacher described him as quiet and polite despite his limited mental abilities and implored the court for a life sentence [R Vol. IV, p. 535], as did the varsity basketball coach, and other family members,

The investigation also revealed that Appellant dropped out of school after completing the 11th grade out of frustration and being older than the other students [R Vol. IV, p. 536].

Most cogent were the comments of Detective Braggs, chief investigator, who "expressed his belief that the subject

undoubtedly committed the murder but recommends that he be sentenced to a period of life in prison based on his belief that the defendant did not intend to kill the baby when he picked him up from his mother, the lack of motive as well as a lack of an understanding of the circumstances surrounding the victim's death." Emphasis added [R Vol. IV, p. 537]. The investigator also spoke with numerous other persons all of whom agreed that "the defendant's having committed such and act was totally out of character for him" [R Vol. IV, p. 5391.

The investigator found one applicable aggravating circumstance, that the crime was especially wicked and atrocious or cruel [R Vol. IV, p. 540].

The investigator found that because of some traffic and two misdemeanor cases, and the one prior non violent felony that the mitigating factor of no significant history of criminal activity did not apply [R Vol. IV, p. 541] but found two that did and she too recommended a life sentence.

At sentencing, Judge Henning found one aggravating circumstance, that the crime was especially heinous, atrocious or cruel and elaborated thereon in her written order [R Vol. IV, p. 560] [and included therein the fact that she read the pre-sentence report in reaching her decision].

The trial court, as to the mitigating circumstances found: "After due deliberations and consideration to all evidence presented, not only all the statutory mitigating circumstances, the court find there are no mitigating

circumstances in this case" [R Vol. IV, p. 5611, and rejected the jury's recommendation as unreasonable in that "it is obvious to this court that the aggravating circumstance overwhelmingly outweighs any mitigating circumstance" and recited that "it is very probable that defense counsel's emotional appeal to the jury caused the jury's recommendation'' [R Vol. IV, p. 562].

Judge Henning concluded her emotional sentencing order by rejecting the jury's recommendation and imposed the death sentence.

Space does not allow for the synopsis of the numerous cases where this Court has reversed a judicial override and the undersigned has probably read them all, however it would appear that this case is one of the more egregious instances of an improper override. See e.g. Cailler v. State, 13 FLW 256 (Fla. 1988); Brown v. State, 13 FLW 317 (Fla. 1988); Harmon v. State, 13 FLW 332 (Fla. 1988); Ferry v. State, 507 So.2d 1373 (Fla. 1987); Wasko v. State, 505 So.2d 1314 (Fla. 1987); Brookinss v. State, 495 So.2d 135 (Fla. 1986); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Goodwin v. State, 405 So.2d 170 (Fla. 1981); Odom v. State, 403 So.2d 936 (Fla. 1981); Neary v. State, 384 So.2d 881 (Fla. 1980); Thompson v. State, 328 So.2d 1 (Fla. 1975).

The case that sets the standard for review is of course Tedder v. State, 322 So.2d 908 (Fla. 1975) wherein the court held that "in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death

should be so clear and convincing that virtually no reasonable person could differ" [emphasis supplied]. Needless to say a jury, the lead detective, the pre-sentence investigator among others ought be considered somewhat reasonable people, and they recommended life.

As this court phrased the guide in LeDuc v. State, 365 So.2d 149 (Fla. 1978):

> "[t]he primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all reasonable data was considered unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation" [citing to Tedder, supra].

And, as this Court stated in Provenzano v. State, 497 So.2d 1177, 1185 (Fla. 1986), "the trial judge does not consider the facts anew. In sentencing a defendant a judge lists reasons to support a finding in regard to mitigating or aggravating factors". The trial court did not follow this standard. One also ought recall the words of the court in Garcia v. State, 492 So.2d 360 (Fla. 1986), although upholding a death sentence imposed upon the recommendation, and disagreeing it was error to give weight to that recommendation:

> "There is no error; this is the law. It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and when the recommendation is received to give its weight" [emphasis added]

This obviously did not occur at bar.

The trial court's sentencing order is quite ambiguous as to mitigation. Firstly, the court finds "there are no mitigating circumstances [R Vol. IV, p. 561]. She then finds "there are no mitigating circumstances that apply" [R Vol. IV, p. 561] and concludes "it is obvious to this court that the aggravating circumstances overwhelmingly outweigh any mitigating ~~circumstances~~" [emphasis added].

To quote this Court in Lamb v. State, 13 FLU 531 (Fla. 1988) "this statement give us pause". The Lamb decision cited to ~~Echols v. State~~, 458 So.2d 568 (Fla. 1985) and quoted from ~~Rogers v. State~~, 511 So.2d 526 (Fla. 1987):

> "However, a 'finding' that no mitigating factors exist has been construed in several ways: (1) that the evidence urged in mitigation was not factually supported by the record; (2) that the facts, even if established in the record, had no mitigating value or (3) that the facts although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved."

The trial court's sentencing order contains something of each of the above which makes clear the judge did not even give brief moment to the mitigating circumstances. This is contrary to Rogers, supra.

The trial judge found one aggravating factor, that the crime was especially heinous, atrocious or cruel and recited conclusions the court made from Dr. Wright's testimony. The

Appellant will not recite the same anew, but some aspects of that testimony leaves questions as to what occurred.

Notable in the judge's order also is that she employs the Appellant's "drug deal" story, that apparently everyone knew he made up, to support her findings that the child was not of concern to Appellant and that the child lingered without medical attention [R Vol. IV, p. 5601.

The Appellant cannot and would not attempt to minimize the tragedy that results and is the death of an infant. Death of an infant from natural causes is atrocious and cruel.

The aggravating circumstance does not apply in this case, however. The applicable standard was set forth by this Court in State v. Dixon, 283 So.2d 1 (Fla. 1973), quoted in Brown v. State, 13 FLW 317 (Fla. 1988):

> "It is over interpretations that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily tortious to the victim" [emphasis added].

No one knew what really happened that day, although it appears [and see P.S.I., R Vol. IV, p. 54 regarding this] that the child's injuries occurred [at least some] at the Appellant's

home. Others were there who would be potential witnesses. Whatever happened to this child happened quickly. If, as the prosecutor suggests, the Appellant was punishing the child and lost control, it was still swift.

Child murders are perhaps the most horrible of crimes, but as with all murders, to the trite, some are worse than others. The most tragic and unfortunate death of this child does not, however, fit the Dixon standard to support the trial court's finding, and same ought be reversed.

The trial court instructed the jury as to the following mitigating circumstances.

1. No significant history of prior criminal activity and the court informed the jury that conviction of grand theft is not an aggravating circumstance to be considered in the penalty but may be considered by the jury in determining if there be a significant history of prior criminal activity.
2. The Appellant was under the influence of extreme emotional disturbance.
3. The age of the Appellant at the time.
4. Any other aspect of the Appellant's character or record or any other circumstance of the offense.

There was sufficient evidence presented for the jury to find mitigating circumstances in each category.

The jury could well find that one grand theft conviction is indeed not a significant history of prior criminal

activity; the very word significant would convey to the jury that it would have to be much more than stealing some meat. There was ample support for this mitigating circumstance.

The Appellant's father testified that the death of sister a few months before had a devastating effect on the Appellant. The Appellant, as shall be pointed out below is borderline defective. The jury may well have coupled this with his "drug story" and the factor of his grief over the death of Matthew and his love of that child. By the very crime, the very circumstances of the offense and the evidence adduced, the jury could reasonably find the Appellant was suffering from mental or emotional disturbance. It had support in the record and should have been weighed and considered by the trial judge, Garcia, supra.

The pre-sentence investigation indicates the Appellant was twenty years of age at the time of the offense. It also indicates hi8 I.Q. as about 74. Too, the jury must have observed as did defense counsel, that Appellant is not one of God's brightest creatures.

A court may decline to find age as a mitigating factor "in cases where defendants were twenty to twenty-four years old at the time their offenses were committed" Scull v. State, 13 FLW 545 (Fla. 1988) citing to Garcia, supra, and Mills v. State, 476 So.2d 172 (Fla. 1985). In Scull, supra, the trail judge found that defendant's age, twenty-four, to be a mitigating factor and

the state cross-appealed the issue. This Court upheld that stating:

> "Scull's age of twenty-four alone could not establish a mitigating factor, but factors which were observable by the judge during the trial and sentencing proceeding support his finding that Scull's emotional age was low enough to sustain this mitigating circumstance."

GEORGE MORRIS's jurors were the judges of the facts on mitigation. Age was instructed as a factor. The jury could well have reasonably found this factor.

The Appellant would also direct this Court to Brown v. State, 13 FLW 317, heretofore cited, at page 319 for a full discussion of a borderline defective with an I.Q. of 75 who suffered remarkably the same emotional handicap as Appellant. The Court state, inter alia:

> "Mitigating evidence is not limited to the facts surrounding the crime but can be anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant [cites omitted by Appellant]. This type of mitigating evidence is particularly significant in a case such as this where the defendant at the time of the crime was a borderline eighteen year old functioning emotionally as a disturbed child, citing also Edding v. Oklahoma, 455 U.S. 104 (1982) and Amazon v. State, 487 So.2d 8 (Fla. 1986)."

As to the above three mitigating circumstances the trial judge rejected them with the stroke of a pen, although, it is

submitted, they have support in the record. Not only did the judge not give clear and convincing reasons to reject them and show the unreasonableness of the jury [~~Tedder~~, supra], she accorded them not a word.

The final factor is, as noted above, any other aspect of the defendant's character or record or any other circumstance of the case. Numerous factors are available under this category.

The Appellant had a decent employment history and had provided support to the child. This Court has recognized "employment history as relevant to a defendant's potential rehabilitation and productivity within the prison system if sentenced to life in prison". Cooper v. Dugger, 13 FLW 313 (Fla. 1988) and cases cited therein. There was much evidence to indicate potential for rehabilitation, which is clearly mitigating, Cooper, supra, and may well have been a factor the jury considered.

The Appellant loved the child, cared for the child, was upset over the death of the child and went to the hospital for several hours instead of leaving. This, coupled with all that was argued, including the Appellant's lack of intelligence or intent to hurt that child provided numerous other factors and circumstances that the jury could have employed to recommend life. The trial judge may not have believed this evidence or impaired capacity or other mitigating circumstances but the jury may have [see Holsworth v. State, 13 FLW (Fla. 1988); ~~Burch v. State~~, 13 FLU 153 (Fla. 1988); Robinson v. State, 487 So.2d 1040

(Fla. 1986)], and it is clear that the best that can be said is that the trial judge had a difference of opinion with the jury which is not remotely sufficient to override the decision of the "conscience of the community" Holsworth, supra, a case whose sentencing factors are similar to the ones at bar, and of course the judicial override was reversed.

To close this issue as it began the Appellant would quote from Brown citing to Tedder and the line of cases following:

> "For a trial judge to overrule the recommendation of the jury, the facts justifying the death sentence must be so clear and convincing that the jury can be said to have acted unreasonably."

Most unfortunately, it is clear and convincing that a uniquely qualified and usually superb trial judge became emotionally charged and "acted unreasonably". The death sentence is singularly inappropriate in the case at bar.

CONCLUSION

For this, and for all of the foregoing, the Appellant's conviction and sentence ought be remanded with directions for Appellant to either be discharged for lack of evidence or that he be retried upon the facts subject to no more than a life sentence.

The order of judgment and sentence should therefore be REVERSED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 7 day of January, 1989.

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1144