IN THE SUPREME COURT OF FLORIDA

DONNIE GENE CRAIG,)

Appellant,)

vs.) CASE NO. 72,591

STATE OF FLORIDA,)

Appellee.)

_____)

INITIAL BRIEF OF APPELLANT
APPEAL FROM THE CIRCUIT COURT OF
THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR OKEECHOBEE COUNTY, FLORIDA
HONORABLE WILLIAM L. HENDRY, JUDGE

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TABLE OF CONTENTS

TABLE OF CITATIONS

Other authorities: Page

STATEMENT OF THE FACTS

On March 31, 1987, Shirley Johnson, a waitress at a local Okeechobee City restaurant, became concerned that a regular customer, Clifton Ellis, did not arrive as usual for breakfast (R-498, V-3). After calling a few people and making a visit to Mr. Ellis' residence with no answer, at around 10:30 a.m. Ms. Johnson reported Mr. Ellis missing to the Okeechobee Sheriff's Department (R-501, V-3). In response Deputy Sheriff Eddie Bishop of the Okeechobee Sheriff's Department made checks of the residence by knocking at the door and attempting to look through the windows (R-523, V-3). Nothing unusual was noticed by the deputy. Later that day, around 2:30 p.m., at the urging of Shirley Johnson, Jack Dietz, a part-time tenant of Mr. Ellis, and actually renting a room of the residence, entered Mr. Ellis' bedroom and found what was later identified as Mr. Ellis on the floor by the bed covered with blankets (R-533, V-3). Mr. Dietz reported last seeing Mr. Ellis on March 30, 1987, at approximately 4:00 p.m. at which time he had paid his rent (R-529, V-3). Additionally. that same evening Mr. Dietz testified that he had left the residence and had noticed Mr. Ellis' auto was parked in the garage.

The medical examiner testified the body of Mr. Ellis revealed bruises to the side of his head, his lip, left arm and dorsal aspect of the hand. The bruise to the side of the

head was considered to be inconsequential (R-1237, V-8). In addition, there were several slash wounds on his left side, as well as what were characterized as defensive wounds on Mr. Ellis' left arm (R-40). The medical examiner determined the cause of death to be a stab wound to the neck and front of the neck (R-1242).

The scene was processed in the main by Detective Sergeant George Miller of the Okeechobee Sheriff's Department who testified that when he entered the bedroom of Mr. Ellis he found the mattress slid partially off the bed and the bedcovers on the floor. Mr. Ellis' body was hidden by the bedcovering with only his feet and legs visible. There was a considerable amount of blood on the floor and particularly in the area of the body. Next to the head of Mr. Ellis was found a single bladed knife (R-564, V-3). Laying on the floor was a blue song book. On the cover of the song book was a partial impression of a shoe print marked in what appeared to be blood. Other observations included a damp towel at the foot of the bed. Also, the telephone line had been cut to the phone next to the bed. Mr. Ellis' wallet was found laying on a chair partly open. No money was in the wallet but personal identification and effects, including photographs, were intact. There was no testimony offered that any money had been taken.

Under Mr. Ellis' body two (2) unfired .25 caliber bullets were found (R-594). The search for latent prints in

the residence produced no identifiable impressions.

A blue 1977 Oldsmobile identified as belonging to Cliff Ellis through vehicle registration in the Okeechobee license collector's office was found between 4:30 and 5:00 p.m. March 31, 1987, in the parking lot of a local tavern (R-771). The officer's processing of the blue Oldsmobile recovered a partial latent located in the upper right hand corner of the interior rear view mirror (R-1042, V-7). This latent was subsequently identified as matching the right palm under the ring and middle finger of Appellant Donnie Craig (R-1063). No time period could be established at trial as to the age of the latent impression (R-1074).

Testimony from an expert in bloodstain interpretation was that Mr. Ellis was seated on the bed during the initial bleeding. The medical examiner testified that Mr. Ellis had a bruise to the side of his head as well his lip, left arm, and the dorsal aspect of the hand (R-1237, V-8). Also, there were several slash wounds on Mr. Ellis' left side including defensive wounds of the left arm (R-1240, V-8). The medical examiner found the cause of death to be a stab wound to the neck at the front of the neck. (R-1241, V-8). Additionally, the medical examiner testified that Mr. Ellis would have remained conscious for approximately five minutes and would have been brain dead in approximately ten minutes (R-1242). Testimony of trial witnesses Nathaniel Brice (R-376) and

Laura Mayo (R-92) identified Appellant as arriving at their apartment in West Palm Beach during the evening hours of March 31, 1987. Both witnesses testified as to the Appellant's use of rock cocaine. Laura Mayo testified that Appellant had been to their apartment before and had used rock cocaine on those occasions as well. The State elicited further testimony from Laura Mayo that, while the Appellant was smoking rock cocaine, she and a friend of hers by the name of Wally had searched the automobile driven by Appellant. Laura Mayo testified she saw insurance papers and at trial identified a checkbook belonging to Mr. Ellis as one of the items she had seen in the car. Laura Mayo also identified, as similar, an expended .25 caliber cartridge which she stated she had found in the front and had thrown into the back seat. In addition, Ms. Mayo testified that there was also in the glove compartment a pistol and bullets (R-896). At trial she identified the pistol as similar to the one she had seen that evening. Ms. Mayo further testified that she had last seen Appellant while he was making a telephone call at a pay phone outside the apartment building. The State produced testimony that the number of this pay phone appeared on the telephone bill of Dolores Andrews as a collect call on March 31, 1987, at 1:30 in the morning. Dolores Andrews testified she had received collect calls in the past from Appellant but did not remember this specific call. Trial witness Nathaniel Brice testified that

Appellant brought up a purple Royal Crown bag which contained a .25 caliber pistol. Brice testified that the next day he sold this pistol to a person by the name of Jamaica Red. Jamaica Red was identified by trial testimony as Oswald Jones (R-883). An officer acting on an unrelated warrant arrested Oswald Jones and a female companion (R-1013). At the time of the arrest the officer recovered a .25 caliber pistol which was identified at trial as the pistol sold to Mr. Clifton Ellis by Mike O'Conner, a local gun shop owner in Okeechobee, Florida (R-753). During trial a ballistics expert matched the expended cartridges recovered March 31, 1987, from 206 30th Street, West Palm Beach, Florida, as being fired from the pistol identified as having been sold to Mr. Ellis.

At the time of Appellant's arrest officers seized a pair of Reebok tennis shoes. These shoes were compared with the partial shoe impression left on the song book cover. At trial Detective Sergeant George Miller testified that the partial shoe print impression left on the song book cover was made by the right shoe taken from Appellant's residence at the time of his arrest on April 13, 1987 (R-1164). Although Appellant was a suspect in the murder of Mr. Ellis he was arrested on outstanding warrants for violation of probation. Appellant was initially taken to the Okeechobee Police station where he was questioned by Detectives Dale Laflam and Sr. Detective Eugene O'Neill. At trial O'Neill testified

that Appellant made the following statement:

A: "Okay, Mr. Craig had stated he had been back in Okeechobee since around the 16th of March, that he'd been staying with Dolores Andrews until about the 24th or 26th and that he then returned home to his parents' house. That he was currently working at the Flying G Dairy and had been there for about three weeks. That it had been about a month and a half since he had last saw Cliff Ellis and that he had never driven Cliff's car but that he had been in the car approximately a hear and a half ago. He advised that the shoes were his, that he had bought them about two months ago in West Palm Beach at Sears, that he had not loaned anyone his shoes. He advised that since being at the Flying G Ranch he had worked seven nights a week except for last Friday, March 10th, 1987. He also advised that prior to moving back to Okeechobee he was living and working in West Palm Beach. That he had worked for Villa Flora Catering, also known as Ralph and Julie Ann Incorporated, for three weeks and also at Christopher's Downtown, and that a restaurant in Palm Beach, for about two weeks and he denied any knowledge of the death of Cliff Ellis." (R-1281, V-7)

At trial the Appellant presented no evidence.

STATEMENT OF THE CASE

On April 13, 1987, at 2130 hours Appellant was arrested on the charge of murder (R-1502, V-10). On April 14, 1987, at first appearance, Appellant was held on the charge of murder with bond set at $50,000.00. Appellant was then appointed an attorney in the office of the Public Defender (R-507, V-10). On April 24, 1987, Appellant, by and through his attorney, filed Declaration Declining Questioning in this matter as well as violation of probation case no. 87-110 and 84-240. Copies of said Declaration Declining Questioning were furnished to the office of the State Attorney, the Okeechobee County Sheriff's Department and the Okeechobee City Police (R-1509, V-10). On April 29, 1987, the Grand Jury returned an indictment for First Degree Murder against Appellant (R-1510). On May 5, 1987, the State filed motion for blood and hair samples (R-1513, 1514). On May 13, 1987, the State filed amended motion to compel defendant to submit to physical test or examination and amended motion for blood and hair samples (R-1517, 1518). On May 15, 1987, the court granted the State's motion and entered orders accordingly (R-1519, 1520). On May 19, 1987, Appellant filed motion to stay taking of hair, blood and physical test examination (R-1521, 1522). That on May 19, 1987, the State and Appellant agreed upon an order staying the State's amended motion for physical test or examination and Appellant's consent to State's amended motion for blood and hair samples (R-1523). On May

27, 1987, Appellant filed motion for appointment of expert (R-1524) which was later granted on June 25, 1987 (R-1531). On May 29, 1987, Appellant filed a motion for rehearing on State's amended motion to compel defendant to submit to physical test and/or examination. On May 13, 1987, the State filed notice of intent to use similar fact evidence and notice of intent to seek death penalty (R-1555, 1556, 1557). On January 26, 1988, Appellant filed motion for appointment of expert which was later granted (R-1592). On January 26, 1988, Appellant filed motion to suppress line-up, show-up, photograph, other pre-trial confrontation and courtroom identification, all of which was later denied as to the witnesses (R-1594, 1595). On January 26, 1988, Appellant filed motions to suppress defendant's confession, admission and statements which was later denied (R-1596, 1597). On February 9, 1988, Appellant filed motion for production of favorable evidence which was denied, but State advised of ongoing duty to disclose (R-1600). On February 9, 1988, appellant filed motion for statement of particulars which was denied (R-1602, 1603, 1604). On February 11, 1988, Appellant filed motion to sequester jury during trial which was later denied. On February 15, 1988, Appellant filed motion to exclude similar fact evidence which was later denied (R-1609). On February 15, 1988, Appellant filed motion to declare death penalty, F.S. Section 92.141, unconstitutional

which was later denied (R-1611, 1612). On February 18, 1988, Appellant filed motion for statement of particulars which was denied with leave to move again with good cause and case authority (R-1613). On February 25, 1988, Appellant filed motion to suppress evidence obtained through unreasonable search and seizure which was later denied (R-1619, 1620, 1621). On March 2, 1988, Appellant filed motion for appointment of expert in fingerprint and shoe print identification which was granted (R-1622, 1623, 1624). On March 4, 1988, the trial court denied Appellant's motion for additional funds to hire expert for jury selection (R-1625, 1625A-1625N). On April 29, 1988, the State filed amendment and addition to notice of intent to use similar fact evidence (R-1730, 1731). On May 4, 1988, the Appellant filed disclosure pursuant to FRCrP 3.220(b) (R-1732). On May 10, 1988, trial began in this matter by selection of the jury. After jury selection and submission of evidence, the jury rendered verdict on May 19, 1988, finding Appellant guilty of felony murder robbery in the first degree (R-1851). On May 27, 1988, the jury rendered an advisory sentence recommendation of life imprisonment (R-1855). May 27, 1988, the court acting on findings of fact (R-1860-1863) sentenced Appellant to death (R-1856-1859). On May 31, 1988, Appellant filed motion for judgment of acquittal, or, in the alternative, new trial (R-1864-1870). On June 1, 1988, Appellant filed specific objections to findings of fact (R-

1871-1875). On June 1, 1988, the court filed amended findings of fact (R-1876-1879). On June 13, 1988, Appellant filed timely notice of appeal (R-1880).

SUMMARY OF CASE

POINT I

Appellant charged in a single count indictment with capital murder was prejudiced and failed to receive an impartial trial when the State introduced evidence of other crimes. Specifically, the State introduced evidence of Appellant's use of rock cocaine and trading property for cocaine. Introduced, but also irrelevant to Appellant's charges, was evidence of assaultive behavior and violence through the introduction of shell casings recovered from an address in West Palm Beach that had no bearing or materiality to the charge of capital murder.

The evidence of other crimes by Appellant was not necessary to the State's case and did not touch on any of the elements of the charged crime. The combination of the drug use and of violence with a firearm severely prejudiced Appellant casting him as a law breaker and thus the propensity to commit the crimes charged. Reviewing the evidence, pursuant to State v. DiGuilio, finds evidence against the Appellant insufficient and the State will not be able to meet their burden that the complained of evidence was harmless beyond a reasonable doubt.

POINT II

On single count of capital murder the evidence at trial

failed to show premeditation. The testimony and evidence presented an ambiguous scene of death which in and of itself was insufficient for evidence supporting premeditation. The wounds of Mr. Ellis fell short of showing a fully formed conscious purpose to kill or the existence in the mind of the perpetrator for a sufficient length of time to permit reflection. With no eyewitnesses or other statements describing the circumstances of Mr. Ellis' death the scene itself lends itself to several scenarios, none of which establish the fully formed conscious intent, coolly deliberated, necessary for capital murder.

POINT III

Arrest of Appellant on charge of technical violations of probation not including new crimes was pretextual and done solely for the purpose of obtaining a custodial statement from Appellant concerning an unrelated charge. The Appellant was taken into custody, suggested leniency, and in this atmosphere was questioned regarding the death of Mr. Ellis. Although advising Appellant of his rights the officer altered the rights waiver form changing the statement of "any statement can be used against you in court" to "may". This lends support to Appellant's claim of promise of leniency and his understanding that statements given on violation of probation would not be used against him on charge of murder. Appellant's refusal to make statement after being arrested

for murder supports this testimony. In short, Appellant's pretectual arrest for technical violations of probation and questioning Appellant on murder charges did deprive Appellant of his ability to make an intelligent and rational waiver of rights.

POINT IV

Appellant was arrested for technical violations of probation not involving commission of additional crimes. The arrest took place at his father's home, and Appellant was in bed at the time of the officer's arrival. Though the arrest was for violation of probation the detective for the Sheriff's Department, in effecting the arrest, seized Appellant's shoes. This arrest was in effect pretextual because it was made for the purpose of investigating Appellant and collecting evidence for the murder charge. Although the detective testified to a similarity in the sole patterns of Appellant's shoes to the imprint of a tennis shoe left at the scene of Mr. Ellis' death, his initial taking of Appellant's shoes was without probable cause or any reasonable suspicion.

POINT V

The trial Court erred in not granting Appellant's motion for statement of particulars as to date, time and place of the offense. In denying Appellant's motion for

statement of particulars the Court and State relied on the indictment as sufficient to inform Appellant. In addition, the Court imposed a good cause burden on Appellant to obtain the statement of particulars. At trial the State proved the date of the offense different than that in the indictment. In addition, three different addresses were given as the residence of Mr. Ellis. With the uncertain date and place of occurrence Appellant was severely prejudiced and unable to adequately prepare.

POINT VI

At trial Appellant was prejudiced by the State's late production of witnesses and documents. Two days into the trial the State listed as additional witnesses two West Palm Beach police officers. One of the officer's reports later used in trial was a document which defense counsel did not receive until the afternoon of the officer's testimony. Contrary to the rules of discovery the State additionally used a photograph and a certified vehicle registration to establish elements and identity. Waiting until two days into trial to disclose important corroborative evidence violates the trial Court's order on pretrial conferences and the Florida Rules of Discovery 3.220. In addition, it was a denial of Appellant's right to due process and effective assistance of counsel. The burden is on the State to show there is no prejudice to the Appellant. Hill v. State, 406

So. 2d 801 (Fla. 1981).

POINT VII

At penalty phase the State produced no additional witnesses relying on the trial evidence. The Appellant presented witnesses consisting of his mother and father, a friend, and a school psychologist. The jury, after deliberation, returned an advisory opinion of life imprisonment without parole for twenty-five years. The finding of the aggravated circumstance of commission of a felony during a capital offense is not a proper aggravated circumstance in this matter since it fails to be a circumstance which sets it apart from other capital offenses. Use of the underlying felony in this matter allows the felony to supply proof of first degree murder and at the same time become an aggravating circumstance. This violates State v. Dixon and Furman v. Georgia. The circumstance of especially cold-blooded and heinous is not clearly established beyond a reasonable doubt and, even so, was not a sufficient aggravating circumstance to warrant jury override. Hansbrough v. State and Nibert v. State.

POINT I

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ALLOWING EVIDENCE OF OTHER CRIMES

On August 13, 1987, the State filed notice of intent to use similar fact evidence (R-1555-1556). On April 29, 1988, the State filed an amendment and addition to notice of intent to use similar fact evidence (R-1730, 1731). At trial, over Appellant's objection, the State produced the following as so-called similar fact evidence:

A. Appellant's Use of Rock Cocaine

1. "...and he was looking to buy some rock" (R-911, L-25 to R-912, L-2)

2. "Yes, she drove it and was going to get some rock." (R-913, L-25)

3. "...and we were smoking it, we smoked the rock..."(R-915, L-9)

4. "...he had her to get more rock...and we smoked that too." (R-915, L-12)

5. "...because it was me, him and her smoking..." (R-916, L-9)

6. "...and him and Cheri split the other dime" (R-919, L-8).

7. "Q What was Baby Face doing at the apartment?

A Getting high."

B. Evidence of Stolen Property and Trading Property

for Drugs

1. "...he wanted to know if we take a watch...then he...pulled another watch out." (R-916)

2. "...Yes, and then he pulled out another one out of his pocket." (R-918, L-11)

3. "I gave it to Nat and got the rock and come back and he gave me a dime and him and Cheri split the other dime."

C. Evidence of Stolen Property

1. "...It was a Lucien Picard 14 karat gold and it had diamonds in the top of it and it had a ruby stem and all of it was... all the rest was solid 14 karat gold." (R-918, L-23-25)

D. Evidence of Assault With a Firearm

1. Introduction of three shell casings recovered March 31, 1987, from 206 30th Street, West Palm Beach (R-1033, L-12 through R-1034, L-3).

All of the foregoing testimony furthered evidence not necessary to the State's case in chief. The testimony did not touch on any elements of the crime charged and was merely prejudicial to Appellant at his trial. This is particularly true regarding the use of rock cocaine and also the evidence regarding the suggested trading of property for rock cocaine.

Initially the State gave notice to the Appellant of the intent to use similar fact evidence pursuant to Section

90.404(2), F.S. Later at motion hearings and during trial the State and Court decided that similar fact evidence was not a proper exception to admissibility of proof of other crimes; however, that said evidence was admissible under current tests of relevancy. (R-475, V-III)

Section 90.401 states: "Relevant evidence is evidence tending to prove or disprove a material fact." Section 90.403, F.S., excludes evidence as inadmissible

> "if it's probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues misleading the jury, or needless presentation of cumulative evidence."

Under this test the testimonial and physical evidence, inferences thereof, and based on remarks by the State, were not relevant. As inadmissible review of the evidence pursuant to State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) establishes that the State cannot meet the burden of proof that the complained of evidence was harmless beyond a reasonable doubt.

Through the analysis of William v. State, 110 So. 2d 614 (Fla. 1959) the initial premise on introduction of evidence is that of admissibility if relevant to prove a fact at issue. In the instant matter appellant was charged by indictment with Capital Murder. Reviewing the elements thereof and even considering all the court's instructions on verdicts of lesser than included there were no facts at issue that would be proved by the complained evidence.

Failing any relevancy the complained of evidence can only be taken for its prejudicial value.

In this matter there was extreme prejudice to the appellant through evidence showing association and use of crack cocaine. Judicial notice has to be taken as to crack's hard effect on society and the fear that is instilled to the citizenry is overwhelming. See, for example, Johnny Terron v. State, 14 Fla. Law Weekly 1349 (1 DCA), opinion filed June 2, 1989, for an example of jury bias on crack cocaine.

Totally unnecessary to the case and sufficient opportunity through pro offers and objections to exclude, the evidence served as only prejudice to the Appellant. Despite prior objections to introduction of the evidence the State began its foundation by bringing up crack cocaine during the voir dire (R-177, L-11)

MR. MILLER: May be some evidence that the defendant used cocaine or had possession of cocaine rock.

Although the subject was dropped after objection by the Appellant the thought lingered in the minds of the venire as evidenced by the spontaneous remark of venireman Larson (R-304, L-16 through R-305, L-12):

MRS. LARSON: There was one question that came up yesterday that I might have a little problem with. If in the evidence that's presented involved drugs. I have such strong feelings toward drugs that I might have a problem with that.

THE COURT: Okay.

MRS. LARSON: I don't know that I would have the ability to separate myself completely from that.

THE COURT: Okay. You have -- you have a conscientious position, a fixed position toward --

MRS. LARSON: Well, it's -- it's pretty strong.

THE COURT: -- controlled -- controlled substances that --

MRS. LARSON: Right.

THE COURT: -- would keep you from independently assessing this case?

MRS. LARSON: I'm not -- not this case particularly but with any case I have such strong feelings, but I would try to put that aside.

THE COURT: Will you promise to accept and follow the Court's instructions to you on the law even though you find that you disagree with the law and wish it were different?

MRS. LARSON: Yes.

Further bias on this subject is expressed by the venireman during the defense of voir dire (R-318, L-25 through R-319, L-4):

MRS. LARSON: Well, it's just that I feel real strongly against drugs.

MR. SULLIVAN: Okay.

MRS. LARSON: I think it's the worst thing that hit our country. And I -- I have a problem with that.

Consequently, in anticipation of the evidence being introduced in trial, the Appellant inquired of the veniremen reference proof of other crimes (R-248). What follows from trial transcript page 248 through 261 is a similar example of juror bias against crack cocaine.

Besides the prejudicial evidence regarding drug use the evidence regarding the watches was also totally unnecessary and irrelevant to any issue at trial. There was never any suggestion or even evidence that Mr. Ellis was missing a watch or that the watch that was being passed about had any connection with Mr. Ellis. Certainly the Lucien Picard which was mentioned had no relevance whatsoever but to point to a completely total different crime inasmuch as it was never mentioned as being an ownership item during the trial of Mr. Ellis. This could only have been connected to the sudden inexplicable address of 206 30th Street, West Palm Beach, Florida, given at trial with no other mention except recovery of shell casings. Since the only mention of this particular address was in connection with recovery of shell casings a reasonable and likely conclusion by a juror would have been that the Appellant in possession of a firearm assaulted someone and took property specifically the Lucien Picard watch. This is a conclusion that the jurors could have reached and is probably the only one that they did reach because the State gave no explanation really for the introduction of this evidence. Initially the State indicated

that it would be introducing the shell casings to establish time (R-1025). However, during the testimony of the officer there was no time mentioned. So the recovered casings proved nothing for the State's case.

The introduction of the prejudicial evidence regarding drugs was without a doubt instrumental in the jury verdict in this matter. The combination with firearms, assault, theft, and dealing in stolen property all combined to clothe the defendant with an evil purpose.

In conclusion, the complained of evidence was not relevant because it proved no element of the State's case and was only admitted to show Appellant's propensity. In support, White v. State, No. 88-0338, 14 FLW 1882, August 11, 1989 (4 DCA), opinion filed 8/9/89, where testimony concerning activities in a base house were not relevant to the charge of armed robbery. Therefore, Appellant's sentence should be vacated and he should be granted a new trial.

POINT II

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN NOT GRANTING APPELLANT'S MOTION FOR DIRECTED VERDICT OF ACQUITTAL

Appellant was charged by indictment with capital murder. There were no other counts. At trial there was absolutely no evidence supporting premeditation. Testimony concerning the discovery and subsequent investigation of the death of Mr. Ellis did not suggest a killing with premeditation as required for first degree premeditated murder. The wounds and blood stains of Mr. Ellis were fully described by testimony from the crime scene technician, blood stain expert and medical examiner.

Testimony from the State's expert on blood stain was that Mr. Ellis was sitting on the bed at the time of the stabbing. Further, that the blood pattern was such that the major bleeding of Mr. Ellis was while he was lying on the floor. The photograph, State's Exhibit 17, shows the victim lying down with his face to the bed and as if he is asleep.

The medical examiner testified to ten knife stab wounds to the body plus a combined stab slash wound and five knife slash wounds (R-1232).

Examination of Mr. Ellis' room did not reveal ransacking although the detective testified to drawers left open and a wallet lying open on a chair. There was no testimony offered by the State from a personal friend

regarding Mr. Ellis' habits regarding general housekeeping. Although the wounds to Mr. Ellis were multiple only one was fatal which was a stab wound to the front of the neck which caused the left carotid artery severed. The medical examiner testified that Mr. Ellis would be irretrievably brain dead in about ten minutes but conscious for about five. In addition, the medical examiner testified that he could not rule out the possibility that the wounds were self-inflicted. The wounds themselves are not indicative of the fully formed conscious purpose to kill or showing the existence in the mind of the perpetrator for a sufficient length of time to permit reflection. Provenzano v. State, 497 So. 2d 1177 (Fla. 1986). Also, this is not the victim who in Nibert v. State, 508 So. 2d 1 (Fla. 1987), is on his knees pleading with death from an excessive number of stab wounds which showing a premeditated design. Further, this lacks the malice and premeditated design of Roberts v. State, 510 So. 2d 885 (Fla. 1987) where victim was struck repeatedly in the back of the head by a baseball bat.

In fact, besides the possibility that the victim's wounds were self-inflicted, the scene is consistent with a struggle which was provoked by Mr. Ellis. The defense wounds lend support to the theory of a struggle. Also, the knife found at the scene and not identified as property of Mr. Ellis lends support for a theory of a knife fight between Mr. Ellis and one or more persons. Testimony from Detective

Eugene O'Neill was that Mr. Ellis had a reputation for entertaining young boys between fifteen and twenty by giving money for his performing oral sex. A scenario could have been that Mr. Ellis was discovered with a young boy by the boy's parent or friend resulting in a confrontation leading to the death of Mr. Ellis. The defendant's fingerprint found in Mr. Ellis' car cannot be cited for any particular period of time. The crime scene technician could not put an age on the latent recovered, and, therefore, it could have been placed there when defendant admitted he was a passenger some eighteen months prior. Likewise, the shoe impressions linked to the defendant through testimony of the State's expert does not place defendant at the scene at or even near the time of the incident. The medical examiner testified that the impression could have been left up to fifteen hours after the death of Mr. Ellis. There was no evidence to contradict this or suggest the impression had been left during the incident.

Similarly, Appellant's alleged possession of the .25 caliber pistol which had been sold to Mr. Ellis some eleven months prior still does not show or touch on premeditation. Further, all testimony regarding the .25 caliber pistol failed to show or prove defendant's presence at or near the time of Mr. Ellis' death.

Also absent and legally insufficient was any evidence regarding nonconsentual use by the Appellant of Mr. Ellis'

property. The only evidence suggestive of property missing from Mr. Ellis was the testimony regarding the location of Mr. Ellis' car on April 1 and the testimony by witnesses regarding Appellant's access and possession of the .25 caliber pistol. Further, the evidence was insufficient and lacking as to any money missing from Mr. Ellis. There was no testimony suggesting that Mr. Ellis was missing, in fact, any property whatsoever. See Alicea v. State, 392 So. 2d 960 (Fla. 4 DCA 1980) where there was sufficient evidence that murder victim was known to carry large sums of money.

Considering all of the State's evidence in the light most favorable to the State the evidence was legally insufficient upon which a jury should base a verdict of guilt. The shoe impression left at the Ellis residence was inconclusive and did not show or establish that the impression could have been only placed during the commission of the crime. Jackson v. State, 511 So. 2d 1047 (Fla. Appeals 2d District 1987) where defendant charged with armed burglary and first degree murder bite mark matching defendant's general tooth impressions along with strands of hair and statement indicating knowledge of the death insufficient to exclude a reasonable hypothesis that someone else committed the crime. Also, Varamillo v. State, 417 So. 2d 257 (Fla. 1982) where fingerprint at scene was insufficient to sustain State's burden even though defendant's own testimony placed him at the scene of the

crime within four hours of the time of the crime.

In addition, there was no evidence regarding any prior animosity between Appellant and Mr. Ellis. While motive is not a necessary element to the State's case the lack of motive becomes a significant consideration in determining the sufficiency of the evidence.

Absent proof of premeditation it was error to have not advised the jury of the insufficiency and eliminated capital murder from the instructions. Leaving the instruction bolstered the State's credibility and proposed theory and forced Appellant to explain and answer unnecessarily.

Jury compromises and jury mercy are recognized in the practice of instructing down in all degrees concerning a homicide. If the jury finding of felony murder and subsequent unanimous finding recommending life imprisonment was an exercise of their inherent power to commute or mitigate then unquestionably Appellant was harmed by the erroneous inclusion of the instruction on capital murder. Without a verdict possibility of capital murder (the verdict most likely to bring a death sentence from a jury or judge) the jury could have settled on murder in the second degree. Finding a person not guilty of a capital murder is a heavy burden for the citizen impressed into the jury service notwithstanding the instructions touching on fairness and bias. The judicial recognition of the State's evidentiary

shortfall does show the exercise of fairness and direction to the jury. Additionally, common sense has to tell the juror that if the charge hadn't been at least partially proved we wouldn't be considering the charge. Although never articulated in their presence the jury must be aware of the concept of a prima facie case. In conclusion, the evidence was insufficient to show premeditation or the Appellant's presence at or near the time of the incident. The evidence of the death of the victim was neutral as to premeditation and may have even been a suicide. In no case was there evidence sufficient to show premeditation. Therefore, Appellant's sentence should be vacated and remanded for a new trial.

POINT III

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENT

On April 13, 1987, Appellant was arrested at the home of his father for an unrelated charge of technical violations of probation. (R-69) The arrest was effected by an officer of the Okeechobee Sheriff's Department. After arrest of Appellant, instead of proceeding directly to the jail and booking on the violation of probation, Appellant was taken by police vehicle to the Okeechobee City Police Department. At that time an Okeechobee Police Detective O'Neill told the Appellant he wanted to talk with him concerning the death of Mr. Ellis, and subsequent to that did advise Appellant of his rights. A rights waiver form, State's Exhibit No. 49, was executed by Appellant. It should be noted that the police department rights waiver form was altered by Detective O'Neill to the extent that the sentence which states that any "statements made can be used against me in court" was modified by striking through the word can and changing it to "may".

It is well established that statements by the accused are admissible only when they have been made freely and voluntarily without any inducement by the expectation of benefit or fear of threatened injury or by the exertion of any improper influence. Further, any custodial statement

must be the product of rational intellect and free will. Bush v. State, 461 So. 2d 936, Certiori denied 106 Supreme Court 1237, 475 U.S. 1031, 89 Lawyer Ed. 2d 345. Appellant's statements to Detective O'Neill were obtained through the promise of no death sentence. Although denied at trial (R-1307) the detective later made a statement conceding the promise of leniency.* Further, the altering of the rights waiver form, State's Exhibit 49, is evidence of the detectives misleading Appellant into thinking that his statement he was making on arrest of violation of probation would not be used against him on any charge of murder of Mr. Ellis. Certainly this was Appellant's understanding as evidenced in his testimony at motion to suppress (R-83, L-11 through L-22):

"A I couldn't identify who it was. Then he read me the rights. And I was under the expression that it was for violation of probation cause he told me that I was under arrest for violation of probation. And then he proceeded to question me about Mr. Ellis. And then when I went to the County Jail later on about an hour later on that's when he read me the rights to the murder charge in the booking area over there.

Q And then -- and after he read you your rights at that point what did you tell him? Did you make a statement

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*Motion pending to supplement record with evidence of officer's promise at time of arrest.

at that time?

A No, I did not."

The foregoing establishes the misrepresentation made to Appellant as to the effect of his statements and also reveals the ploy used by the police in collecting evidence in this matter.

After Appellant's statement there was no new evidence obtained by the police. Nevertheless, within an hour after Appellant's arrest on violation of probation and subsequent statement to Detective O'Neill, he was placed under arrest for the charge of murder. At that time he was again advised of his rights and asked as to whether or not he would make a statement. He did refuse to make a statement. Appellant's refusal to make a statement upon being charged in the murder shows his intent and understanding that no statement would be used against him, and that if he had realized that they were going to charge him with murder he would never have answered the detective's questions. This is particularly true since the questions asked by the detective do not make it clear that Appellant will be charged or that he is even a suspect in the death of Mr. Ellis.

For Appellant to have made an intelligent and rational waiver of rights it is essential that he know the charges for which he is being accused. Appellant could not rationally realize the consequences of his statement unless Detective O'Neill had told him at that time he was under

arrest for the murder of Mr. Ellis. Therefore, Appellant's waiver was not one which was truly intelligent with full understanding.

In addition, not fully informing Appellant of the charges but questioning him nevertheless to collect evidence is a deprivation of right to counsel pursuant to the Sixth Amendment, U.S. Constitution, and Fla. Stat. Section 910.24.

No statement of any defendant should be used in a capital murder case unless the defendant has benefit of counsel at the time of his statement. While in custody on other charges Appellant had no option to leave during the questioning. Further, there can be no meaningful waiver of counsel unless Appellant is informed as to the charge thus impressing upon Appellant the need for counsel.

> "The purpose of the constitutional guarantee of the right to counsel is to protect one accused of crime from a conviction resulting from his own ignorance of his legal rights and constitutional rights." 23 C.J.S. Crim. Law, Sect. 979(1), p. 911.

Appellant's right to counsel in this matter was violated by the officer's action in participating in an arrest on one charge but questioning Appellant concerning another charge. In addition, Appellant's waiver of counsel was not voluntary or intelligent when it was induced by promises of benefit or leniency. In conclusion, Appellant's right to counsel in this matter was violated when he was arrested by one police agency for violation of probation and then questioned by

another police agency concerning an unrelated charge. See Edwards v. Arizona, 451 U.S. 477, 101, Supreme Ct. 1880, 68 Lawyer's Ed. 2nd 378 (1981), Kight v. State, 512 So. 2d 922 (Fla. 1987). The sentence and judgment should be vacated granting Appellant a new trial and suppressing Appellant's statements to Detective O'Neill at any future trial or hearing.

POINT IV

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE

On April 13, 1987, Appellant was arrested at his father's home on a charge of technical violation of probation involving no new criminal offenses by members of the Okeechobee Sheriff's Department. Present at the time of the arrest was City Police Detective, Okeechobee Police Department, Eugene O'Neill. At the time of Appellant's arrest he was asleep in a bedroom clothed only in underwear. In attempting to dress to accompany officers to the jail a pair of shoes was seized from his mother by an officer of the Okeechobee Sheriff's Department. The officer, upon viewing the soles of the shoe and seeing a similarity with the pattern left at the scene of Mr. Ellis' death, advised Appellant that the shoes would be kept for evidence. Appellant's request for return was refused. Ultimately at trial the shoes were used against defendant by being matched by the State's expert as the shoes which left a partial imprint at the residence of Mr. Ellis.

The officer's seizure of Appellant's shoes was without warrant or probable cause. The officer's initial observation of Appellant's tennis shoes did not arouse any suspicion since at the time of Appellant's arrest on violation of probation no identification had been made as to the brand of tennis shoe (R-35). It was only after the seizure of the

shoes by the officer and his subsequent inspection that any similarity at all was noted (R-32). Even then the shoes had to be turned over to the crime scene technician for his expertise in comparing (R-34).

> "For purpose of determining whether evidence was inadvertently discovered by a police officer rightfully in a position to observe it and thus admissible under the plain view exception to the search warrant requirement critical question is whether evidence was in fact exposed to officer's view or whether it was discovered only as a result of search." U.S. v. Bowdach, 414 F.Supp. 1346, Affirmed 5/61 F. 2d 1160, Rehearing denied 5/65 Fed. 2d 163.

During the motion the detective indicated that he seized the shoes because he was curious (R-33). No other reason was given to justify the seizure of Appellant's shoes. This is so because, except for the officer's curiosity, there was nothing recognizable or distinguishable about Appellant's shoes that stirred the officer's inquiry. Appellant's tennis shoes, which were described later at trial, are common high top tennis shoes that in and of themselves are not distinguishable from thousands of any other tennis shoes of various size, shape and color. The detective's seizure of Appellant's shoes based on feelings of curiosity, rather than probable cause or even a reasonable suspicion, is insufficient to justify this warrantless search and seizure. Schneider v. State, 353 So. 2d 870 (Fla. DCA 1977). Also in support see Oliveira v. State, 527 So. 2d 959 (4 DCA 1988) where officer lacked probable cause to believe that

prescription medicine "found in accident victim's pockets while looking for identification" was illegal substance and thus should have been suppressed in subsequent prosecution for possession of illegal drugs. Also in support Sanchez v. State, 516 So. 2d 1062 (3 DCA 1988) where officer, after stopping defendant lawfully pursuant to Terry v. Ohio, 392 U.S. 1, 88 Supreme Ct. 1868, 20 Lawyer's Ed. 2d 889 (1968) not in suspicion of finding any weapon, but rather crack cocaine, ordered defendant to open a clinched fist at which time a small clear plastic bag containing cocaine fell to the ground warranted suppression of evidence.

In addition, the arrest on violation of probation was pretextual to murder charge supporting lack of probable cause or reasonable suspicion. Ackles v. State, 270 So. 2d 39 (4 DCA 1973) where officers in making lawful arrest exceeded the scope of their arrest based search.

Examination of the record reveals that the detective did not fear for his safety, nor was the seizure a precaution for weapons.

In conclusion, the officer's curiosity will not suffice as sufficient cause to seize and search Appellant's shoes.

Wherefore, Appellant moves this Honorable Court for an order vacating Appellant's conviction and ordering suppression of Appellant's shoes in any further trial proceedings.

POINT V

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR STATEMENT OF PARTICULARS

Appellant filed motion for statement of particulars (R-1602 through 1604, 1613) which requested, inter alia, date, time and place of the offense all pursuant to FRCrP 3.140 (h). The trial court denied Appellant's motion with leave for Appellant to move again with good cause and case citations. (R-95) The State, during hearing on the Appellant's motion for bill of particulars, indicated that the place and date had already been provided. (R-93)

Indictment in this matter reflects date of the offense as March 31, 1987 (R-1511, 1512). However, at trial, witnesses testified to dates which would establish the day of the offense as March 30, 1987. In addition, at trial, three different addresses were given for the place of the offense, Mr. Ellis' residence (R-522, R-605, R-764). During hearing on motion the State gave no reason not to supply the date other than it was already stated in the indictment.

FRCrP 3.140(n) states that "the court upon motion shall order the prosecuting attorney to furnish statement of particulars.... Such statement of particulars shall specify as definitely as possible the place, date and all other material facts...". The committee notes in the 1967 adoption of this rule indicate that the only change was the narrowing

of the scope of judicial discretion now granted by statute.

The trial court's denial of Appellant's motion was an abuse of discretion given no excuse, reasonable or otherwise. Contrary to Williams v. State, 344 So. 2d 927 (3 DCA 1977) which the State relied on during motion hearing, the State in this matter failed to prove its case at trial for the same date of offense as contained in the indictment. The court's placing the burden on Appellant to show good cause or case authority was unfair denial of due process and effective assistance of counse since Appellant was asking for nothing unreasonable, but was simply trying to narrow the time period in order to adequately prepare and represent Appellant at trial. In the instant matter Appellant was severely prejudiced by this because the indictment specified one date for the offense while the evidence established another. Since Appellant did not testify or offer evidence at trial it is impossible to know whether or not the difference in date would have prejudiced him in terms of a potential alibi. In a framework which offers a presumption of innocence the accused should be afforded the full use of the rules of procedure as enacted. The use of the statement of particulars is a particularly useful tool which also is time saving and has the effect of narrowing the issues and times for all concerned. This statement of particulars, when furnished, can often or expose the case to the parties so that intelligent negotiation can follow and the accused can

be fully informed as to the offense. With the rules requirement that reasonable doubts concerning the construction of the rule to be resolved in favor of the defendant this motion of Appellant should have been granted in the trial court, and it was an abuse of discretion not to have done so.

Wherefore, Appellant moves for order vacating conviction in this matter.

POINT VI

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ALLOWING TESTIMONY OF WITNESSES AND INTRODUCTION OF DOCUMENTS VIOLATIVE OF DISCOVERY FRCrP 3.220

On May 8, 1987, Appellant filed demand for discovery (R-1976, 1977). State responded with their answer to discovery including witness list May 15, 1987 (R-1978-1981). There were no further answers filed by State or additional lists of witnesses until the day of trial when the State listed as a witness Officer Wilburn of West Palm Beach (R-1983). The Appellant would concede that he was aware of the existence of Officer Wilburn and had in fact been furnished a copy of his police report. Two days into the trial of this matter the State also listed as an additional witness police officer McMillan of West Palm Beach (R-1982). With respect to this officer there had been no report furnished by the State. The only information the Appellant had regarding this particular witness was found in the police report of the investigating officer Perez which stated that the .25 caliber automatic which had been sold to Mr. Ellis was recovered April 29, 1987, by an Officer McMillan of the West Palm Beach Police Department pursuant to an arrest of an Oswald Jones on warrant for aggravated battery. The Raven .25 caliber automatic was found on the front seat of the truck unloaded. At trial and during the motion hearing on this matter it was revealed that Oswald Jones had been arrested with a female

who was a passenger in the truck where the .25 caliber Raven had been seized. The State offered no reason for its failure to list witnesses McMillan or Wilburn or the female passenger. With respect to the missing report this was explained that the State did not have possession of the officer's police report.

It is the duty of the State Attorney to be responsible for evidence which is being withheld by other State agents and the State Attorney is charged with constructive knowledge and possession thereof for discovery purposes. State v. DelGaudio, 445 So. 2d 605 (3 DCA 1984), review denied 453 So. 2d 45. Further discovery violations which aggravated the testimony of Officer McMillan was the State's sudden production of a photograph purportedly that of a person identified as Oswald Jones. Allowing the testimony of Police Officer McMillan along with his use of his police report and the introduction of State's Exhibit 36, photo of Oswald Jones, permitted the State to circumvent the rules of discovery. FRCrP 3.220. Further, the late disclosure prohibited Appellant from any attempt at rebuttal or investigation. In short, this was surprise testimony and evidence which was not possible because of the death of the listed witness Oswald Jones. In this case there had been six pretrial conferences which the trial court included in its order of special trial procedures to be observed including

pretrial marking of tangible exhibits. Waiting until two days into trial and a day before presentation of evidence in a capital murder case of what was important corroborative evidence for the State violates the trial court's order on pretrial conferences and the Florida Rules of Discovery 3.220 and is a denial of Appellant's due process and also does deny Appellant his effective assistance of counsel.

The State's misuse of the rules of discovery required reversal in Barnett v. State, 444 So. 2d 967 (1 DCA 1983), where the State used a statement of witnesses taken during a deposition as evidence in trial when the use of depositions was not to refresh witness recollection or impeach witness. Similarly, the testimony of Officer McMillan, the use of his police report and State's Exhibit 36, photograph of Oswald Jones, should have been stricken as evidence in this matter. The burden is on the State to show there has been no prejudice to the Appellant. Hill v. State, 406 So. 2d 801, 1981.

The testimony of Officer Wilburn did nothing but link Appellant to a scene of violence with a firearm. The State's earlier promise that recovery of the shell casings would establish time in the case was not fulfilled.

Another discovery violation and cumulative to prejudice of the Appellant was the introduction of a vehicle registration, State's Exhibit 31, which established ownership of the vehicle recovered as that of the victim Mr. Ellis (R-

802). Establishing the ownership of the vehicle was important to the State's case and was only proven by an exhibit which had never been furnished to Appellant in discovery. The objection of Appellant at trial was overruled by the court which rationalized the vehicle information had been furnished to Appellant in the form of the teletype that had been transmitted regarding recovery of Mr. Ellis' car equating that since the information was the same then the document which included much of the same information could, therefore, not be prejudicial. This, again, overlooks Appellant's right to effective counsel and the State's obligation to provide list of witnesses and furnish Appellant with all documents or exhibits it intends to use at any trial or hearing. FRCrP 3.220(a)(1)(xi). The purpose of discovery rules is to help a defendant prepare his case. Ivester v. State, 398 So. 2d 926, review denied, 412 So. 2d 470, appeal after remand 429 So. 2d 1271, review denied, 440 So. 2d 352. In addition, the purpose is to avail the defense of evidence known to the State so that convictions will not be obtained by the suppression of evidence favorable to a defendant or by surprise tactics in the courtroom. Cooper v. State, 336 So. 2d 1133, cert. denied, 97 Supreme Ct. 2200, 431 U.S. 925, 53 Lawyer Ed. 2d 239. Appellant was severely prejudiced by the aforementioned discovery violations for which the State has offered no good excuse. Holding back evidence that is

relevant to issues is reversible. Neimeyer v. State, 378 So. 2d 818, (2 DCA 1979), where State withheld information bearing on defendant's self-defense claim. Also, Jones v. State, 376 So. 2d 437 (1 DCA 1979), where State held back statement which might have affected defense tactics.

Review of the record will reveal Appellant was diligent in discovery in this matter deposing all lay witnesses and the lead investigators. Thomas v. State, 374 So. 2d 508, cert. denied, 100 Supreme Ct. 1666, 445 U.S. 972, 64 Lawyer Ed. 2d 249, stay granted, supplemented 788 Fed. 2d 684, stay denied, cert. denied, 106 Supreme Ct. 1623, 475 U.S. 1113, 90 Lawyer Ed. 2d 173.

As a result of the foregoing the judgment and sentence should be vacated and Appellant granted a new trial.

POINT VII

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN OVERRIDING THE JURY ADVISORY OPINION OF LIFE BY IMPOSING A SENTENCE OF DEATH

On May 27, 1988, the penalty phase in this matter began with Appellant presenting evidence of nonviolence through the testimony of Appellant's mother, father, and a friend. In addition, a school psychologist testified that Appellant's school tested I.Q. was 54 and that Appellant attended classes for the mentally handicapped students. Appellant's low I.Q., it was testified, would make for his verbal slowness and would interfere with his ability to understand abstract terms (R-1454). The inability to understand abstract terms would diminish Appellant's ability to understand the consequences of his acts (R-1455). At conclusion of the evidence the trial Court instructed the jury on three possible aggravating circumstances and four mitigating circumstances (R-1485). After deliberation the jury returned an advisory opinion of life imprisonment without possibility of parole for twenty-five years (R-1855). After receiving the opinion the trial Court recessed for the noon hour and returned thereafter to sentence Appellant. After reviewing the evidence the Court, in its amended findings of fact, found two aggravating circumstances to exist beyond a reasonable doubt. One, that the capital felony was committed while the Appellant was engaged in the commission of a robbery. Two, that the

capital felony was especially heinous, atrocious or cruel.

With respect to the aggravating circumstance, Section 921.141(5)(d)...."the capital felony was committed while the defendant was engaged in the commission of a robbery." This circumstance was proven, the Court found, by the jury verdict of finding the Appellant guilty of first degree felony murder. Use of this circumstance as aggravation in the instant matter is in the form of improper doubling because this is an aggravating circumstance that would always be found in any instance where a defendant was found guilty of felony murder involving one of the enumerated felonies pursuant to Section 921.141(5)(d). Imposition of the death penalty based upon the foregoing aggravating circumstance when in combination with a jury finding of felony murder is duplicitous and violative of the finding in Furman v. Georgia, 408 U.S. 238, 92 Supreme Ct. 2726, 33 Lawyer's Ed. 346 (1972), and State v. Dixon, 283 So. 2d 1, 9 Fla. (1973). In the latter it was stated:

> "What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies..." (emphasis added)

Use of the underlying felony to supply both premeditation and an aggravating circumstance does not result in setting the crime apart from the norm of capital felonies. Further, the double use of the underlying felony is not an additional act and, therefore, should not be considered as an aggravating

circumstance.

With respect to the finding that the capital felony was especially heinous, atrocious or cruel, the trial Court relied on the fact that that the Appellant and victim were not strangers, the number of slash and stab wounds, including defensive wounds, and the conclusion that the victim experienced pre-death apprehension of physical pain and of impending death (R-1877). On point and in support of trial Court's findings with respect to impending death and multiple stab wounds are Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987) and Nibert v. State, 508 So. 2d 1 (Fla. 1987). However, these cases can be distinguished from the instant matter in that in those cases the evidence of the aggravating circumstance came from the defendant's statement and an eye witness to the condition of the victim shortly before death. The instant matter is neither, and the trial Court must rely solely in finding the circumstance on the evidence of the crime scene and the testimony of the medical examiner that Mr. Ellis could have been conscious for five minutes (R-1242).

The fact of multiple stab wounds is ambiguous and in and of itself cannot establish the aggravating circumstance, and even if proving the circumstance is still insufficient to override jury recommendation of life imprisonment. See Hansbrough v. State, supra, where medical examiner identified

thirty-one stab wounds with several defensive wounds, aggravating circumstance found but no reason to override jury recommendation. Also, Burch v. State, 343 So. 2d 831 (Fla. 1977), where victim's thirty-one stab wounds were indicative of defendant's mental history; and similarly, Jones v. State, 332 So. 2d 615 (Fla. 1976), where jury override was improper on victim who had been stabbed forty times, mitigated by defendant's diminished capacity.

Since the trial Court imposed the sentence of death upon Appellant over the jury's advisory opinion of life "...the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

The jury's opinion in the instant matter rendered after hearing all the evidence and the Court's instruction was entitled to great weight reflecting the conscience of the community and should not be exceeded unless there was no reasonable basis for the opinion. Bowman v. State, 437 So. 2d 1095 (Fla. 1983). The trial Court did not explain its reason for rejecting the jury's advisory opinion, but simply found the aggravating circumstances to outweigh any mitigating circumstances. In effect, disagreed with the jury's conclusion. The testimony of the school psychologist was persuasive regarding Appellant's inability to appreciate the consequences of his acts. In addition, in evaluating the

testimony of Appellant's mother and father and a friend the jurors could have concluded that Appellant would be or could be a useful and rehabilitated member of society. Certainly, the death penalty was too harsh for this Appellant and his crime. On this point the jurors must have considered the Appellant's young age and thought the positive of rehabilitation over the finality of death. In addition, the testimony regarding Appellant's use of drugs in the penalty phase may have been a factor which jurors concluded robbed him of his ability to conform his acts to the law; that is, only a very dangerous drug could cause an otherwise likable young man to commit such acts of violence. Finally, the jurors may have also concluded that Mr. Ellis was contributorily negligent in his practice of entertaining young men to satisfy his homosexual desires. In fact, jurors could have even considered that Mr. Ellis may have been just completed or beginning to engage in an illegal non-consentual sex act. In conclusion, the trial Court had only the defendant's prior record as additional evidence upon which to override this advisory recommendation. Appellant's convictions for burglary and grand theft are not sufficient to override jury recommendation. As a result, imposition of Appellant's sentence for death should be vacated.

CONCLUSION

Appellant was severely prejudice in trial on capital murder by State's introduction of evidence showing crack cocaine use, dealing in stolen property, theft and assaultive use of a firearm.

In addition, through late production of witnesses and documents, appellant was faced with surprise testimony and thus denied a fair and impartial trial and effective assistance of counsel. Further magnifying these discovery violations was the Court's denial of appellant's motion for statement of particulars requesting date, time and place.

Statement and shoes seized from appellant should have been suppressed because they were the product of a pretextual arrest on technical violations of probation.

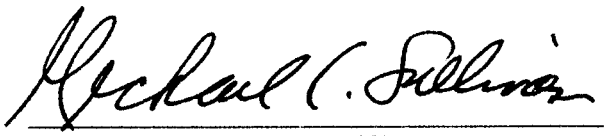
Evidence at trial was insufficient to support a charge of capital murder and the trial Court should have directed verdict of acquittal in favor of defendant as to that charge.

Override of jury recomendation was improper where aggravating circumstances were not proved beyond a reasonable doubt and if so did not outweigh mitigating circumstances and were insufficient to override jury verdict.

Appellant requests that conviction in this matter be vacated and that his case be remanded to the trial court for new trial with evidence of the seized shoe and his statement to be excluded.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to Deborah Guller, Esq., Dept. of Legal Affairs, 111 Georgia Ave., Room 204, West Palm Beach, FL 33401, this 1st day of September, 1989.



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