IN THE SUPREME COURT OF FLORIDA

ARTHUR LYNN SCHAFER,	)	
	)	
Appellant,	)	CASE NO: 70,834
	)	
vs.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

BRIEF OF APPELLANT

Appeal from the Circuit Court
Seventeenth Judicial Circuit
In and For Broward County, Florida
Judge Russell E. Seay, Jr.
Case No: 86-7765 CF

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STATEMENT OF THE FACTS

On May 24, 1986, several neighbors of Yetta Katzman became concerned at the condition of her Century Village apartment and, upon entering the apartment, found the bound and gagged body of Yetta Katzman in her bedroom. (Tr. vol. III, pgs. 503, 513, 543). Found lying amidst her ransacked bedroom, Katzman was bound hand and foot, with her hands tied with a red bandanna, gagged with a scarf, and her underwear was pulled down. (Tr. vol. IV, pg. 611). The victim had suffered bruises and contusions around the forehead and eyes and was found to have died from asphyxiation through strangulation (Tr. vol. IV, pg. 626). While the gag alone could have caused the death, the body showed neck injuries, a substantial amount of blunt force and, in short, showed all the hallmarks of manual strangulation (Tr. vol. IV, pgs. 628, 631).

In interviewing some of the Century Village residents, it was learned that a person had been seen walking in the area of the victim's apartment earlier in the day wearing brown pants and a beige shirt (Tr. vol. III, pgs. 514, 547), and in fact, that the same young man had gone to other apartments trying to gain entry under the guise of being a phone repairman (Tr. vol. IX, pg. 539, 541). Further investigation revealed Steven Caputo and Tom Oberrander who were handymen who worked at Century Village and who had seen the Appellant at Century Village on the day of the incident (Tr. vol. IV, pg. 661).

Once it was learned that the Appellant was a worker for the City of Deerfield Beach Public Works, the Administrator, John Vogel, was contacted and supplied the investigating officers with work schedules and the Appellant's name and address. After the Appellant's photograph was identified by Caputo and some of the residents of Century Village, the Appellant was invited to the police station by Detective Gary Null and Detective William Murray on June 3, 1986 at approximately 10:00 AM (Tr. vol. IV, pg. 700). When the Appellant was confronted with some of the witnesses who put him in the area of Century Village at the time of the incident, the Appellant denied being present and, in fact, gave a tape recorded statement at approximately 12:30 PM on the same day, chronicling his activities for the entire day (Tr. vol. IV, pg. 708).

After further discussion between the Appellant and Detectives Murray and Null and further skepticism by the investigators, the Appellant was transferred to the Broward Sheriff's Office to meet with Detective Tom Eastwood. After some conversation and interrogation, the Appellant made an oral admission (Tr. vol. IV, pgs. 752-753), which was repeated to Detective Null (Tr. vol. IV, pg. 757) and which eventually resulted in a tape recorded complete confession by the Appellant (Tr. vol. XV, pg. 820). These oral and recorded admissions were the subject of the Motion to Suppress, which was litigated pre-trial and was eventually denied by the trial court (Tr. vol. I, pg. 167).

The Appellant was, of course, arrested thereafter (Tr. vol. V, pg. 848) and signed a consent to search for his locker at the Public Works building in Deerfield Beach, Florida (Tr. vol. V, pg. 849), which resulted in the recovery of the jewelry stolen from the apartment of Yetta Katzman (Tr. vol. V, pgs. 815, 900).

The Appellant's girlfriend, Betty Boronson, testified regarding the Defendant's history of alcohol and cocaine abuse as well as his psychiatric problems leading to his violent and erratic behavior - specifically dealing with the night before the incident (Tr. vol. V, pg. 866). Boronson also verified the V.A. Hospital psychiatric treatment which both the Appellant and the Appellant's psychiatrist testified to (Tr. vol. V, pgs. 873-874, 877, 925-931, 978). The Appellant also testified in his own behalf and basically verified or affirmed the factual content of his tape recorded confession, though emphasizing his alcohol and drug dependency and psychiatric and emotional problems. (Tr. vol. V, pgs. 983-984, 986, 992-997).

Other facts will be cited throughout the body of the brief as appropriate.

SUMMARY OF THE ARGUMENT

The trial court erred in admitting oral and tape recorded statements made by the Appellant, in that the Appellant was effectively in custody and a suspect in the investigation, with the investigation focusing upon him, by virtue of eyewitness testimony and photographic identification of both the Appellant and a bandanna used to bind the victim before the Appellant was even invited to the police station. The Appellant was then misled as to his rights with an informal and inaccurate accounting of Miranda. The Appellant was then questioned continuously for several hours, including being confronted with evidence and the unfavorable results of the polygraph examination, before finally being broken down and confessing. Even after the confession when Miranda rights were supposedly given, these rights were inadequate and incomplete, not containing the Appellant's right to terminate questioning at any time, making it impossible for the Appellant to properly and voluntarily waive those rights, and making it impossible for any subsequent statement to be voluntary.

Finally, regarding the statements, the policeman's conduct should be taken in conjunction with the Appellant's psychiatric problems, drug and alcohol problems and lack of medication at the time of the statement, for the conclusion that there was a due process Fourteenth Amendment violation regarding the voluntariness of the statements involved.

The Appellant's right to a fair trial was destroyed by the prosecutor's eliciting of several incidences of violent and unrelated misconduct by the Appellant, effectively attacking the Appellant's character and showing his criminal propensity without there being any connection between those acts and the case at bar.

Further prosecutorial misconduct found a concerted effort to elicit emotion and sympathy from the jury by emphasizing the victim's age and the effect of her death upon her family.

The cululative effect of various trial court evidentiary and legal rulings require reversal, including the admission of inflammatory photographs, the improper instruction and failure to instruct the jury on the Appellant's theory of defense, and the failure to grant a mistrial upon outside influence on the jury: emotional outbursts by spectators in the audience and the juror contact with outside news accounts of the trial.

Finally, the death sentence was imposed improperly as aggravating circumstances were not proven beyond a reasonable doubt and were improperly considered, mitigating circumstances both statutory and non-statutory were ignored, and a statewide review for proportionality shows that the death sentence was not warranted in the instant case.

POINT I

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS STATEMENTS MADE BY THE APPELLANT.

After initial investigation of the homicide which occurred on May 24, 1986 led to the Appellant's name and tentative identification by unseen witnesses (Tr. vol. I, pgs. 112, 12, 23), the Appellant was invited to the Deerfield Beach Police Station on June 3, 1986 (Tr. vol. I, pg. 10). From the outset of the interrogation, there were no Miranda rights given to the Appellant, but he was told that he didn't have to talk and he was free to leave (Tr. vol. I, pg. 14). The Appellant was cooperative but upset that the police were not believing him, and when confronted with witnesses, stated that they were lying and accepted the polices' officer to take a polygraph examination (Tr. vol. I, pgs. 14, 15). The Appellant was also told that his boss would be contacted so that he would not be fired during the continued interrogation (Tr. vol. I, pg. 16). After approximately two hours at the police station, the first tape recorded statement was taken from the Appellant was a denial of the incident (Tr. vol. I, pgs. 28-29). In total, the Appellant was in the presence or custody of the police from 10:30 AM until 4:30 PM when he finally confessed orally and then on tape (Tr. vol. I, pg. 41). It should be noted that the Appellant was called a suspect by Detective Null as early as the first statement, at 12:30 PM (Tr. vol. I, pgs. 48-49).

After making an initial statement inculpating himself of the crime to Detective Eastwood, the Appellant was given some of his rights and the eventual tape recorded confession was taken immediately thereafter (Tr. vol. I, pgs. 55-56; vol. 4, pg. 753). Also, while Detective Eastwood was administering the polygraph examination, before any rights, the Appellant was confronted with the polygraph charts showing deception and was asked why he was reacting to certain questions (Tr. vol. I, pgs. 67-68). Also after this confrontation, the Appellant was told that polygraphist Eastwood could not clear the Appellant and that he would check into the Appellant's alibi. Further, the Appellant was told that if he was the person, it was just a matter of time before the police would get to the truth (Tr. vol. I, pgs. 71). All this led to the initial inculpatory statement that the Appellant wanted to "get it off his chest" and that the Appellant was, in fact, involved.

The Appellant testified at the Motion to Supress regarding his psychiatric problems and the fact that he did not take his prescribed medication of Tranxene and Chloralhydrate on the day of the questioning and that he was always worse without his prescription medication (Tr. vol. I, pgs. 124-125). Appellant also testified that he had no choice but to go to the police station, as his foreman said that he had to go (Tr. vol. I, pg. 127). The Appellant felt he was not free to leave the way he was being pounded with questions and confronted with

evidence (Tr. vol. I. pg. 129). Appellant emphasizes that it was the police who suggested the polygraph examination and, moreover, he was handcuffed before being taken to the police station for the polygraph (Tr. vol. I, pgs. 130-131). The Appellant felt that his head was "busting" from lack of food, lack of medication and the pressure about the questions, and further felt that he was in custody and was not free to go, nor was he free to refuse to answer questions (Tr. vol. I, pgs. 137-138). Despite this testimony being elicited, the court found that the interrogation was non-custodial and that the statements were made freely and voluntarily, and consequently, the Motion to Suppress the Statements was denied (Tr. vol. I, pg. 167). It was the denial of this motion and the overruling of the repeated objections to the admission of such statements and recordings (Tr. vol. IV, pgs. 707, 752, 793, 818, 820), with its resultant admission of such statements before the jury, that mandates reversal in the instant case.

The admission of the Appellant's inculpatory statements in the instant case failed to meet constitutional standards under the Fifth Amendment provisions dealing with waiver of specified rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), and under general Fourteenth Amendment due process standards dealing with inculpatory statements. It was and remains the State's burden to prove that the Appellant voluntarily and knowingly waived his rights as set forth in Miranda, supra,

and also to prove that any resultant statement or confession was voluntarily given in accordance with due process standards.

Miranda rights protect defendants against government coercion leading them to surrender rights protected by the Fifth Amendment. The relinqishment of this Fifth Amendment right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Colorado v. Connelly, __U.S.__, 107 S.Ct. 515 (1986), pgs. 523-524). The court must ensure through its review that the Appellant was not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit. There must be a lack of any physical or psychological pressures used to elicit the statements involved, as well as a lack of intimidation or threats. Connelly, pg. 524.

When the Appellant was initially called to the police station, it is important to remember that the police already had not only a description of the Appellant, but his name and identifications of him in at least one photo lineup. (Tr. vol. I, pg. 21). The police were also aware of the Appellant's clothing at the time and the fact that he had a bandanna when he was observed at the scene of the crime (and a bandanna was used to bind the victim). (Tr. vol. I, pgs. 22-23). It was also admitted by the police that in the preliminary stages of the interview regarding the Appellant's whereabouts, that they knew someone was lying (either the Appellant or the witnesses).

(Tr. vol. I, pg. 29). Further, the Appellant was definitely a suspect and catagorized as same as early as the first tape recorded statement at 12:30 PM on June 3, 1986 (Tr. vol. I, pgs. 48-49, 119).

The initial fatal flaw in the interrogation process came with the calculated effort by the officers involved to deceive the Appellant as to his actual position, and more importantly, to mislead the Appellant with an incomplete and inaccurate version of Miranda rights. Despite the fact that the Appellant was a suspect and did have considerble evidence amassed against him, the officers claim that no Miranda rights were given as they were just trying to eliminate the Appellant as a suspect (Tr. vol. I, pg. 14). Of course, this is a desperate attempt to avoid what the officers did and what they were attempting to accomplish. This is further aggravated by the fact that the Appellant was given an abridged version of his rights, being told that he didn't have to talk and that he was free to leave (Tr. vol. I, pg. 14). It is blatant on the face of this perversion of the Miranda rights that the Appellant was not notified of his right to have an attorney present, was not notified of his right to terminate the questioning at any time, nor was he made aware that anything that he said would be used against him in later proceedings. Of course, shortly after these misleading warnings, the Appellant gave his first "spontaneous" statement - after two hours of

questioning with no complete panoply of rights being given (Tr. vol. I, pgs. 72, 77).

This is a situation where certainly the police had shifted from investigatory process to the accusatory, focusing their attention upon the Appellant and attempting to elicit a statement, making Miranda rights mandatory. Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758 (1964), pg. 1766. Certainly, the activity that took place at the police station, whether described as discussions, conversations or as interrogations, were practices that the police should know were reasonably likely to evoke an incriminating response from a suspect such as the Appellant, and therefore amounted to interrogation. Rhode Island v. Innis, __U.S.__, 100 S.Ct. 1682 (1980), pg. 1690. Certainly, under Innis, interrogation refers not only to express questioning but also to words or actions on the part of the police reasonably likely to elicit incriminating responses. This situation was exaggerated when, after the initial taped statement at 12:30 PM on 6/3/86, the Appellant was transported to the Broward Sheriff's Office for the purpose of a polygraph examination (Tr. vol. I, pgs. 37-38). Once at the Broward Sheriff's Office, still without the benefit of Miranda warnings, officers conducted a pre-test interview, actually coming out one or two times during the pre-test interview and informing the other detectives that the Appellant appeared not to be telling the truth (Tr. vol. I, pgs. 38-39). Eastwood then ran the polygraph examination and

went to far as to confront the Appellant with the deceptive charts and questioned the Appellant as to "why are you reacting to these questions?". Eastwood even went so far as to admit in his testimony that his purpose in confronting the Appellant with the polygraph information and the other evidence against him was to either get an admission or to get the Appellant to give a reasonable explanation, although Eastwood already indicated to the Appellant that he could not clear the Appellant (Tr. vol. I, pgs. 70-71). Eastwood went so far as to tell the Appellant that he could not clear the Appellant, in that they would check out the Appellant's alibi, and if the Appellant was the person involved, it was just a matter of time before the police know the truth, and that if anything was not the truth, the Appellant might as well tell them now, as eventually they would find out (Tr. vol. I, pgs. 71-71). Up to this stage there were still no rights given to the Appellant (Tr. vol. I, pg. 72). In fact, it was only after the Appellant predictably responded to this subtle coercion and interrogation without the benefit of his rights and finally stated that he did it and didn't mean to do it (Tr. vol. I, pg. 54), that the Appellant was "stopped" and given his Miranda rights (Tr. vol. I, pg. 55).

The continuous chain of activity from the Appellant's initial appearance at the police station to the initial tape recorded statement to the transfer to the Broward Sheriff's

Office to the eventual confession showed that the Appellant, as any reasonable person would have concluded, was in custody and was not free to go, therefore mandating Miranda rights from the very beginning. See Immigration and Naturalization Services v. Delgado, __U.S.__, 104 S.Ct. 1758 (1984). Along these lines, the Appellant testified not only that he had no choice but to go to the police department because of his foreman's instructions (Tr. vol. I, pg. 127), but that he felt that he was not free to go at any time, particularly the way that he was being questioned and confronted with evidence and witnesses (Tr. vol. I, pg. 129). This view of the situation is corroborated by the admission by Detective Murray that during the course of the interrogation, the Appellant's boss would be called so the Appellant would not be fired (Tr. vol. I, pg. 16).

This case is a classic example of the police officers deliberately delaying a formal arrest in an attempt to avoid compliance with Miranda. The United States v. Martin, 781 F.2d. 671 (U.S.C.A. 9th Circ. 1985), pg. 673. The circumstances surrounding the Appellant's interrogation were certainly of the type calculated to delude the Appellant as to his true position, making any statements inadmissible. Frazier v. State, 107 So.2d. 16 (Fla. 1958), pg. 21. This is particularly true when the court recalls the misleading partial Miranda rights that were the only rights that the Appellant heard until after his initial inculpatory statements were elicited.

The recent case of Mosely v. State, __So.2d.__; 12 F.L.W. 765 (Fla. 1st DCA 1987) deals with a situation much more favorable to the State, yet just as improper and reversible as the case at bar. Mosely was the subject of a marijuana investigation, with his description and the description of his truck being given to the police. Mosely was then invited to the police station and informed in the same artificial and self-serving manner as in the instant case that he was not under arrest and was free to leave. The deputy also testified that Mosely was free to leave during the conversations. The intention of the officer, as in the case under review, was to secure a statement. As with Appellant Schafer, Mosely was confronted with evidence and accusations, without Miranda rights.

The State's argument that Mosely went voluntarily to the police station and was not in custody and was, therefore, not entitled to Miranda warnings was rejected by the court in language that is absolutely perfect to dispose of the instant case. The court held that Mosely was an individual who had become a definite suspect in a drug investigation before he was initially contacted. He was then informed by a law enforcement officer that his presence was desired at the stationhouse for questioning. Although Mosely arrived voluntarily at the stationhouse for questioning, he was without benefit of counsel during an interview initiated by a law enforcement officer who had focused upon Mosely as his prime and only suspect. Pg. 776.

After distinguishing the authority cited by the State, the court found that given these circumstances (as well as the officer's desire to have Mosely cooperate as an informant), the officer "should have informed Mosely of his right to remain silent and his right to presence of counsel and allowed him the opportunity to freely and voluntarily waive both rights". Id., pg. 766. Although Mosely was not in custody arising to the level of a formal arrest most often viewed as that which requires a Miranda warnaing, he was the accused from whom a confession and future cooperation was sought through a plan formulated before Mosely arrived at the station. "Given the totality of these circumstances, we find the Appellant should have been apprised of his Miranda rights and given an opportunity to waive them." Page 766.

Appellant Schafer was even more deceived as he received the partial, bogus rights. Clearly, Miranda warnings were required, and the statements must be suppressed.

A further fatality to the State's attempt to present the confessions and statements of the Appellant before the jury is the fact that when the Miranda rights were finally given, they were not adequately and completely given. Detective Eastwood of the Broward Sheriff's Office testified that he informed the Appellant that he had the right to remain silent, that anything that the Appellant said could be used against him, that the Appellant could have an attorney present now or

at any time during the questioning and that if the Appellant could not afford an attorney, one would be provided without charge (Tr. vol. I, pgs. 56-57). At no time was the Appellant advised that he could terminate questioning at any time. The Appellant readily concedes that verbatim Miranda rights are not necessary where a defendant is adequately and fully informed of the rights, Alvord v. State, 322 So.2d. 533 (Fla. 1975), the right to terminate questioning is critical, and in this case, lacking. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has once been invoked. Shriner v. State, 386 So.2d. 525 (Fla. 1980), pg. 529. A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the court in that case to adopt fully effective means to notify the person of his right of silence and to assure that that exercise of the right will be scrupulously honored.

> The critical safeguard identified in the passage at issue is a person's right to cut off questioning ... for the exercise of his option to terminate questioning, he can control the time at which questioning occurs, the subjects discussed and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressure of the custodial setting. We therefore conclude that the admissibility of statements obtained after

> the person in custody has decided to remain silent depends under Miranda on whether his right to cut off questioning was scrupulously honored.
> Michigan v. Mosely, 423 U.S. 96, 96 S.Ct. 321 (1975), pg. 326; Shiner, supra, pg. 529.

It hardly requires comment to note that if the person involved is not informed of this critical safeguard, he cannot make a knowing and voluntary waiver of such safeguard - nor can he make a voluntary statement which is admissible. See Wasko v. State, supra, where this court upheld the admission of a statement despite claims of a relentless questioning session occupying twenty-one hours of a thirty-nine hour period. This court emphasized in upholding the trial court's admission of the evidence that Wasko "was told that he could stop the questioning whenever he wished". Page 1315. The inadequate rights prevent a knowing and voluntary waiver of Fifth Amendment protections, and make a finding of voluntariness of the statements that resulted impossible. When it is recalled by this court that it is axiomatic that the reviewing courts indulge in every reasonable presumption against waiver of constitutional rights, Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232 (1977), it is inescapable that the statements must be suppressed and the case reversed.

Distinct from the Fifth Amendment shortcomings in the instant case, the Appellant also points out the Fourteenth

Amendment due process flaws in the admission of the statements before the jury. When the "police overreaching", as detailed previously, is taken in conjunction with the deficient mental condition of the Appellant at the time of the questioning, it is clear that the statements involved cannot pass due process constitutional muster, and the statements must be excluded. Colorado v. Connelly, supra, pgs. 520-521. Certainly, all factors singluar to the case under review must be considered regarding the voluntariness of the statement, and this includes the Appellant's mental capacity or deficiency. Simms v. Georgia, 389 U.S. 404, 88 S.Ct. 523 (1967).

Along with the factors enumerated previously (deception as to the Appellant's position, psychological coercion, constant and lengthy questioning, inadequate and misleading advisement of rights, etc.), this court must also consider the Appellant's history of psychiatric problems and psychotropic medications, as well as the cocaine and alcohol induced problems. The Appellant testified regarding his psychiatric treatment and hospitalization in the military (Tr. vol. I, pg. 128; vol. V, pg. 978), as well as his follow-up treatment in V.A. hospitals (Tr. vol. I, pg. 134; vol. V, pg. 93). Further, Appellant testified that he was, in fact, on medication but did not have his medication on the day the statements were made, and that he was always in worse condition without medication, specifically being nervous, upset and unable to think (Tr. vol. I, pgs. 124,

125, 135). Appellant testified that his head was "busting" before the statement, from no food, no medication and the pressure of the questions involved (Tr. vol. I, pg. 138), and this is verified by the actual transcription of the tape played before the jury (Tr. vol. V, pg. 841). Further verification of the Appellant's mental condition was the fact that it was admitted by the officers that the Appellant was crying and sobbing on the tape recorded statement played before the jury (Tr. vol. V, pg. 852). Further (set forth with more detail in the Sentencing Point of this brief), psychiatrist Dr. DelCampo testified regarding the Appellant's treatment since 1982 regarding personality disorders and drug abuse conditions, as well as possible Post-Traumatic Stress Syndrome (Tr. vol. V, pgs. 927-928, 931, 934). This history of extreme drug abuse and alcohol abuse was corroborated by State witness Betty Boronson (Tr. vol. V, pg. 871, 884, 877) and by the Appellant's testimony at trial (Tr. vol. V, pgs. 986-987), with the Appellant again emphasizing that his head was not clear when he gave the statements in question (Tr. vol. V, pg. 1049). The state of the record simply does not support a finding of voluntariness of the waiver of the partial and inadequate rights under Miranda or a finding that the statements resulting were voluntary. In Deconingh v. State, 433 So.2d. 501 (Fla. 1983), this court held statements to be

inadmissible when the court found Deconingh to be upset, a crying and confused person, with the mental and emotional distress preventing her from effectively waiving her Miranda rights and making any statements inadmissible. Page 503. In Breedlove v. State, 364 So.2d. 495 (4th DCA 1978), the conviction was reversed and a statement found to be involuntary because of Breedlove's emotional confusion raising serious doubts as to whether her statements were knowingly and intelligently made and whether or not such emotional state precluded a knowing and voluntary waiver of her Fifth Amendment rights. Page 497. Although each separate shortcoming in the interrogation phase of the investigation is sufficient to merit reversal of the instant case, the cumulative effect of such problems makes it clear beyond dispute that the case must be remanded for the suppression of any and all inculpatory statements made by the Appellant. Parenthetically, it should also be noted that the physical evidence involved (jewelry) must also necessarily be suppressed as being the direct and proximate result of the unconstitutional activity of the police in improperly obtaining the statements from the Appellant. It was admitted by the police officers involved that there was, in fact, no independent source for their securing of the jewelry involved (Tr. vol. I, pg. 41) and therefore, with the taint of the unconstitutional interrogation process, the recovery of the jewelry through the supposed consent form is tainted, as there were no intervening factors to dissipate the initial constitutional taint. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963).

POINT II

THE APPELLANT'S RIGHT TO A FAIR TRIAL WAS DESTROYED BY PROSECUTORIAL MISCONDUCT.

It has often been said that a prosecutor's duty and obligation is to see that justice shall be done, not just to win a case. See Berger v. United States, 295 U.S. 788, 55 S.Ct. 629 (1935). In the case at bar, the prosecutor went to great lengths to improperly prejudice the Appellant before the jury, and the cumulative effect of such actions requires reversal. See Groebner v. State, 342 So.2d. 94 (Fla. 3rd DCA 1977).

The most blatant misconduct and certainly the most damaging, was the relentless character attack which was conducted by the prosecutor in the form of unrelated yet specific instances of misconduct, showing criminal propensity of the Appellant. Although the Appellant concedes that there were no objections to these repeated instances, the net effect of this activity was such as to violate basic fundamental principles of fundamental fairness and due process, and reversal is required regardless of objection.

Although it was elicited from State witness Betty Boronson that the Appellant had serious drug and alcohol problems and sometimes became violent when under the influence (Tr. vol. V, pg. 872), the prosecutor took it upon himself to elicit specific instances of criminal activity, including one instance when the Appellant put a knife to the throat of Betty

Boronson, saying, "let's see if Betty bleeds", mentioning incidences of beatings, including an emergency room treatment for broken ribs suffered at the hands of the Appellant, and the placing of a gun to Boronson's head by the Appellant, stating, "let's scare Betty to death". (Tr. vol. V, pg. 885). It was then elicited that the Appellant would grab Boronson and chase her with a telephone cord around her neck, trying to hurt her severely (Tr. vol. V, pg. 886). Of course, this all came on the State's case without the Appellant's character ever being brought into question. Later, on the defense side of the case, Dr. DelCampo was also questioned by the prosecutor regarding the Appellant's attempt to hurt and hit his girlfriend (Tr. vol. V, pgs. 960-961), and by the Appellant's statement to the doctor that he almost killed his ex-wife (Tr. vol. V, pg. 962). Also during the cross examination of DelCampo by the prosecutor, it was specifically elicited that the Appellant's V.A. hospital records were missing, that the originals are always kept at the V.A. hospital, that the hospital would never give permission to anyone to take them out, and that, in fact, the original records were in the possession of the Appellant's attorney (Tr. vol. V, pgs. 942-947). Of course, consistent with the prosecutor's tactics, this line of questioning ended with the doctor being asked if anyone would have stolen the records in question (Tr. vol. V, pg. 947). It should be noted that at this point, an objection was in fact brought to the

court's attention. which was sustained (Tr. vol. V, pgs. 947-948). Later in the trial, when the Appellant was compelled through this misconduct to testify in his own behalf in an attempt to clarify the incidences brought before the jury by the prosecutor (Tr. vol. V, pg. 990), the prosecutor again took this opportunity to emphasize the fact that the Appellant almost killed Betty when he beat her up to the point of hospitalization and that he put a knife to her throat (Tr. vol. V, pgs. 1019-1020). Finally in this regard, the prosecutor implied that the Appellant had done other burglaries in the area by questioning him regarding the Appellant's knowledge that the apartment doors were left open in the Century Village complex (Tr. vol. V, pg. 1044).

The law in the state of Florida regarding the admissibility of similar act evidence or collateral crime evidence is well settled, with Section 90.404(2)(a) of the Florida Statutes being a recent codification of Williams v. State, 110 So.2d. 654 (Fla.) cert denied 361 U.S. 847 (1959). Similar act evidence of other crimes, wrongs or acts is admissible when relevant to prove material fact at issue, such as motive, opportunity, intent, identity, etc., but is inadmissible when the evidence is relevant solely to prove bad character or propensity. Not only is a striking and certain similarity between the incidents involved to the case being tried a crucial and special question, but the court must also weigh the prejudicial effect of such evidence

in conjunction with its probative value. Peek v. State, 488 So.2d. 52 (Fla. 1986). This court emphasized in Peek that collateral prime evidence is not relevant and admissible merely because it involves the same type of offense, but that it must be in proportion to the aspect of the crime to be proven. This court in Peek cited the second Williams case, Williams v. State, 117 So.2d. 473 (Fla. 1960) as an illustration of the similar act evidence being overly prejudicial. The court cited and approved the reversal of the conviction in Williams, finding that the admission of a collateral offense of robbery in a robbery and murder trial was "so disproportionate to the issue of sameness of perpetrator and weapon of design that it may well have influenced the jury to find a verdict resulting in the death penalty". Peek, pg. 176.

The State fails on both special tests in the instant matter: similarity and proportionality. There is absolutely no similarity in the specific instances of violence directed toward Betty Boronson or the Appellant's ex-wife to the incident charged in the Indictment. Other than being violent acts against women, there was no similarity of motivation, of weapon, of technique, etc. Parenthetically, it must also be noted that because of the State's reliance upon the Appellant's full confession and secondary confession to Betty Boronson, identity was never an issue to be proved through such supposed similar

act evidence. nor were any other of the approved factors set forth in Section 90.404(2)(a) even passingly involved.

Notwithstanding this lack of similarity, the second factor, the proportionality, also mandates reversal, as the testimony of these repeated incidences of violence (one with a gun, one with a phone cord, one involving broken ribs and hospitalization) certainly outweigh any relevance. See Jackson v. State, 451 So.2d. 458 (Fla. 1984), where this court refers to a murder conviction and death sentence based upon the improper testimony before the jury regarding a boast of Jackson that he was a thoroughbred killer while pointing a gun at a witness. This testimony was found to be impermissible and prejudicial, and this court was unable to envision a circumstance in which the objected testimony would be relevant to a material fact in issue, and was precisely the kind of evidence forbidden by the Williams rule. Our criminal justice system requires that a case be proven beyond a reasonable doubt without resorting to the character of the Appellant or the fact that the Appellant may have propensity to commit the particular type of offense in question.

Therefore, the admission of improper collateral crime evidence is presumed harmful error, because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged. Straight v. State, 397 So.2d. 903 (Fla. 1981), pg. 908; Peek, supra, pg. 177.

The eliciting of such similar act testimony cannot be justified by the State as impeachment under Section 90.610 of the Florida Statutes. Although the Appellant is subject to cross examination regarding prior convictions should he testify, the Appellant in fact accurately testified to his only conviction of drug sales in 1978 (Tr. vol. V, pg. 986). It is well established that the prosecutor can only ask the Appellant on cross examination whether or not he has been convicted of a felony and how many times, with no further inquiry being allowed, (Johnson v. State, 380 So.2d. 1024 (Fla. 1979), pgs. 1025-1026.) Should the Appellant choose to testify in his own behalf and bring out the prior convictions, the State is not authorized to inquire further than it would otherwise have been allowed to - the defendant does not open the door for the prosecutor to inquire into the nature of the conviction. Sneed v. State, 397 So.2d. 931 (Fla. 5th DCA 1981), pg. 933. It is obvious that the incidences of misconduct elicited by the State were inappropriate attempts at impeachment, as they did not result in convictions and mistakenly gave the impression to the jury that the Appellant was either misquoting his prior record or attempting to hide it. Again, the prejudice is apparent.

As there simply is no justification for the prosecutor to elicit the specific acts of misconduct by the Appellant in the form of a character attack, and as such evidence, apart from being totally dissimilar to the case being tried,

was extremely prejudicial, the Appellant's right to a fair trial was destroyed, and reversal is mandated.

The prosecutor also prejudiced the Appellant's right to a fair trial through a continuous campaign to evoke sympathy for the victim and to improperly elicit emotional as well as intellectual responses from the jury. Starting with the State's refusal of the offer to stipulate the cause of death of the victim and the State's insistence on admitting heinous and prejudicial photographs of the victim (Tr. vol. I, pg. 174; Tr. vol. III, pgs. 549, 574; Tr. vol. IV, pg. 618), the prosecutor blatantly brought in the victim's daughter Eileen Knobel under the guise of identifying the jewelry which was recovered from the Appellant's locker as being the jewelry missing from the apartment of the victim (Tr. vol. V, pgs. 898, 900). It is clear that these issues were never in dispute and were adequately proven earlier through the complete tape recorded confession of the Appellant, including the issue of the jewelry being stolen (Tr. vol. V, pgs. 844, 847). The transparent reason for bringing Ms. Knobel to court was to emotionally charge the jury with the daughter's emotional breakdowns in the courtroom (Tr. vol. V, pgs. 896, 904) and the daughter's emotional accounts of her mother's blood and picking up her mother's body in Florida for burial. (Tr. vol. V, pgs. 904-905). Appellant's objection, Motion for Curative Instruction and Motion for Mistrial were denied, despite the

two breakdowns in the courtroom (Tr. vol. V, pg. 905).

The prosecutor's finesse continued throughout the cross examination of the Appellant, repeatedly phrasing questions in terms of the victim's age and characterizing the victim as this elderly lady, this eight-four year old lady, and this poor old lady (Tr. vol. VI, pgs. 1031, 1032, 1035, 1042, 1046, 1047). The prosecutor went so far as to ask the Appellant if he knew anything about the victim's life (Tr. vol. V, pg. 1042).

Finally, the prosecutor coordinates his efforts at prejudicing the jury during the closing argument by not only arguing the specific incidences of misconduct which were improperly brought out (regarding the Appellant's character) (Tr. vol. VI, pg. 1074), but arguing that the victim lived in fear and moved to Century Village for peace and security and happiness away from crime (Tr. vol. VI, pg. 1068). These tactics, culminating in the final argument, are exactly the types of improper methods calculated to produce wrongful convictions that were denounced in Berger v. United States, supra. Page 633. In Edwards v. State, 428 So.2d. 357 (Fla. 3rd DCA 1983), the first degree murder conviction was reversed based in part on the prosecutor's closing argument asking for justice on behalf of himself and the people of the state of Florida, as well as the victim's wife and children. The court found that this argument was an improper appeal to the

jury for sympathy for the wife and children of the victim, the natural effect of which would be hostile emotions toward the accused. Page 359. The court went further to find that these types of appeals to the prejudice or sympathy of the jury are calculated to unduly influence the jury. See also Vaczek v. State, 477 So.2d. 1034 (Fla. 5th DCA 1985).

Finally, characterizing the Appellant's testimony as "the big lie" (Tr. vol. VI, pg. 1104) runs afoul of Bullard v. State, 436 So.2d. 962 (Fla. 3rd DCA 1983) and its progeny prohibiting personal attacks and personal opinions by the prosecutor against the Appellant.

As a result of these cumulative incidences of misconduct, a reversal is required.

POINT III

THE CUMULATIVE EFFECT OF VARIOUS ERRORS AT THE TRIAL LEVEL VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL.

Throughout the course of the litigation in the instant matter, various evidentiary rulings and legal rulings were made by the trial court which were erroneous, and which taken together have the cumulative effect of depriving the Appellant of a fair trial.

Despite efforts to stipulate to the cause of death in the instant matter in an attempt to exclude the heinous and prejudicial photographs in question (Tr. vol. I, pg. 173; vol. III, pg. 549), the State chose to introduce these photographs for the mere purpose of prejudicing the jury (Tr. vol. III, pg. 574; vol. IV, pg. 618). These photographs were of such nature as to unduly prejudice the jury and to detract from the fair and unimpassioned consideration of the evidence in the case. Young v. State, 234 So.2d. 341 (Fla. 1970), pg. 348.

In conjunction with the prosecutor's prejudicial attempts to evoke emotion from the jury, this was further aggravated by the person in the audience during the trial who was crying and carrying on in the presence of the jury, which even the prosecutor had to admit was noticable and upsetting (Tr. vol. III, pg. 544). This incident, in conjunction with the prosecutor's attempts to evoke emotion (in particular

staging the multiple emotional breakdowns by the victim's daughter) prejudiced the jury against the Appellant.

The trial court erred by failing to grant a mistrial based upon the fact that several jurors admitted to seeing media coverage (either newspaper or television) during the course of the trial (Tr. vol. VI, pgs. 1146-1149), and more importantly, the fact that there was a newspaper actually in the jury room with accounts of the trial, which the court's bailiff was later sent to retrieve (Tr. vol. VI, pgs. 1149-1150). It is fundamental that every defendant is entitled to be tried by a fair and impartial jury, that our system of law has continuously endeavored to prevent even the possibility of unfairness. In Re: Murchison, 349 U.S. 133, 75 S.Ct. 623 (1955). In the case at bar, like any other case in our system, it is to be decided only by evidence and argument in open court and not by any outside influence. See Patterson v. Colorado, 205 U.S. 454, 27 S.Ct. 566 (1907). Therefore, with it being blatant on the record that outside influence did, in fact, come into play with the jury deliberation, with a newspaper actually being in the jury room, it was error for the court to allow the jury to deliberate to verdict on this case.

The trial court erred in improperly instructing the jury, in that the special requested instruction propounded by the Appellant was denied (Tr. vol. VIII, pg. 1311), although it accurately set forth the elements distinguishing acts of

violence during the course of a robbery, as opposed to during the course of an escape, and distinguishing therefore the offense of robbery versus grand theft. This failure to instruct was, of course, critical as it made the difference between a felony murder of the first degree or of a lesser degree. It is encumbent upon the court to charge the jury on every offense which is recognized by the law and sustained by a version of testimony which the jury has a right to accept. Palmes v. State, 387 So.2d. 648 (Fla. 1981). Further exaggerating this error was the court's erroneous instruction on flight over the objection of the Appellant (Tr. vol. VI, pg. 1055), where the only indication of flight was the simple leaving of the area of the crime and failure to give an immediate confession.

Finally, the court exasperated the problem of the failed jury instructions by re-reading jury instructions at the request of the jury, and therefore improperly emphasizing various aspects of the case, and more importantly, emphasizing the lack of instruction regarding the elements of robbery versus theft as an underlying cause of action.

The culumative effect of these various evidentiary and legal rulings prevented the Appellant from having a fair trial, and a new trial is required.

POINT IV

THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE ON THE APPELLANT.

In reviewing the two discreet facets of the death sentence which was imposed by the trial court, it becomes clear that not only were there procedural problems in the sentencing, but the sentence was not relatively proportional when considering death sentences which have been imposed statewide. In imposing the death sentence, the trial court found five aggravating circumstances to be proven beyond a reasonable doubt: Defendant had been convicted of a prior violent felony (the contemporaneous robbery), that the murder was done during the course of a robbery and a burglary, that the murder was done to avoid arrest, that the murder was particularly heinous, atrocious and cruel, and that the murder was done in a cold and calculated manner (Tr. vol. VII, pgs. 1216-1221, vol VIII, pg. 1353). The trial court found no mitigating circumstances. Of the aggravating circumstances found by the court, only the aggravating circumstance of murder done in the course of a robbery or burglary is arguably sustainable by the evidence.

Regarding the first aggravating circumstance found by the court, the previous conviction of another capital or felony or a felony involving violence, the court specifically set forth its reliance upon Hartwick v. State, 461 So.2d. 78 (Fla. 1984), "which holds that a contemporaneous conviction may properly be considered in the penalty phase". (Tr. vol. VIII,

pgs. 1354). The court went on to find that this aggravating factor existed because of the Appellant's contemporaneous conviction for the violent felony of robbery. This exact situation has finally been clarified to the Appellant's benefit in Wasko v. State, 505 So.2d. 1524 (Fla. 1987), where this court found that although contemporaneous convictions prior to sentencing can, in fact, qualify as previous convictions of violent felonies and may be used as aggravating factors, this finding applies only to cases involving multiple victims in a single incident or separate incidents combined in a single trial. Id., pg. 1317. This court went on to factually distinguish such cases from the case under consideration in Wasko where the court relied upon the contemporaneous conviction for attempted sexual battery upon the murder victim. This was found to be error in Wasko and is error in the instant case. This aggravating circumstance prior to a violent felony must be stricken from consideration in the case at bar.

The trial court also found that the murder was committed for avoiding or preventing lawful arrest or effecting an escape (Tr. vol. VIII, pg. 1354). To support this conclusion, the court noticed that the victim was tied and gagged, and then the court goes on to speculate that the victim had seen the Appellant previously and would be able to identify him, leading to the speculative conclusion that there was no other reason to strangle the victim other than the fact that

she would later have been able to identify the Appellant. The court adds that the Appellant testified that "he did not want to be arrested for this offense and that was one reason he misled the police in his first statement". (Tr. vol. VIII, pg. 1354). This statement seems to set forth the obvious in nearly any murder case (or crime) and cannot be used as a rationale to find an aggravating circumstance, as it would be an automatic aggravation in any capital crime, which is not the intent of the death sentence statute.

Regarding a murder done for the purpose of avoiding detection or arrest, it is clearly established that:

> The mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement officer. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases. Riley v. State, 366 So.2d. 19 (Fla. 1978), pg. 22.

The murder in question, even by the Appellant's own account on the tape recorded statement played to the jury and during his trial testimony, was that it occurred accidentally and spontaneously, with no intent that the victim die. (Tr. vol. VI, pgs. 1042, 1047). The fact that the Appellant did not want to be arrested and speculation regarding the possible identification is insufficient to support this aggravating circumstance. In Doyle v. State, 460 So.2d. 359 (Fla. 1984), the Appellant was convicted of kidnapping, raping and later strang-

ling his cousin while Doyle was on probation. Although the cousin/victim obviously knew Doyle (with no speculation necessary regarding identification), and although the victim knew that Doyle was on probation at the time of the rape and that the rape would be a violation of his probation and would send Doyle to prison, this court struck the aggravating factor of murder done to avoid arrest, finding that in that circumstance, the effort to avoid arrest or eliminate witnesses must be the dominant reason if a police officer is not involved. This court further went on to find that the killing of the rape victim was just a continuation of the aggressive act, not a conscious effort to eliminate a witness. Clearly, this situation is much more consistent with the aggravating factor of avoiding arrest than the instant matter, and only tends to point out the court's error in the case at bar.

In Rogers v. State, 511 So.2d. 526 (Fla. 1987), this court reviewed and reversed the aggravating circumstance of avoiding arrest in the case where Rogers and a co-defendant watched a grocery store and planned and attempted to rob such store. During the attempted robbery, the victim was shot three times with a .45 caliber handgun as the robbers were leaving the store. Although Rogers actually made the statement that he shot the witness "for trying to be a hero", this court struck the trial court's finding of aggravating circumstance of murder done to avoid arrest, as it was clear

that the State did not prove beyond a reasonable doubt, despite the statement of motivation, that the shooting to eliminate a witness was the dominant or only motivation for the murder. See also Hansbrough v. State, 509 So.2d. 1081 (Fla. 1987) and Bates v. State, 464 So.2d. 1183 (Fla. 1985), both finding that the possibility of identification by the victim, as was speculated by the trial court in the instant case, was insufficient to sustain the finding of murder done to avoid arrest. Therefore, this aggravating circumstance must be stricken from consideration.

The trial court also erroneously found that the murder was committed in a cold, calculated and premeditated manner (Tr. vol. VIII, pg. 1355). To support this conclusion of cold and calcualted, the trial court noticed that the Defendant grabbed, tied and gagged the victim, rendering her helpless and pulling down her underwear to make it look like a rape, knowing that she was dead already and could not disclaim the appearance. The court went on to add that fingerprints were wiped from the scene and that a great deal of blunt force was used to cause the death. It is well established that ordinarily, this aggravating circumstance applies to those murders that are characterized as executions or contract murders. McCray v. State, 416 So.2d. 804 (Fla. 1982).

Similarly and singluarly applicable in the instant case, is this court's holding that the proof of the intent to

commit the underlying felony in a felony murder (in this case the robbery) does not necessarily support a finding of intent to commit first degree murder. Jackson v. State, 498 So.2d. 906 (Fla. 1986). The pertinent facts of the instant case: the Appellent being surprised during a burglary, grabbing, binding and gagging the victim, necessarily support a finding of a frenzied, spontaneous overreaction aggravated by a cocaine induced paranoia, as opposed to a well planned execution-style murder of the type noted in Vaught v. State, 410 So.2d. 147 (Fla. 1982).

Very recently, this court has refined the definitions necessary for a proper finding of a cold and calculated murder in Rogers v. State, supra, in 526 (Fla. 1987). In reviewing a multiple shooting of a witness for the stated reason that the witness tried to be a hero and prevent Rogers and his co-defendant from exiting an aborted grocery store robbery, the court struck the finding of cold and calculated, noting that there was no showing of calculation to support such an aggravating circumstance. The court went on to hold that calculation necessary for this aggravating circumstance consists of a careful plan or prearranged design. Id., pg. 371. This type of calculation is not present in the instant case. To support the Appellant's position, the following cases have reversed a finding of cold and calculated murder on facts much stronger than those found in the case at bar: Smith v. State, __So.2d.__;

12 F.L.W. 541 (10/30/87), aggravating circumstance of cold and calculated overruled by this court although the Appellant had to leave the home to look for a rock to use as a weapon to use during the rape and bludgeoning death of an eight year-old girl. This was still found to fall short of the requisite heightened premeditation; Niebert v. State, 508 So.2d. 1 (Fla. 1987), murder not cold and calculated, although Niebert stabbed his old drinking buddy seventeen times and bragged about the fact that the victim pled for mercy while on his knees; Hansborough v. State, supra, striking a finding of cold and calculated, although during an armed robbery the female employee of an insurance agency was robbed and stabbed thirty times.

Finally, in a case remarkably similar to the instant case and dispositive in the regard of cold and calculated, this court struck the cold and calculated finding in Hartwick v. State, 461 So.2d. 79 (Fla. 1984). Hartwick was a painter and handyman for a seventy-two year-old widow and was eventually convicted for the burglary, robbery, rape and first degree murder of the victim, who was strangled during the course of the rape. Hartwick then ransacked the house and took property to make it look like a robbery. The court found that the finding of the aggravating circumstance of cold and calculated was inappropriate as it needed to be proven that there was premeditation exceeding that needed for the conviction of the underlying crime, and although it took a few

minutes for the death by strangulation and although the robbery was planned beforehand, this was insufficient for the finding of cold and calculated. Therefore, the finding of murder done in a cold and calculated manner must be stricken from consideration by this court.

Finally, regarding the court's finding that the murder was done in a heinous and atrocious manner, the court almost relies upon a presumption of heinous, atrocious and cruel from the fact that the murder was done through strangulation. (Tr. vol. VIII, pg. 1355). Although the Appellant recognizes that this finding of heinous and atrocious has been upheld in strangulation deaths, it is against the intent of the statute for any aggravating circumstance to be "automatic", and obviously, each case must be examined upon the individual facts present. This court must consider that while any killing is reprehensible, and more specifically, while the fact that the victim in the instant matter was eighty-four years old, the death under review was not 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 tortorous to the victim. State v. Dixon, 283 So.2d. 1 (Fla. 1973), pg. 9. As a review of the aggravating circumstances of heinous, atrocious and cruel necessarily entails a review of the appropriateness of the death sentence when considering statewide proportionality, the Appellant cites the following cases as illustrations of

the fact that the instant case was not heinous, atrocious and cruel as defined by the statute and applicable case law, nor was the death sentence properly and proportionally imposed: Masterson v. State, __So.2d.__; 12 F.L.W. 603 (Fla. 12/11/87), death sentence reversed although Masterson and co-defendant shot a drug dealer and a girlfriend while stealing drugs; Proffit v. State, __So.2d.__; 12 F.L.W. 373 (Fla. 1987), death sentence reversed although the victim was stabbed to death while in bed during the burglary of the victim's home; Hansborough v. State, supra, death sentence reversed although the female employee of an insurance agency was stabbed thirty times during a robbery, had many defensive wounds and, in fact, did not die or lose consciousness instantly; Niebert v. State, 508 So.2d. 1 (Fla. 1987), death sentence reversed although an old drinking buddy of Niebert's was stabbed seventeen times while begging for mercy on his knees; Ferry v. State, 507 So.2d. 1373 (Fla. 1987), death sentence reversed although Ferry poured gas over five total strangers in a grocery store and burned them to death; Wasko v. State, supra, death sentence reversed although the ten year-old female victim was found dead on her blood-soaked bed after an attempted rape and burglary by Wasko and a co-defendant. See also Irizarry v. State, 496 So.2d. 822 (Fla. 1986), death by five chops with a machete, almost decapitating the victim; Huddleston v. State, 475 So. 2d. 204 (Fla. 1985), beating, strangulation and stabbing of

a female ex-boss, with Huddleston returning two or three different times to finish the still-living victim; Drake v. State, 441 So.2d. 1079 (Fla. 1983), the victim found stabbed eight times with her hands tied; Herzog v. State, 439 So.2d. 1372 (Fla. 1983).

By contrast, the following cases are of the type that merit the death sentence and have been upheld after a review for statewide proportionality: Smith v. State, supra, where the eight-year old female victim was raped so brutally as to cause severe anal and vaginal damage and was then beaten to death with a rock; Jennings v. State, 512 So.2d. 169 (Fla. 1987), where the death sentence was upheld after a kidnap, rape and murder of a six year-old girl, wherein the rape was so violent that it caused abrasions to Jenning's penis, and where Jennings broke into the house where the girl slept, grabbed her, drove her to a canal where the rape occurred, then lifted the girl by the feet over his head like a sledge hammer and pounded her head into the ground, fracturing her skull, damaging her brain and then drowning the still-living girl in the adjacent canal; Hooper v. State, 440 So.2d. 525 (Fla. 1985), approving the death sentence when Hooper, a six-foot eight-inch, three hundred twenty-five pound man, living with his brother and the brother's family, stabbed and mutilated his sister-in-law and then strangled and cut the throat of his nine year-old niece and beat his twelve year-old nephew

in the head, crushing his skull but failing to kill him; see also Gore v. State, 475 So.2d. 1205 (Fla. 1985); Roman v. State, 472 So.2d. 886 (Fla. 1985).

Clearly, the finding of heinous, atrocious and cruel does not survive review by this court, nor does the death sentence involved survive the review for statewide proportionality. Consequently, the death sentence was inappropriately based upon improperly found aggravating circumstances and must be reversed.

The trial court also erred by failing to find both statutory and non-statutory mitigating circumstances. The trial court specifically found that the statutory mitigating circumstance of acting under extreme duress or substantial domination of another person did not apply, and also found that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law being substantially impaired did not apply (Tr. vol. VIII, pg. 1357). While there was no justification given by the court to exclude the mitigating circumstances of extreme duress, the court did attempt to justify the conclusion that the Defendant was not acting under diminished capacity by pointing out that the defendant was intelligent, made efforts to conceal evidence, and that he gave an alibi to the crime. More importantly, the court found that "all three doctors appointed to examine the Defendant concluded that he knew the difference between right and wrong and knew the nature and consequences of his actions."

(Tr. vol. VIII, pg. 1357). Clearly, the trial court misinterpreted his duty and responsibility in considering both statutory and non-statutory mitigating circumstances dealing with emotional problems and diminished capacity, using the standard for a legitimate defense to the charges to exclude this mitigating circumstance. Clearly, under the teachings of the United States Supreme Court and this court, emotional problems such as suffered by the Appellant must be considered in the sentencing equation regardless of whether such problems fall short of a defense of insanity or diminished capacity. Eddings v. Oklahoma, __U.S.__, 102 S.Ct. 869 (1982). The evidence showed, even through the taped statement played in the State's case in chief, that the Appellant had used cocaine and spent all of his money on cocaine the night before the incident (Tr. vol. V, pgs. 832, 866). Further, State's witness and Appellant's ex-girlfriend Betty Boronson testified that she lived with the Appellant for four or five years and he had a problem with drug and alcohol abuse and became difficult and almost a different person when using drugs and alcohol. (Tr. vol. V, pg. 871). Similarly, Boronson testified that the Appellant would scream in his nightmares often and went to the V.A. hospital and saw psychiatrists, Dr. May and Dr. DelCampo, and was prescribed medication (Tr. vol. V, pgs. 873-874). Boronson continued to testify that the Appellant's drug and alcohol problem led to physical and emotional problems, including his worry that he might kill somebody sometime, as he handled stress poorly (Tr. vol. V, pgs. 877, 880).

Further, she testified that the Appellant was addicted to cocaine at the time and was an alcoholic, and over five years she did cocaine with the Appellant almost every day. (Tr. vol. V, pgs. 883-884).

The Appellant's sister Diane McGurk testified that the Appellant was getting treatment in the V.A. hospital and was taking Thorazine as he tried to stop drinking and taking his pills, and that the Appellant had also admitted having a cocaine habit (Tr. vol. V, pgs. 916, 917, 921). Dr. Enrique DelCampo, psychiatrist for the V.A. hospital, testified that he had been treating the Appellant since 1982 and that the Appellant was abusing valium and quaaludes, resulting in a prescription for Thorazine and anti-psychotic drugs (Tr. vol. V, pgs. 927-928). The Appellant was also seeing Dr. May, a psychologist for the diagnosed drug abuse condition, leading to irritability, difficulty controlling his temper, sleep and dream problems and the feeling of losing control (Tr. vol. V, pg. 932). The secondary diagnosis was possible Post-Traumatic Stress Syndrome with it's accompanying nervousness, irritability, hyper-alertness and increased vigilance, which is commonly known as a society disorientation common in Vietman veterans, though not exclusive to them. (Tr. vol. V, pg. 934). The Appellant was also discharged from the service for a personality disorder (Tr. vol. V, pg. 948). Finally, the Appellant himself testified about his psychiatric treatment while in the military and his

pattern of drug abuse which started in the military and continued into civilian life. (Tr. vol. V, pgs. 978, 980). He explained about living his dreams of violence which came from LSD and other hallucinogens and about going to the V.A. hospital for help for these dreams and the personality disorder that he suffered from (Tr. vol. V, pgs. 982-983). The Appellant was doing cocaine with his girlfriend daily, particularly in May of 1986, and he was also drinking at the time (Tr. vol. V, pg. 987). On the night before the incident, the Appellant paid his entire four hundred fifty-seven dollar paycheck for cocaine rocks and ingested thirty or more of those rocks and did not sleep at all the night before the incident (Tr. vol. V, pgs. 991, 995). The Appellant was up at 5:30 the morning of the day of the incident and ingested approximately six more cocaine rocks before going to Century Village (Tr. vol. V, pg. 997).

On the basis of this testimony, from both State and defense witnesses as well as expert witnesses, it is clear that the trial court erred in failing to find both statutory and non-statutory mitigating factors due to cocaine and alcohol use and the resultant diminished mental capacity. See Burch v. State, 343 So.2d. 831 (Fla. 1977), where a death sentence was reversed when the evidence established that Burch was mentally disturbed and his capacity to conform his conduct to the requirements of law was substantially impaired, notwithstanding the fact that a defense of not guilty by reason of insanity

was found to be unavailable to Burch as in the instant case. In Mines v. State, 380 So.2d. 332 (Fla. 1982), this court found substantial medical testimony in the record regarding paranoid-type schizophrenia of Mines. Holding that the finding of sanity of mind did not eliminate the consideration of the statutory mitigating factor concerning mental condition, the court held that:

> The evidence clearly establishes that the Appellant had a substantial condition at the time of the offense ... the trial court erred in not considering the mitigating circumstances of extreme mental or emotional disturbance ... and the substantial impairment of the capacity of the defendant to appreciate the criminality of his conduct. Page 337.

Certainly it is beyond dispute that the trial court used the wrong standard of consideration regarding the mental capacity and problems of the Appellant, and therefore did not properly consider the mitigating circumstances regarding the mental capacity of the Appellant.

Added to this error is the trial court's failure to consider the Appellant's background and childhood. Justice requires that there be taken into account the circumstances of the offense together with the character and propensities of the offender. Gregg v. Georgia, 28 U.S. 153, 96 S. Ct. 2929 (1976). It is certainly axiomatic that any considerations reasonably relevant to the question of mitigation or punishment should be

considered. Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954 (1978). When the Appellant's mental and emotional problems and his drug addiction and alcohol abuse are considered, along with Appellant's character aspects and history, it is clear that there is substantial mitigation to prevent the death sentence being imposed. Both the Appellant's sister, Robin Allen, and his mother, Margerie Allen, testified that the Appellant's father had a terrible drinking problem and became very violent and beat the Appellant, leading to a very bad childhood (Tr. vol. VI, pgs. 54, 57). The mother maintained that the Appellant went through alot of mental anguish, but was basically a good son and went into the service to escape the fathers' abuse (Tr. vol. VI, pgs. 57, 58). Also, the Appellant, although not serving overseas, was in the service until given a medical/emotional discharge in a special security division (Tr. vol. V, pgs. 975-977). Also, the Appellant had a good work record working for the City of Deerfield Beach for approximately three and a half years with the Public Works Department, according to the State's witness, John Vogel (Tr. vol. IV, pg. 769). In the recent case of Masterson v. State, supra, this court reversed a death sentence, emphasizing the fact that Masterson was a veteran and a bad drug abuser with possible Post-Traumatic Stress Syndrome as strongly persuasive mitigating factors. The death sentence was reversed in Fead v. State, 512 So.2d. 176 (Fla. 1987), although Fead, who had

had a prior second degree murder conviction, argued with and shot his girlfriend after a bout of heavy drinking similar to the case at bar. The court found valid mitigating factors discernible on the record, including alcohol influence and/or mental and emotional disturbances sufficient to reverse the death sentence. Hansborough v. State, supra, had the death sentence reversed despite the stabbing of a female employee thirty times, based upon the cumulative effect of non-statutory mitigating factors regarding the many aspects of Hansborough's life, as well as psychiatric testimony, mental and emotional problems and drug abuse.

Finally, see Chambers v. State, 339 So.2d. 204 (Fla. 1976), where this court considered all circumstances of the case, including Chambers being under the influence of illegal drugs at the time of the incident, in reversing the death sentence. The trial court's failure to consider the statutory mitigating circumstances of emotional disturbance and diminished capacity, as well as the failure to consider the cumulative effect of the non-statutory mitigating circumstances, resulted in an erronous application of the death penalty in the instant case. This is further aggravated by the improper consideration of four of the five aggravating circumstances found by the trial court. The case must be remanded for the imposition of life sentence in place of death.

CONCLUSION

Based upon the improper admission of the Appellant's oral and tape recorded statements before the jury, as well as the permeating prosecutorial misconduct in the trial and erroneous evidentiary rulings by the trial court, the Appellant was prevented from receiving a fair trial, and a reversal of the conviction and sentence is mandated in this case.

Also, notwithstanding the guilt phase of the trial, the death sentence was improperly imposed on the Appellant, as aggravating circumstances were found by the trial court, though not supported by the evidence, and the imposition of the death sentence was also not in accordance with statewide review regarding proportionality. Therefore, the sentence of death must be vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Appellant was furnished by mail this 22nd day of December, 1987 to the Attorney General's Office, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, 33401.

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