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SUPREME COURT OF FLORIDA

JAMES AREN DUCKETT,

Appellant,

vs.

Appeal Case No. 72,711

STATE OF FLORIDA,

Appellee.

AMENDED BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

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PRELIMINARY STATEMENT

REFERENCES TO THE RECORD ON APPEAL WILL BE MADE BY THE DESIGNATION (T-XX) WITH THE XX REPRESENTING THE PAGE OF THE RECORD CITED AS NUMBERED BY THE CLERK.

STATEMENT OF THE CASE

On October 27, 1987, in the Circuit Court of the Fifth Judicial Circuit, in and for Lake County, Florida, Appellant, James Aren Duckett was indicted for:

1. The unlawful killing of Teresa May McAbee, in violation of Florida Statute 782.04(1)(a); in case number 87-1347-CF, on October 27, 1987, and

2. An Information charging Capitol Sexual Battery upon the same person was filed March 1, 1988, in case number 88-262-CF.

3. These matters were consolidated for trial on April 11, 1988.

4. Appellant was tried and convicted of both charges.

5. That a penalty phase was conducted following conviction upon which the Jury recommended Death.

6. That the Sentence of Death was imposed.

STATEMENT OF FACTS

At or about 8:55 a.m., o'clock, on May 12, 1987, the body of an eleven (11) year old girl, Teresa McAbee, was found floating along the shoreline of a lake located approximately 1 mile south of Highway 50, adjacent to the South City Limits of the city of Mascott, Lake County, Florida. The cite was approximately 1/2 mile South West of the child's home and 1 mile south of a Circle K convenience store hereinafter referred to. The child, an apparent virgin, had been sexually assaulted, (T-816)-(T-817) her hymen having been broken causing **"considerable** bleeding" T-833, and strangled. Her clothing, including underwear, were intact upon her person, showing no signs of rips or tearing. A pubic hair, State's Exhibit #77, was ultimately discovered in her panties, (T-1011). This hair was described by State's witness, Michael Malone, Federal Bureau of Investigation, as similar in characteristics with Defendant's pubic hair (T-1011), which is contradicted by Deborah Steger, F.D.L.E., as having sufficient comparisons from which to make any definitive comparison, (T-1626)

Appellant was a police officer for the City of Mascotte and was on patrol within the city limits between the hours of 7:00 p.m. and 7:00 a.m. o'clock. He was the only officer on duty.

Finger and palm prints identified as those of the victim were located upon the hood of Appellant's patrol vehicle in a position that would indicate the victim had been sitting on the hood. One fingerprint of the Appellant was found intermingled with those of the victim but showed much less distinctly than those of the latter, (CT-1198), giving rise to two possibilities. One, that the

victim's prints were fresher than those of the Appellant or, two, that his finger exuded less oil than the fingers and palms of the victim (T-1145-47). A light rain that had terminated earlier in the evening could have caused the fading of the Appellant's prints.

The Appellant had been observed talking to the victim and a young mexican boy at or about 10:30 p.m. Appellant testified that he had observed them in a somewhat compromising conversation and had questioned each concerning such observation. He further testified that he had instructed the victim to return to her home, located approximately 1 1/2 blocks south of the Circle K, formerly Shop & Go convenience store. Appellant was acting in his capacity of police officer. He maintained that the victim left the store, that he resumed his patrol activities and that he never again saw the victim.

Gwen Gurley, who was a juvenile on May 11, 1987, and pregnant out of wedlock at the time of the trial, testified to having come up to the convenience store at or about 10:45 p.m. (video tape), at which time she observed the patrol car leave the store with a "small person" sitting in the passenger side of the front seat. This was refuted by the testimony of Shirley Williams, **a** clerk arriving for the 11:00 p.m. shift, who observed the police vehicle but observed no one other than the Appellant in the vehicle (T-1658).

At some point after 11:00 p.m. the victim's mother entered the store looking for her daughter and shortly before midnight she drove to the Groveland Police Department seeking to report the child missing (T-1780-81). The Groveland Police Department is

located approximately 2 1/2 mile east of the Mascotte Police Department. She was sent to Mascotte and a call was radioed to the Appellant to meet her there (T-1781-82). Her arrival at the Mascotte Police Department virtually coincided with Appellant's and was accompanied by the arrival of a Lake County Deputy (T-1784). Both the mother and the Deputy agreed that Appellant showed no evidence of dishevelment whatsoever. Appellant's wife related that Appellant returned home in the same conditions of neatness that she had observed when he departed for work and that he wore the same uniform back to work the following day.

Appellant took a missing persons report from the mother, including a description of the child's clothing which differed from those found on her body. He made the report to his chief and resumed his patrol duties, including attempts to locate the child. All persons whom he interviewed acknowledged that there was nothing unusual or disheveled about his appearance during these interviews (T-1661).

Tire impressions found at the scene where the body was located were similar to those on Appellant's patrol car (T-853), and were unusual for that area, having been recently installed upon two Mascotte patrol cars and being the only 8 tires of that tread design known to have been sold in that area.

The vehicle which left the impressions had driven through a deep mudhole though, but no mud nor dirt was found adhereing to the tires or the fender wells of Appellant's vehicle (T-911). All indications were that Appellant had made no effort to clean his vehicle at the end of his shift and no debris from the scene was

found in the vehicle **(T-917).** Neither were any blood traces found on, in or about the vehicle.

Appellant was questioned at great length by Deputies but steadfastly maintained his innocence. He was arrested following which Gwen Gurley came forward with the claim of having seen the "**small** person" in the patrol car leaving the convenience store. She was being held on an auto theft charge at the time of this revelation and could give no real explanation of her failure to have reported this observation earlier.

The Trial Court allowed testimony of three young women, Shelby Ann Dow, Linda Upshaw, and Kimberly Fowler Ruetz, under the "**William's** Rule" Doctrine, that was particularly devastating to the Defense.

Shelby Ann Dow testified to an attempt on the part of Appellant to kiss her in the patrol car. Upon her refusal he promptly desisted, she exited the vehicle and he drove away **(T-1416).** Miss Dow was 20 years old, as compared to the victim, age **11** years, and the Appellant neither used nor threatened force or violence.

Linda Upshaw testified to the Appellant having transported her in his patrol car to a remote area where he attempted to kiss and fondle her. He desisted where she rejected him and immediately returned her to the destination she requested **(T-1438-1443),** Miss Upshaw was **18** years old and, again, Appellant neither used nor threatened force or violence.

Kimberly Fowler Ruetz related that she requested Appellant meet her twice in an area near Mascotte. Each time Appellant was in the patrol car and in uniform.

Mrs. Ruetz indicated that she was the aggressor on each occasion and that on each occasion she performed oral sex upon the Appellant of her own volition and that Appellant neither used nor threatened to use either force or violence (T-1503). Mrs. Ruetz was 16 years old at the time, driving her own vehicle.

Appellant denied any involvment whatsoever with the victim and the evidence presented by the State was totally of a Circumstantial Nature. Upon Motion for Directed Judgements of Acquittal, the Trial Court found there was no reasonable hypothesis of innocence.

The penalty phase consisted of the testimony of Defendant's brother, (T-2030-37); a family friend, (T-2038-44); the Defendant's wife, (T-2045-50; and the Defendant, (T-2051-52). The testimony consisted of remarks concerning his good character and gentle background. The State offered no evidence or testimony, choosing to rely upon that presented during the guilt phase.

The Trial Court's findings of fact as proven during the guilt and penalty phase of the trial beyond a reasonable doubt:

1. The Defendant, JAMES **AREN DUCKETT**, a police officer at the time of the offense, in uniform, enticed the victim, Theresa Mae McAbee, an eleven year old child, into his marked patrol car. Thereafter, the Defendant drove the victim to a remote location whereupon the Defendant raped, strangled, and drowned the victim.

2. The victim in this case was sexually battered immediately prior to her death. This finding was supported by the testimony of Dr. William Shutze, Medical Examiner, who stated that the victim's hymen painfully ruptured immediately prior to death. Further evidence presented proved that the victim's clothing was stained with semen.

3. The victim died as a result of stranglulation and subsequent drowning. However, death was not immediate. The evidence shows that the victim died after tremendous pressure was exerted upon her throat for several minutes. During that time, the victim was conscious for one or two minutes and undoubtably terrified at the realization that she was going to die. Thereafter, the victim was thrown into a nearby lake where she died

after ingesting a quantity of water.

4. The Defendant is an adult male who weighed approximately two hundred twenty-five **(225)** pounds at the time of the offense, and who stands approximately six *(6)* feet tall. The victim was four **(4)** feet, eleven **(11)** inches tall and weighed eighty-three (83) pounds at the time of her death.

And further, that the following was proven;

5. The Defendant herein has no significant history of prior criminal activity, has supportive family and friends, has a strong family background, and has engaged in efforts to better his educational level.....

The Trial Courts conclusion based upon the foregoing findings of fact, and having considered the recommendation of the jury, the Pre-Sentence Investigation Report, all aspects of Defendant's character of record, the circumstances of the crime, and all statutory and non-statutory circumstances of mitigation presented by the Defendant, it is the conclusion of the Court that:

1. The victim in this case was murdered during the commission of, or immediately after, a sexual battery, thus establishing an aggravating circumstance under Section **921.141** (5) (d), Florida Statutes.

2. The child victim in this case was strangled by an adult during which she was conscious, and subsequent to which she was thrown into a lake where she ingested water and died, thus establishing the aggravating circumstances under Section **921.141** (5) (h), Florida Statutes, that the crime ws especially heinous, atrocious, or cruel.

3. The Defendant has no significant history of prior criminal activity, thus giving rise to a mitigating circumstances under Section **921.141 (6)** (a), Florida Statutes.

4. The Defendant's family background and educational efforts give rise to non-statutory mitigating circumstances.

5. The aggravating circumstances legally outweigh the mitigating circumstances herein.

ISSUES

ISSUE #I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL.

ISSUE #II

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF SHELBY ANN DOW, LINDA UPSHAW, AND KIMBERLY FOWLER RUETZ, UNDER THE THEORY OF THE "WILLIAMS RULE".

ISSUE #III

THE TRIAL COURT ERRED IN QUALIFYING MICHAEL MALONE AS AN EXPERT IN THE FIELD OF HAIR ANALYSIS.

ISSUE #IV

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY.

ARGUMENT

ISSUE #I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MOTION FOR JUDGEMENT OF ACQUITTAL.

The Trial Court and Counsel for Appellant applied an improper standard to the evidence at the time of argument and ruling on Appellant's Motion for Judgement of Acquittal.

Counsel argued that the evidence was subject to two reasonable constructions, one consistent with guilt, the other consistent with innocence. The Court found that "when taking all the circumstances presented by the State, in the light most favorable to the State, and a whole, there is, at this time, in the mind of the Court, no reasonable hypothesis of Innocence" **(T-1535).**

Neither position is the law of the State of Florida.

Commencing with McArthur v. State, **351** So2nd 972, (1977) this Court cited Davis v. State, 90 So2nd 629 (Fla. 1956) (and others) to-wit:

> Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the hypothesis of innocence.

This has been consistently followed in Briggs v. State, **513** So.2nd **1382** (Fla. App **3** Dist 1987), to-wit:

> It has long been held in Florida that "where the only proof of guilt is circumstancial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of **innocence."** McArthur v. State, **351** So.2nd 972 (Fla. 1977). Further, the Defendant's version of events must be believed if the circumstances do

> not demonstrate his version to be false. Id. at 976, n. 12. It is the actual exclusion of the reasonable hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Davis v. State, 90 So.2nd 629 (Fla. 1956). See also Fowler v. State 492 So. 2nd 1344 (Fla. 1st DCA 1986) state has burden to produce competent substantial evidence susceptible of only one inference that is clearly inconsistent with defendant's hypothesis of innocence.

and further recognized by Fowler v. State 492 So.2nd 1344 (Fla. App 1 Dist. 1986); Valdez v. State, 504 So.2nd 9 (Fla. App 2 Dist. 1986) along with numerous other decisions.

The principle evidence upon which the State's case rests consists of the victims finger-prints on the hood of the patrol car, the pubic hair found in her panties and the tire tracks found at the scene of the location of the body.

Among the multitude of the victim's prints upon the hood was found **one** fingerprint of Appellant. The prints of the victim were fresh and dark, the print of the Appellant light, giving rise to two (2) theories. One, that Appellant's print had been placed on the hood prior to a light rain which had fallen earlier in the evening, while the victim's were placed there subsequent to the rain. Two, that the victim's fingers and palms simply extended a greater amount of oil than those of Appellant. There was no indication of scuffing of the hood and no indications that the act of intercourse took place there on, **"maybe",** maybe not" (T-1198).

The pubic hair was determined to contain several similarities to pubic hairs of Appellant by the FBI witness, Malone, called by the State. This was contradicted by the F.D.L.E. Agent, Steger, called by the defense (T-1636). Additionally, Malone was shown to be a braggart and one who grossly exaggerated his background and

experience **(T-985-86).** As pointed out on Voir Dire of Malone by the defense, to have completed the number of hair comparisons he claimed to have made, Malone would have worked 24 hours a day for 45 years. Steger, on the other hand, was precise, thorough and straight-forward. Conclusion, **"maybe",** "maybe not".

The interesting point of the tire comparison is the testimony of the State's witnesses that the vehicle laying down those tracks had driven through a several inch deep mud-hole but no mud adhered to the tries, the fenderwells or the under portions of Appellant's patrol car (T-912). No debris from the scene, at all, was found on, in or about the patrol car. The car had neither been cleaned nor washed.

It seemed conceded that the sexual battery and the homicide took place at some point other than where the body was found. It was the testimony of the pathologist that **"considerable** bleeding" was incidental to the intercourse (T-833).

Conclusion, the bleeding body was transported to the scene, yet no traces of blood, whatsoever, were found in, on or about Appellant's patrol car. The car having been examined in a totally dark room after having been sprayed with a chemical, inside and out, that would disclose even the most minute traces of blood, had any been present. Not even a **"maybe",** just a "not" **(T-1168-69).**

All persons who observed Appellant after midnight, this being after the death of the child, found him to be as neat and clean as though he had just come on duty. He either stripped to his bare skin or he had no contact with the victim. Maybe a **"maybe",** maybe a "maybe not".

A very suspect witness testified to having seen the patrol car drive away from the convenience stroe with a "small person" in the front passenger seat. This information was only forth-coming after Appellant's arrest upon this Homicide charge and while the volunteer was in Juvenile Detention on an auto theft charge. This testimony was rebutted by a convenience store clerk who arrived at the store as the patrol car was leaving, **"maybe",** "maybe not" (T-1658).

That, in essence, is the State's case. Each brick in Its wall of evidence subject to two conclusions. By no stretch of the imagination is there an EXCLUSION of a hypothesis of innocence. The Trial Court should have Directed a Judgement of Acquittal and it is respectfully submitted that this Honorable Court should reverse Appellant's conviction.

ISSUE II

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF SHELBY ANN DOW, LINDA UPSHAW, AND KIMBERLY FOWLER RUETZ, UNDER THE THEORY OF THE "WILLIAMS RULE"

The victim in the instant case was an eleven (11) year old girl, raped and strangled and left floating in a lake near the city of Mascotte, Florida.

Appellant was convicted of her murder and sexual battery and accused of having perpertrated the crimes while on duty, in his patrol car, in uniform at night.

The trial court allowed the following testimony under the theory of the "Williams Rule". On each occasion Appellant, who denied each of the incidents, was alleged to have been on duty as a police officer, in uniform, in his patrol car, at night. There all similarity ended.

Shelby Ann Dow, age 20, impeached, testified that the Appellant, while assisting her in finding her boyfriend drove her around the city of Mascotte and , upon arriving in front of her apartment, attempted to kiss her. She refused him, only slightly, and he desisted, she exited his patrol car and he departed (T-1416).

Linda Upshaw, age 18, testified that following a fight with her boyfriend she was walking along the highway that runs through the city of Mascotte. She was distraught and crying.

She maintained that the Appellant pulled up beside her in his patrol car, spoke with her concerning her problems, invited her into his automobile and drove her to a remote area north of

Mascotte approximately 1 mile. He parked, he kissed her, he attempted to fondle her breasts, she rebuffed him, he returned her to the city of Mascotte and dropped her at the **"Clay-Pits",** an area within Mascotte city limits near it's western limits. She proceeded to the rendezvous in her automobile, he in the patrol car.

On each occasion she entered his automobile of her own volition and after some short conversation she performed oral sex upon Appellant (T-1503). At some point in time she became disinchanted with Appellant because of his refusal to leave his wife.

The rape, the killing, even the **"picking-up"** of an eleven (11) year old is a far cry from any of the above. The only similarities are male and female, officer, on duty, in uniform, in patrol car. These would not go to prove motive, intent, absence of mistake, indentity or a common scheme or design.

To the contrary, the ages of the other witnesses, the total lack of force, the total lack of violence, the immediate termination of advances upon being rebuffed, fly right in the face of the requirements of the "Williams Rule". The testimony of Miss Dow, Miss Upshaw and Mrs. Ruetz merely showed a propensity on the part of the Appellant to make passes at two mature young women and succumb to the advances of a third.

The episode with Miss Upshaw is of extreme interest as it relates to the instant case.

She entered the patrol car in the early hours of the morning, completely unobserved by anyone. She found herself in a remote

area, alone with Appellant. She was kissed and to some extent fondled by Appellant. BUT when she resisted he desisted and returned her to town. No violence, no rape, no death, no discarding of a body. An indication of a total lack of propensity to commit so horrible a crime as that perpetrated in the instant case.

The damage, though, was truly done by Mrs. Ruetz.

No jury, no matter how young or old, sophisticated or naive, conventional or liberal could fail to look with distain upon an officer of 30 participating in an act of oral sex with a 16 year old, no matter how mature she may have appeared. The testimony of this witness alone so destroyed Appellant's credibility as to deprive him of any semblance of a fair and impartial trial and in no way can the ruling of the Trial Court be justified. For all intents and purposes the Appellant and his defense were emasculatd. As stated in Banks v. State 298 So2d 543, Fla. App. 1974;

> Once again we have before us a record where the State, in the name of **"Williams"**, went for the over-kill. ABRAM v. STATE - 216 So 2d 498.

The "Williams Rule" encroaches dangerously upon the prohibition against attacking the character of the accused, even when most strictly construed. It is a vehicle which certainly has its place in our jurisprudence but only when used with Judicial Prudence.

Here it was abused.

Here the State failed to demonstrate that any of the collateral offenses were relevant to a material fact in issue, and the Trial Court failed in It's obligation to require such the Trial Court

failed in It's obligation to require such demonstration. In Clingan v. State, 317 So 2d 863, Fla. App. 2d District, 1975, the Court held:

> 1. The State failed to meet its burden of demonstrating that the collateral offense was relevant to a material fact in issue. The two offenses were so disimilar that evidence of the prior offense would not tend to prove motive, intent, absence of mistake, identity or a common scheme or design. The testimony of the collateral act merely showed the bad character of the defendant and his propensity to commit a homosexual act. Banks v. State, Fla. App. 1st 1974, 298 So. 2d 543; Harris v. State, Fla. App. 2d 1966, 183 So. 2d 291. See Williams v. State, Fla. 1959, 110 So. 2d 654; Marion v. State, Fla. App. 4th 1973, 283 So. 2d 53; Drayton v. State, Fla. App. 3d 1974, 292 So. 2d 395.

and further in Knox. v. State, 361 So. 2d 799 (Fla. App. 1d. 1978,) the Court found:

> 2. Moreover, the evidence of the collateral incident here became the **"featured"** evidence, in violation of this Court's opinion in Reyes v. State, 253 So. 2d 907 (Fla. 1 DCA 1971). We conclude that the admission into this trial of the testimony regarding the collateral incident and the appellant's statement about his ongoing relations with his step-daughter violated the Williams rule and constituted reversible error.

Ruetz, in particular, and Dow and Upshaw to a lessor degree, became the **"featured"** evidence to the complete decimation of Appellant. It did not and does not go unchallenged and should be stricken.

Even though there are similarities as to officer, uniform, patrol car, duty and night, these are insufficient. The dissimilarities cry out for the proper application of the Rule. They cry out for the Reversal of these convictions and the remanding of this case.

ISSUE #III

THE TRIAL COURT ERRED IN QUALIFYING MICHAEL MALONE AS AN EXPERT IN THE FIELD OF HAIR ANALYSIS.

Michael Malone, Agent, Federal Bureau of Investigation, fits the classic description of an expert. He is a so and so out of town, with a brief case.

Michael Malone loves Michael Malone and this is evident from his testimony and his attitude.

He is of vast experience.

He is of vast knowledge.

He is a vast artist of hair.

He has made hundreds of thousands of hair comparisons (T-981).

It takes three (3) to four (4) hours for such comparisons.

He has been with the FBI for 16 years.

Had he performed only a portion of the comparisons he claimed to have performed, his task would have been monumental. His Herculean task would have taken 45 years, had he worked 24 hours per day. Hercules could have cleaned many more stables had he the strength and stamina of Michael Malone.

Perjury is a word, a crime, that causes our honored profession to cringe because no other act has such a devasting effect upon our system of jurisprudence. Perjury, if detected, should result in the disqualification of a witness, the striking of his testimony, his prosecution for his assault upon justice. Perjury is like pregnancy, it is or it isn't. There is neither being a little bit pregnant nor a little bit perjurious.

Malone, whether prompted by ego, braggadocio or simply a

desire to mislead the jury, lied about his qualifications (T-981).

Those qualifications are the base upon which a jury accepts or rejects the opinion of an expert. Those qualifications are the keystone of the bridge of credibility. Those qualifications should be true, exact, not exaggerated and to the point. As to one area of his qualifications we know this is not the case with Malone.

Therein lies the danger.

Are we to assume that Malone exaggerated, lied, as to only one area of his qualifications? Must we say Malone is only a little bit pregnant, only a little bit of a perjurer? That the number of comparisons he has made are not material? Hopefully this Honorable Court will say no. Such a mis-statement must go to all his qualifications and result in his rejection as an expert witness.

There was no way the defense could attack Malone's contentions that he was an instructor in the field of hair analysis, only that he lied grossly concerning the number of hair comparisons that he had conducted.

There was no way the defense could attack Malone's contention that he had examined a sufficient number of hairs of persons of Mexican or Indian decent to enable him to distinguish between theirs and those of other races, only that he lied grossly concerning the number of hair comparisons that he had conducted.

There was no way the defense could attack Malone's contention that he had been responsible for the breaking of many cases through hair and/or fabric comparison, only that he lied grossly concerning the number of hair comparisons that he had conducted.

He did have a briefcase. He was from out of town. A

perjurer probably qualifies as a so and so. The definition of an expert, but not in a case of this significance, not in a case where such critical evidence evaluation and comparison is so significant, not where another expert in the same field, an honest, honorable Agent of the State of Florida is giving contradictory testimony.

The Trial Court erred in allowing Malone the status of expert and this Honorable Court should reverse.

ISSUE #IV

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY

The landmark case in which the Florida Supreme Court initially addressed this state's post-Furman death penalty statute, Section 921.141, Florida Statutes, was State v. Dixon, 283 So.2d 1 (Fla. 1973). Dixon upheld the constitutionality of the statute. The language of the opinion in Dixon is authoritative and not dicta because it is the Court's definition of standards, criteria and procedure for applying the statute in a constitutional manner that is used by that Court and by the United States Supreme Court to grant Florida's statutory death penalty scheme legitimacy.

In Dixon at 7-8, the Florida Supreme Court outlined the Florida scheme as a five step process, each step an integral stage necessary to remove arbitrariness from the outcome as to who receives death and who does not. The first step is the evidentiary penalty phase hearing. Second is the jury's penalty recommendation. Third is the trial judge's decision as to penalty. Fourth is the requirement that the trial judge justify any sentence of death in writing. Fifth is the Florida Supreme Court's review.

The description in Dixon of steps three and four are the guideposts for the trial judge's role. Significant is that the perceived purpose of the Florida rule placing sentencing responsibility in the hands of the trial judge rather than the trial jury is to protect against those situations where a jury might inappropriately recommend death. The Supreme Court explained:

> The third step added to the process of prosecution for the capital crimes is that the trial judge actually determines the sentence to be imposed - guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience. Dixon at **8.**

The function of the Florida Scheme is to guarantee that "the inflamed emotions of jurors can no longer sentence a man to die." The concept is to enfuse the penalty decision with the light of judicial experience. This Honorable Court has such experience. It is the responsibility now for this Court "with experience in the facts of criminality...to balance the facts of this case against the standard criminal activity which **can only be** developed by **involvement with the trials of numerous defendants."**

The United States Supreme Court in Proffitt v. Florida, **428** U.S. **242, 252-3, 49** L.Ed.Ed. **913, 923 (1976),** lauded this aspect of Florida's capital sentencing scheme, saying:

> And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analagous cases.
>
> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner.

Florida's capital sentencing scheme does include this protection stage, that of allowing the trial court rather than the jury to impose sentence, which not all states with death penalty

laws have. However, states where juries actually impose sentences require a unanimous vote or death cannot be imposed. While the vote in this case was a strong majority, it was not unanimous.

The Court is well aware from discussions throughout this trial that a jury's recommendation is to be afforded great weight. That standard developed from Tedder v. State, 322 So.2d 908.910 (Fla. 1975), where restrictions were placed on a trial court imposing death, despite a jury recommendation for life. While a death recommendation should also be given serious consideration, the consideration is not of an equal nature with that to be given the life recommendation. The Supreme Court addressed this distinction in Thompson v. State, 328 So.2d 1 (Fla. 1976):

> It stands to reason that the trial court must express must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprisonment.

This dichotomy is based, of course, in the principle that the primary function of the trial judge's authority to contravene the jury's recommendation is to protect defendants from lay overreaction in cases not appropriate for the death sentence, as decreed in Dixon, at 8.

Where the course of a trial holds open the possibility that a penalty recommenation may have been influenced by improper considerations, the recommendation is not necessarily to be disregarded entirely, although it may be. The weight to be given the recommendation, however, **is** to be assessed in light of such possibility. The Florida Supreme Court has held in several cases

that a jury's recommendation may be seen as "tainted" and, therefore, not worthy of full credit. see, e.g., Trawick v. State, 473 So.2d 1235 (Fla. 1985).

The Trial Court seem to place undue emphasis on Appellant's being a police officer, in uniform, in a marked patrol car (T-2556). This is the same lack of logic which appeared to be the primary dictate of the Court's ruling on Williams Rule Evidence. This coupled with an unnecessary finding concerning the respective sizes of Appellant and the victim, (T-2556), had an obvious effect upon the Trial Courts ultimate decision to follow the non-unanimous recommendation of the Jury.

CONCLUSION

There are, no doubt, cases that require a reversal because of a multitude of minor errors by the Trial Court. Errors, which if taken alone would be insufficient, but which, in total, permeate the record with the need to reverse. They are the difficult cases for this Honorable Court.

The instant case, though, falls not into that category.

"Maybe" "maybe not" circumstantial evidence is not such as excludes every reasonable hypothesis of innocence. To the contrary it establishes such a hypothesis and requires not only that this Honorable Court reverse but that it reverse with Instructions to Acquit.

The Williams Rule was adopted for a specific purposes, and must be restricted to that purpose. It must not be used to attack the character of the accused, to develop a **"feature",** to drag red herrings across the path of justice. In the instant case it was abused and again calls out for reversal.

A witness, particularly an agent of the Federal Government, is expected to tell the truth, whether as to the facts observed or as to qualifications in a particular field. Here there has been a gross display of exaggeration as to a very material point of qualifications.

It is respectfully submitted that this should not be allowed, that Malone should not have been qualified as an expert and that his testimony should not have been received. That this case should be reversed upon that error of the Trial Court.

The Trial Court failed to properly weigh the Aggravating and

Mitigating factors of the case and apparently let his justifiably human emotions outweigh the law of Florida in imposing the Death Sentence and this Honorable Court should order the matter remanded for imposition of a Life Sentence, in the event the conviction is not reversed.

It is respectfully submitted that the convic :ions of Appellant should be Reversed with **Instructions to Acquit.**

Respectfully submitted,

JACK T. EDMUND, ESQUIRE

REQUEST FOR ORAL ARGUMENT

Comes now Appellant, JAMES AREN DUCKETT, and hereby requests oral argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to the Office of the Attorney General, 125 Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014, by U. S. Mail/hand delivery, this 7th day of April, 1989.

JACK T. EDMUND, ESQUIRE