SUPREME COURT OF FLORIDA

CASE NO. 71,646

KRISHNA MAHARAJ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

On Direct Appeal From the Circuit Court
For the Eleventh Judicial Circuit,
In and For Dade County, Florida

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INTRODUCTION

This appeal is based upon the conviction and sentencing of KRISHNA MAHARAJ, for the double murder of Duane and Derrick Moo Young. Pursuant to a jury's recommendation, the trial court pronounced a sentence of death for the murder of Duane Moo Young and life imprisonment for the murder of Derrick Moo Young.

Throughout this INITIAL BRIEF, the parties will be referred to as follows:

KRISHNA MAHARAJ shall be referred to either as the DEFENDANT/APPELLANT or by proper name.

The STATE OF FLORIDA shall be referred to as the STATE.

All references to the Record on Appeal shall be by the designation "R-" and references to the trial transcript shall be by the designation "TR-".

All emphasis is supplied unless otherwise indicated.

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STATEMENT OF THE CASE AND THE FACTS

APPELLANT, KRISHNA MAHARAJ, adopts the Statement of the Case and of the Facts set forth in his INITIAL BRIEF. The Statement of the Case and of the Facts set forth in the STATE'S BRIEF, while generally correct, does not detail the proceedings for the trial court to the extent that the proceedings are set forth in APPELLANT'S BRIEF. Because of that fact, it is imperative that this Court review, in totality, the complete record of the circumstances surrounding APPELLANT'S conviction and sentence.

For example, on Page 2 of the STATE'S BRIEF, the STATE refers to the trial court's remarks regarding the fact that the jury renders an "advisory opinion" and that the "ultimate sentence", is the Court. Yet, as set forth in APPELLANT'S INITIAL BRIEF, there were far more comments made by both the Court and the prosecution regarding the responsibility of the jury and the Court in the sentencing process and, merely, to excerpt what has been set forth in the STATE'S BRIEF as to the role of the jury and judge does not place the total picture before this Court.

Further along, the STATE discusses the testimony of Neville Butler (Page 18-24 of the STATE'S BRIEF), but both fails to set forth to this Court the fact that Butler had previously lied on several occasions, under oath, to the STATE as well as to defense counsel and further fails to set forth to this Court the fact that Butler fully participated in the murders of the Moo Youngs at the DuPont Plaza Hotel both of which are set forth in detail in APPELLANT'S BRIEF.

At Page 27 of the STATE'S BRIEF, the STATE fails to set forth any colloquy between the Court and APPELLANT regarding the fact that Judge Gross was unable to continue with the trial and that a mistrial was being offered to APPELLANT. The STATE conveniently fails to disclose to this Court that no colloquy, in fact, occurred and that the Court solely relied upon APPELLANT'S response in the affirmative as to whether he wished to continue with this trial or accept a mistrial.

Continuing along, the STATE, in summarizing the testimony of Dr. Wetli, the Deputy Medical Examiner for Dade County, fails to discuss that Dr. Wetli offered several scenarios involving the death of Duane Moo Young, including that of an individual who attempted to attack his gun wielding captive. The testimony, as set forth in the STATE'S BRIEF, merely referred to Wetli's testimony that the physical evidence was consistent with a theory of "execution". Of course, as set forth in APPELLANT'S BRIEF, this was only one of several theories espoused by Dr. Wetli as consistent with the physical evidence. This condensement of Dr. Wetli's testimony was again set forth in the STATE'S BRIEF on Page 36 when the STATE referred to the testimony of Wetli during the penalty phase of the proceedings. Again, Wetli espoused various theories consistent with the physical evidence.

Next, the STATE on Page 38 of its BRIEF, completely fails to set forth the actual blatant and prejudicial cross-examination conducted by the STATE upon the APPELLANT who took the stand in his own mitigation. Only a complete reading of the trial transcript will clearly and accurately show this Court the

prejudicial effect (as well as the total disregard for the trial judge's warnings) of the STATE'S irrelevant and prejudicial cross-examination of APPELLANT.

Finally, on Page 40 of its BRIEF, the STATE sets forth the fact that the trial court found that there was only one mitigating circumstance, however, the trial judge, in its Sentencing Order, stated that there were <u>two</u> mitigating circumstances. Accordingly, the assertion of only one mitigating circumstance is erroneous. The trial court both found that the statutory mitigating circumstance that Defendant has no significant history of prior criminal activity was established and that the non-statutory mitigating circumstances were likewise established.[1] Accordingly, by the trial court's own Order, there were two mitigating circumstances.

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[1]While the Sentencing Order is not specific as to which non-statutory mitigating circumstance the trial Court relied upon there is no question that the Court did find that two (2) non-statutory mitigating circumstances existed. The Court, however, felt that the two mitigating factors were outweighed by the five aggravating factors. Thus, the re-weighing of the factors in mitigation shall be important upon this Court's finding that one or more of the statutory aggravating circumstances were invalidly considered.

ISSUES ON APPEAL

I

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO INTRODUCE PREJUDICIAL NEWSPAPER ARTICLES ACCUSING THE DEFENDANT/APPELLANT OF COMMITTING VARIOUS CRIMES FOR THE ALLEGED PURPOSE OF SHOWING "MOTIVE".

II

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO ELICIT TESTIMONY FROM ONE OF ITS WITNESSES ABOUT AN ATTEMPT TO MURDER AN INDIVIDUAL UNRELATED TO THIS ACTION.

III

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO APPRISE THE DEFENDANT/APPELLANT IN A LEGALLY ADEQUATE MANNER, OF THE EFFECTS OF A MISTRIAL, WHEN THE ORIGINAL TRIAL JUDGE COULD NOT CONTINUE WITH THE CASE DUE TO HIS ARREST FOR BRIBERY.

IV

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO ELICIT FROM POLICE OFFICER WITNESSES THE FACT THAT SEVERAL MONTHS PRIOR TO THE MURDERS, THE DEFENDANT/APPELLANT HAD A VARIOUS ASSORTMENT OF WEAPONRY IN THE TRUNK OF HIS AUTOMOBILE, NONE OF WHICH WAS ILLEGAL TO POSSESS NOR RELEVANT TO THE CHARGED OFFENSES.

V

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SENTENCING THE DEFENDANT/APPELLANT TO DEATH WHEN, FROM THE STANDPOINT OF PROPORTIONALITY, THE UNINDICTED COCONSPIRATOR, NEVILLE BUTLER, TESTIFIED FOR THE STATE AND WAS NEVER CHARGED WITH ANY CRIME.

VI

WHETHER THE STATE COMMITTED REVERSIBLE ERROR IN FAILING TO CONFINE ITS CROSS-EXAMINATION OF THE DEFENSE WITNESSES IN THE PENALTY PHASE TO MATTERS RELATING TO THE AGGRAVATING/MITIGATING CIRCUMSTANCES SURROUNDING THE OFFENSES.

VII

WHETHER THE STATE'S COMMENTS TO THE JURY REGARDING THE MERE "ADVISORY" ROLE OF THE JURY IN THE SENTENCING PHASE DENIGRATED THE JURY'S ROLE IN THESE PROCEEDINGS RESULTING IN REVERSIBLE ERROR.

VIII

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MANNER.

IX

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

X

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

XI

WHETHER THE TRIAL JUDGE ERRED IN EXCLUDING EVIDENCE OF THE STATE'S WITNESS FAILING HIS POLYGRAPH EXAMINATION WHEN SUCH EVIDENCE DIRECTLY RELATED TO THE CREDIBILITY OF SAID WITNESS WHO TESTIFIED AT TRIAL THAT HIS REVISED TESTIMONY WAS MADE SOLELY FOR THE BENEFIT OF A "CLEAN CONSCIENCE".

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ARGUMENT

I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO INTRODUCE PREJUDICIAL NEWSPAPER ARTICLES ACCUSING THE DEFENDANT/APPELLANT OF COMMITTING VARIOUS CRIMES FOR THE ALLEGED PURPOSE OF SHOWING "MOTIVE"

The STATE, in its BRIEF of Appellee, first attempts to argue that the alleged error of introducing collateral crimes evidence was not preserved for appellate review. The STATE, obviously, has not read the Record on Appeal in that it was the specific Order of the trial judge, Judge Gross, that all objections to testimony and evidence be conducted pre-trial at a hearing held by the trial judge. (R 2159-2170) Obviously, the trial judge has the right and ability to conduct his trial as he sees fit and it was the Court's admonishment to counsel that all objections to evidence in testimony be made pre-trial for ruling by the Court. It should not be this Court's position that it is necessary to risk contempt and violate the trial judge's procedure in contemporaneously objecting to testimony and evidence, as a pre-requisite to preserving erroneous rulings by the trial court for appellate review.

On the merits, the STATE fails to comprehend the argument that whether or not the newspaper articles established "motive" in some fashion, the STATE failed to properly notify the APPELLANT in accordance with the dictates of Section 90.404(2)(b)1, Florida Statutes, by notifying counsel at least ten (10) days prior to trial of the STATE'S intent to utilize this type of evidence. The STATE has utterly failed to address

this requirement under Williams v. State, 110 So.2d 654 (1959) cert. denied 361 U.S. 847 and its proginy.

Further, the collateral crimes set forth in the various newspaper articles (money laundering, theft, and drug dealing) is not "similar" as required by Section 90.404(2)(a) and it is obvious to any observer at the trial or reader of the Record on Appeal that the focus of the STATE throughout the proceedings was to draw attention away from the events at the DuPont Plaza Hotel and to direct the jury's attention toward the "bad character" of the APPELLANT. Motive was hardly the reason for parading the newspaper articles before the jury.

This Court has often stated that even if motive be the reason for the introduction of collateral crimes evidence, the probative value in the introduction of the collateral crimes evidence must outweigh the prejudicial effect that said evidence has on the trial. State v. Lee, 531 So.2d 133 (Fla. 1988); and Randolph v. State, 463 So.2d 186 (Fla. 1985); cert. denied 105 S.Ct. 3533, 473 U.S. 907, 87 L.Ed.2d 656 (1986). It is quite obvious that the prejudicial effect of the articles, which did nothing more than accuse APPELLANT of various crimes far outweighed any probative value in establishing motive.

Throughout the trial, the STATE emphasized to the jury the contents of the newspaper articles. Clearly, the intent of the STATE was to focus the attention away from the actual murders of Duane and Derrick Moo Young. Certainly, there was no need to establish motive, given the alleged eyewitness testimony of Neville Butler. Further, motive could easily have been

established by the testimony of live witnesses without the introduction and emphasis upon the various newspaper articles introduced over the objection of counsel.

Even, assuming arguendo, that the newspaper articles were in some manner admissible to establish "motive" pursuant to the Williams rule, and were not overly prejudicial, then the STATE has nevertheless failed to abide by the ten (10) day requirement set forth in the above cited statute and, as such, this Court must afford the APPELLANT a new trial, given the clear violation of the STATE in failing to timely notify counsel for the APPELLANT of its intent to utilize collateral crimes evidence to 'establish motive'.

II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO ELICIT TESTIMONY FROM ONE OF ITS WITNESSES ABOUT AN ATTEMPT TO MURDER AN INDIVIDUAL UNRELATED TO THIS ACTION.

Again, the STATE attempts to circumvent the requirements of Section 90.404 Florida Statutes, in introducing testimony regarding an alleged attempt upon the life of Eslee Carberry by the APPELLANT. It cannot be seriously argued that testimony, regarding how the Defendant dressed in camouflage gear with cross-bows, Chinese throwing stars and various guns and rifles in an attempt to do away with Eslee Carberry, had any relevance to the events at the DuPont Plaza Hotel. Clearly, this is again an attempt by the STATE to focus the attention of the jury away from the murders of Derrick and Duane Moo Young and to merely paint the APPELLANT as an individual with bad character and propensity to commit crimes.

The STATE attempts to argue (Page 50 of its BRIEF) that the evidence was relevant to establish the "Defendant's guilt and discredit his alibi". Yet, the Defendant did not establish an alibi at trial, as he did not take the witness stand in his own defense. Further, when examined in the light most favorable to the STATE, the testimony of the eyewitness, as well as the physical evidence located at the DuPont Plaza Hotel, was more than sufficient to establish the STATE'S theory and the use of collateral crimes evidence,(such as the attempted murder of Eslee Carberry), was far more prejudicial than probative and merely added to the error plagued trial which denied APPELLANT his right to a fair trial.

As for the STATE'S argument that the attempt on the life of Eslee Carberry somehow was relevant to establish APPELLANT'S guilt, one only needs to be reminded that APPELLANT was not on trial for any alleged wrong committed against Carberry!

Finally, the STATE claims that this issue was not presented for appellate review. It can only be suggested that the manifest error in permitting this type of testimony went to the heart of the trial process and amounted to fundamental error requiring reversal.

III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO APPRISE THE DEFENDANT/APPELLANT IN A LEGALLY ADEQUATE MANNER, OF THE EFFECTS OF A MISTRIAL, WHEN THE ORIGINAL TRIAL JUDGE COULD NOT CONTINUE WITH THE CASE DUE TO HIS ARREST FOR BRIBERY.

It is evident upon reading the STATE'S argument under the above point that the STATE has, again, failed to review the Transcript of Proceedings with respect to the questioning of APPELLANT'S rejection of the offered mistrial. The Record is completely barren as to any colloquy showing a knowing and intelligent waiver by the APPELLANT of the offered mistrial.

In arguing that the right to a mistrial does not go to the "very heart of the adjudicatory process", the STATE fails to address the opinion of the United States Supreme Court in United States v. Dinitz, 96 S.Ct. 1075, 424 U.S. 600, 47 L.Ed.2d 267 (1976) which requires a knowing and intelligent waiver of this "valued right". The Record is obviously devoid of this knowing and intelligent waiver, notwithstanding several sessions of questioning by the trial Court. Merely asking counsel if his client wants a mistrial would not seem to satisfy the standard set forth in Dinitz, supra.

Finally, it is interesting to note that under United States v. Jaramilla, 745 F.2d 1245 (9th Cir. 1984), cert. denied 105 S.Ct. 1292 (1985), the Ninth Circuit has held that a mistrial made by a sitting Federal Judge who had just been indicted was the only available option to that judge, notwithstanding the desire of the Defendant to continue with his trial. Accordingly, based upon the Jaramilla decision, an offer for the mistrial

should not have been made to the APPELLANT but, in fact, a mistrial should have been made by the Court without deference to any decision by APPELLANT. The explanation by the Ninth Circuit, in analyzing the Federal Rules (which our Florida procedural rules are patterned after) is that the administration of justice calls for such a decision even over the objection of a Defendant.

Thus, whether this Court takes the view that the Record does not establish a knowing and intelligent waiver by APPELLANT under Dinitz, or, alternatively, whether this Court accepts the Jaramilla analogy that a judge under indictment has no choice but to declare a mistrial (even over objection of a Defendant), this case should not have proceeded and APPELLANT is entitled to a new trial.

IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO ELICIT FROM POLICE OFFICER WITNESSES THE FACT THAT SEVERAL MONTHS PRIOR TO THE MURDERS, THE DEFENDANT/ APPELLANT HAD A VARIOUS ASSORTMENT OF WEAPONRY IN THE TRUNK OF HIS AUTOMOBILE, NONE OF WHICH WAS ILLEGAL TO POSSESS NOR RELEVANT TO THE CHARGED OFFENSES.

Again, the STATE has attempted to interject collateral crimes and irrelevant evidence regarding APPELLANT'S possession of exotic weaponry some two months prior to the incidents at the DuPont Plaza Hotel. The introduction of these collateral issues constituted fundamental error.

The STATE has, again, violated the "Williams Rule" dictates. Not only is the elicited testimony of the police officer witnesses regarding the various assortments of weaponry completely irrelevant to the events at the DuPont Plaza Hotel,

but the introduction of said testimony was in violation of the ten (10) day rule of Section 90.404(2)(b)1 and its introduction into evidence merely refocused the jury's attention away from the Moo Young murders in an attempt by the STATE to paint APPELLANT as possessing a "bad character".

The STATE attempts to establish the appropriateness of the testimony as discrediting APPELLANT'S "alibi defense" (Page 54 of STATE'S BRIEF). Yet, there was no alibi defense offered by APPELLANT at trial.

There can be no serious argument that the STATE violated the dictates of the "Williams Rule" protection when it both failed to afford counsel for APPELLANT the opportunity established by the ten (10) day notice period and further, interjected into this trial completely irrelevant and prejudicial evidence which had nothing to do with the facts of the case in chief.

V

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SENTENCING THE DEFENDANT/APPELLANT TO DEATH WHEN, FROM THE STANDPOINT OF PROPORTIONALITY, THE UNINDICTED COCONSPIRATOR, NEVILLE BUTLER, TESTIFIED FOR THE STATE AND WAS NEVER CHARGED WITH ANY CRIME.

The STATE argues that the disparate treatment of Neville Butler could not constitute a non-statutory mitigating circumstance and, as its authority, cites Palms v. Wainright, 460 So.2d 362 (Fla.1984). Unlike the facts in Palms, however, Neville Butler was far more than an aider and abetter. Mr. Butler clearly participated in the murders of the Moo Youngs by tying the victims to their chairs and in restraining Duane Moo

Young. Neville Butler was a participant in the murders of the Moo Youngs.

The STATE argues that the cases cited by APPELLANT in his INITIAL BRIEF do not mandate that one who is a dominant "force" behind a homicide be given a less severe sentence than an aider and abetter. There is no argument that the law permits a harsher sentence upon the dominant party. It is the argument of APPELLANT, however, that the trial judge, in failing to consider the disparate treatment of Neville Butler, clearly disregarded an important non-statutory mitigating circumstance.

This Court, in Herring v. State, 446 So.2d 1049 (Fla. 1984), cert. denied 469 U.S. 989 (1985) opined that the disparity in sentence as given to a co-defendant is an appropriate element to be considered by a trial judge in imposing a sentence upon a defendant. There is no mention in the trial judge's Sentencing Order, nor statements in the Record, that the Court even considered the fact that Neville Butler, a participant in the murders of Duane and Derrick Moo Young, was never as much as arrested in this case.

VI

THE STATE COMMITTED REVERSIBLE ERROR IN FAILING TO CONFINE ITS CROSS-EXAMINATION OF THE DEFENSE WITNESSES IN THE PENALTY PHASE TO MATTERS RELATING TO THE AGGRAVATING/MITIGATING CIRCUMSTANCES SURROUNDING THE OFFENSES.

It is the position of APPELLANT that the STATE went far afield in cross-examining the APPELLANT at his penalty phase hearing. As set forth in APPELLANT'S INITIAL BRIEF, even the trial judge felt that error had been committed by the STATE'S

actions. (TR 4271-4281) Further, the STATE'S repeated interjection of APPELLANT'S lack of compassion during both the cross-examination and closing argument portion of the penalty phase was a clear violation of both Hill v. State, 549 So.2d 179 (Fla. 1989), as well as constituting an impermissible victim impact statement in violation of Booth v. Maryland, 482 U.S. 496 (1987) and Welty v. State, 402 So.2d 1159 (Fla. 1981).

While the STATE is certainly correct in its argument that a defendant who takes the stand in his own mitigation may be cross-examined as to those matters he puts forward in mitigation, the STATE, sub judice, in referring to APPELLANT as "a used car salesman" certainly went far afield and its cross-examination, as well as interjection of passion in the closing argument portion of the penalty phase, constituted error (recognized by the trial court), and such error mandates a new sentencing hearing.

The STATE attempts to argue away the "lack of remorse" argument made by the prosecution by stating that the prosecutor's comment "was not for the non-statutory aggravating circumstance of lack of remorse, but rather was an argument used to rebut the Defendant's mitigating evidence that, although he did not kill the victims, the Defendant was sorry they were dead." (Page 61 and 62 of Appellee's BRIEF). Yet, a simple reading of the closing argument of the STATE will clearly show that the prosecutor calculatingly argued to the jury that APPELLANT had no remorse or compassion for the deaths of the Moo Youngs. The STATE'S interjection of the non-statutory aggravating factor of "lack of remorse" in the arguments was

erroneous, warranting a new sentencing hearing.

VII

THE STATE'S COMMENTS TO THE JURY REGARDING THE MERE "ADVISORY" ROLE OF THE JURY IN THE SENTENCING PHASE DENIGRATED THE JURY'S ROLE IN THESE PROCEEDINGS RESULTING IN REVERSIBLE ERROR.

The STATE fails to address the language of the prosecution in "advising the jury that the sentencing responsibility of APPELLANT was "not your responsibility". The STATE, again, does not, somehow, read the Record on Appeal.

The STATE argues that the comments of the prosecution "correctly stated the law, that the jury's role was merely advisory" (STATE'S BRIEF at Page 63). Yet, the STATE conveniently fails to address the fact that, throughout the proceedings, the prosecution also advised the jury that the decision it would have to make was only "advisory" and that the ultimate life or death issue was "not your responsibility". (TR 4456).

In point of fact and law, the "responsibility" under our current system of determining the life and death of a defendant, rests very much with the jury and prosecutorial argument should in no way diminish the "responsibility" of the jury's role in rendering an advisory opinion. To tell the jury that the verdict they rendered vis-a-vis, the life or death of a defendant, is merely "advisory" and the ultimate decision is "not your responsibility", clearly diminishes the role that a jury plays under the law in Florida. See Tedder v. State, 322 So.2d 908 (Fla. 1975).

Again, this denigration of the jury's role in the sentencing phase warrants a reversal of APPELLANT'S sentence and the remanding of this cause for further proceedings, including a new sentencing hearing.

VIII

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MANNER.

The STATE, in attempting to support the decision of the trial court in finding, as an aggravating circumstance, that the murder of Duane Moo Young was "especially heinous, atrocious and cruel" cites various cases which rely upon the pre-death emotional or mental anguish which a victim suffered as a result of his or her murder. Yet, none of the factors found in Adams v. State, 412 So.2d 850 (Fla. 1982), cert. denied 103 S.Ct. 182 (1982), nor Knight v. State, 338 So.2d 201 (Fla. 1976) is present sub judice. Unlike the facts in those cases, there is no proof, beyond a reasonable doubt, that Duane Moo Young suffered the mental anguish as set forth in the trial judge's Sentencing Order (T 1767-1768). There was no long, torturous toying with the victim or knowledge of impending death. What was present was the fact that a young man, prior to his own death, saw the death of his father. Under the guidelines set forth by this Court, the scenario, as argued by the STATE, would not permit the establishment of the aggravating factor of, especially heinous, atrocious or cruel. See Trawick v. State, 473 So.2d 1235 (Fla. 1985) cert. denied 106 S.Ct. 2254, 476 U.S. 1143, 90 L.Ed.2d 699; Scull v. State, 533 So.2d 1137 (1988), cert. denied 109 S.Ct.

1937; State v Dixon, 283 So.2d 1, (Fla. 1973) cert. denied 416 U.S. 943 (1974) and Menduk v. State, 545 So.2d 846 (Fla. 1986).

IX

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

While the STATE attempts to argue that the murder of Duane Moo Young was "cold, calculated and pre-meditated", its reliance upon Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied 108 S.Ct. 733 (1988) is inappropriate. According to the STATE'S theory, a plan had been pre-arranged for the luring of Derrick Moo Young into the DuPont Plaza Hotel. Yet, there was clearly no such plan to eliminate Duane Moo Young.

Further, as set forth in APPELLANT'S INITIAL BRIEF, there was certainly no showing that witness elimination was the "dominant motive" behind the killing of Duane Moo Young. See Doyle v. State, 460 So.2d 353 (Fla. 1984). The "heightened pre-meditation" argued by the STATE in its BRIEF certainly was not established "beyond a reasonable doubt" in that, as Dr. Wetli's testimony showed, the death of Duane Moo Young could have occurred in a number of ways, including Mr. Moo Young's attempt to flee or charge at the gun wielder. (TR 3260-3263). These alternate theories were insufficient to establish as a "dominant motive" the elimination of Duane Moo Young. Doyle, supra.

Thus, the necessary "heightened pre-meditation" and/or "witness elimination" theory was not established beyond a reasonable doubt and, accordingly, the aggravating factor of

"cold, calculated and pre-meditated", in accordance with Section 921.141(5)(i) was erroneously utilized by the Court as an aggravating factor.

X

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

As previously argued, witness elimination, as a means of preventing or avoiding a lawful arrest, must be the "dominant motive" in a killing. Doyle v. State, 460 So.2d 353 (Fla.1984). The facts, sub judice, do not establish witness elimination as the dominant motive in that, as Dr. Wetli's testimony establishes a witness elimination or execution style theory is one of several which could be espounded based upon the physical evidence. The STATE argues that Duane Moo Young was "killed to prevent him from identifying against the Defendant" (STATE'S BRIEF at Page 71). Yet, this is not established beyond a reasonable doubt in the Record. Rather, the "facts" as testified to by Dr. Wetli, was that it was quite possible, that Duane Moo Young was shot when he attempted to flee the gun wielder. Accordingly, there is no basis in the Record to conclude that Duane Moo Young was killed for the purpose of eliminating him as a witness.

XI

THE TRIAL JUDGE ERRED IN EXCLUDING EVIDENCE OF THE STATE'S WITNESS FAILING HIS POLYGRAPH EXAMINATION WHEN SUCH EVIDENCE DIRECTLY RELATED TO THE CREDIBILITY OF SAID WITNESS WHO TESTIFIED AT TRIAL THAT HIS REVISED TESTIMONY WAS MADE SOLELY FOR THE BENEFIT OF A "CLEAN CONSCIENCE".

The STATE contends that the true motive behind Butler's testimony, i.e. "to save his own neck" is tantamount to a revelation that Neville Butler's second and third version of the facts of the instant case somehow can be equated to a cleaning of the conscience.

Obviously, the jury should have been permitted to hear of Mr. Butler's failing of his polygraph examination. The Courts have held that the polygraph examination, in and of itself, is admissible when utilized to prove something other than the truth of the results of said polygraph examination. See U.S. v. Grant, 473 F.Supp. 720 (D.C.S.C. 1979) and U.S. v. Kampiles, 609 F.2d 1233 (7th Cir. 1979), cert. denied 100 S.Ct. 2923, 446 U.S. 954, 64 L.Ed.2d 812 (1980); and U.S. v. Piccinonna, 885 F.2d 1529 (11th Cir.1989).

To give the impression that Mr. Butler's testimony, during the trial, was superior in any manner to his previous testimony (to which he later admitted were lies) clearly placed Butler's testimony in a false light and above all other testimony. The basis for Neville Butler changing his testimony was not that of a "cleaning of the conscience", but rather the threats of prosecution at his failing of a polygraph test. This information should have been available to the jury for its ultimate evaluation of the testimony of Mr. Butler and the Motion in

Limine precluded APPELLANT'S counsel from inquiring into that motive.

CONCLUSION

Based upon the foregoing authorities and legal arguments it is respectfully requested that this Honorable Court reverse the conviction and sentence of the APPELLANT and remand the cause for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the REPLY BRIEF OF APPELLANT was mailed this 8th day of November, 1990, to: The Office of the Attorney General, Atten: Michael N. Neimand, Esq., 401 N.W. Second Avenue, Suite N921, Miami, Florida 33128.

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