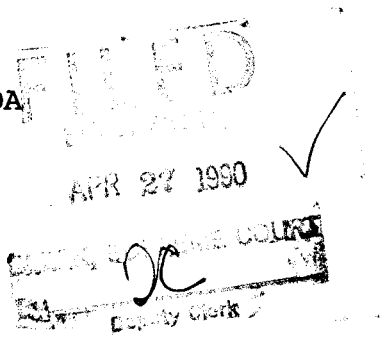
IN THE SUPREME COURT OF FLORIDA



BRADLEY P. SCOTT,

Appellant,

vs. Case No. 72,091

THE STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT

(On Appeal from the 20th Judicial Circuit
In and for Charlotte County, Florida)

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TABLE OF CONTENTS

TABLE OF CITATIONS

ISSUE ONE: THE COURT ERRED IN EXCLUDING THE TESTIMONY OF VIRGIL SHELTON REGARDING STATEMENTS MADE BY BRIAN KANE.

Appellee contends that the proffer of statements was limited solely to consideration of the hearsay exception premised upon statements adverse to penal interests. In support thereof Appellee refers the Court to only a limited portion of the record which does in fact limit itself to discussion of the procedural niceties of the hearsay rule. By limiting the Court's consideration solely to this page, Appellee attempts to preclude the Court from considering the constitutional parameters of Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed. 2d 297, 93 S.Ct. 1038 (1973). Chambers is predicated upon the fundamental premise that a criminal defendant has a constitutional right to present relevant evidence in his own behalf. The Chambers court recognized that a confession by a third party is certainly relevant evidence and should therefore be admissible. Reference to the record reveals that trial counsel for Appellant initially proffered the statement as simply relevant evidence. (R2755). As such he impliedly invoked the Appellant's due process rights to present relevant evidence in a proceeding. Although inartful the arguments of counsel are sufficient to invoke simple due process relevance. The trial judge in fact sua sponte paraphrased trial counsels arguments by stating:

> "While apparently any statement made by any person that they may have committed the crime would be relevant. Is that the defenses position?" (R2759).

Counsel thereupon responded in the affirmative. Counsel thereafter discussed statements against penal interest as a separate ground of admissibility. Thus Appellee's suggestion that there was a failure to advance the constitutional arguments espoused in Chambers is not applicable here. Although trial counsel did not specifically invoke the name of the Chambers case, he certainly invoked and relied upon the constitutional right to present relevant evidence. He argued specifically that the Shelton statement was relevant evidence in that it indicated a third party had in fact committed the crime. The Appellant presented this evidence, asserted that it was relevant to his defense and asserted his right to present it. Is it necessary to chant ritualistic words of art to invoke due process rights to present relevant evidence? Appellant hopes not. A failure to admit relevant evidence proffered on the part of the Appellant in fact invokes the principles espoused in Chambers. Thus the Appellee's argument that there has been a procedural default or waiver of the Chambers v. Mississippi argument is misplaced. Perhaps the perfect lawyer in a perfect world invokes constitutional rights in clear and precise language during the heat of battle. More often however, an invocation of rights is made in general terms sufficient to notice the trial court of the grounds of admission therefore. To hold otherwise is to thwart a fundamental right through semantics and mechanistic application of rules. This is the evil decried in Chambers.

The scenario sub judice with regard to the Shelton statement

is indistinguishable from the scenario in Chambers. Appellee however continually insists that the Shelton statement was not a confession but was a third hand recitation of a hearsay within hearsay statement like that considered in Hill v. State, 549 So.2d 179 (Fla. 1989). This assertion by Appellee is unfounded. The source of the exculpatory testimony in Hill was in fact three steps removed from its presentation at trial. The testimony sub judice was only one step removed. Using a Hill type analysis, the eye witness "A" told Shelton the witness "B" that he had been present and personally observed all or a portion of the crime and helped the perpetrator leave the scene thereof. Thus the analysis is an "A" to "B" analysis not "A" to "B" to "C" from an unknown source as in Hill. Thus the two sets of facts are easily distinguishable. Likewise in Hill there was a dearth of corroborating evidence. The corroborating evidence herein is certainly sufficient to mandate a finding that the trustworthiness of the statement has been shown.

The presence or absence of corroborating circumstances is admittedly a discretionary decision to be made by the trial judge. This discretionary decision however impacts on a fundamental right of the defendant to present evidence. Thus Appellant suggests that the determination that corroborating evidence exists should be liberally indulged in by the trial courts. A harsh or strict standard for corroborative evidence would result in exclusion of testimony which otherwise would be admissible and certainly relevant. Appellant suggests that the

trial court should limit itself to determining whether or not corroborating evidence is in fact present and not enter into an exacting weighing and balancing of the sufficiency thereof. Like all issues of credibility the weight and credibility of corroborating evidence should be a matter of determination by the jury.

The trial judge below surpassed a mere finding of the existence or non-existence of corroborating evidence. Instead the court utilized its own prejudices and opinions in determining the weight and sufficiency or the credibility to be given the corroborating evidence. This is not a proper function of the trial court in a criminal case. The weight and sufficiency of evidence should be determined by the jury, and not made at a threshold determination by the court.

The sufficiency of the corroborative evidence here is apparent on its face. The facts were noted at length in Appellant's original brief and recitation again would be pointless. Certainly this corroboration far surpassed a threshold inquiry. Beyond that the weight to be given is a matter for the jury to consider.

The court precluded testimony by Virgil Shelton and Brian Kane. Thus the Appellant was procedurally barred from presenting the testimony of the witnesses and arguing that the philosophy espoused in Irons v. State, 498 So.2d 958 (Fla. App. 2 Dist. 1968) would justify the admission. His failure to raise the Irons argument at trial is understandable under the circumstances and should not work a waiver of this argument.

ISSUE TWO: THE COURT ERRED IN COMMENTING ON THE EVIDENCE.

Appellee contends that the identity of the victim in this case was not in issue. In support of his contention he refers to excerpt from opening and closing arguments.

Appellee argues that issues can be limited or totally foreclosed by isolated references to passages from opening and closing statements. Such is simply not the case. What is in issue in a trial is a fluid concept which changes based upon the answer to a question or the failure of a gambit. The last day's issues often have not yet been thought of on the first day. To suggest that opening statements govern the position of the parties thereafter is a misstatement. Opening statements may complicate a change of positions, but they do not legally foreclose changes.

The fact that only one of the jurors who was exposed to the trial court's comments ultimately served on the jury does not detract from the harm. Is it acceptable that only one of the jurors was influenced as opposed to all? The harm is no less if considered numerically.

In any event all of the jurors heard the judge comment that the hat in question was the victim's. Arguments that the ownership of the hat was not a contested matter and lent little to the jury's decision ignores the fact that the hat in question was the source of the hair which was analyzed. Since the source

of the hair was established circumstantially, ownership of the hat was crucial. To appreciate the critical nature of the hair, one need only read Appellee's fervent reliance on the hair as the lynch pin of their circumstantial evidence argument aptly demonstrates its critical nature. The hair, however, has value only if the jury was satisfied that the source of the hair was in fact the victim's. The jury can draw this conclusion only if the hat belongs to the victim. The judge's comment that the hat belonged to the victim made this conclusion inescapable for the jurors. (R1818).

ISSUE FOUR: THE COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS BASED UPON PRE-INDICTMENT DELAY.

Appellant asserts that it was error to deny his pretrial Motion to Dismiss based upon pre-indictment delay.

Two standards of review exist for evaluating pre-indictment delay. The federal standard requires that the defendant establish prejudice and thereafter establish that the delay was due to a desire on the part of the prosecutor to secure some tactical advantage. U.S. v. Benson, 846 F.2d 1338 (U.S. Ct. of Appeals, 11th Circuit 1988). Absent the affirmative showing of delay for tactical advantage such complaints are of no avail in the federal system.

The second standard of review is that followed by this Court in Rogers v. State, 511 So.2d 526 (Fla. 1987). Rogers requires that the defendant initially establish prejudice when a claim of pre-indictment delay is advanced. If prejudice is established, the court then must balance the demonstrable reasons for delay against the gravity of the prejudice on a case by case basis. At issue is whether the delay violates fundamental concepts of justice, decency and fair play. Id. at p. 531. Under the Florida view tactical advantage by the prosecutor is a factor to be weighed but it is not a prerequisite to dismissal. The federal cases on the other hand require tactical advantage as an absolute prerequisite. Obviously these two standards of review

differ significantly.

Appellee now concedes in its brief that Rogers governs. A review of the trial record reveals that such was not the case at the time of hearing on the motion. During argument the State cited federal cases and affirmatively argued that tactical delay was a necessity. The Assistant State Attorney argued ... "but there's a second prong to the test that must be applied, that is, that the delay was done deliberately by the State in order to obtain tactical advantage." (R3638). This assertion was made repeatedly. Unfortunately the trial judge was not made aware of the significant difference between the two standards. In fact the court was supplied only federal cases which emphasized the tactical advantage requirement.

The State's propensity to blend federal decisions in this area into argument is demonstrated by reference to Appellee's brief herein. Appellee initially acknowledges Rogers. Notwithstanding Appellee's acknowledgment that Rogers is the rule of law for this state, it argues that the delay herein is justifiable and in support of this argument cites to Stoner v. Graddick, 751 F.2d 1535 (11th Cir. 1985). Appellee uses Stoner in an intellectual exercise in which it argues that a 19 year delay was acceptable in Stoner and therefore the delay herein must be justifiable. Absent from the State's argument is the recognition that Stoner applies the stricter federal analysis to the facts. The appellant in Stoner was unsuccessful because the federal court requires a positive finding of tactical delay. The decision states:

> The thrust of binding precedent in this circuit requires the defendant to show both actual prejudice and deliberate prosecutorial delay to gain tactical advantage... cites omitted. Id. at p. 1542.

The decision in Stoner lends no logical support to the State's position herein. The Stoner decision and others of its ilk cited by the State lend rhetoric and emotionalism, but not viable legal analysis. Prosecutorial delay for tactical advantage is an absolute requirement in a federal analysis of pre-indictment delay. Prosecutorial delay for tactical advantage is not an absolute necessity in Florida. Appellee's use of Stoner to justify the State's position herein is illustrative of Appellant's contention that the delay here can be supported only if the oppressive standard of federal review is utilized.

The decision to grant or deny a pre-trial motion to dismiss is normally an exercise of discretion on the part of the trial court, and the exercise of discretion should not be disturbed absent a showing of plain error. Plain error is apparent here. The trial court was at no time correctly apprised of the proper standard of review to apply in considering the pretrial motion to dismiss. Every case cited by the state involved a standard of review which required a showing of prosecutorial delay for tactical advantage. A reading of the record clearly reveals that the Rogers standard was wholly ignored. Since the wrong standard of review was utilized the exercise of discretion by the court herein should be closely scrutinized. Upon scrutiny it will not

stand.

The confusion with regard to the appropriate standard of review is further evidenced by the trial court's refusal to enter a written order herein. Prior to submission of briefs, this cause was remanded in part so that the trial court could, as it promised it would, enter a written order on this issue. (R3772). Notwithstanding the remand by this Honorable Court, the trial court failed and specifically refused to reduce its finding to writing. The refusal on the part of the trial court certainly should be considered by this Honorable Court in considering what weight it should give to the exercise of discretion herein.

Appellee suggests that the record does not support the Appellant's arguments. This assertion is unfounded. Each argument which Appellant makes is drawn directly from testimony in the record.

The Appellant was investigated in 1978. He cooperated with the authorities and provided them with testimony concerning an alibi. (R3479). The police officers investigated the sufficiency of the alibi. (R3479). After investigating the alibi they requested an indictment. (R3479-3480). The local state attorney refused to indict. (R3480). The request for an indictment was refused because of the existence of the alibi. (R3480, 3492). This factual scenario is established in the record and the conclusions that the Appellant draws therefrom are inescapable.

Appellee discusses at length the discovery of new evidence in the case. Appellant again reiterates the fact that each item

of evidence which Appellee cites as newly discovered was available to the state for years prior to the indictment. In fact the witnesses whom Appellee suggests are essential were known to the state literally within days of the occurrence. The ability to submit various pieces of evidence for testing and consideration was available to the state within months after the occurrence of the offense. The failure of the state to timely interview witnesses and submit evidence for testing cannot support an argument that these matters constitute newly discovered evidence. Such conduct is negligence, not necessary investigative delay. In evaluating these facts the court is bound to engage "in a sensitive balancing of the government's need for an investigative delay... against the prejudice asserted by the defendant." U.S. v. Townley, supra. (emphasis supplied). Unless this Court finds that the state of Florida needed to ignore potential witnesses for seven years making no effort whatsoever to interview, the balancing favors the Appellant. Unless this Court finds that the State needed six years to decide which tests to conduct the balancing favors the Appellant.

Prejudice is apparent. The passage of time in this case eroded the Appellant's ability to determine facts, prepare defenses and present his alibi. This Court then must ask the simple question, why did this happen? When this question is asked it is apparent that no satisfactory justification was given and indeed none is possible.

It is not sufficient as Appellee contends to simply

determine that the police and prosecutors felt it was desirable. The weighing and balancing approach taken by the Fifth Circuit and by this Court rejects the idea that the government with its awesome power can vacillate and equivocate on the advisability of prosecution and at some time in the far distant future arbitrarily decide that the time has arrived.

ISSUE FIVE: THE COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

(i) The Circumstances Herein are Insufficient to Support a Finding of Guilt.

(ii) The State Failed to Establish the Corpus Delecti.

Appellant contends the circumstantial evidence is insufficient to support a finding of guilt herein. In support of this contention he primarily relies on the three cases of Cox v. State, 555 So.2d 353 (Fla. 1989), Horstman v. State, 530 So.2d 368 (Fla. App. 2 Dist. 1988) and Jackson v. State, 511 So.2d 1047 (Fla. App. 2 Dist. 1987). The facts here are indistinguishable from those in the cited cases and indeed the Appellee makes no attempt to distinguish these facts from those in Cox, Horstman, and Jackson. Only if this Court now decides to retreat from its position in Cox and its adoption of Horstman and Jackson can this conviction be upheld. Appellee by its failure to even attempt to factually distinguish these cases impliedly recognizes this.

Admittedly the totality of the circumstances must be considered. Even in their totality these circumstances do not support a finding of guilt. A lengthy repetition of the circumstantial evidence upon which the state relied is needless here. Conceding as one must that the Appellant was talking to the victim on the evening in question, it does not establish that he killed the victim. At no time was there testimony regarding any force, attacks, or any conduct on the part of the Appellant

which exceeded conversations. The same types of conversations and contacts had been occurring between the Appellant and victim over the proceeding months.

The circumstantial evidence in this matter is sufficient only if this Court assists the state by making the same assumptions that they make. There is no basis however for making these assumptions.

Appellee's attempts to bolster the circumstantial evidence by suggesting that the hair was forcibly removed, and the forcible removal of one hair is irrefutable evidence of a struggle. The state's argument literally and figuratively hangs by a hair. The force needed to break one hair is insufficient to support this argument. It is difficult to imagine a lower threshold of force than that required to break one strand of hair. However the single broken hair must be accepted as evidence of a forcible struggle if the verdict is to stand. The tortured logic necessary to supply a violent struggle predicated solely on this level of force not a reasonable explanation of the circumstances. It is certainly not the only reasonable construction.

Appellee acknowledges that the victim on previous occasions had many previously friendly contacts with the Appellant but argues that the victim would not into the car voluntarily. Based on the record one must ask, why not?

Assuming arguendo that the victim was in the car of the Appellant on the evening in question, does that indicate he

killed her? No, it simply indicates he talked to her. Why does it follow that if the victim was in the car of the Appellant he killed her? It is undisputed that the Appellant and victim had numerous contacts in the months preceding the death. Appellee concedes that the victim had numerous contacts previously and that they even smoked marijuana together. Each of the prior contacts involved the Appellant's car. Why was this night different?

The bike hidden in the bushes is consistent with two explanations. First, the killer threw it in the bushes to hide it. Second, the victim voluntarily accompanied someone, perhaps even the Appellant, and hid the bike so it would be present upon her return. Prior to her return someone, not the Appellant, killed her. Counsel suggests that hiding a bike for safekeeping is a fairly common incident of childhood, and arguably bike riding in general.

Appellant insists that the ambiguous roadblock testimony will suffice to support the verdict. As the record indicates the nature and existence of this statement is uncertain. It certainly will not support the verdict in view of Jackson.

Appellant contends that the circumstances are not sufficient and the conviction should be set aside.

ISSUE SEVEN: THE CLOSING ARGUMENT OF THE PROSECUTOR IN THE PENALTY PHASE IS FRAUGHT WITH IMPROPER COMMENT AND PREJUDICIAL APPEALS TO THE JURY. ALTHOUGH NO OBJECTION WAS MADE IT CONSTITUTED FUNDAMENTAL ERROR.

Appellee correctly notes that an erroneous page number is denoted in Appellant's initial brief. Specifically the quote "that was the damn girl on the bicycle that Mr. Johnson told you about" is attributed in the initial brief to (R3065). In fact the quote referenced above occurred at (R3061). The earlier page number citation was an inadvertent error. Notwithstanding the erroneous page number the quotation is part of closing arguments albeit four pages prior to its referenced location.

Appellee suggests that the characterization of the defense witnesses as drug pusher gents was invited. No logical explanation is offered for why a size comparison between the Appellant and Phil Drake, justifies a characterization by the state attorney of defense witnesses as "drug pusher gents." The state's comments were not linked to the defense arguments that Phil Drake was the actual perpetrator. There was no effort to suggest that the "drug pusher gents" were the perpetrator or the "drug pusher gents" were somehow linked to Phil Drake. The drug pusher gent characterization coupled with the suggestion that the state wanted to prosecute them served only to inflame the jury and undermine the defense presentation. Further the repetition

of the unfortunate damn girl epitaph and suggestions that police and grand jurors had previously arrested and indicted the Appellant herein cumulatively resulted in fundamental error.

The comment regarding the failure of all parties to testify was preceded by the Appellee's urging the jury to ignore Appellant's suggestions of reasonable inferences to be deduced from the evidence because "a trial is about testimony and credibility of all parties." This can be construed as nothing other than a comment on the fact that the Appellant did not testify. The comment highlighted the lack of testimony and urged the jury to draw a conclusion therefrom which is contrary to law. The comment by the prosecutor in this context when coupled with other offensive comments constitutes fundamental error.

Appellant suggests that even without objection a Diguillio analysis should be used to determine whether the argument was reasonably susceptible of being interpreted as a comment on the fact the Appellant did not testify. The reference to "parties" is obviously a comment that all parties did not testify. The analysis now turns to whether or not the comment is harmless. In this instance the answer is no. This was a close circumstantial case. In such an instance a comment like this cannot be harmless. Even without objection it contributed to fundamental error. Coupled to other inappropriate comments by the prosecutor herein it mandates a new trial.

Appellant acknowledges that the comments complained of were not objected to by trial counsel. He contends nonetheless that

the nature of the comments and the number thereof were of such a nature as to constitute fundamental error.

Tuff v. State, 509 So.2d 953 (Fla. App. 4th Dist. 1987) directly considers the possibility of fundamental error arising from prosecutorial comments during closing notwithstanding the lack of an objection. The Tuff decision recognizes that under normal circumstances objection must be made to preserve the inappropriate comment for appellate review. Nonetheless Tuff notes that even absent objection prosecutorial comments during closing, can justify reversal. The Tuff decision states:

> "This court said in Ryan that prosecutorial misconduct amounts to fundamental error, and is excepted from the contemporaneous objection/motion for mistrial rule, when the prosecutors argument, taken as a whole, is of such character that its sinister influence cannot be overcome by rebuke or retraction. (cites omitted) Id. at pp. 955, 956.

Ryan v. State, 457 So.2d 1084 (Fla. App. 4 Dist. 1984), the court also said that:

> (I)n a close case... when the jury is walking a thin line between a verdict of guilt and innocence, the prosecutor cannot be allowed to push the jury to the side of guilt with improper comments such as these. Id. at pp. 956,959.

It is without doubt that the case sub judice was a close case. It is also without doubt that the comments of the prosecutor were inappropriate and resulted in fundamental error.

The conviction therefore should be reversed and the cause remanded.

ISSUE EIGHT: THE COURT ERRED IN ITS ANALYSIS OF THE EXISTENCE OF AGGRAVATING AND MITIGATING FACTORS AND ITS DECISION TO IMPOSE THE DEATH PENALTY.

Appellee suggests that the failure to instruct the jury on kidnaping is harmless error and relies upon Hoffman v. State, 474 So.2d 1178 (Fla. 1985) to support this contention. Notwithstanding Hoffman. Appellant contends that there is prejudice when the jury is misinstructed. A jury recommendation of life must be afforded great weight by the reviewing court. It will be disturbed only when no reasonable juror could have arrived at such a conclusion. The Appellant is potentially deprived of securing this cherished recommendation if the jury is misinstructed. If the jury is misinstructed their findings are inappropriate and one rung of the ladder which should be scaled before the death penalty can be imposed has been avoided. It is only through religious application of the safeguards built into the statutory scheme condoning the death penalty that the penalty itself can be condoned. If this Court approves a procedure which permits a meaningful jury recommendation to be undermined by misinstruction then the purpose of the statute has been thwarted and the imposition of a death penalty is inappropriate. The suggestion that prejudice is not present when a misinstructed jury returns a finding against a party be it in a death penalty proceeding or a small claims action is untenable. Such a proposition denigrates the role of the jury in the American

system of justice. Certainly the right to a jury must mean a properly informed jury.

The court found as an aggravating factor the presence of a desire to avoid lawful arrest. At this juncture we can still only speculate as to the motivation for the killing. As suggested previously however there is a more plausible motive for the homicide. Mainly that the perpetrator, for his own peculiar purposes, delighted in the act of the burning and this was the motivating factor. If the intention and motivating factor for the burning was to avoid lawful arrest how much simpler would it have been to simply choke, stab, or shoot the victim. Instead there was a ritualistic type of burning which suggests some deviant motivation totally apart from avoiding arrest.

Appellee's repeated references to the scattering of the victim's belongings and the pattern of the fire (brief p. 63) is puzzling. Testimony at trial indicated the belongings of the victim were all found within a matter of feet from of the body. Likewise the focus of the fire was confined to and originated with the body. The suggestion that the belongings of the victim were scattered is simply not supported by the evidence herein. Likewise the significance of the burn pattern at this time eludes Appellant. Perhaps it is the lack of expertise in the field but his reading of the record suggests that an accelerant was poured on or about the body and the fire ignited. What significance is to be derived from this burn pattern is unclear.

Appellee suggests that the heinous atrocious or cruel

aggravating factor can be justified in this case because of the fear and anxiety which accompanied the abduction and transportation of the victim. There is no evidence here to support the finding of any such fear and or anxiety. The only evidence of the use of force and an abduction in this case comes from the state's hair expert. Wherein he characterized a hair as having been forcibly removed. From this flimsy foundation the state at trial and during argument has through rhetoric and hysterics inflated the force necessary to break one strand of hair into a struggle. Such an argument simply is not supported by the record. Review of the record reveals that the hair was split and broken. It takes no great force to break one hair. Certainly the force exerted is insufficient to justify a conclusion beyond a reasonable doubt that the victim was forcibly confined and suffered great anxiety. This of course assumes arguendo that the hair was actually the victim's.

Appellant reasserts the balance of the arguments contained in his initial brief on this issue.

ISSUE NINE: THE COURT ERRED IN EXCUSING JUROR GOSTYLA FOR CAUSE ON A WITHERSPOON ANALYSIS.

The dialog between Mrs. Gostyla, counsel, and court can be read and reread. Each reading indicates the juror assured the court without equivocating that she would follow the law and impose a death penalty if warranted notwithstanding her own personal feelings. The fact that she would find it difficult to do so and the fact that she may hold personal reservations against the death penalty do not justify excusing her from the panel on this basis alone. Her repeated assertions to the court that she would follow the law and would impose a death penalty if appropriate qualified her as a juror in this matter. To excuse her solely because she is not an avid proponent of the death penalty is to create the error feared in Witherspoon and Witt. Mr. Scott the Appellant is entitled to a cross section of the community. The cross section of the community should include all persons whatever their political beliefs provided they are able to follow the law. Mrs. Gostyla in this instance expressed a clear assurance to the court that she would follow the law and would in fact consider imposition of the death penalty if merited.

The dialog with the juror Gostyla differs significantly from the dialog found in Lambrix v. State, 494 So.2d 1143 (Fla. 1986). In Lambrix upon questioning by the court the perspective juror

indicated that he or she would not be able to impose a death penalty. In effect the perspective juror in Lambrix indicated that they would not follow the law. Here the dialog differs significantly. A juror who indicates she will not under any circumstances impose the death penalty should be excused under the law as it now stands. This however is not the situation demonstrated by the record herein. The record herein demonstrate the juror repeatedly assured the court that she would follow the law and impose the death penalty if she felt it warranted under the law. There is nothing in the record other than her honest indication concerning her own feelings as to the death penalty to justify her excusal herein. To excuse her was error and the error worked prejudice to the Appellant.

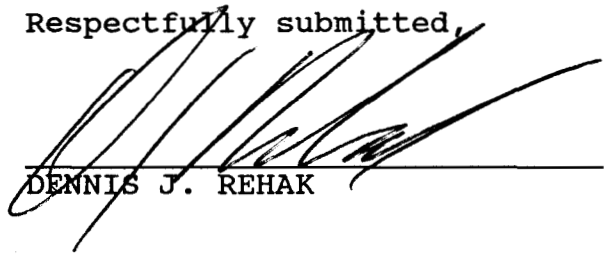
CONCLUSION

The court erred in denying the Appellant's pretrial Motion to Dismiss and Motion for Judgment of Acquittal. The matter should now be remanded for dismissal or entry of a judgment of acquittal.

In the alternative, error occurred in excluding the Shelton Statements and as a result of comments made by the State during closing argument. Further error occurred when the court commented on the evidence. These errors were not harmless and rresulted in a fundamentally flawed trial. The conviction should be reversed and the matter remanded for a new trial.

As a final alternative the court erred in its decision to impose the death penalty and in the excusal of the juror. The death penalty should be set aside and a life sentence imposed.

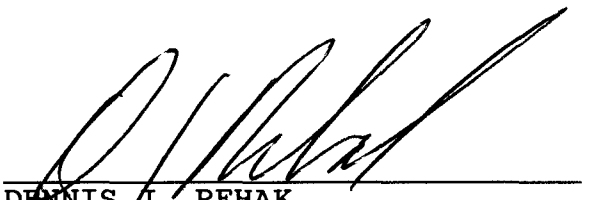
Respectfully submitted,



DENNIS J. REHAK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded to Davis Anderson, Assistant Attorney General, Dept. of Legal Affairs, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602 this 26th day of April, 1990.



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