SUPREME COURT OF FLORIDA

CHARLES EDWARD CARTER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee

SUPREME COURT CASE NO. 73,089

Circuit Court No. CF87-4304
(Polk)

(COURT APPOINTED)

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT
COURT OF POLK COUNTY

May 3, 1989

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STATEMENT OF THE FACTS AND OF THE CASE

On September 22, 1987, Charles Carter and his co-defendant, fifteen-year-old Johnny Johnson, were hitch-hiking in Polk County when they were picked up by an elderly woman named Millie Worden. They were without transportation because they had abandoned Carter's van when the police had investigated it the night before. Millie Worden took Carter and Johnson to her home in the middle of the afternoon. She apparently picked men up occasionally and had an alcohol problem. When her adult daughter, Susan Yates, came to Millie's house, Millie concocted a story that Carter and Johnson were relatives from West Virginia.

A few days after Millie invited Carter and Johnson into her home in Wahneta, her partially decomposed body was found in an abandoned house several miles away in Alturas. In the mean time, Carter and Johnson had driven to North Carolina in Millie's car, had used her long distance calling card to charge telephone calls, and had charged sneakers on her Sears charge card.

Millie was apparently killed either by Carter alone, by Johnson alone, or by the two of them acting in concert. It is not disputed by anyone that both Carter and Johnson were with Millie in her home until minutes or hours before her death at shortly before or shortly after midnight. Nor is it disputed

that both Carter and Johnson travelled to North Carolina in Millie's car. What is heatedly disputed is who caused Millie's death and how, when and where she died, who stole her car, and who disposed of various items stolen from her car.

The disputed events occurred in a very short time span. That time span was described in one version, on behalf of the state, by Johnny Johnson. A very different version was described by Charlie Carter in his own defense. A friend of Carter's, Mary Geary, corroborated parts of Carter's testimony. A comparison of the Johnson story with the Carter/Geary story will reveal the factual battleground at the trial.

Johnson, at the trial, testified that while at Millie's, Carter called Toni Freeman, who suggested that they steal Millie's car. It is important to note that Johnny never even remotely suggested that either he or Carter set out to kill Millie. Under Johnson's version, they intended only to steal her car.

According to Johnny, Carter grabbed Millie from behind and choked her. Carter then, according to Johnny, threw Millie on the bed, bound her arms and her legs, stuffed cloth in her mouth, and wrapped sheets around her, including her head. Johnny helped tie one knot, he said. Johnny could not remember a ligature that was later found around Millie's mouth.

In Johnny Johnson's version, he and Carter stole various items, including a television and credit cards, and put them in Millie's car. They then took Millie's body to the abandoned house in Alturas and dumped it. Afterwards, they drove to an apartment complex parking lot in Winter Haven, where Johnny went to sleep. When he awoke, he testified, Carter was driving them toward North Carolina. Most of the stolen merchandise was no longer in the car, and Johnny professed not to know what had happened to it. He acknowledged using the telephone charge card and wearing shoes bought by Carter with Millie's Sears card. **(R 501-611)**

Carter's version was very different. He said that late in the evening, he left Johnny with Millie and hitch-hiked to Mary Geary's. While there, he talked to Mary and her live-in man friend for a few hours. At about 2:00 a.m. Mary told him that someone was outside honking a horn. He went outside and found Johnny in Millie's car. He got in with Johnny, and they drove to North Carolina. He said he did not know what had happened to Millie until a few days later. He acknowledged being aware that the car was stolen and that he had used the stolen credit cards. **(R 769-864)**

Mary Geary testified that, although she could not pinpoint the night, she remembered Carter coming to her house late one evening at about the time of Millie's death and that it was

right after Carter had lost his van. She remembered a long-haired young fellow driving up outside and honking his horn and Charlie going out, getting in the car, and leaving with him. (R 369-87)

It is not clear whether Johnson and Carter returned to Florida together. Johnson was the first take into custody, and then Carter was arrested. Each was charged with first degree murder, robbery, and kidnapping in connection with what happened to Millie Worden on September 22, 1987. The state evidently did not seek the death penalty in Johnson's case. Before Carter's trial, Johnson was tried and convicted on all three counts and was awaiting sentencing at the time he testified against Carter. The indictment charged first degree murder only by premeditation (R 3-6), but the case was submitted to the jury under the alternative theories of premeditated murder and felony murder. (R 1001-03).

The central issues at the trial were whether Millie Worden died at her house, whether it was Johnson or Carter or both of them who killed her, and whether the killing was intentional or occurred during the course of another felony.

On the time and cause of death, the state called the medical examiner, Alexander Melamud, M.D. Dr. Melamud testified that when he examined the body, it was "markedly decomposed." (R 481) He was nevertheless able to identify the cause of death

as "mechanical asphyxiation due to strangulation of her neck and airway obstruction." (R **482)** He found marks around the mouth consistent with a gag having been placed there and bruises on the neck. The hyoid bone in the neck was broken. (R **482-84)** She apparently had had emphysema (R **486),** which was verified by her daughter.

Dr. Melamud indicated that "mechanical asphyxia" occurs when a person stops breathing because of mechanical airway obstruction. (R **487)** In this case the gag and the bedding contributed to cause Ms. Worden not to be able to breathe, especially because of her emphysema. (R **488)** But Dr. Melamud was unwilling to say it was only the gag that caused the death. Instead, he said:

> I think in this case it was a combination. It's not only the gag, it was gagged, it was strangulation and also her head and all her body was tied tightly wrapped in sheets and also her wrists and shins were tied tightly by electric cord and she had a position restriction of her breathing.

(R 488) Dr. Melamud classified the death as homicide **"[b]ecause** of mechanical asphyxia due to strangulation and obstruction of its airway." (R **490)**

On cross-examination, Dr. Melamud acknowledged that there had been a gag inserted deeply into the victim's mouth (R **492)** and that the gag itself could have caused the death. (R **493).** Because of Ms. Worden's emphysema, stopping her breathing and strangling her would have been much quicker and easier than with

a healthy person. (R **497)** Dr. Melamud indicated that a normal person may live anywhere from a few seconds to three or four minutes after being deprived of oxygen, but it was **"likely",** because of the strangulation indicated by the bruise on the neck, the broken hyoid bone, the deeply inserted gag, the position of her body because of her hands and feet being bound, and her emphysema (which required her to take a lot more breaths per minute than a normal person takes), that she would have died more quickly than a normal person. (R **498-500)**

During the penalty phase, Dr. Melamud was recalled by the state to explain the two ways in which mechanical asphyxia occurs. One is the prevention of air flow by obstruction in the airway. The person dies from lack of oxygen to the brain. Death normally occurs within five minutes. The other mechanism by which mechanical asphyxia occurs is by strangulation. Pressure on the neck at the convergence of the carotid artery, the jugular vein, and the vagal nerve "can cause marked cardiac arrhythmia and [the] heart can stop almost instantly." (R **1058-59)** On cross, Dr. Melamud agreed that the victim in this case at the most would have lived only a few minutes. (R **1064-65)**

Johnny Johnson's testimony also bears on the time and location of Millie's death. He described how the body was bound and completely wrapped in bedsheets and put in the trunk of Millie's car by him and Carter. (R **546-52)** He said that when

they dropped her body into the car, he heard "a grown or something." (R 552) Incredibly, despite all the binding, gagging, and sheets, Johnny claimed that when they threw the body onto a porch in Alturas, he "thought I heard her saying let me out of here or something." (R 562)

Obviously, the state's case turned largely on the credibility of Johnny Johnson. Defense counsel sought to diminish Johnny's credibility by impeaching him with his own statements in which he had said he had not been in the house when Charlie Carter allegedly strangled Millie Worden, that he had told a number of different stories, that he did not admit being in the house until after he was himself convicted, and that he hoped by his testimony to get a good sentencing recommendation from the prosecutor. (R 636-45) The prosecutor reminded Johnny that he could still get three "consecutive sentences". (R 507) (The prosecutor would in closing argument misrepresent Johnny's testimony to be that he could get "three consecutive life sentences." (R 921)

To further attack Johnson's credibility, defense counsel cross-examined Det. Ashley about the value of the information given him by Johnson. (R 735) The assistant state attorney objected that the questioning "refers to my role as a prosecutor. . ." (R 736) Defense counsel continued to elicit from Det. Ashley admissions that Johnny did not tell him

anything he did not already know except for the period of time during which Millie was bound, gagged, and disposed of. (R 736-41) That was the period about which Johnny told Det. Ashley he had not been in the house -- contrary to his testimony at Carter's trial.

The prosecution, in closing argument, used defense counsel's cross-examination of Det. Ashley as the basis for attacking defense counsel, bolstering the credibility of his own witnesses, and drawing a mantle of truth about himself. Appendix A to this brief contains some of the prosecutor's improper remarks in the opening portion of his closing argument. Appendix B contains remarks he made in rebuttal.

Although the appendices contain a fuller presentation of the prosecutor's misconduct, the following remarks, out of context, show the prosecutor's scheme for buttressing the state's case by improper argument:

> Keep in mind that Charlie Carter had an absolute right to remain silent. He chose to take the witness stand. That is not something that the State can plan on in a prosecution. (R 897)
>
> * * *
>
> And Mr. Brock [defense counsel] tries to ask questions, trained lawyer, in a fashion to make you believe the State is trying to tell you this was Toni Freeman's idea. (R 912)
>
> * * *
>
> Nobody except Mr. Brock in his mind thought up that Toni was some ring leader. And yet when he asks the questions in a very skillful fashion it make it sound

like that's what the State's trying to tell you. That's not what we're trying to tell you. We're just trying to tell you the facts. (R **912-13**

* * *

Johnny Johnson is telling you the truth. (R **923)**

* * *

The defense tries to make you believe that the State's entire case is Johnny Johnson. This State's entire case convicted Johnny Johnson with only one different piece of evidence, his statement, that Mr. Brock wants to claim is a lie. (R **984)**

* * *

. . . don't let a clever lawyer lead you astray. Calling a kid psychotic five times in your closing argument with absolutely not one shred of evidence, pretty clever trick. (R **985-86)**

* * *

. . . I'm going to suggest to you that that alone that Johnny Johnson did not take the witness stand in his trial but did in this one, is that his lawyer knew the truth, is that Johnny Johnson could try and claim that he was sitting on a car by letting the State use those statements. His lawyer can't support perjury and put him up there to say that if he knows it's not true, but that was his statement and the State played them in his trial. (R **992-93)**

The case was submitted to the jury on the alternative theories of premeditated murder and felony murder, and the jury was given jury verdict forms which did not specify the theory upon which they convicted. They returned verdicts which for each count indicated that the defendant was "guilty as charged." **(R 1222-24)** Thus, the jury was not asked to specify whether it found Carter guilty of premeditated murder or felony murder, and

the jury did not indicate under which theory it reached its verdict.

During the penalty phase, the state, as indicated above, called Dr. Melamud who, in addition to describing the cause of death, indicated that a person dying from either type of mechanical asphyxia is still consciously thinking, is able to think, and is experiencing fear. (R **1061-63)** The state also called Susan Yates, Millie's daughter, who testified that when her mother couldn't breath, she became frightened. (R **1070)**

In mitigation, Charles Carter called two mental health experts. Excerpts from their testimony is included in this brief as Appendices **3** and **4.** Dr. Henry Dee, a clinical psychologist with a neuropsychology subspecialty, testified that Carter has organic brain damage and a verbal memory quotient of **68. (R 1097-98)** The brain damage was confirmed by psychological testing, and Dr. Dee's opinions were based on the test results, not on the history provided him by Carter. (R **1092-97)** Carter did, however, provide Dr. Dee a history of brain injuries, including a beating administered to him by his father. The beating knocked him unconscious. Another loss of consciousness occurred when, as a young child, he was hit by a truck. A third brain injury occurred when as a teenager he was beaten over the head with a baseball bat. (R **1099-1102)** Carter also reported a history of chronic cocaine abuse. (R 1101).

The history merely confirmed Dr. Dee's test results. When asked if Carter suffered from a mental defect or disease, Dr. Dees indicated that, yes, Carter suffers from organic brain syndrome. **(R 1097-98).** With regard to mental health issues directly applicable to mitigation in the penalty phase, this colloquy took place:

> Q. Okay. Specifically, do you have an opinion as to whether he was under the influence of extreme mental or emotional disturbances as of that time?
>
> A. Yes, I think he was. I don't see any way that he could have developed the kind of emotional disorders he's showing today since he's been incarcerated or since that time. These are chronic conditions we're talking about. These are not something that happens suddenly at the age of thirty-three.
>
> Q. So these mental or emotional disturbances are not mild or moderately chronic, is that an accurate statement, sir?
>
> A. Yes, I believe they are the reason for his drug use and abuse.
>
> Q. Sir, do you have an opinion as to whether his capacity to conform his conduct to the requirements of the law was substantially impaired by all of these things we've talked about?
>
> A. It would be diminished.
>
> Q. Do you have an opinion as to whether his capacity to appreciate the criminality of certain conduct would have been substantially impaired?
>
> A. Yes. He is so impulsive that sometimes his behaviors are almost bazaar. I would say he's probably never planned anything in his life.
>
> Q. Do you have an opinion, sir, as to whether Mr. Carter's condition would have substantially affected his ability to commit a crime in a cold, calculated, premeditated manner?

A. I don't think he premeditates things. He does whatever he feels on the spur of the moment.

Q. Your answer then is that it would have substantially affected his ability to do that?

A. Yes, yes. (R **1105-07)**

A psychiatrist, Dr. Thomas McClane, also testified in mitigation. He gave a more detailed history for Carter, including parental abuse by an alcoholic father who beat and neglected Carter and his siblings. The abuse included one beating at age **14** that knocked Carter unconscious. The assault on Carter with a baseball bat occurred when he was **16.** He was hit by a Coca Cola truck when he was **6** or **7. (R 1142)**

Dr. McClane found that Carter had three mental problems: brain damage; a personality disorder, and drug abuse. (R **1143-44).** It was Dr. McClane's opinion that Carter suffered from an extreme mental or emotional disturbance in September of **1987). (R 1145)** He also believed that Carter was substantially drug-intoxicated at the time of Millie Worden's death, and the organic brain damage and organic personality syndrome enhanced his reaction to the drugs. (R **1144-45)** Like Dr. Dee's, Dr. McClane's professional opinion was that Carter's capacity to appreciate the criminality of his conduct was substantially impaired, that his ability to conform his conduct to the requirements of the law was substantially impaired, and that his ability to commit a crime in a cold, calculated, and

premeditated manner was substantially impaired. (R **1146-49)**

Both Dr. Dee and Dr. McClane believed that, with treatment, some of Carter's mental problems could be treated and that Carter could be rehabilitated. (R **1107-08; 1152-53)**

Carter, in his testimony, described his drug abuse. He said that he had abused drugs during the day preceding the day of the offense, during the night before, and again the morning of the offense. (R **1174-76)** His brain impairment is apparent in the following colloquy:

> Q. I want you to tell the jury how you got caught?
>
> A. I was at a softball game.
>
> Q. Let's tell the jury why you went to that softball game, Charlie.
>
> A. I don't really recall why, but I knew I was going to get caught anyway.
>
> Q. Well, do you recall what you told me about it?
>
> A. I can't remember.
>
> Q. The doctors said you've got a short-term memory, it's been -- I'm starting to believe it's certainly short-term. Was there a softball game being played --
>
> MR. BROCK: I hope John will indulge me in leading. Do you object to my leading?
>
> MR. AGUERO: (Shaking head.)
>
> Q. Was there a softball game that was being conducted between two different police departments, Charlie?
>
> A. Yes sir, Ashboro Police Department and Gilford

County Police Department.

Q. Why did you not answer me that question a minute ago?

A. I forgot.

MR. BROCK: I don't think -- he's not -- really did forget. Here I am testifying and I apologize to the Court.

Q. Why did you go to a soft -- you're an escaped prisoner; is that correct?

A. Yes sir.

Q. And you go to a softball game between who and who?

A. Ashboro and Gilford County Sheriff's Department.

Q. Did you know any of the members of that department or did they know you?

A. Sure, they knew me. I knew some of them.

Q. When you went to that softball game what did you think was going to happen to me?

A. I'd probably get caught.

Q. Why did you go?

A. I guess I wanted to get caught. I was tired of running.

Q. You went to a softball game being carried on between two department that you knew?

A. Yes.

Q. Tell the jury, if you remember, what happened?

A. Well, somebody at the softball game recognized me and they come up to the car and called in. And a bunch of police cars come out there and arrested me. (R 1179-81)

The issue of punishment was submitted to the jury on five statutory aggravating circumstances and four mitigating circumstances. (R 1211-12) The jury recommended that "the Court . . . impose the sentence of life imprisonment on Charlie Carter without possibility of parole for 25 years." (R 1216)

At a subsequent sentencing hearing, the state argued the same five aggravating circumstances for overriding the jury's verdict. (R 1242-44) The trial judge read a written order setting forth all five of those aggravating circumstances as grounds for overriding the jury's recommendation and imposing the death penalty. The trial judge expressly found that there was "no evidence" of extreme mental or emotional disturbance, "no evidence" that Carter's capacity to appreciate the criminality of his conduct was substantially impaired, and no evidence that his capacity to conform his conduct to the requirements of the law was substantially impaired. (R 1245-51) The trial judge's written order is found at pages 1256 to 1262 of the record and in Appendix 5 of this brief.

In determining the existence of aggravating circumstances, the trial judge indicated that "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." (R 1256) The trial judge never made a finding that any aggravating circumstance was established beyond a reasonable doubt.

The trial judge also departed from the sentencing guidelines by imposing a life sentence for kidnapping and fifteen years for robbery, each consecutive to the other and both consecutive to the death sentence on the murder count. (R 1259)

SUMMARY OF THE ARGUMENT

Introduction of gruesome photographs, a gun, a knife, proof of a recent burglary, proof of present drug abuse, and a long history of theft crimes, whose prejudicial effect outweighed their probative value, denied the appellant a fair trial.

The prosecutor's focus in closing argument on the cross-examination skills and "clever tricks" of defense counsel, the state's own burden and high goals, and extra-record proof of the accomplice's credibility denied the appellant a fair opportunity to avail himself of access to the courts to present a defense, and denied him many other basic constitutional trial rights.

An alleged accomplice's testimony which is not credible makes the evidence insufficient to sustain the convictions.

The death penalty cannot properly be imposed in this case because the jury apparently convicted the appellant of felony murder. The aggravating circumstances relied upon by the trial court either do not exist or are not legally applicable in this case. Overriding the jury's recommendation against death is not valid under Tedder v. State.

ARGUMENT

I

ADMISSION OF EVIDENCE WHOSE UNFAIRLY PREJUDICIAL EFFECT OUTWEIGHTED ITS PROBATIVE VALUE DENIED CARTER A FAIR TRIAL.

Defense counsel tried vigorously to exclude gruesome photographs of the victim showing her body in a decomposed state. (State's exhibits 6 and 76)[1] The photographs were unnecessary or misleading because they did not show the cause of death, they did not accurately reflect the condition of the body at the time of the offense, and because the medical examiner was available to, and did, testify concerning the condition of the body at the time of the offense as well as the cause of death and the condition of the body at the time it was found. The objections were overruled (R 169-71), and the photos were introduced into evidence. (R 182) Despite the limited number of photographs, their introduction was improper under Section 90.403, Florida Statutes, "the gruesomeness of the portrayal [was] so inflammatory as to create an undue prejudice in the minds of the jury and detract them from a fair and unimpassioned consideration of the evidence." Leach v. State, 132 So.2d, 329, 331-32 (Fla. 1961), as quoted in Young v. State, 234 So.2d 341,

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[1]. Carter's trial counsel did not direct that the photographs be included in the record on appeal. Appellate counsel on May 2, 1988, filed supplemental directions to the clerk to forward state's exhibits 6 and 76 to the Supreme Court.

348 (Fla. 1970).

Defense counsel also resisted the introduction of a gun and a knife, neither of which was related to the commission of this offense. The weapons were ostensibly offered to prove that Carter had been in North Carolina, but that fact was not in dispute. Defense counsel correctly pointed out that the weapons were cumulative and were actually being offered to convince the jury that Carter had a violent disposition. (R 171-75) The objections were overruled and the gun and knife were introduced into evidence. (R 460; 700) Introduction of these weapons was improper under Section 90.403, Florida Statutes, and, although it is factually dissimilar, Hush v. State, 511 So.2d 583, 588-89 (Fla. 4 DCA 1987).

When Carter testified, the prosecutor, over objection, cross-examined him about a burglary he had committed a few days before the incident involving Millie Worden. (R 824-33). Similarly, the prosecutor asked about Carter's use of drugs:

Q. How did you stay awake?

A. You told me you didn't want to bring that out.

A. I want you to tell me if that's the truth, that you stayed up for four days straight, I want to know how you did it?

A. I was doing dope.

(R 844). Evidence of the burglary and Carter's drug use is inadmissible under Section 404, Florida Statutes.

Upon Carter's direct examination, his lawyer asked him about his prior record, evidently in anticipation of his being impeached on cross-examination. (R **822)** On cross, the prosecutor went over each conviction in detail. (R **852-54)** In closing, the prosecutor repeatedly referred to Carter as **"a** thief" and criticized his character (e.g., R **903, 903, 904, 911, 994).** The prosecutor's use of Carter's convictions on cross-examination and in argument constitutes a clear effort to convict him on the basis of bad character in violation of Section **90.404** and **90.610,** Florida Statutes.

Convicting Charles Carter and sentencing him to death on the basis of all this unfairly inflammatory evidence denied him a fair trial in violation of his rights under Florida Constitution, Article 1, Sections **2, 9, 16** and **17** and under the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

II

THE PROSECUTOR'S CLOSING ARGUMENT DENIED CARTER SPECIFIC TRIAL RIGHTS AND AN OVERALL FAIR TRIAL

Appendices 1 and 2 show the nature of the prosecutor's closing argument. Before defense counsel made his first word of argument, the prosecutor attacked him, attacked the accused, complained of how trial procedure disadvantage the state, vouched for the state's key witness (Johnny Johnson), explained that the state wanted to tell the jury all the facts, and made

references to many extra-record (and perhaps unfounded) facts. Let us first categorize, by listing, the types of improper argument presented by the prosecutor:

A. Attacks on defense counsel.

1. From opening portion of summation - (Appendix 1)

Mr. Brock seems to be trying to tell you . . . **(R 894)**

* * *

Mr. Brock tried to argue to you yesterday . . . **(R 899)**

* * *

It was done so Mr. Brock can get up . . . **(R 900)**

* * *

Mr. Brock would have you believe . . . **(R 900)**

* * *

Mr. Brock would have you believe that his overriding concern, Mr. Brock's words . . . **(R 909)**

* * *

Now, Mr. Brock tried to tell you in cross-examining Johnny . . . **(R 910)**

* * *

So Mr. Brock would have you believe . . . **(R 911)**

* * *

And Mr. Brock tries to ask questions, trained lawyer, in a fashion to make you believe . . . **(R 912)**

* * *

Nobody except Mr. Brock in his own mind thought up that Toni was some ring leader. And yet when he asks questions in a very skillful fashion, . . . **(R 912-13)**

* * *

Mr. Brock would have you believe . . . **(R 916)**

* * *

Mr. Brock didn't seem to understand that. (R **924)**

* * *

When did you hear that story. You heard that when Mr. Brock asked her questions on cross-examination. (R **925)**

* * *

That comes from Mr. Brock asking them questions.... Mr. Brock wants you to believe . . . **(R 925-26)**

* * *

When Johnson gets on the stand Mr. Brock says did you go to a store. He says that is that important. (R **926)**

* * *

Mr. Brock wants you to believe . . . **(R 926)**

* * *

. . . think about who asked the question. (R **927)**

2. **From rebuttal portion of states summation - (Appendix 2)**

. . . don't let a clever lawyer lead you astray. (R **986)**

* * *

. . . pretty clever trick. (R **986)**

* * *

His whole idea of fifteen going on thirty is another creature of the mind of the defense. Mr. Brock has to do his job. He's doing a good job.

* * *

It's interesting that in some points in his argument Mr. Brock wants you to believe that Johnny is brilliant and in others that he's ignorant. (R **989)**

* * *

. . . Mr. Brock wants you to believe **. . . (R 991)**

* * *

It's being said that Johnny in the closing argument of Mr. Brock is fifteen, when Mr. Brock -- when that suits his argument. And he's twenty-five when it suits his argument otherwise. (R **994-95)**

B. <u>Attacks on Charles Carter.</u>

Why did they go over there? Because that man is a thief from **1971,** he's a thief. (R **903)**

* * *

This man who wants you to believe that he's not a murderer, that's been a thief and a liar for at least **17** years lied to his own family. (R **903)**

* * *

Charlie Carter lies to everybody he walks up to. He doesn't tell the truth ever. (R **904)**

* * *

. . . something that Charlie Carter's been known for **17** years, known proven fifteen convictions. (R **911)**

* * *

She knows Charlie's background, but she's still Charlie's girlfriend. (R **917)**

* * *

He doesn't even known how many times he's been convicted. We have to go through that. How many? Fourteen or fifteen times. And for what? Every thing

about this man is dishonest. Felonious larceny, breaking and entering, unauthorized use of a car, concealing merchandise, breaking and entering and burglary four more times, unauthorized use again, theft again, worthless checks. Except for the escape charge where he escaped from prison, he has proven himself for **17** years to be a liar. (R **923)**

C. Vouching for the state's key witness (Johnny Johnson).

Johnny Johnson is telling you the truth. **(R 923)**

D. **Complaints that trial procedures and the defendant's rights disadvantage the state.**

Keep in mind that Charlie Carter had an absolute right to remain silent. He chose to take the witness stand. That is not something that the State can plan on in a prosecution. (R **897)**

* * *

Does the State know that going in? No, the State doesn't know he's [Johnny Johnson] going to get on the stand and agree he was there. (R **898)**

* * *

How does the State get the evidence in? They have to call these witnesses, they seized it; otherwise, it can be attacked. (R 900)

* * *

(See excerpts quoted above concerning Mr. Brock's skillful questioning technique.) (R **912, 913)**

* * *

Mr. Brock is going to have a chance to argue to you. I'm going to have a short rebuttal period. **As** you listen to the defense's argument think about it, think about how logical it is when you think about the questions asked on cross-examination of Mr. Brock. He's going to tell you a witness said so and so, think about who asked the question. (R **927)**

* * *

Defense gets those responses, they are allowed to ask leading questions, it's entirely proper. I'm not telling you it's not. I'm just telling you to think about the reason why a witness may appear to answer something sometimes is because of the form of the question that is asked.

E. Vouching for the prosecution itself.

We take every piece of evidence that we can come up with and present it to you so that the case is proven beyond a reasonable doubt. (R **895)**

* * *

We're not building some case for you to go back in the jury room and say I don't know what the State proved here. (R **902)**

* * *

We're just trying to tell you the facts. (R **913)**

* * *

But as I told you, the State's going to put on everything valuable. (R **984)**

F. Extra-record references.

[Johnny Johnson's] trial got the same jury instructions this trial's going to get. (R **896)**

* * *

He admitted to the police and a confession was played at his trial. (R **896)**

* * *

He can get three consecutive life sentences. (R **921)**

* * *

This State's entire case convicted Johnny Johnson with only one different piece of evidence, his statement, that Mr. brock wants to claim is a lie. This convinced **12** people beyond a reasonable doubt. (R **984)**

* * *

> . . . his lawyer knew the truth. . . . His lawyer can't support perjury and put him up there to say that if he knows it's not true. . . . But if he had got on the witness stand in his trial and testified to the truth that he told after it and to his lawyer most likely that he was in the house and knew of the robbery of the car, that they were going to steal the car, he'd have been guilty, so he didn't testify.
> **(R 992-93)**

* * *

> I have no control and the judge has no control over the Department of Corrections. The Department of Corrections puts people where they want. They are convicted, sentenced, they go to Lake Butler. They are sent where the prison people want to send them. It's ludicrous to think Johnny Johnson thinks he's going to get some **25** years better somewhere than somewhere else, that's why he's going to lie.
> **(R 996-97)**

In a criminal case, a defendant is entitled to have the effective assistance of counsel, to confront and cross-examine witnesses, to compel witnesses to testify in his own behalf, to testify or remain silent and not have his choice used against him, to follow fair trial procedures, and to be tried by a fair and impartial jury. These rights are preserved for the defendant by the fifth, sixth, and fourteenth amendments to the United States Constitution and by Article One, Sections **2, 9,** and 16 of the Constitution of the State of Florida. Florida provides further protection in its constitutional access to the courts guaranty. Art. I, §21, Fla. Const. All of these constitutional rights were violated in one way or another by the

prosecutor's closing argument.

Carter's right to testify free from penalty for choosing to do so was violated when the state complained that it could not anticipate what he would say. His right to effective counsel was violated when the prosecutor hammered at "Mr. Brock" for what he said in his questions, for what he argued, for what he thought, for what he wanted, and for his "clever tricks." The right of confrontation was violated when the prosecutor complained of Mr. Brock's skillful questioning on cross-examination and explained that the defendant can ask leading questions without adding that the state can do so as well. The right of compulsory process was violated when the prosecutor criticized the defendant's witnesses. The right of confrontation and to a fair trial was violated by the prosecutor's repeated extra-record assertions about evidence at Johnny Johnson's trial, Johnson's lawyer's knowledge that Johnson's current story is the truth, jury instructions at Johnson's trial, Johnson's truthfulness, and the possibility that Johnson would receive three consecutive life sentences. All of these violations poisoned the jury, thus denying Carter the right to a fair and impartial jury - indeed, denying him fair access to the courts.

Use of extra-record argument is a frequent subject of prosecutorial misconduct. Huff v. State, 437 So.2d 1087 (Fla.

1983); See, DeFoor, Prosecutorial Misconduct in Closing Argument, 7 Nova L. Rev. 443. (1983) Comments on a defendant's silence are also well-documented prosecutorial error. E.g., State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), and related federal cases. In the instant case, the prosecutor's comment pointed out that Carter exercised his right to remain silent until the time of trial and that his exercise of the rights caused the state to be unprepared to deal with his testimony when he chose to exercise his right to testify. Ferauson v. Georgia, 365 U.S. 570 (1961); Brooks v. Tennessee, 406 U.S. 605 (1965). Attacks on defense counsel are not a newly discovered device by any means. Douglass v. State, 135 Fla. 199, 184 So. 756 (1929). What is different about the prosecutor's argument in this case is that it is a pervasive, insidious assault on the adversary process and on the defendant's right to defend himself.

A defendant's right to present a defense has been recognized by the United States Supreme Court as growing out of the various trial rights afforded the accused in a criminal case:

> The right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. Just as an accused has a right to confront the prosecution's witnesses for the purposes of challenging their testimony, he has the right to present his own witnesses to establish a

defense.

Washinston v. Texas, 388 U.S. 14 (1967); Cool v. United States, 409 U.S. 100 (1972). Our own state constitution guarantees access to the courts, a right which implies a fair opportunity to defend oneself.

The Supreme Court of Illinois considered a case in which the prosecutor claimed there was trickery by the defense lawyer, and concluded:

> Finally, we note that the prosecutor's rebuttal closing argument introduced additional error into the record. The prosecutor's suggestion that Byron's trial strategy was a subterfuge deliberately calculated to introduce reversible error unfairly, and without any basis for doing so, discredited Bean's attorney. A defendant is entitled to be tried by an unbiased jury and to be judged on the merits of his case, not on the unsubstantiated personal opinion which the prosecutor holds of the defense attorney's ethics and abilities. The prosecutor's accusation of defense trickery substantially prejudiced the defendant's right to a fair trial and was improper.

State v. Bean, 485 N.E. 2d 349, 359 (Ill. 1985). In this case, the cumulative effect of the prosecutor's violations of Carter's rights constitutes "inexcusable prosecutorial overkill" warranting reversal under Hill v. State, 477 So.2d 553 (Fla. 1985), because there were substantial disputes as to whether Johnson or Carter committed the killing and when and where the death occurred. Furthermore, the prosecutor's attacks were so insidious that defense counsel failed to object. The rights involved are so fundamental and the prejudice so great that the prosecutor's misconduct must be declared plain error.

III

THE CONVICTIONS ARE NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE.

The conviction of Charles Carter was possible only because his co-defendant testified against him. Without Johnny Johnson, the state would not have had any evidence that Carter was in the house at the time the victim was attacked. Nor would the state have had any evidence that Millie was alive when her body was placed in the car and when it was disposed of.

It is true that an accomplice may testify, but his testimony must be received with great caution and should be scrutinized carefully by the court and the jury. Padsett v. State, 53 So.2d 106 (Fla. 1951); Vaughn v. State, 2 So.2d 122 (1941); Henderson v. State, 135 Fla. 548, 185 So. 625 (1939). Johnny Johnson's testimony was obviously colored by his own desire to receive less than consecutive life sentences. Furthermore, his testimony that Millie made a noise when put in the car and said something like "let me out of here" when disposed of is both inherently incredible and controverted by the state's own medical examiner who testified Millie would have died within a few seconds to, at most, five minutes. This incredible testimony bears directly on several of the state's theories, particularly with regard to premeditation and some of the aggravating circumstances relied on in overriding the jury's

recommendation of life. Most clearly, perhaps, is the fact that the conviction for kidnapping cannot be sustained because Millie Worden was already dead when she was moved from the bed in her home.

IV

IMPOSITION OF THE DEATH PENALTY IS ILLEGAL UNDER THE CIRCUMSTANCES OF THIS CASE

A. IMPOSITION OF THE DEATH PENALTY WOULD VIOLATE ENMUND V. FLORIDA, CABANA V. BULLOCK, THE EIGHTH AMENDMENT AND ARTICLE I, SECTION 17.

In the guilt phase, the jury was instructed that it could find Carter guilty on either a premeditated murder theory or a felony murder theory. (R 1001-03) They were also instructed on the law of principals and accessories. (R 1011-12) Johnny Johnson, the only witness who acknowledged presence at the death of Millie Worden, testified that the only intent was to steal her car. He blamed the actual killing on Carter. Carter implicitly blamed the death on Johnson by saying he left Johnny with Millie and Johnny later appeared with Millie's car. The jury had available to it two legal theories: premeditated murder and felony murder. It also had available to it four factual theories:

1. Johnny Johnson actually caused the death and Charlie Carter is innocent because he was not present;

2. Johnny Johnson actually caused the death in a felony murder and Charlie Carter is guilty of felony murder because of his involvement before, during and after the death.

3. Charlie Carter is guilty of felony murder because he actually caused the death in the course of a robbery; or

4. Charlie Carter is guilty of premeditated murder.

The jury returned a verdict that Charlie Carter was "guilty as charged." Of the four factual theories above, the only thing we can say with certainty is that the jury did not adopt number one (that Johnson is guilty and Carter is innocent). There is absolutely no way to tell upon which of the other three options the jury predicated its finding of "guilty as charged."

In Enmund v. Florida, 458 U.S. 782 (1982), the Supreme Court held that proportionality principles embodied in the eighth amendment bar imposition of the death penalty upon a defendant convicted of felony murder who did not himself kill, attempt to kill, or intend to kill. In the present case, it is possible that the jury found Carter guilty on a felony murder theory although the jury believed Johnson committed the act. In any event, however, we do not know, and there has been no determination beyond a reasonable doubt whether Carter was (1) the actual killer or (2) intended the victim's death. Without such a determination, Enmund prohibits imposition of the death penalty.

In Cabana v. Bullock, 106 S.Ct. 689 (1986), the Supreme Court reviewed and vacated a conviction and death penalty imposed in circumstances like the present case. The Supreme Court sent the case back to the state courts for a determination of Enmund culpability. Id. at 700. The Supreme Court found that the Mississippi Supreme Court's finding of "overwhelming" evidence was not sufficient.

Cabana held, at least for federal constitutional purposes, that it was not necessary to have a jury make the Enmund culpability finding, and, indeed, an appellate court could make the finding. Id. at 697. The dissent in Cabana correctly pointed out that an appellate court cannot correct a jury's inadequate finding of guilt, Cole v. Arkansas, 333 U.S. 196 (1948), and that when state law creates a liberty interest in having a jury make a particular finding, due process principles preclude an appellate court's making that decision. Hicks v. Oklahoma, 447 U.S. 343 (1980).

A defendant is entitled to have each element of an offense found by a jury beyond a reasonable doubt. Here the jury did not specify which elements of which variety of first degree murder it found to exist. It might not have been convinced beyond a reasonable doubt that Carter either actually committed the killing or intended the death. Carter is entitled to have the jury make that determination under Article 1, Sections 16

and 22, of the Florida Constitution.

The trial judge found as an aggravating circumstance that the killing was premeditated. But he did not make a specific finding of proof beyond a reasonable doubt that Carter premeditated the killing. Instead, he found the aggravating circumstances to have been proven by clear and convincing evidence. The trial judge's finding, therefore, is inadequate because he did not find the defendant guilty beyond a reasonable doubt. Furthermore, under the Florida Constitution, Carter is entitled to have such a finding made by a jury. Art. 1 §§16, 22, Fla. Const.

B. THE TRIAL COURT MADE INADEQUATE FINDINGS OF AGGRAVATING CIRCUMSTANCES.

The trial [illegible] in [illegible] and i writing that he sta [illegible] hi he must evalu the evi is clea and convincing" proof. (R 1246, 1256) The judge then found five aggravating circumstances "established by clear and convincing evidence." (App. 5) A defendant in Florida may not be sentenced to death in the absence of proof beyond a reasonable doubt of at least one aggravating circumstance. Williams v. State, 386 So.2d 538 (Fla. 1980). Accordingly, this case, at the least, must be remanded for a determination whether at least one aggravating circumstance exists beyond a reasonable doubt.

C. NONE OF THE FIVE AGGRAVATING CIRCUMSTANCES FOUND BY THE TRIAL COURT MAY BE RELIED UPON FOR

IMPOSITION OF THE DEATH PENALTY IN THIS CASE.

1. USE OF THE FIRST CIRCUMSTANCE EXPANDS RATHER THAN NARROWS THE CASES IN WHICH THE DEATH PENALTY MAY BE IMPOSED.

The first aggravating circumstance found by the trial judge was that the murder was committed while Carter was engaged in robbery or kidnapping. In all likelihood, however, the jury convicted Carter on a felony murder theory. Thus, the fact of the attendant felony was the basis for both the conviction and the aggravating circumstance. Use of the commission of another crime as aggravation in this case constitutes impermissible "doubling." Furthermore, it expands the number of cases in which the death penalty may be imposed to all felony murders. This expansion is improper under Lowenfield v. Phelps, 108 S.Ct. 546 (1988).

2. USE OF THE FIRST AND THIRD AGGRAVATING CIRCUMSTANCES CONSTITUTES IMPERMISSIBLE DOUBLING.

By aggravating the sentence for commission of a robbery and for committing a murder for pecuniary gain, the trial judge impermissibly made double use of the same circumstance. Messer v. State, 403 So.2d 341 (Fla. 1981); Palmer v. State, 397 So.2d 648 (Fla. 1981).

3. USE OF THE SECOND AGGRAVATING CIRCUMSTANCE IS NOT SUPPORTED BY LOGIC OR THE EVIDENCE.

The written finding of aggravating circumstance number two (murder committed for purpose of avoiding or preventing arrest)

(R1257) is on its face invalid. It says only that the defendant took "the body" to a remote place, "thereby dumping the body..." Quite clearly, even the trial judge believed that Millie Worden was already dead when the body was disposed of. Disposing of or concealing evidence is not a valid aggravating circumstance. Only when the death itself was caused for the purpose of avoiding arrest may this aggravating factor be invoked. Riley v. State, 366 So.2d 19 (Fla. 1978).

4. THE FOURTH AGGRAVATING CIRCUMSTANCE, THAT THE CRIME WAS "ESPECIALLY HEINOUS, WICKED, EVIL, ATROCIOUS OR CRUEL", IS UNCONSTITUTIONALLY VAGUE AND WAS ESTABLISHED BY INADMISSIBLE VICTIM IMPACT EVIDENCE.

The statutory aggravating circumstance, that the capital felony was especially heinous, atrocious, or cruel, is unconstitutionally vague under an eighth amendment analysis. Maynard V. Cartwright, 108 S.Ct. 1853 (1988). As applied in this case, the circumstance was expanded to include the adjectives **"wicked"** and **"evil".** These words are even less capable of accurate definition. Furthermore, they appear improperly to expand the statutory definition.

The heart-rending description of Millie Worden's last moments was necessarily based upon the evidence introduced by the state in the penalty phase about Millie's ill health, how slowly she died, the fear she must have felt, and the fear she had previously experienced. This victim impact evidence was

improper, and the court should not have relied upon it. Booth v. Maryland, 482 U.S. 496 (1987); Grossman v. State, 525 So.2d 833 (Fla. 1988).

5. THE FIFTH AGGRAVATING CIRCUMSTANCE, THAT THE CRIME WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER, IS NOT SUPPORTED BY THE EVIDENCE.

The jury recommended life. It no doubt was unpersuaded by this aggravating circumstance because it had not found the killing to have been premeditated at all. Furthermore, Dr. Dee and Dr. McClane testified that Carter acted impulsively. Dr. Dee even testified that "I don't think he premeditates things. He does whatever he feels on the spur of the moment." (R 1107) Johnny Johnson's testimony was that the intended crime was robbery.

The trial court simply misjudged the facts. When it is not even clear that the killing itself was premeditated, the aggravating circumstances of "cold, calculated, and premeditated" cannot be found. This Court has made it clear that proof of premeditation for death penalty purposes must be even stronger than the proof of premeditation as an element of the offense. Washington v. State, 432 So.2d 44 (Fla. 1983); Combs v. State, 403 So.2d 418 (Fla. 1981). Where the conviction is most likely based on a theory of felony murder, proof that the killing was cold, calculated, and premeditated cannot rise to the level required by this Court's decisions.

D. JURY OVERRIDE IS IMPROPER UNDER TEDDER.

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So.2d 908,910 (Fla. 1975). This test, the so-called Tedder standard, absolutely precludes the death penalty in this case.

The jury in this case recommended that Carter be sentenced to prison for life. The jury did not, in its recommendation, make any specific finding with regard to the existence or non-existence of aggravating or mitigating circumstances. As stated repeatedly throughout this brief, it seems likely that the jury found Carter guilty on a felony murder theory. If so, all of the judge's aggravating circumstances are inappropriate. Furthermore, implicit in the jury's verdict of guilty of felony murder and its recommendation against the death penalty is the jury's belief that the aggravating circumstances do not exist or that they are outweighed by mitigating factors. Finally, as discussed above, the five aggravating circumstances either are not in fact present or are invalid under the circumstances of this case. The trial judge went into great detail in describing the supposed aggravating circumstances. By contrast, he only briefly addressed the statutory mitigating circumstances and dismissed them summarilly. In fact he found that there was "No

evidence to determine or establish that defendant was under the influence of extreme mental or emotional disturbance." (R 1258 (emphasis added). That statement simply is not true. Both Dr. Dee and Dr. McClane testified to the contrary.

The judge also found that there was "No evidence to establish that the capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired." (R 1259) (emphasis added). But there was evidence. Objective, neuropsychological testing demonstrated that Carter had substantial brain damage. And both Dr. Dee and Dr. McClane found that his ability to appreciate criminality as well as his ability to conform himself to the law were substantially impaired.

The trial court's finding of "no evidence" of mitigation goes beyond the statutory matters. The judge said he reviewed other mitigation, but he did not state what it was. A review of the record discloses many non-statutory mitigating circumstances: Carter's co-defendant received a life sentence; he was the victim of child abuse at the hands of his father; he was a drug addict; he suffered from brain damage; his brain damage caused his mental level to be below normal in some respects; his mental and emotional disorders were such that he could be partially rehabilitated in a prison setting; he had

apparently saved the life of a child having a seizure. Thus, for the trial court to summarily find "no evidence" of statutory mitigation and summarily dismiss other mitigating facts is inconsistent with the commands of Tedder. A valid application of Tedder to this case establishes that the jury override was improper because reasonable persons could find that the aggravating factors either were not present or that they were outweighed by mitigating factors the judge chose to ignore.

CONCLUSION

The conviction should be reversed or, at least, the sentence of death should be vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Robert Landry, Esquire, Attorney General's Office, Park Trammel Building, **1313** Tampa Street, Tampa, FL **33602**, by regular **U.S.** mail, this 3rd day of May, **1989.**

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