IN THE SUPREME COURT OF THE STATE OF FLORIDA

EDWARD EUGENE RAGSDALE,

Appellant,

v. **Case Number: 72,664**

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM A **JUDGEMENT**
AND SENTENCE OF THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CURCUIT, IN
AND FOR PASCO COUNTY, FLORIDA, WHEREIN
A SENTENCE OF DEATH WAS IMPOSED

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

I. Whether a Defendant in a Capital Case should be Allowed to Question Prospective Jurors on Voir Dire with Regard to their Willingness to Impose a Similar Penalty to that Imposed Upon a Co-Defendant, If they should Conclude that the Defendant's Level of Culpability was Equal or Lens.

II. Whether it is Error to Impose the Death Penalty When a Jury has Recommended Death, But Also Indicated that the Defendant was Less Culpable than a Co-Defendant Who was Sentenced to Life Imprisonment.

III. Whether the State is Obligated to Provide Notice, in the Charging Document, of Aggravating Circumstances Intended to be Used in the Penalty Phase of Trial.

IV. Whether Section 921.145, Florida Statutes, Violates the Separation of Powers Between the Law-Making Function of the State Legislature and the Rule-Making Function of the Judiciary.

V. Whether Sections 782.04 and 921.141, Florida Statutes, are unconstitutionally Vague and Overboard.

VI. Whether Chapter 782.04, Florida Statutes, Calls for Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

VII. Whether Chapter 782.04, Florida Statutes, Calls for Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

VIII. Whether Death by Electrocution as Provided €or in Section 922.10, Florida Statutes, is Cruel and Unusual Punishment without Penological Justification and A Denial of Due Process of Law, Contrary to the Eighth and Fourteenth Amendments to the Constitution of the United States.

IX. whether Chapter 775.082, Florida Statutes, is in Violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and to Article I, Section 2, 9 and 16 of the constitution of Florida.

X. Whether Chapters 782.04 and 921.14, Florida Statutes, are in Violation of the Fourteenth Amendment to the United States Constitution in that their Overall Effect is to Place the Burden of Proof upon the Defendant During Sentencing.

SUMMARY OF ARGUMENT

The first issue raised by Appellant contends that the court below erred in not permitting counsel to make indirect references to the conviction and sentence of a co-defendant, during voir dire. By prohibiting such references, the court prevented Appellant from determining whether jurors were willing to apply the principle that "Defendants should not be treated differently upon the same or similar facts."

Appellant's second issue argues that the court below also erred its response to a jury question which indicted that the jury considered Appellant to be less culpable than his co-defendant. This error led the court to substitute it own judgment on a question of fact €or the judgment of the jury, creating a fatal flaw in the court findings in support of the death sentence.

The other issues raised by Appellant present a series of questions relating to the constitutionality of the Florida death penalty statutes. All of these questions have previously been considered by this court.

LIST OF CASES CITED

FLORIDA CASES

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FOREIGN CASES

FLORIDA STATUTES

FOREIGN STATUTES

OTHER AUTHORITIES

SUPREME COURT OF FLORIDA

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

On the evening of January 1, 1986, Ernest Mace of Zephyrhills, Florida, was robbed and murdered. The next door neighbor, Samuel Morris, saw Mace alive at about 9:00 p.m. (R260). He later heard noise "just like slamming furniture and things" and went to Mace's mobile home to investigate. No one answered the door and Morris presumed that Mace had gone to bed until he looked back and, through a window, saw someone in Mace's kitchen "messing with the light". (R261). Morris later identified Appellant as the man he had seen through the window (R262). Morris knocked on Mace's door a second time and two men ran out the back way. One ran down the street and the others ran into an orange grove. Morris chased man until he heard his girlfriend call him back to Mace's trailer (R264) where he found Mace, badly beaten with his throat cut "from ear to ear". (R265, 267, ***286)***. Morris tried to ask Mace who did it. Mace was unable to talk, but, by nodding, indicated that he knew who had injured him. Morris asked "was it Mark" and Mace responded with a negative nod. (R267). Emergency rescue workers arrived with an ambulance, but Mace died en route to the hospital. (R288).

Within a few days, through means not clear from the record,

the Pasco County Sheriff's Office concluded that Appellant was involved in the murder, together with a younger man named Leon Illig. Shortly afterward, in the course of their investigation, Sheriff's deputies obtained a statement from Appellant's cousin, Carl Florer, indicating that on the day following the murder, Appellant stated that he had "cut the old man's throat. (R300-302). Bulletins were sent out notifying law enforcement agencies that Appellant and Illig were sought in connection with a murder investigation.

On January 12, 1986, Appellant was arrested in Alabama on a fugitive warrant issued in 1985 when Appellant's Alabama parole officer reported that Appellant had left the State without permission. Appellant had been placed on parole in 1984 in connection with a charge of selling marijuana. (R680-683).

While processing Appellant's arrest, Alabama authorities discovered that he was wanted in Florida as a suspect in the case here appealed. The Pasco County Sheriff's office sent Deputy McNulty to Clanton, Alabama, on January 14, 1986, to question Appellant. (R446). After being advised of his rights and, while being tape recorded, Appellant made his first confession, in which he admitted going with Illig to "Ernie's" mobile home intending to rob him. (R457) This confession stated that Appellant and Illig beat Mace up, that Appellant left Illig with "Ernie" and went to the back room and that when he returned, blood was all over the floor and Illig declared, "I cut the man's throat. I had to kill him or he could identify us." (R457). According to this first confession, Appellant and Illig fled the scene, taking different paths. Appellant returned to La Flamboy's car and drove around looking for Illig, did not find him, and returned to La

Flamboy's residence where Illig later appeared, without his clothes "about to freeze to death", driven there by his mother to whom he had explained that he had "got in a fight with another boy, beat him up pretty bad". **(R457-460).** He also described attempts by Illig's family to get him out of the country. **(R465).** This first confession repeatedly declared that Appellant had not been an active participant in cutting "Ernie's" throat **(R457, 460, 463, 469) and** admitted telling others that **"a** man got his throat cut. I imagine he's dead, and I felt sorry for what I had to do with it."

On January **16, 1986,** the Grand Jury in Pasco County returned indictment charging Illig and Appellant with first degree murder and armed robbery. (R775).

Following extradition to Florida, Appellant was arrested on April 18, **1986.** The following day he was found to be insolvent and William R. Webb, Esquire, was appointed **as** counsel. Prior to arraignment date, May 12, 1986, Webb filed a plea of not guilty and sought discovery. **(R776-778).**

On August 28, **1986,** Webb moved **to** dismiss the indictment or in the alternative to declare that death was not a possible penalty in Appellant's case. **(R813-814).** Supported by **a** memorandum of law **(R780-787).** The motion and memorandum argued that Florida law provides insufficient notice **of** aggravating circumstances and consequently denies due process of law at the sentencing phase. The motion also argued that the court lacked jurisdiction to impose the death sentence, because the indictment did not allege aggravating circumstances.

The same day, Webb filed a motion to compel a release of police reports in discovery, (R788-789) to appoint a confidential expert to determine Appellant's competency (R790) and a motion to dismiss the indictment with regard to the penalty circumstances. (791). The substance of this motion was that Section 921.141 Florida Statutes is unconstitutionally vague and overbroad and in contravention of the United States Constitution and the Constitution of Florida.

On September 3, 1986, Webb moved for continuance (R795) and refiled copies of the earlier motions. He also filed a new motion, consolidating issues raised in earlier pleadings. This was styled Motion to Dismiss - I. (R818). Webb also filed a motion to declare Florida's death penalty statute unconstitutional or in the alternative to strike portions of the statute. This motion argued that use in Chapter 921.141(6), Florida Statutes, of qualifying words such as "extreme", "significant", "relatively" and "substantial" has an effect of requiring a threshold of extent or degree before a circumstance could be Considered mitigating by a jury during the penalty phase. This, the motion argued, contravenes the Eighth and Fourteenth Amendments to the United States Constitution.

The same day, motions to dismiss numbered II through VII were filed. Motion to Dismiss - II raised the question whether Chapter 921.141, Florida Statutes was an unconstitutional infringement upon this court's right to adopt all rules far practice and procedure. (R817). Motion to Dismiss - III argued that the same statute is unconstitutional in that it violates rights of due process, equal protection of law and protection against cruel and unusual punishment. (R827-828). Webb argued that the death penalty has no penological justification, being no

deterrent to crime and that it was applied in an arbitrary and discriminatory manner.

Motion to Dismiss - IV argued that Chapter **925.145** is unconstitutionally vague, indefinite, ambiguous and uncertain and deprives a Defendant in a capital case of sufficient knowledge of the charge and opportunity to prepare a defense. (R825-826). This motion also repeated arguments raised in other motions as to the provisions for aggravating and mitigating circumstances being vague and overbroad.

Motion V argued that Chapter 782.04 is unconstitutionally vague and overbroad in that it makes insufficient dietinction between murder in the first degree and murder in the second degree. **(R824).**

Motion VI argued that death by electrocution is cruel and unusual punishment in violation of the United States Constitution and the Constitution of Florida. **(R829-830).**

Motion VII also argued that the death penalty under Florida law constitutes cruel and unusual punishment in that Chapter **921.141,** Florida Statutes, contains within itself at least one aggravating circumstance applicable to ever first degree murder and coneequently **requires** the Defendant to go forward with attempts to prove mitigating circumstances to overcome the aggravating Circumstances. **(R831).** A memorandum of law accompanied this motion. (R832-836).

All of the motions, except the motion to compel police reports, were denied on October 3, **1986.** **(R837).**

By January, 1987, differences had arisen between Appellant and his attorney and Webb was allowed to withdraw. **(R840).** A.J. **Ivie,** Esquire, **was** then appointed as Appellant's counsel and trial was once again continued. **(R843-844).**

Ivie filed a motion to suppress Appellant's confessions. (R845-846). The motion alleged that the confession was "the products of coercion and intimidation by virtue of implied promises and threats" made by law enforcement officers after Appellant had been read his rights.

Meanwhile, Appellant's co-defendant, Leon Illig, retained private counsel, entered a plea of nolo contendre and was sentenced to the custody of the Department of Corrections for life. (R729,735, 916 - Defenae Exhibit "J"). On April 16, 1987, he was named as a witness against Appellant. (R847).

On April 16, 1987, the court heard testimony on attorney Ivie's motion to suppress and denied the motion, finding that the statements were freely and voluntarily made. (R848).

Upon Appellant's motion, trial was again continued and, in June, Ivie moved to withdraw based upon irreconcilable differences between attorney and client. (R853, 856, 857). E. Summers Sheffy, Esquire, wae then appointed and immediately withdrew, having at on@ time represented Illig. (R858).

Robert Focht, Esquire, was then appointed. (R859). He immediately moved to withdraw on grounds that he was in partnership with a former State's attorney who had participated in the investigation of the case. (R860). Attorney Marc H. Salton, Esquire, was then appointed and immediately withdrew because of a conflict. (R861-862).

In August, the court appointed attorney Robert Culpepper, Esquire, as Appellant's counsel. (R862). Culpepper would carry the case through jury trial.

Culpepper moved for continuance. (R863-864). At hearing on

the motion on September 15, 1987, Culpepper apparently also made a motion ore tenus for the court to consider the ethical property of appointed counsel's representation. (R865). The court found that Culpepper could represent Defendant and continued the pre-trial conference in November, 1987. (R866).

In November, Culpepper filed a "Motion to Reveal Promises, Deals and Rewards to Witnesses" (R867) and a motion to compel discovery. (R869-870).

The motion to compel discovery sought disclosure of the results of blood tests conducted on the clothing worn by Illig on the night of the murder.

The case was again continued to December (R871) and then to January, 1988. (R872).

In December, Culpepper moved to suppress Appellant's confession. (R875-877). The motion was on substantially the same grounds as the motion made and argued by attorney Ivie. At hearing the court observed that a similar motion had already been ruled upon and ordered a transcript. (R881).

In January, Culpepper moved for continuance and also filed a demand for discovery specifically seeking results of a lumenol test conducted on Illig's clothing. (R880).

A second demand sought copies of composite drawings prepared from the accounts of witnesses who had seen the two men who fled Mace's trailer the night of the murder. (R882).

A motion to appoint a confidential expert to perform additional chemical tests was also made in January. (R885-886). The motion was granted. (R888).

A third demand for discovery was filed by Culpepper in February, seeking a list of all property receipts and copies of all photographs showing the luminesence of Illig's clothing. (R889).

Shortly afterward, Culpeppr filed a motion to compel discovery, specifically referring to the blood *tests* performed on Illig's clothing. (R890-892). This motion also sought an alleged video tape of the victim's residence. This motion was granted. (R899).

In March, Culpepper again moved for continuance. (R894-896). This motion was apparently resolved at pre-trial conference, and trial was set for May 2, 1988. (R897).

On March 15, 1988, the court appointed a non-confidential expert to perform serological and other chemical examinations of the clothing of Leon Illig, together with the luminesence photographs and other evidence. (R900-901). Two days later, the court ordered that Appellant be provided with a complete list of all tangible papers and objects obtained from the accused or other peraons. (R902).

Shortly before trial, the State moved in limine for an instruction that Appellant and his counsel make no reference to, or other attempt to convey to the jury, the conviction of Illig and the sentence he received. (R903)(A1). After a brief hearing, within minutes of defense counsel's receipt of the motion, the court granted the motion, ordering no reference to Illig's conviction and sentence during voir dire. (R9, 906)(A2). This motion was granted in part. (R906).

The State's first witnesses were Sam Morris and Vicki Martin. Morris described his visits to Mace's trailer and the night of the murder and identified Appellant as one of the two men he had seen

fleeing the trailer. (R262). He also described the crime scene and Mace's indications that his billfold was missing and that he knew who had attacked him. (R262-270). Martin, a paramedic, described Mace's condition when rescue workers arrived on the scene and described his death en route to the hospital. (R286-289). Both Morris and Martin indicated that there was significant amount of blood on the floor, door and walls of the mobile home. (R292-294).

A photograph of the crime scene was admitted into evidence over a defense objection as to the inflammatory nature of the picture. (R289-291).

The next witnesses were Appellant's cousin, Carl Florer, and his brother, Terry Ragsdale. Florer testified that shortly after the murder, he heard Appellant say "he hit him a couple of times and cut his throat". (R303). Terry Ragsdale testified that when Appellant came back to Alabama, accompanied by "a girl and three kids", he told family members that he had an altercation with "Ernest Kendricks" concerning a drug transaction. The fight ended with "Kendricks" having his throat "slit from ear to ear". (R313-314). Terry Ragsdale identified a knife which Appellant had given to a younger brother and testified that Appellant said that he and another person were trying to rob "Kendricks". (R320). The knife was admitted into evidence. (R312).

Detective Fay Wilbur of the Pasco County Sheriff's Office, one of the investigators at the crime scene, identified Mace's wallet and other papers found along the conjectured route taken by Appellant from Mace's trailer to La Flamboy's residence. (R332-325). Appellant's counsel objected to the witness referring to the conjectured or assumed route. (R325). The court observed that no objection was made when the

witness described the route and commented "I probably would have sustained it if you had objected earlier, but I thing I've got to overrule it now." (R326). The wallet and other items were entered into evidence without objection. (R328-329).

Paul Strange, the decedent's landlord testified (over objection) that Mace was a "peaceful sort of person" who did not "use drugs". (R332). He also testified to having identified Mace's remains. (R333).

Deputy Curtis Page, a crime scene technician, identified various photographs of the crime scene, some blood stained rags and the plaster cast of a shoe print found approximately one hundred yards from the trailer. (R336-341). Page testified that latent fingerprints were found to be available for use. (R337, 351). Appellant's trial counsel objected "for the record" to introduction of those photographs which had not been provided in pre-trial discovery, but agreed that the pictures were not crucial and did not prejudice Appellant's case. (R345). The photographs were admitted into evidence. (R348 . Deputy Page also described the blood stains and spatters on the wal . (R354-356).

The State called Dr. Joan Wood, Chief Medical Examiner for the Sixth Circuit. Dr. Wood testified as an expert forensic pathologist. (R362). She testified that the decedent had been struck in the face and head several times and had received four separate cutting wounds to the neck. (R363-365). she indicated that one of the cuts was much deeper than the other. (R366). She determined that Mace died from bleeding from the cuts to his neck. The court overruled objections to testimony indicating that a knife wound to Mace's finger appeared to be a

defensive wound. (R370-371).

On cross-examination, Dr. Woods indicated that the one deeper cut to the neck was the fatal wound. (R382, 384). On re-direct examination, Dr. Woods clarified her testimony to say that death was caused by an accumulation of all of the wounds and the blood stains on the wall and door were consistent with the decedent having been seated next to the door when received the injuries. (R386-387).

The State next introduced testimony of Cindy La Flamboy who stated that she was living with Appellant's co-defendant, Leon Illig. She said that Appellant borrowed her car shortly after 9:00 p.m. on the night of the murder "to collect some money and then stop at the liquor store before it closed." (R398). He and Illig left together in her car, she said. (R397-399, 414-416)> About forty-five later, Appellant returned with the car, but without Illig. La Flamboy stated that Appellant was "upset, uptight, nervous" and remarked "I hope that Leon didn't get caught." (R399).

La Flamboy further testified that about fifteen later, Illig returned to her home, driven by his mother, wearing only his shorts, without the shoes, jeans, shirt and jacket he had worn when he left. (R399, 400, 419). A confrontation occurred between Appellant and Illig, according to La Flamboy, during which Illig struck Appellant and remarked "you didn't have to kill that man." She also stated that she saw Appellant cleaning blood from a pocket knife, in her kitchen sink. (R403).

After news of the murder appeared in the newspaper, La Flamboy testified, she took Illig to the bus station and then drove with Appellant to Alabama. (R407). She also testified that Appellant gave

her $220.00 which surprised her because Appellant was unemployed at the time. (R402, 408).

According to La Flamboy, while they were en route to Alabama, Appellant told her "how he went into the trailer and how he slit the old man's throat" and took some money. (R408-409). She identified the knife already admitted into evidence as the one Appellant customarily carried. La Flamboy returned to Florida shortly after leaving Appellant at his mother's home in Alabama. (R411).

On cross examination, La Flamboy admitted that there were no blood stains on Appellant's clothing and that, when she returned from Alabama, she was wearing Appellant's jacket. (R417-418). She later turned it over to Detective Wilbur. (R418). She also acknowledged that it was cold when Illig returned, wet and shivering, clad only in the jogging shorts he usually wore under hie jeans. (R420).

La Flamboy added that when Illig arrived, he asked her to "get rid of his mother" while he took a shower. He also told her that "there was a warrant for his arrest and he was afraid, so he hauled ass", went to Zephyr Lake, buried his clothes and went to the nearest phone and called his mother. (R421). After Illig's mother had left, he told La Flamboy that he and Appellant had gone to Mace's residence, that "they hit him two or three times", that he had gone to the back of the trailer to see if there was anything of value and when returned to the front room "Eugene was slicing the old man's throat". (R423-426). Illig also told La Flamboy that someone knocked on the door and Appellant tried to "spook whoever it was away" (R423) and then "came back and finished the old man off". (R424). By La Flamboy's account of what Illig told her, Illig was in the hallway on his knees to avoid being seen through the

window, while Appellant murdered Mace. When the two men fled the scene, Appellant took the car leaving Illig to proceed on foot to Zephyr Lake where he buried his clothes and called his mother. (R424). She also stated that Illig told her "blood squirted on him before they left the trailer. (R425).

La Flamboy also testified on cross-examination that a couple of weeks after her return from Alabama Illig returned to her residence and she notified Detective Wilbur, who had previously inquired her about her boyfriend. **(R432-434).**

When asked if she knew Appellant's reputation for telling the truth, she replied, "He's just a bull shitter, half of what he says might be true and other half might not." **(R438).** On re-direct she indicated she thought he was being truthful during their conversation in the car on the way to Alabama. **(R439).**

The state introduced testimony of former deputy William McNulty who testified as to Appellant's confessions **and** acknowledged that the tape recording and transcripts were true **and** accurate records of the confessions. **(R450).** Appellant's counsel repeated objections to the introduction of the confession, made earlier in **a** motion to suppress evidence, and was again denied. **(R452).** Assistant State's Attorney Alweiss and the witness then proceeded, without objection, to read the transcripts to the jury, Alweiss reading the part of Appellant. **(R454).** In the first confession **(R454-469),** Appellant denied having committed both the murder and the robbery, but admitted to being present and to throwing Mace to the floor. He insisted "Leon done the rest of **it".** (R463). In the second confession, Appellant admitted striking and McNulty also verified having taken Appellant's confession which stated

that after arrival at Mace's trailer "I grabbed him throwed him on the floor. I thought he was going €or a gun." Appellant then added, "I cut him, Leon took the knife from me, and the cut the man's throat. He said, "Let me show you how its done." **(R471-473, 477-480, 483).**

The second confession included an admission that the knife used belonged to Appellant **(R472-473)** and that he had taken Mace's money and given it to La **Flamboy. (R474).** Appellant added that Illig told La Flamboy that he had "cut the man's throat... I cut his throat all the way through, you know, doing enough you know he would bleed to death." **(R475, 484).**

The second confession also supplied references to the neighbors who interrupted the crime, along with details of Appellant's routs after leaving Mace's mobile home and his disposal of Mace's wallet. **(R475, 476, 479-484).** Appellant also admitted giving the knife to one of his brothers. **(R487).**

Both of Appellant's confessions emphasized his contention that Illig had administered the fatal cut. **(R487-488).**

McNulty also identified the sneaker he obtained from Appellant, which was then admitted into evidence without objection, **(R489).**

The State's last witness, Edward Guenther, a crime laboratory analyst testified that he had examined the shoe and the plaster cast of **a** footprint taken from the crime scene and opined that the footprint cast "could have" been made by Appellant's shoes. (R501). He did, however, indicate that this was a class comparison only, not a positive identification. **R502).** The plaster caste were admitted into evidence without objection **(R499-500).**

The State then rested its case and the court denied a motion for directed verdict. (R504-505).

Appellant's counsel attempted to call Illig, but during a proffer in open court, Illig pled the Fifth Amendment. "I want to take the Fifth, I don't want to say nothing." (R507). A request to allow Illig to plead the Fifth Amendment in the jury's presence was denied. (R509). The defense then rested without presenting testimony. (R509).

When the court conferred with counsel regarding jury instructions, Appellant's counsel renewed his motion €or judgment of acquittal and was again denied. (R512).

It was agreed that the court give instructions on murder in the first, second and third degrees, on manslaughter, armed robbery, robbery with a weapon other than a deadly weapon, unarmed robbery and attempted robbery. The court and counsel alsw agreed to instructions on aggravated battery, battery, assault, grand theft and petit theft. (R513-521).

The State proffered an additional instruction on flight, Appellant's counsel had no objection. (R523). They also agreed upon various standard instructions including principal and accessory, reliability of evidence and statements and defendant not testifying. (R523-529).

Appellant's counsel requested all instructions requiring the jury to consider whether a witness had received money or preferred treatment or had pressure or threat applied to affect the testimony. The State objected, asserting that La Flamboy denied being threatened. The court decided not to give that instruction. (R530).

The court and counsel agreed upon instructions regarding statements claimed to have been made by defendant outside of court. (R531).

Over the State's objection, the court also decided to give instructions on the maximum and minimum penalties for murder. (R531

Following closing argument, (R537-587), the court instructed the jury (595-623). Appellant's counsel was then asked if it wished to renew any objections. Instead, Culpepper asked the court to repeat the opening instruction that the indictment was not evidence. The court declined to do so. (R624-625). No objection was made to the instructions as delivered. (R625). On May 4, 1988, the jury returned a verdict of guilty of murder in the first degree and of robbery with a deadly weapon. (R623-637).

On May 5, 1988, the court and jury convened for the penalty phase of the trial and received evidence in mitigation (R 673-715). The State called Cindy LaFlamboy and Appellant's Alabama parole officer, Roy Brown. LaFlamboy testified that so far a8 she knew, Illig, was not acquainted with Mace and that Ragsdale had admitted in her presence that Mace was killed "because he could identify him". (R 675) On cross examination, LaFlamboy admitted that she was Illig's Fiancee, that she helped Illig and Ragsdale leave the state, and that Ragsdale had no blood on his clothing when he returned to LaFlamboy's on the night of the murder while Illig returned with no clothes except €or his shorts. (R676-677). Brown testified that Appellant was on parole in Alabama and had left without permission in August 1985, causing an arrest warrant to be issued. (R *680-682).*

The Defense called Terry Ragsdale, to testify about the

character and history of Appellant. Terry Ragsdale's testimony was that he had spent "close to 30 years" with his brother and that the Appellant was not a violent person. He also testified that Appellant "ran his mouth a lot" and was a "follower" type person. (R 686-688) Terry also testified that Appellant was blind in one eye from a childhood accident (R 690-691). On cross examination, Terry Ragsdale admitted that Appellant was a "bully" and "got mean" when on dope. (R692-693). Terry Ragsdale also admitted that Appellant would do anything "if he was mad enough". (R693). He added that Mr. Mace was a family friend and that he thought Appellant's statement that he cut a man's throat was false "You can't believe what he says half the time". (R694) On redirect examination, Terry Ragsdale stated flatly, "I don't think he's got the guts to kill somebody". (R698)

Before final argument;, the court conferred with counsel in chambers. Mr. Culpepper stated his intention to introduce a certified copy of Mr. Illig's sentence and objected to a reading of the instruction on "cold calculated and premeditated murder" arguing that from the testimony it appeared that the murder was a "monetary decision". (R700) The court concluded that it would give the instruction. (R702) The court read all requested instructions on mitigating circumstances, over the State's objection to the instruction on age. (R710-712)

In August, during the sentencing phase, Assistant State Attorney, Jack Jordan argued that the crime was committed while Appellant was under a sentence of imprisonment, that the murder occurred during an armed robbery, that the crime was committed for financial gain, that the murder was especially wicked, evil, and atrocious and

that it was committed in a cold, calculated, and premeditated manner. Jordan also argued that mitigating circumstances did not apply, and that the jury should recommend the death sentence. (R716-732).

Appellant's counsel pointed out that Leon Illig had plead nolo contendere and received a sentence of life imprisonment. (R735). He addressed the mitigating circumstances of murder for financial gain by pointing out that Illig's lover, LaFlamboy, was the ultimate recipient of the stolen money. (R737). Culpepper also questioned LaFlamboy's testimony, calling attention to the fact that she was Illig's fiancee. He also drew attention to Appellant's confession statement that he cut Mace, and then Illig took away the knife saying, "let me show you how it is done" and slit Mace's throat. (R 740-741).

Culpepper reviewed testimony as to the extensive blood stains in the trailer, the absence of blood stains on Appellant's clothing and the fact that Illig hid his clothed in a lake on a cold, mid-winter night, while fleeing the scene of the crime. "It doesn't take anything more than common sense to conclude he had blood all over him". (R 742-746).

The court then instructed the jury and asked if counsel for either side had any objection. There were none. (R 754). One Juror asked if they would be polled as to their individual votes and was told they would not. (R 754-755). The jury was sequestered and the court reconvened. (R 757).

The Court returned when the bailiff reported that the jury had a questian, "We would like a legal definition of no contest, nolo contendere." After same discussion, the court and counsel agreed to a definition from Black's Law Dictionary. (R 769) The jury had a second

question which was, "Is it unjust, just to sentence the defendant to a greater sentence (death) than the accomplice, if based upon the testimony heard by the jurors, the jurors believe that the defendant may have had a lesser part in the murder?" (R 762). The court immediately announced that it would respond to this question by reading the instruction that deciding a verdict is the exclusive province of the jury. (R762)(A3).

One of the jurors asked if the State had the right to rebut Culpepper's remarks in the penalty phase and was told, "no". (R 763) The same juror asked about rewording the question on different sentences €or codefendants to include the wording, "should the jury consider the fact that..." but was interrupted and abruptly told by the court "I can't help you anymore on that. That is your decision.'' (R763)(A3 pg.7). The court again directed that the jury return to it's deliberations. (R764).

The court returned upon the Bailiff's announcement that a verdict had been reached. The verdict was that a majority of eight to four recommended the death penalty. (R 923)

Appellant was sentenced to death an May 13, 1988. (R 926-929) The court's findings in support of the death penalty (R 914-917)(A4) found three aggravating circumstances: The crime occurred when appellant was on parole, under a sentence of imprisonment; the murder occurred during a robbery and was committed €or monetary gain; the crime was extremely wicked, evil, atrocious and cruel. The court specifically supported the last finding by referring to the defendants' ages, the severity of the cut and the evidence of defensive words on the victim.

The court further faund "no mitigating circumstances whatsoever" (R916)(A4 pg.3) and addressed the question of different sentences for Illig and appellant, acknowledging the authority of Meeks v. State, 339 So.2d 186 (Fla. 1976) and Slater v. State, 316 So.2d 539 (Fla. 1975). The court stated that "the undeniable evidence indicated that while Mr. Illig struck Mr. Mace, it was Mr. Ragsdale that pitilessly cut his throat" and referred to Mrs. Flamboys statement that Illig was upset with Ragsdale and "considered the killing to be unnecessary". The court also cited the difference in age between Illig (17) and appellant (25), and the fact that Illig had on prior significant criminal record while Ragsdale was an absconded parolee. (R916)(A4 pg. 3-4).

Notice of Appeal was filed in a timely manner. There were no post-trial motions, nor any statement of judicial acts to be reviewed.

ARGUMENT - I

WHETHER A DEFENDANT IN A CAPITAL CASE SHOULD BE ALLOWED TO QUESTION PROSPECTIVE JURORS ON VOIR DIRE WITH REGARD TO THEIR WILLINGNESS TO IMPOSE A SIMILAR PENALTY TO THAT IMPOSED UPON A CO-DEFENDANT, IF THEY SHOULD CONCLUDE THAT THE DEFENDANT'S LEVEL OF CULPABILITY WAS EQUAL OR LESS.

It has been long established in Florida that wide latitude should be allowed counsel in the examination of jurors on voir dire, Cross v. State, 89 Fla. 212, 103 So. 636 (Fla. 1925), and that the circumstances of each case should govern the sound discretion of the court.

In the case here appealed, the court exercised its discretion to grant a prosecution motion to limit voir dire. (R903)(A1). This motion (R903)(A1) cited State v. Wilson, 483 So.2d 23 (Fla. 2nd DCA 1985) and was granted by the court. (R6-10, 906)(A2). The record indicates that defense counsel received the State's motion in limine only a few minutes before hearing (R7)(A2 pg.2) and was only allowed "about half an hour" to research the question. (R10)(A2 pg.5)

Wilson, supra, involved a situation where the defendants were charged with hiring someone to commit a murder. The person whom they were alleged to have hired was tried and acquited and the Second District, on certiorari to review an interlocutory order, held that evidence relating to the not guilty verdict was inadmissible.

> "The general rule in most jurisdictions is that a plea of guilty, conviction or acquittal of an accomplice or one involved in the crime with the accused is not admissible to prove the guilt or innocence of the accused" Wilson, supra. (emphasis supplied).

As Appellant's trial counsel unsuccessfully argued (R9) (A2 pg. 2-3). Appellant's situation wae totally different. Just as a

bifurcated (or trifurcated) trial differs from the usual form of trial, so should the extent of allowable questions on voir dire differ. Potts v. state, 430 So.2d 900 (Fla. 1982), Salvatore v. State, 366 So.2d 745, (Fla. 1978), Manning v. State, 93 So.2d 716, 719 (Fla. 1957), Thomas v. State, 202 So.2d 883, 884 (Fla. 3rd D.C.A. 1967).

The Second District court, in Wilson, supra, also quoted, with approval, a Colorado Supreme Court decision:

> "Since it is guilt in fact and not an antecedent conviction that the state must prove against the accessory then it is guilt in fact when shown by competent evidence that the accessory defendant must controvert. A judgment of conviction and a judgment of acquittal are equally solemn judicial acts. If on the trial of an accessory a judgment of conviction of the principal does not bind the defendant when offered offensively by the state, and we are convinced it does not, then we do not think it binds the state when offered defensively by the defendant.
>
> ...If a judgment of acquittal of the principal was prima facie proof on the trial of the accessory that the principal had not committed the crime, then a judgment of conviction of the principal would be prima facie proof that he had committed it. But the theory under which judgments are admissible as proof of the facts determined shows that the judgment in question is not admissible in the action against the accessory. Judgments, when admissible in evidence, are conclusive determinations upon the facts involved, and are not merely prima facie proof of them. If a judgment were to be merely prima facie proof of the principal's guilt or innocence, then, of course, either side could offer further bearing on that question. When the jury came to pass on it, should they consider the judgment as evidence or merely the other proof? If they could consider the judgment, what weight should they give to it? How could they know upon what proof it render, and, without knowing that, what value would it be as evidence, unless a matter of law it was held to be conclusive? To say that it is prima facie evidence seems to mean little or nothing. If it is evidence at all, it must be conclusive; otherwise, it should not be admitted." Roberts v. People, 103 Colo. 250, 259; 87 P.2d 251, 256 (Col. 1938).

It is significant that neither Wilson, supra, nor any of the cases cited therein dealt with questions relating to the sentencing

phase of a capital felony trial. Wilson considered the relevance of disposition of a co-defendant's case only with reference to the question of guilt. Referring to Potts, supra, the Second District Court in Wilson, supra, observed:

> "The supreme court went on to reject the collateral estoppel rationale or consistency of judgments approach in criminal cases. In doing so, it adopted the reasoning of the United State Supreme Court in Standifer v. United States, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980):
>
> > 'That court refused to adopt the doctrine of non-mutual collateral estoppel in criminal cases because acquittals can result from many factors other than guilt or innocence, the procedural elements pertaining to one defendant can be totally different than those applying to another, and there is no procedure for retrying a defendant once acquitted even though the verdict might be clearly erroneous.
>
> "While the Potts decision does not squarely hold so, we read that case to mean that a judgment of acquittal or guilt in the case of the principal perpetrator is not relevant to the case of the aider-abettor. If the evidence is not relevant to the case, then it should not be admissible in the trial of the aider-abettor." Wilson, supra.

The Wilson decision placed considerable reliance upon the U.S. Supreme Court's decision in Standifer v. United States, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980) which dealt with a charge of bribing public officials and aiding an employee of the interenal revenue service in accepting unlawful compensation. There, the IRS agent was acquitted on those charges wherein Standifer was alleged to have been involved. The Supreme Court held that this did not act as a bar to Standefer's prosecution.

> "This case does no more than manifest the simple, if discomforting, reality that 'different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system'" (citing Roth v. U.S., 354 US 476, 492; 1 L.Ed. 2d 1498, 77 S.Ct 1304.) Standifer, supra.

Appellant contends that the court below erred in applying Wilson in such manner as to preclude all reference to the co-defendant's plea and sentence in voir dire. While such plea and sentence was indeed irrelevant and improper matter fox consideration with relation to the question of Appellant's guilt, it was proper matter for the jury's consideration in the sentencing phase, due to the principle stated by the Supreme Court of Florida in Slater v. State, 316 So.2d 539 (Fla. 1975) and Jackson v. State, 366 So.2d 752 (Fla. 1978), that defendants should not be treated differently upon the same or similar facts.

while the State's motion in limine (R903)(A1) only dealt with making references to the co-defendent's plea and sentence during the guilt phase of the trial, the court's order (R9)(A2 pg.4) was stated so as to preclude all other reference in voir dire.

> "I'm going to grant the motion to the extent that I will prohibit it being mentioned in voir dire."

Appellant contends that because voir dire examination in a first degree murder trial is used to select the jury which considers both guilt and sentence, some indirect reference to the co-defendant's plea and sentence, at least an indirect reference in the form of a hypothetical question, should have been permitted in order to ascertain whether any jurors were opposed to the concept advanced in Slater, supra, that it is improper to impose a death sentence where a co-defendant who was equally guilty or more guilty and was sentenced to life imprisonment.

Appellant also suggests that an instruction directing the jury to give no consideration to the co-defendant's plea and sentence during

the guilt phase of Appellant's trial would have provided adequate protection from the problems apprehended in Wilson, supra, and Standifer, supra.

The court below should be reversed and the cause remanded with instructions to allow indirect reference to the co-defendant's plea and sentence during voir dire examination, in the form of hypothetical questions directed toward determination of individual jurors' willingness to apply the principle that, in sentencing, "defendants should not be treated differently upon the same or similar facts."

ARGUMENT - II

IS IT ERROR TO IMPOSE THE DEATH PENALTY WHEN A JURY HAS RECOMMENDED DEATH, BUT ALSO INDICATED THAT THE DEFENDANT WAS LESS CULPABLE THAN A CO-DEFENDANT WHO WAS SENTENCED TO LIFE IMPRISONMENT.

It is a long recognized principle of law that persons of equal culpability should not receive different sentences and that the severity of punishment should increase in proportion to the defendant's increased level of guilt.

> "It is moreover absurd and impolitic to apply the same punishment to crimes of different malignity." Blackstone's Commentaries, Book IV, pg. 17.

The Supreme Court of the United States acknowledged this principle to be particularly applicable in capital cases. The concurring opinion of Mr. Justice Douglas in Furman v. Georgia, 408 U.S. 230, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972), quotes with favor the statements:

> "It is unfair to inflict unequal penalties on equally guilty parties. .. Any law which in nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment." Furman v. Georgia, supra.

The concurring opinion of Mr. Justice Brennan observes:

> "In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause - that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words 'cruel and unusual

> punishments' imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause revelas a particular concern with the establishment of a safeguard against arbitrary punishments." Furman v. Georgia, supra, citing "Nor Cruel and Unusual Punishment Inflicted": The Original Meaning, 57 Cal. L.Rev. 839, 857-860 (1969).

The Supreme Court of Florida has acknowledged that a mitigating factor exists where an accomplice in the crime charged was of equal or greater culpabilitiy, but received a lesser sentence than the accused. Slater v. State, 316 So.2d 539 (Fla. 1975), Gafford v. State, 387 So.2d 333 (Fla. 1980), Downs v. Dugger, 514 So.2d 1069 (Fla. 1987), Meeks v. State, 339 So.2d 186 (Fla. 1976).

> "We are extremely sensitive to the demands of equality before the law in cases in which we must consider whether a sentence of death should be upheld. Our reading of Furman, supra, convinces us that identical crimes committed by people with similar criminal histories require identical sentences. Meeks v. State, supra.

In several cases, this court has held that a death sentence was improper when an accomplice who was equally culpable, or more culapable had been sent to prison for life. Slater v. State, supra; Gafford v. State, supra.

Under other factual situations, where evidence justified the conclusion that a co-defendant who received a life sentece was less culpable, the death sentence has been upheld. Salvatore v. State, 366 So.2d 745 (Fla. 1978), Smith v. State, 365 So.2d 704 (Fla. 1978) cert denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115, Meeks v. State, 339 So.2d 186 (Fla. 1976), Jacobs v. State, 396 So.2d 1113 (Fla. 1981), Denton v. State, 480 So.2d 1279 (Fla. 1985), Witt v. State 342 So.2d 407 (Fla. 1977), cert denied, 434 U.S. 935, 985 S.Ct. 422, 54 L.Ed2d 294, Jackson v. State, 366 So.2d 752 (Fla. 1978), cert denied, 444 U.S. 885,

200 S.Ct 177, 62 L.Ed.2d 115, Barfield v. State, 402 So.2d 377 (Fla. 1981).

In the case here appealed, the trial court made specific findinge to distinguish Appellant's case from that in Slater, aupra:

> "There were differences in the culpability of the two defendants for this murder. The credible evidence indicated that while Mr. Illig struck Mr. Mace, it was Mr. Ragsdale that pitilessly cut his throat. In fact, the testimony of Ms. LaFlamboy indicated that Illig was upset that Ragsdale had killed Mr. Mace and considered the killing to be unnecessary.
>
> Furthermore, there was a difference in the criminal histories of these two defendants. Mr. Ilig was only 17 years old at the time of the killing, while Mr. Ragsdale was 25 years old. Mr. Illig has no prior significant criminal record, while Mr. Ragsdale had been confined to the Alabama for commisssion of a felony and had absconded from parole from that State." (R916)(A4 pg.3).

As is clear from it's findings, the court below discredited evidence indicating that Illig delivered the fatal cut, but believed the testimony of Illig's lover, Ms. LaFlamboy. The court below apparantley gave no consideration to teetimony indicating that Appellant had no blood on his clothing while Illig was so bloodstained that he hid hie clothes in a lake and returned to LaFlamboy's residence in his shorts, shivering in the winter cold.

While the jury's deliberations are not part of the record, the questions asked by the jury, and a juror's subsequent attempt to reword the question, indicate that a significant number of jurors, perhaps all of them, considered Appellent to be less culpable than his companion in crime,

The jury's first question was to ask for a legal definition of nolo contendre, the plea entered by Illig. (R757)(A3 pg.5-6). After discussion with counsel, the court read the definition provided in Black's Law Dictionary.

indicates an unwillingness on the part of the court to hear the question in another form. This, Appellant contends, was an error.

> "As a general rule, it is error for a judge to respond to a jury's question without the parties being present and having the oppurtunity to discuss the request." Hitchcock v. State, 413 So.2d 741 (Fla. 1982), Ivory v. State, 351 So.2d 26 (Fla. 1977). (emphasis supplied).

This court has held that mere presentation of non-statutory mitigating evidence is not enough.

> "It is not what the Lawyer thought could be preented that is important. Rather, what is important is what the jury was permitted to consider in making its recommendation to the court." Waterhouse v. State, 522 So.2d 341 (Fla. 1988).

Although the court below did not instruct the jury to limit its consideration of mitigating circumstances to those named in statute, but, instead, properly instructed them to consider any other mitigating circumstances they thought appropriate (R750-751) the court's response to the jury's question and to juror Polansky's attempted re-wording was sufficient to leave the jury with the impression that there is nothing to contrary to Florida law in inflicting more serious punishment upon the lees guilty of two perpetrators of the same crime. As this court observed in O'Callaghan v. State, 542 So.2d 1324 (Fla. 1989):

> "The question... is whether the jury, in the penalty phase, knew it could take into consideration, as nonstatutory mitigating evidence, the disparate treatment and punishment given the other participants. We have previously held that the disparate sentencing of individuals involved in the same offense may be considered in determining an appropriate sentence." O'Callaghan v. State, supra.

As in O'Callaghan, Appellant's jury knew that his co-perpetrator received a life sentence. However, the jury did not know that the less culpable party should not receive the most severe punishment.

Although the court below instructed the jury that they might consider non-statutory mitigating factors (R751); and the court, in its findings, addressed itself to the question of disproportionate sentences, (R916, A4), the effect of this court's reaction the jury's question regarding imposing the most severe sentence upon the less culpable party worked as a bar to the jury's consideration of this important factor. The overall effect upon the jury was to contravene the principles enunciated by the U.S. Supreme Court in Hitchcock v. Dugger, 481 U.S. 393, 95 L.Ed. 2d 347, 107 S.Ct. 1821 (1987).

The court below apparently misapprehended the jury's second question, and juror Polansky's attempted rewording, as an attempt on the jury's part to induce the court to express an opinion an a question of fact. This misapprehension may be the reason for the court's reluctance to discuss the question with counsel or to hear attempts to reword the question.

Appellant contends that the question and the attempted rewording clearly indicate that the jury considered Appellant leas culpable than Leon Illig and wanted to known if that lesser culpability was a factor which they could consider in deciding whether to recommend the ultimate penalty. The court's failure to recognize this, and to respond accordingly, left the jury with the false impression that they were bound by law to place no weight upon their conclusion that Appellant was the lesser of the two murderers.

In its zeal to avoid substituting its conclusions of fact €or those of the jury, the court below ignored the implications of the jury's question: that Appellant was less culpable than Illig; and proceeded to do precisely that which it was trying to avoid. The court accepted the testimony of LaFlamboy, disregarded Appllant's confession and the forensic evidence indicating that there were bloodstains on the clothing which Illig hid at the cost of going home in his shorts in mid winter. In doing so, the court also disregarded the jury's apparent finding that Illig was the principal perpetrator of the murder.

This case should accordingly be remanded for re-sentencing in the light of this court's decision in Downs v. Dugger, supra.

ARGUMENT - III

WHETHER THE STATE IS OBLIGATED TO PROVIDE NOTICE, IN THE CHARGING DOCUMENT, OF AGGRIVATING CIRCUMSTANCES INTENDED TO BE USED IN THE PENALTY PHASE OF TRIAL.

In the court below, Appellant's Motion to Dismiss Indictment or to Declare that Death is not a Possible Remedy (R780-787, 813-814) raised the question of providing notice of aggravating circumstances in the charging document.

Being notified of specific charges in the charging document is an essential part of the due process, and was recognized as such at common law:

> "... the indictment is to be read to him distinctly in the English tongue (which was law even while all other proceedings were in Latin) that he may fully understand his charge. After which it to be demanded of him, whether he be guilty of the crime, whereof he stands indicted, or not guilty." Blackstone's Commentaries, Book IV, pg. 318, see also Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948).

In Florida capital cases, due process consideration extend throughout the sentencing phase. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Appellant's argument is that this entitles a defendant in a capital case to be formally notified as to which statutory aggravating circumstances the State intends to prove.

In Texas, courts have held such notice mandatory "in order to fully apprise the accused of the charges against him." Jurek v. State, 522 S.W.2d 934 (Tex. Crim. App. 1975). In Georgia, the State code provides that the accused receive formal notice before trial of

aggravating circumstance and of evidence in aggravation. § 2725, Ga. Code Annoted. In Ohio, Statute requires notice of a least one statutory aggravating circumstance in the indictment § 2929.03, Ohio Revised Code Annotated.

In Florida, a requirement that an information or indictment allege the aggravating circumstance of use of a firearm has been found with reference to crimes for which statute requires more Severe punishment if committed by use of a firearm. Chapola v. State, 347 So.2d 762 (Fla. 1st D.C.A. 1977), Averhart v. State, 358 So.2d 609 (Fla. 1st D.C.A. 1978).

With regard to the aggravating circumstances necessary to uphold a death sentence, however, this court has rejected the argument that due process requires notice in the charging document. Skreci v. State, 399 So.2d 964 (Fla. 1981), cert denied 456 U.S. 984, 102 S.Ct. 2257, 77 L.Ed.2d 862 (1982), Lightbourne v. State, 438 So.2d 380 (Fla. 1983), Medina v. State, 466 So.2d 1046 (Fla. 1985), State v. Bloom, 497 So.2d 2 (Fla. 1986), Du Four v. State, 495 So.2d 154 (Fla. 1986), Hitchcock v. State, 413 So.2d 741 (Fla. 1981), cert. denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982), Tafero v. State, 403 So.2d 355 (Fla. 1981), cert. denied, 455 U.S. 983 (1981).

Appellant argues that the better rule requires notice of aggravating circumstances in the indictment in a capital case and that in the absence of such notice, death is not a proper penalty. Appellant recognizes that this would involve a substantial revision of the position previously taken by this court.

ARGUMENT IV

WHETHER SECTION 921.141 FLORIDA STATUTES VIOLATES THE SEPARATION OF POWERS BETWEEN THE LAW MAKING FUNCTION OF THE STATE LEGISLATURE AND THE RULE-MAKING FUNCTION OF THE JUDICIARY.

Appellant's Motion to Dismiss II (R817) raised the question whether Chapter 921.141 Florida Statutes is unconstitutional in that its substance concerns matters of court practice and procedure and is therefore contrary to Article V, Section 2(a) of the Florida Constitution which provides that rules for the practice and procedure in all courts be adopted by the Supreme Court and that the legislature may repeal such rules only by a two-thirds vote in each house.

Appellant's argument is substantially the same as that rejected by this court in Morgan v. State, 415 So.2d 6 (Fla. 1981), cert denied 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed2d 621 (1982), Medina v. State, 466 So.2d 1046 (Fla. 1985), Vaught v. State, 410 So.2d 147 (Fla.) State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). See also The Florida Bar, Re: Florida Rules of Criminal Procedure, 343 So.2d 1247 (Fla. 1977).

While Appellant does not abandon this issue, Appellant recognized that reversal of the court below on this ground would involve a substantial revision of positions taken by this court.

ARGUMENT V

WHETHER SECTIONS 782.04 AND 921 141, FLORIDA STATUTES, ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Appellant's pretrial Motions to Dismiss 111, IV and V (R824-830) raised the question of the constitutionality of Chapter 782.04, Florida Statutes, defining and prohibiting murder and Chapter 921.141, Florida Statutes, setting forth the procedure for imposing the death penalty. Appellant's motions argued that the language of the statute is so vague and over-broad a5 to render consistent application impossible.

Applicant's argument is substantially the same as that rejected by this court in Peavy v. State, 442 So.2d 200 (Fla. 1983), Riley v. State, 433 So.2d 976 (Fla. 1983), King v. State, 390 So.2d 315 (Fla. 1980), cert. denied 450 W.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 824 (1981), Medina v. State, 466 So.2d 1046 (Fla. 1985), Lightbourne v. State, 438 So.2d 380 (Fla. 1983), Chandler v. State, 442 So.2d 171 (Fla. 1983), Dobbert v. State, 375 so.2d 1069 (Fla. 1979), cert. denied, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980), Fleming v. State, 374 So.2d 954 (Fla. 1979), Tafero v. State, 403 So.2d 355 (Fla. 1981). *See* also Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

While Appellant does not abandon this argument, Appellant recognized that reversal of the court below on this ground would entail a substantial revision of positions taken by this court and by the Supreme court of the United States.

ARGUMENTS VI, VII & VIII

WHETHER CHAPTER 782.04, FLORIDA STATUTES, CALL FOR CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTTTUTION OF THE UNITED STATES.

WHETHER CHAPTER 921.141, FLORIDA STATUTES, CALLS FOR CRUEL AND UNUSUAL PUNISHMENT IN VIOEATON OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

WHETHER DEATH BY ELECTROCUTION AS PROVIDED FOR IN SECTION 922.10, FLORIDA STATUTES, IS CRUEL AND UNUSUAL PUNISHMENT WITHOUT PENOLOGICAL JUSTIFICATION AND A DENIAL OF DUE PROCESS OF LAW, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Appellant's Motions to Dismiss 111, VI and VII (R827-836) raised the question of the constitutionality of death by electrocution as punishment for murder under Chapters 782.04, 921.141 and 922.10, Florida Statutes, on grounds that such punishment constitutes cruel and unusual punishment, contrary to the Eighth Amendment to the United States Constitution, that it is without penological justification and that it violates Appellant's right to due process of law.

Appellant's argument is that death penalty procedures in Florida fall within the range of those punishments so lacking in penological justification that they result in gratuitous infliction of suffering contrary to Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed2d 859 (1976). Appellants also argues that Chapter 921.141, Florida Statutes, in in contravention of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), in that it results in arbirtary capricious and discriminatory application of the death penalty.

Appellant's argument is substantially the same as that rejected by this court in Morgan v. State, 415 So.2d 6 (1982), cert. denied, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982), Booker v.

State, 397 So.2d 910 (Fla. 1981), cert. denied, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981), Lightbaurne v. State, 438 So.2d 380 (Fla. 1983), Medina v. State, 466 So.2d 1046 (Fla. 1985), Porter v. State, 478 So.2d 33 (Fla. 1985), State v. Dixon, 283 So.2d 894 (Fla. 1981), cert. denied, 456 U.S. 904, 102 S.Ct. 2260, 72 L.Ed.2d864 (1982), Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert. denied, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862, State v. Ferguson, 556 So.2d 462 (Fla. 1990), Antone v. State, 382 So.2d 1205 (Fla. 1979), cert. denied, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980), Alvord v. State, 322 So.2d 533 (Fla. 1976), cert. denied, 425 U.S. 923, 96 S.Ct. 2324, 496 L.Ed.2d 1226 (1976), Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). See also Gregg v. Georgia, supra, Lousiana ex rel Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 2d 442 (1947), Spinkellink v. Wainwright, 478 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed2d 796 (1979).

While Appellant does not abandon these arguments, Appellant recognizes that reversal of the court below on these grounds would entail a substantial revision of positions taken by thie court and the Supreme Court of the United States.

ARGUMENTS VI, VII & VIII

WHETHER CHAPTER **782.04,** FLORIDA STATUTES, CALL FOR CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

WHETHER CHAPTER **921.141,** FLORIDA STATUTES, CALLS FOR CRUEL AND UNUSUAL PUNISHMENT IN VIOLATON OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

WHETHER DEATH BY ELECTROCUTION AS PROVIDED FOR IN SECTION **922.10,** FLORIDA STATUTES, IS CRUEL AND UNUSUAL PUNISHMENT WITHOUT PENOLOGICAL JUSTIFICATION AND A DENIAL OF DUE PROCESS OF LAW, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Appellant's Motions to Dismiss 111, VI and VII (R827-836) raised the question of the constitutionality of death by electrocution as punishment for murder under Chapters **782.04, 921.141** and **922.10,** Florida Statutes, on grounds that such punishment constitutes cruel and unusual punishment, contrary to the Eighth Amendment to the United States Constitution, that it is without penological justification and that it violates Appellant's right to due process of law.

Appellant's argument is that death penalty procedures in Florida fall within the range of those punishments so lacking in penological justification that they result in gratuitous infliction of suffering contrary to Gregg v. Georgia, **428** U.S. **153, 96** S.Ct. **2909, 49 L.Ed2d 859 (1976).** Appellants also argues that Chapter **921.141,** Florida Statutes, in in contravention of Furman v. Georgia, **408** U.S. **238, 92 S.Ct. 2726, 33** L.Ed.2d **346** (1972), in that it results in arbirtary capricious and discriminatory application of the death penalty.

Appellant's argument is substantially the same **as** that rejected by this court in Morgan v. State, **415** So.2d 6 **(1982),** cert. denied, **459** U.S. **1055, 103** S.Ct. **473, 74 L.Ed.2d 621** (1982), Booker v.

State, 397 So.2d 910 (Fla. 1981), cert. denied, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981), Lightbourne v. State, 438 So.2d 380 (Fla. 1983), Medina v. State, 466 So.2d 1046 (Fla. 1985), Porter v. State, 478 So.2d 33 (Fla. 1985), State v. Dixon, 283 So.2d 894 (Fla. 1981), cert. denied, 456 U.S. 904, 102 S.Ct. 2260, 72 L.Ed.2d864 (1982), Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert. denied, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862, State v. Ferguaon, 556 So.2d 462 (Fla. 1990), Antone v. State, 382 So.2d 1205 (Fla. 1979), cert. denied, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980), Alvord v. State, 322 So.2d 533 (Fla. 1976), cert. denied, 425 U.S. 923, 96 S.Ct. 2324, 496 L.Ed.2d 1226 (1976), Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). See also Gregg v. Georgia, supra, Lousiana ex rel Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 2d 442 (1947), Spinkellink v. Wainwright, 478 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed2d 796 (1979).

While Appellant does not abandon these arguments, Appellant recognizes that reversal of the court below on these grounds would entail a substantial revision of positions taken by this court and the Supreme Court of the United States.

ARGUMENT IX

WHETHER CHAPTER 775.082, FLORIDA STATUTES, IS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND TO ARTICLE I, SECTION 2, 9 AND 16 OF THE CONSTITUTION OF FLORIDA.

Appellants Motion to Dismiss VII and accompanying memorandum (R832-836) raised the question of the constitutionality of chapter 775.082, Florida Statutes, arguing that it was contrary to the Fourteenth Amendment to the United States Constitution and to Article I, Section 2, 9 and 16, of tho Constitution of Florida, in that it provides no reasonable guidelines for imposition of punishment and that, by fixing penalties for capital felonies, the legislature infringed upon the principle of separation of powers by eliminating judicial discretion at sentencing.

Appellants argument is substantially the same as that rejected by the court in Antone v. State, 382 So.2d 1205 (Fla. 1979 , cert. denied, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980) Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976), State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), Sowell v. State, 342 So.2d 969 (Fla. 1977), Lightbourne v. State, 438 So.2d 380 (Fla. 1983).

While Appellant does not abandon this argument, Appellant recognizes that reversal of the court below on this ground would entail a substantial revision of positions taken by this court and the Supreme Court of the United States.

ARGUMENT X

WHETHER CHAPTERS 782.04 AND 921.14, FLORIDA STATUTES, ARE IN VIOLATION OF FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT THEIR OVERALL EFFECT IS TO PLACE THE BURDEN OF PROOF UPON THE DEFENDANT DURING SENTENCING.

Appellant's Motion to Dismiss VII, (R831-836) in the court below, raised the question whether Chapters 782.04 and 921.141, Florida Statutes, defining and prohibiting murder, are contrary to the Fourteenth Amendment to the United States Constitution in that, together, they deny due process of law by placing the burden of proof upon the Defendant during the sentencing phase in a capital case.

Appellant's Motion suggeet that the amendment to Chapter 921.141(5), Florida Statutes by Chapter 79-353, Laws of Florida, had the effect of returning sentencing procedures in Florida to a position similar to where those procedures stood prior to the U.S. Supreme Court's decision in Furman v. Georgia, 408 U.S. 329, 92 S.Ct. 2726, 33 L.Ed2d 346 (1972). That amendment established as an aggravating circumstance that the homicide was "committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification." 921.141(5) Florida Statutes.

Appellant's motion suggested that this circumstance applies to all murders under Florida Law, except for death arising from unlawful distribution of opium. Consequently, in Appellant's case, as in most

murder cases, the jury is required to find at least one aggravating circumstance, thereby making death the presumptory correct sentence and thus shifting the burden of proof onto the Defendant's shoulders, a procedure contrary to the principles of due process as elucidated in Mullaney v. Wilber, 421 U.S. 684, 95 S.Ct 1881, 44 L.Ed.2d 508 (1975), Presnell v. Georgia, 58 L.Ed.2d 707 (1978), Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2d 393 (1977).

This court has tacitly recognized the fact that the statute imposes a burden of proof upon the Defendant.

> "While we do not contend that the statutory mitigating circumstances encompass every element of a defendant's character or culpability, we do maintain that the factors, when coupled with the jury's ability to consider other elements in mitigation, provide a defendant in Florida with every opportunity to prove his or her entitlement to a sentence less than death." Armstrong v. State, 429 So.2d 287 (Fla. 1983).

Appellant's argument in the trial court was found in part upon the premise that some of the statutory aggravating circumstances are present in every murder and that fact necessarily imposes a burden of proof upon the defendant. This court has rejected the argument that aggrivating circumstances are present in every murder.

The question whether all murders are heinous, atrocious and cruel was considered by this court in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), Salvatore v. State, 366 So.2d 745 (Fla. 1978) and Riley v. State, 366 So.2d 19 (Fla. 1978) and it was found that the statute contemplates something apart from the norm of capital felonies.

This court reached the same conclusion with regard to Chapter 921.141(5)(i), Florida Statutes. Herring v. State, 446 So.2d 1049 (Fla. 1984), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed2d 330

(1984), Griffin v. State, 474 So.2d 777 (Fla. 1985), Burr v. State, 466 So.2d 1051 (1985), cert. denied, 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985).

This court has also repeatedly upheld the constitutionality of the death penalty provision in Florida Statutes. State v. Dixon, 283 So.2d 1 (Fla. 1973), Profitt v. Florida, 428 U.S. 242, 96 S.Ct 2960, 49 L.Ed.2d 913 (1976), Spinkellink v. Wainwright, 478 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), Foster v. State, 369 So.2d 928 (Fla. 1979), cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979), Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), Swafford v. State, 533 So.2d 270 (Fla. 1988), Eutzy v. State, 541 So.2d 1143 (Fla. 1989).

While Appellant does not abandon this issue, Appellant concedes that the ruling of the court below in denying Appellant's motion appears to be in keeping with the position taken by this court and that a reversal baeed upon this issue would involve a revision of that position taken by that court.

CONCLUSION

The court below erred in granting the State's motion to prohibit Appellant from mentioning the plea conviction and sentence of his eo-defendant during voir dire. While this was not proper matter for the jury's consideration during the guilt phase of Appellant's trial, it was quite relevant to the sentencing phase. By prohibiting indirect mention of the co-defendant's sentence in voir dire, the court prohibited Appellant from making any attempt to determine whether prospective jurors were opposed to the principle that equal sentences should be imposed upon the same or similar facts.

The court below also erred in finding that the disparity between Appellant's sentence of death and the co-perpetrator's sentence of life imprisonment was justified, when the jury had indicated that it considered Appellant to be the less culpable of the two parties. In this connection, the court erred in not allowing full discussion of the jury's question regarding the fairness of recommending a death sentence for Appellant when his more culpable co-defendant had been sentenced to life imprisonment. The court also erred in not responding to that question by stating the principle that equal sentences should be imposed upon the same or similar facts.

This case should be remanded with instructions to sentence Appellant to life imprisonment.

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Appellant,

vs. Case No. 72, 664

EDWARD EUGENE RAGSDALE.

Appel 1ee.

REQUEST FOR ORAL ARGUMENT

Appellant respectful 1y requests oral argument in this appeal.

William G. Dayton, Esq.
Attorney for Appel lant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Brief has been furnished by U. S. Mail to Carol M. Dittmar, Office of the Attorney General, 1313 Tampa Street, Suite 804, Tampa, FL. 33602, this 3td day of November, 1990.

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