IN THE SUPREME COURT OF FLORIDA

DONNIE GENE CRAIG,)

Appellant,)

vs.) CASE NO. 73,251

STATE OF FLORIDA,)

Appellee.)

_____)

INITIAL BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
HONORABLE JAMES T. CARLISLE, JUDGE

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STATEMENT OF THE FACTS

On March 31, 1987, witnesses Suzanne West and Lynn Berryhill, concerned that Thomas Sisco had not arrived at his office and had missed a morning appointment. went directly to Mr. Sisco's house to investigate. Upon arriving they found all doors locked but were able to observe Mr. Sisco inside lying on the floor (R-966). 911 was called and members of the West Palm Beach Police Department arrived, forced their way into the residence to find Mr. Sisco dead of a gunshot wound in the left side of the head (R-742). Initial observations included a disheveled billfold (R-746) and missing property including a Teltech card, gold lighter, and a Lucien Picard wrist watch (R-756,776). A later review of the West Palm Beach pawn shop receipts located the Lucien Picard wrist watch as having been pawned by a Daniel Wall on March 31, 1987. Questioning of Wall by the police revealed the watch had been received by Wall from Nathaniel Brice on or about March 31, 1987 (R-929). Witness Nathaniel Brice testified that he had received the Lucien Picard watch and State's Exhibit One a Raven .25 caliber automatic pistol the same evening after being the middleman for purchase and use of crack cocaine by himself and his companions Daniel Wall. Laura Mayo, and the defendant (R-885). At trial witnesses Laura Mayo and Nathaniel Brice testified to cocaine use with the defendant and receipt of the evidentiary items of the .25 caliber pistol and the Lucien Picard wrist watch. The latter was identified as belonging to Mr. Sisco by Gregory Nash who

had originally sold Mr. Sisco the watch (R-1576).

On April 27, 1987, an officer of the West Palm Beach Police Department P.O. McMillan seized a .25 caliber Raven pistol during an arrest of an Oswald Jones on a warrant for assault. At trial witness Nathaniel Brice identified a photograph of Oswald Jones as the person to whom he had sold the Raven .25 caliber pistol (R-885). Additional trial testimony indicated that the .25 caliber pistol had been sold to a Clifton Ellis of Okeechobee, Florida, on September 29, 1986. Okeechobee police witnesses testified that the body of Mr. Ellis had been found on or about March 31, 1987. Evidence of the stabbing death of Ellis was introduced including evidence of a partial footprint left in blood on a song book cover in the bedroom of Mr. Ellis. Shoes taken from the appellant's residence upon his arrest on violation of probation on April 13, 1987, were compared and matched in trial testimony by State's expert Detective George Miller as matching the shoe print at the scene of Mr. Ellis' death. In addition, a partial palm print found on the interior rear view mirror of an automobile registered in the name of Clifton Ellis was matched with that of appellant. No age could have been established for the date of this print. During questioning by Okeechobee Police Detective Eugene O'Neill appellant admitted that he had been in Mr. Ellis' car approximately a year and a half previously (R-1342). As to the shoes taken at the time of his arrest on VOP appellant

admitted ownership and denied lending the shoes. Further evidence from the Ellis crime scene included two .25 caliber cartridges which were later matched by expert Gerald Styers as having been cleared in the Raven .25 caliber pistol (R-1266).

Testimony from Okeechobee Deputy Sheriff Joe Schumacher introduced a statement wherein appellant admitted being at the scene of Mr. Ellis' death and watching another person stab Mr. Ellis and obtain a firearm (R-1496). According to Schumacher's testimony appellant stated that. he and another person identified as Pete Andrews had driven to Palm Beach County where they met with Palm Beach people Nathaniel Brice and Laura Mayo (R-1497). Schumacher also testified that appellant stated that he and Pete Andrews along with the other Palm Beach people went to the door of Mr. Sisco and when the door was opened one of the other subjects shot Mr. Sisco (R-1498). Appellant in his own case denied the statement to Schumacher but admitted that he knew Laura Mayo and her daughter and had actually gone into the residence of Thomas Sisco accompanied by Laura Mayo's daughter and obtained the Lucien Picard watch when no one was present. Appellant denied any knowledge or assistance in the death of Mr. Sisco or Mr. Ellis (R-1688).

STATEMENT OF THE CASE

On May 21, 1987, the Grand Jury returned indictment charging appellant with Count I First Degree Murder, Count II Burglary, Count III Robbery, Count IV Grand Theft, Count V Possession of a Firearm by Convicted Felon (R-2193, 2194). On July 20, 1987, appellant filed demand for discovery (R-2201).

On October 20, 1987, the State filed notice of intent to rely on evidence of other crimes, wrongs or acts (R-2214, 2215).

On October 20, 1987, the State filed answer to demand for discovery and demand for reciprocal discovery (R-2216 to 2220).

On November 4, 1987, the parties stipulated to continue the case to the March trial docket, docket sounding March 4, trial March 7, 1988 (R-2229).

On March 4, 1988, appellant filed motion for statement of particulars (R-2230 to 2232) which was denied on 8/19/88 (R-137).

On March 4, 1988. appellant filed motion to suppress line-up, show-up, photographs, other pre-trial confrontation and courtroom identification (R-2233, 2234) which was denied on 8/19/88 (R-28).

On March 4, 1988, appellant filed motion for add tional funds to hire expert for jury selection (R-2235, 2236) which was denied on 8/19/88 (R-126).

On March 4. 1988, appellant filed motion to suppress defendant's confession, admissions and statements (R-2257, 2258) which was denied by the court on 8/19/88.

On June 29, 1988, the State filed notice of intent to rely on evidence of other crimes, wrongs or acts (R-2266, 2267).

On July 25, 1988, appellant filed motion to exclude similar fact evidence (R-2282, 2283) which was denied by the court on 8/19/98 (R-137 to 149).

On July 25, 1988, appellant filed motion to suppress evidence obtained through an unreasonable search and seizure (R-2278, 2279) which was denied by the court on 8/19/88 (R-174).

On August 11, 1988. appellant filed motion for severance R-2293, 2294 which was denied, except to Count V, Possession of a Firearm by a Convicted Felon. by the court on 8/19/88 (R-152 to 154).

On August 18, 1988, appellant filed motions to declare death penalty, Section 782.04, 921.141, 922.10, F.S., unconstitutional which was denied by the court on 8/19/58 (R-196).

On August 18, 1988, appellant filed motion for county wide jury pool which was denied on 8/19/88 (R-157).

On August 18, 1988, appellant filed motion to preclude death qualifications of jurors in the innocence of guilt phase of the trial and to utilize a bifurcated jury. if a

penalty phase is necessary (R-2357-2393) which was denied by the court on 8/19/88 (R-195).

On August 19, 1988, appellant filed motion to declare section 921.141, F.S., unconstitutional as applied (R-2396-2413) which was denied by the court on 8/19/88 (R-196).

On August 19, 1988, appellant filed motion to declare Sections 782.04 and 921.141, F.S., unconstitutional (R-2414-2418) which was denied on the court on 8/19/88 (R-196).

On August 19. 1988, appellant filed motion to declare Section 921.141(5)(h), F.S., unconstitutional (R-2419-2426) which was denied by the court on 8/19/88 (R-196).

On August 19, 1988, the State filed answer to motion for individual private voir dire (R-2427-2429).

On August 19, 1988, State filed answer to motion to declare Sections 782.04 and 921.141, F.S., unconstitutional (R-2430, 2431).

On August 19, 1988, State filed answer to motion to declare Section 921.141 (5) (h), F.S., unconstitutional (R-2432).

On August 19, 1988, state filed answer to motion to declare Sections 921.141 and 922.10, F.S., unconstitutional (R-2433).

On August 19, 1988, State filed answer to motion to declare Section 921. 41 (5) (i), F.S., unconstitutional (R-2434).

On August 19. 1988. State filed answer to motion to

declare section 921.141 (5) (d), F.S., unconstitutional (R-2435).

On August 19, 1988, State filed answer to motion to preclude death qualification of jurors (R-2436-2440).

On August 19, 1988, appellant filed motion to declare Sections 782.04 and 921.141, F.S., unconstitutional (R-2451-2453A) which was denied by the court on 8/19/88 (R-196).

On August 19, 1988, appellant filed motion to declare Section 921.141, F.S., unconstitutional (R-2454-2479) which was denied by the court on 8/19/88 (R-196).

On August 19, 1988, appellant filed motion to declare Section 921.141 (5) (d), F.S., unconstitutional (R-2480-2486) which was denied by the court on 8/19/88 (R-196).

On August 19, 1988, appellant filed motion to declare Section 921.141(5)(i), F.S., unconstitutional (R-2487-2504) which was denied by the court on 8/19/88 (R-196).

On August 19, 1985, State filed answer to motion to declare Section 921.141, F.S., unconstitutional (R-2505, 2506).

On August 19, 1988, State filed response to the defendant's motion relating to composition of petit jury panel (R-2507-2517).

On August 19, 1988, appellant filed motion to declare Sections 921.141 and 922.10, F.S., unconstitutional (R-2518-2526) which was denied by the court on 8/19/88 (R-196).

On August 22, 1988, appellant filed response to county

attorney's objection for appointment of jury expert CR-2527, 2528).

On August 22, 1988, appellant filed defendant's disclosure (R-2536-2543A).

On August 25, 1988, appellant filed supplemental defendant's disclosure (R-2544).

On August 26, 1988, State filed motion to compel witness to speak (R-2545, 2546).

On August 26, 1988, the court filed order for defense counsel to comply with Rule 3.2220(e) (R-2547).

On August 26, 1988, appellant filed supplemental defendant's disclosure (R-2548).

On September 1, 1988, appellant filed motion to declare Section 921.141 (5) (h), F. S., unconstitutional which was denied by the court on September 1, 1988 (R-2557-2568).

On September 2, 1988, the jury rendered a verdict finding appellant guilty of Counts I, 11, 111, and IV.

On September 12, 1988, appellant filed motion for new trial (R-2573-2577) which was denied by the court on 9/27/88.

On September 23, 1988, State filed response to appellant's motion for new trial (R-2584, 2585).

On September 23, 1988, the jury rendered an advisory sentence recommendation of death by a vote of 10 to 2 (R-2586-2589).

On September 27, 1988, appellant filed motion to

prohibit death as possible punishment (R-2590-2593) which was denied by the court on 9/27/88.

On September 27, 1988, the court rendered sentence as to Counts I, II and III with judgment (R-2595-2598).

On October 11, 1988, appellant filed timely notice of appeal (R-2604, 2605).

SUMMARY OF CASE

POINT I

Appellant was prejudiced and denied a fair and impartial trial by the introduction of other crime evidence showing him as the perpetrator of an unrelated homicide and buying and using crack cocaine. Neither the homicide nor the use of crack cocaine was relevant to any material facts. The other crime testimony did not touch on any of the elements of the crime charged but was merely prejudicial to appellant and offered for the sole purpose of bad character or propensity. Brvan v. State, 533 So. 2d 744 (Fla. 1988).

POINT II

Appellant was denied equal protection by a Palm Beach administrative order creating jury districts which resulted in an unconstitutional systematic exclusion of a significant proportion of the black population from the jury pool for the entire West Palm Beach jury district. The creation of dual jury districts denied appellant a fair representative cross section of the community. Spencer v. State, 545 So. 2d 1352 (Fla. 1989).

POINT III

Appellant was arrested on charge of technical violations of probation for purposes of questioning regarding a homicide in Okeechobee. His statements were involuntary and induced by the expectation of a benefit when the Okeechobee detective encouraged his statement by telling

appellant they would go easy on him if he cooperated (R-1357). In addition, the Okeechobee detective altered the rights waiver form by changing the "can" to "may" in the phrase "Any statement may be used against you in court" thus implying that appellant's statement regarding the homicide would not be used against him in court. There was no new evidence disclosed between the questioning of appellant and his subsequent arrest on the homicide other than appellant's statement establishing the detective's intent to arrest on violation of probation but question on homicide to surprise appellant. Consequently appellant's statements were involuntary and without benefit of counsel.

POINT IV

Appellant, while being transported to the Department of Corrections pursuant to a sentence of death imposed in Okeechobee County for the death of Clifton Ellis, gave incriminating information to transporting officers. The transporting officers had established a friendly rapport with appellant and elicited the incriminating statements from appellant by asking

> "Now that it's all over what really happened to Mr. Ellis?" (Supp. R-2 & 10)

This question, reasonably likely to elicit an incriminating response, was not made during an uninterrupted course of conversation between appellant and the officers, but was asked after the appellant had remained quiet at which time the transporting officer initiated the conversation.

Appellant had refused to make any statement since his arrest on the homicide in Okeechobee April 13, 1987, and had invoked his right to remain silent and benefit of counsel when attempted question by the officers from Palm Beach in this case, In addition, appellant had filed a declaration declining questioning (R-189), appellant's Exhibit No. 2 in the trial court, and notice of invocation of right to counsel (R-2198). Once appellant invoked his right to remain silent and to have counsel present during further interrogation questioning by the transportation officers was not permissible without warnings pursuant to Miranda. State v. DeVille, 513 So. 2d 807 (2 DCA 1987).

POINT V

On April 13, 1987, during arrest of appellant on technical violations of probation, Okeechobee Sheriff's deputy did seize shoes for purposes of examining the soles for comparison with an imprint which had been left at the scene of the Ellis homicide. At the time of the seizure of appellant's shoes the officers were looking for a tennis brand or gym shoe imprint with a circular design. After seizure examination of appellant's shoe did reveal a circular design. Appellant's shoes were held and later identified at trial as being the shoes which left the imprint at the Ellis homicide.

Initial observation of appellant's shoes produced no reasonable suspicion. They were not, instrumentalities of the

arrested charge of technical violations of probation. Nor was there any reason to suspect the shoes contained any weapon and were thus seized for protection of officers. Since appellant's shoes were seized and inspected on less than reasonable suspicion this is insufficient to justify a warrantless search and seizure. Schneider v. State, 353 So. 2d 870 (Fla. 1977). Sanchez v. State, 516 So. 2d 1062 (3 DCA 1988).

POINT VI

Pursuant to FRCrP 3.140(n) appellant filed motion for statement of particulars requesting, inter alia, time, date and place of the offense. This motion was denied by the trial court which found that the rule was an anachronism in light of the rules of discovery. The State gave no reason or excuse for not being able to furnish the requested information. At, trial appellant relied on the defense of alibi and the State proved a different date than on the indictment. The State should have been compelled to furnish the requested information as it was within their knowledge and is mandatory under the rule.

POINT VII

The State. in pushing this matter to trial, waited until ten days before beginning of trial to complete and prepare ballistics findings and photographs depicting findings. The photographs were not known to appellant until August 29, seven days into trial, although photographs were shown to appellant's appointed expert on August 23, 1988.

Examination of the record reflects the State filed supplemental discovery reporting a lab report by their expert on August 22, 1988. In any event, the information and photographs were not received by appellant in time for him to adequately prepare. The "Richardson" hearing held was insufficient by not making full inquiry into the circumstances of the violation and prejudice to appellant. Compounding this discovery violation was the State's use of appellant's appointed expert as their own ballistics expert. This turnabout occurred when the trial court directed appellant to furnish the name of his appointed expert. In an effort to complv appellant supplied his appointed expert's name and address on the witness list. After appointed expert's examination and report to appellant, appellant did strike appointed expert's name from witness list. Nevertheless, the trial court found that since appellant's appointed expert had information material to the case he was a witness and therefore subject to use by the State. This was in spite of appellant's assertion that the appointed expert was never meant to be a witness but to assist appellant and consult regarding firearm identification and tool marking. A "Richardson" hearing was not held in reference to this witness. Photographs and cumulative testimony were unfair surprise to appellant and were not disclosed in time for him to adequately prepare. Robinson v. State, 522 *So.* 2d 869 *(2* **DCA** 1987), Rivers v. State, 526 *So.*

2d 983 (4 DCA 1988).

POINT VIII

After introduction of other crime evidence of homicide appellant moved for mistrial and upon denial asked that the jury be advised that the homicide was not relevant to the main charge. This request was denied. Appellant's request for instruction to the jury coupled with the pre-trial motions and previous trial objections did adequately alert the trial judge to instruct the jury pursuant to Section 90.404(2). Failure to give this instruction is reversible error when said instruction is specifically and unambiguously requested. Rivers v. State, *425 So.* 2d 101 (1 DCA 1982), Hodges v. State, 403 *So.* 2d 1375 (5 DCA 1981).

POINT IX

At trial a Palm Beach police detective was allowed to testify to the telephone number of a pay phone located near an apartment where appellant had been observed by trial witnesses and from which appellant had allegedly made a telephone call. This was hearsay without any exception. Permitting this hearsay on a major evidentiary item was manifest error denying appellant effective cross examination and assistance of counsel.

POINT X

In finding the aggravating circumstance pursuant to 921.141(5)(d) the trial court relied on conjecture and hearsay to support the findings of appellant's intent and commission of other crimes. In addition, this circumstance

and the findings gave double consideration to a single act and thus overlapped with the court's finding of aggravating circumstance no. 1. In addition to being duplicitous this circumstance is violative of Furman v. Georgia, 408 U.S. 238, 92 Supreme Ct. 2726, 33 L.Ed. 346 (1972) and State v. Dixon, 283 So. 2d 1 (Fla. 1973), which requires the aggravating circumstance imposing the sentence of death to be found only when the perpetrator commits such additional acts as to set the crime apart from the norm of capital felonies. The cited circumstances and crimes pursuant to Section 921.141(5)(d) are the norm of capital felonies and thus this circumstance does not set the crime apart from the normal of capital felonies.

POINT XI

The court's findings of aggravating circumstances 3 and 6 were based on the sole finding that appellant and the victim knew each other, and therefore the murder was necessary to avoid identification. Acquaintance alone is insufficient upon which to base a finding of this circumstance. Dufour v. State, 495 So. 2d 154 (Fla. 1986), Griffin v. State, 474 So. 2d 777 (Fla. 1985), and Caruthers v. State, 465 So. 2d 496 (Fla. 1985).

POINT XII

In finding the circumstance pursuant to Section 921.141(5)(h) the trial court relied on mere conjecture as to appellant's intent and appellant's knowledge that the weapon

was operable. Even if appellant knew that the weapon was operable this would not satisfy proof beyond a reasonable doubt of this circumstance. Smith v. State, 515 So. 2d 182 (Fla. 1987).

POINT XIII

Testimony in the penalty phase was that appellant had an I. Q. in the sixties with a mental age of around nine or ten years. Testimony of appellant's school psychologist cast doubt on his ability to plan an idea and consider the consequences of his actions. Imposition of the death penalty on the mentally retarded is ineffective and barred by the Eighth Amendment. Further, it is unfair to impose such severe sanctions on a person who is not capable of appreciating the consequences of his acts. It was a mitigating circumstance which would outweigh any of the aggravating circumstances in this case.

POINT I

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

Appellant was denied a fair and impartial trial by the introduction of evidence showing him as a perpetrator of an unrelated homicide and buying and using crack cocaine. Specifically, the State presented witnesses Laura Mayo and Nathaniel Brice to testify that appellant bought and used crack cocaine. Moreover, Laura Mayo testified of appellant's prior use of cocaine. (L.M. R-815, L 17-22, R-816. L 4-7, L 22-24, R-817, L 8 to R-818, L 21, R-821. L 1-6; N.B. R-872, L 1-4, R-874, L-8, 10, 19, R-875, L-10 to 11, R-879, L-2 to 6, L-11 to 17). All of the foregoing testimony furthered evidence not necessary to the State's case in chief. The testimony did not touch on any of the elements of the crimes charged, but was merely prejudicial to appellant at his trial. Initially the State gave notice to the appellant of the intent to use similar fact evidence pursuant to 90.404. F.S. In denying appellant's motion to exclude other crimes the trial court decided that the evidence was admissible under current tests of relevancy. (R-137 to 146) This objection was preserved for appellant by the trial court. (R-1335A).

Section 90.401 states:

> "Relevant evidence is evidence tending to prove or disprove a materia fact."

Section 90.403, F.S., excludes evidence as inadmissible

> "if its probative value is substantially outweighed

> by the danger of unfair prejudice, confusion of issues misleading the jury, or needless presentation of cumulative evidence."

Under this test the testimonial and physical evidence of the homicide of Mr. Ellis and drug use were not relevant. As inadmissible a review of the evidence pursuant to State v. Diguilio, 491 So. 2d 1129 (Fla. 1986) establishes that the State cannot meet the burden of proof that the complained of evidence was harmless beyond a reasonable doubt.

The relevant testimony of witnesses Laura Mayo and Nathaniel Brice was to link appellant. to the murder weapon and the victim's Lucien Picard watch. This was accomplished through Laura Mayo's and Nathaniel Brice's identification of appellant and their observations of appellant's alleged possession of the firearm and watch. There was absolutely no need to introduce evidence of buying and using crack cocaine. The only purpose of this testimony was to show appellant in an evil manner. Evidence of drug use is highly prejudicial and crack cocaine is in particularly a feared if not despised substance. The prejudice against cocaine's use is well documented. See Johnny Terron v. State, opinion filed 6/2/89, 14 FLW 1349 (1 DCA) where on charge of possession of cocaine prospective jurors expressed inability to be fair regarding crack cocaine. For lack of relevancy see Craig v. State, 510 So. 2d 857 (Fla. 1987) where, on charge of two counts of first degree murder, testimony which indicated that defendant had spent some of the money he gained from the

unauthorized cattle sales on illicit drugs was not relevant. Also, White v. State, No. 88-0338, 14 FLW 1882, 8/11/89 (4 DCA), opinion filed 8/9/89, where testimonies concerning activities in base house were not re evant to the charge of armed robbery.

Through the testimony of witnesses Detective Eugene O'Neill, Okeechobee City Police, Detective George Miller, Okeechobee Sheriff's Dept., and deputy sheriff Joe Schumacher. Okeechobee Sheriff's Dept., evidence was introduced of an unrelated homicide. The stabbing death of the victim Mr. Ellis did not touch on any elements of the death of Mr. Sisco. The deaths of Mr. Ellis and Mr. Sisco were not similar and not connected through motive or a series of transactions. Nor was the death of Mr. Ellis necessary to link appellant circumstantially to the death of Mr. Sisco. Appellant's connection to the firearm purchased by Mr. Ellis was shown through testimony by Laura Mayo that she had seen appellant in a car that looked like the vehicle owned by Mr. Ellis and in which appellant's partial palm print had been found on the rear view mirror. Further connecting appellant to Mr. Ellis was a footprint found on a song book cover at the scene of Mr. Ellis' death. The fact that this footprint had been left in blood was unnecessary (R-1442) and the jury should have merely been shown the evidence. Likewise, the death of Mr. Ellis resulting from multiple stab wounds was not necessary to the State's case against appellant on the death of Mr. Sisco. Showing appellant as the perpetrator of

the vicious homicide of Mr. Ellis was devastating to appellant on his charge in the homicide of Mr. Sisco for not only did it show bad character but was offered for propensity as well. The State could have and should have presented their evidence linking appellant to Mr. Ellis without showing the homicide or referring to a bloody footprint. This includes the statement allegedly given to deputy Joe Schumacher which could have been edited to delete the reference to the death of Mr. Ellis as was the fact that appellant's statement to deputy Schumacher was while appellant was in route to await sentence of death for the killing of Mr. Ellis.

Review of the trial record shows that considerable witnesses and testimony were spent regarding the death of Mr. Ellis including gruesome photographs. As such the death of Mr. Ellis became a "feature of the trial" contrary to Mitchell v. State, 491 So. 2d. review denied, 500 So. 2d 545. See also Bryan v. State, 533 So. 2d 744 (Fla. 1988) where it was held, although not reversible error, pictures of a bank robbery not relevant allowing only the evidence surrounding the bank robbery. Similarly in this case the State should have confined its evidence to that which linked appellant to the firearm but excluded the evidence of the homicide of Mr. Ellis. On this point it was impossible for the jurors to fairly weigh and consider the evidence regarding appellant's charge in the death of Mr. Sisco.

In conclusion, the complained of evidence was not relevant because it proved no element of the State's case and was admitted only to show appellant's bad character and propensity. Therefore. appellant's sentence in this matter should be vacated and he should be granted a new trial.

POINT II

THE APPELLANT WAS DENIED EQUAL PROTECTION RIGHTS PURSUANT TO ARTICLE I, SECTION II, FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY DENIAL OF MOTION TO DRAW JURY POOL FROM COUNTY WIDE JURY AND PALM BEACH ADMINISTRATIVE ORDER WHICH CREATED JURY DISTRICTS WHICH RESULTED IN THE UNCONSTITUTIONAL SYSTEMATIC EXCLUSION OF A SIGNIFICANT PORTION OF THE BLACK COMMUNITY FROM THE WEST PALM BEACH DISTRICT

On August 19, 1985, appellant filed motion for selection from county wide district stating denial of equal protection (R-2313-2350). The court, considering State's filed answer, denied appellant's motion as not timely as the pool from Glades was not available for the current trial setting three days later and to grant the motion would require a continuance (R-157). On this point it should be noted that appellant did request additional time on August 11, 1958, but was denied (R-18-27). In Spencer v. State, 545 So. 2d 1352, (Fla. 1989), the court held that the administrative order creating the districts resulted in an unconstitutional systematic exclusion of a significant portion of the black population from the jury pool for the West Palm Beach district. Further, the procedure of allowing a choice of removal in one district but not in another violates equal protection pursuant to Article I, Section II, of the Florida Constitution, and the Sixth and Fourteenth Amendments of the United States Constitution. At the time of hearing in this case Spencer had not been decided but was pending. Had it been established clearly at that time that the administrative order was in violation of appellant's

right to equal protection appellant's motion would have been granted.

In any case, the matter proceeded with the trial court's prediction (R-157). Denial of appellant's motion deprived appellant of a fair representative cross section of the county. The manner in which the jury selection was determined was a denial of appellant's right to equal protection. Therefore, appellant's sentence should be vacated and the matter remanded for a new trial.

POINT III

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENT TO OKEECHOBEE POLICE DETECTIVE EUGENE O'NEILL

On April 13, 1987, Appellant, was arrested at the home of his father for an unrelated charge of technical violations of probation (R-162). The arrest was effected by an officer of the Okeechobee Sheriff's Department. After arrest of appellant, instead of proceeding directly to the jail and booking on the violation of probation, appellant was taken by police vehicle to the Okeechobee City Police Department solely for the purpose of questioning appellant regarding the the homicide of Mr. Ellis (R-178). At the time Okeechobee Police Detective O'Neill told appellant he wished to talk with him concerning the death of Mr. Ellis, and subsequent to that did advise appellant of his rights. A rights waiver form, State's Exhibit No. 53, was executed by appellant. It should be noted that the police department's rights waiver form was altered by Detective O'Neill to the extent that the sentence which states that any "statements made can be used against me in court" was modified by striking through the word "can" and changing it to "may".

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

must be the product of rational intellect and free will. Bush v. State, 461 So. 2d 936, cert. denied, 106 Supreme Ct. 1237, 475 U.S. 1031, 89 L. Ed. 2d 345.

Appellant's statements to Detective O'Neill were obtained through the promise of benefit and leniency.

Q Didn't you talk to him about the particular case and encourage him to make a statement?

A Sure.

Q And tell the jury what you did to encourage it.

A Well, just told him that, well, to go easy on him: if he cooperated, that he should cooperate if he was involved in it, or words of that nature. (R-1354, L-16 through 25).

Under examination Detective O'Neill wavered and recanted in part under questioning of the court stating:

The Court: I never did get it straight.

Did you tell him you would go easy on him if he cooperated?

The Witness: No, sir, I did not tell him I would go easy on him. (R-1357, L-7 through 12)

Subsequently on further examination Detective O'Neill stated:

Q And you told him it would help if he cooperated?

A I would have told him it would help: I would have told him it would probably help him. (R-1358, L-11-15).

The foregoing, coupled with the alteration by the police detective of State's Exhibit No. 53, established that appellant's statement was induced by the promise of a

benefit. Where a confession is induced by the promise of a benefit, however slight, the confession cannot stand Henthorne v. State, 409 So. 2d 1081, citing Shotwell Manufacturing Company v. United States, 37 U.S. 341, 1983 Supreme Court 448, 9 L. Ed. 2d 357 (1963); Frasier v. State, 107 So. 2d 16 (Fla. 1958); State v. Chorpenning, 294 So. 2d 54, Fla. (2 DCA 1974).

There is no doubt that the Okeechobee police detective planned a scenario wherein appellant would be questioned of the homicide of Mr. Ellis while in custody for other charges. Following through with the express promise of help if appellant cooperated and altering the rights form to imply that the statements may not be used against him in court appellant was misled and induced into making the statement to Detective O'Neill.

For appellant to have made an intelligent and rational waiver of rights it is essential that he know the charges for which he is being accused. Appellant could not rationally realize the consequences of his statement unless Detective O'Neill had told him at that time he was under arrest for the murder of Mr. Ellis. Therefore, appellant's waiver was not one which was truly intelligent with full understanding.

In addition, on this point it should also be noted that evidence was introduced in the penalty phase that appellant was mildly retarded with an I.Q. in the sixties falling in the middle range of mild retardation (R-2067). While it is

not established that the police detective was aware of appellant's low I.Q. O'Neill did testify that he had prior experience with appellant.

Moreover, not fully informing appellant of the charges but questioning him nevertheless to collect, evidence is a deprivation of right to counsel pursuant to the Sixth Amendment, U.S. Constitution, and F. S., Section 910.240.

No statement of any defendant should be used in a capital murder case unless the defendant has benefit of counsel at the time of his statement.

While in custody on other charges appellant had no option to leave during the questioning. Further, there can be no meaningful waiver of counsel unless appellant is informed as to the charge thus impressing upon appellant the need for counsel.

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

Appellant's right to counsel in this matter was violated by the officer's action in participating in an arrest on one charge but questioning appellant concerning another charge. In addition, appellant's waiver of counsel was not voluntary or intelligent when it was induced by promises of benefit and leniency.

In conclusion, appellant's right to counsel in this matter was violated when he was arrested by one police agency for violation of probation and then questioned by another

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

POINT IV

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

On June 2, 1985, while being transported to the Department of Corrections pursuant to a sentence of death imposed in Okeechobee County for the death of Clifton Ellis, a conversation ensued between appellant and the transporting officers Deputies Joe Schumacher and Al Stone (R-50). During the conversation appellant made incriminating statements regarding the death of Mr. Ellis and also of Mr. Sisco. The conversation began with appellant lamenting his sentence of death. Subsequently Sgt. Schumacher elicited incriminating statements from appellant by asking a question reasonably likely to elicit an incriminating response

> "Now that it's all over, what really happened to Mr. Ellis'?" (Supp. R-2 & 10).

In response appellant then made incriminating statements of his presence during the homicide. Further, prompted by questioning of correctional officer Al Stone, appellant continued to make incriminating remarks (Supp.R-2 & 3).

At no time was appellant advised of his right pursuant to Miranda. Appellant's statements to Sgt. Schumacher and Officer Stone were not spontaneous and voluntary but induced and initiated by officers who were very familiar with appellant after spending time bringing appellant to and from court for his trial in Okeechobee. In fact Sgt. Schumacher

reported that he knew appellant for approximately eight years and along with Officer Stone had built up a friendly rapport **(R-62, 63).**

Since appellant's arrest on April 13, 1987. he has refused to make any statement in this matter. In addition, to prevent attempts at further interviews without benefit **of** counsel appellant filed declaration declining questioning. (R-189) (appellant's Exhibit No. 2 in the trial court) Appellant's declaration declining questioning was served on the Okeechobee City Police Department (R-190) and the Okeechobee County Sheriff's Department whose officers include the correctional officers (R-71). **Also** appellant filed similar request for counsel and declination **of** statement in this case (R-2198).

Once appellant invoked his right to remain silent and to have counsel present further interrogation was not permissible unless counsel was made available to him unless appellant himself had initiated further communication. State v. DeVille, **513 *So.*** 2d 807 (2 DCA 1987). In this case Sgt. Schumacher initiated the conversation and subsequent interrogation of appellant.

Q Can you describe how it came about that Donnie Craig started talking to **you?**

A We were, I guess, probably approaching the area **of** Orlando, which would be about an hour and thirty minutes into the trip, and (I) starting talking reference to being sentenced, getting the death penalty in the case in

Okeechobee. Florida. And then he was quiet and I asked Mr. Craig-- (R-51, L-18-25).

Moreover it is clear that these officers who had built "a friendly rapport" with appellant were trying to elicit incriminating information from appellant.

The Witness: I was just trying to get out -- the gentleman answered my question. that he was trying to get it off his chest, that is what I was trying to -- without trying to lead him. I was trying to get to that (R-56, L 13-17).

Since appellant had invoked his right to remain silent and right to counsel he was not subject to further interrogation even though Sgt. Schumacher and Officer Stone were not aware of appellant's invocation or declaration declining questioning. Arizona v. Roberson, 108 Supreme Ct. 2093, 1988, Anderson v. State, 487 So. 2d 85 (2 DCA 1986), State v. Smith, 532 So. 2d 1112 (2 DCA 1988), State v. Wooley, 482 So. 2d 595 (4 DCA 1986).

As a further matter introduction of appellant's statements denied appellant effective assistance of counsel pursuant to U.S. Constitution, Sixth Amendment, by denying appellant effective cross examination in his attempt to explain that the statements were not voluntary.

In conclusion, appellant's statements were taken subsequent to his invocation of right to counsel and without a fresh Miranda warning. Therefore, the trial court's order denying appellant's motion to suppress statements to Joe

Schumacher should be reversed as inadmissible. Review of the statements and their impact pursuant to State v. DiGuilio, 491 So. 2d 1129, Fla. 1986. establishes that the State cannot meet the burden of proof that appellant's statements were harmless beyond a reasonable doubt. Therefore. the trial court's order denying appellant's motion should be reversed with appellant's sentence vacated and remanded for a new trial excluding appellant's statements to Sgt. Schumacher and Officer Stone.

POINT V

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

On April 13, 1987, Appellant was arrested by officers of the Okeechobee Sheriff's Department at his father's home on a charge of technical violation of probation involving no new criminal offense. Present at the time of the arrest was Okeechobee Police Detective Eugene O'Neill. At the time of arrest appellant was asleep in a bedroom clothed only in underwear. While appellant was dressing for accompaniment with officers to the jail a pair of shoes was seized by an officer of the Okeechobee Sheriff's Department (R-166).

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

In this case initial observation of appellant's shoes prompted no suspicion except that they were a tennis type, and the officer had to seize and inspect soles to determine whether there was any similarity. No reason was given to justify the initial seizure of appellant's shoes. There was nothing recognizable or distinguishable about appellant's shoes that stirred the officer's inquiry other than they were a tennis shoe and in and of themselves were not distinguishable from thousands of any other tennis shoes of various size? shape and color. Because appellant's shoes

were seized and inspected on less than reasonable suspicion this is insufficient to justify the warrantless search and seizure. Schneider v. State, 353 So. 2d 870 (Fla. DCA 1977). Also in support see Oliveira v. State, 527 So. 2d 959 (4 DCA 1988) where officer lacked probable cause to believe that prescription medicine "found in accident victim's pockets while looking for identification" was illegal substance and thus should have been suppressed in subsequent prosecution for possession of illegal drugs. Also in support Sanchez v. State, 516 So. 2d 1062 (3 DCA 1988) where officer, after stopping defendant lawfully pursuant to Terry v. Ohio, 392 U.S. 1, 88 Supreme Ct. 1868, 20 L. Ed. 2d 889 (1968) not in suspicion of finding any weapon, but rather crack cocaine, ordered defendant to open a clinched fist at which time a small clear plastic bag containing cocaine fell to the ground warranted suppression of evidence.

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

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

In conclusion, the officers lacked reasonable suspicion to seize and then search appellant's shoes.

Wherefore, appellant moves this Honorable Court for an order reversing trial court's denial of appellant's motion to suppress evidence and remanding matter for new trial with suppression of appellant's shoes in any further trial proceedings.

POINT VI

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

Appellant filed motion for statement of particulars *(R-2230)* which requested, inter alia, date, time and place of the offense all pursuant to FRCrP 3.140 (n). The trial court denied Appellant's motion (R-136). During hearing on motion the State gave no reason not to supply the information reques ed other than reliance on reciprocal rules of discovery which give defense full knowledge of charges. The court found that the rule was an anachronism in light of discovery (R-137). The trial court's denial of appellant's motion was an abuse of discretion given no excuse, reasonable or otherwise.

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

The trial court's denial of appellant's motion for the reason that the rule was an anachronism in light of the discovery rules was an abuse of discretion. Appellant was asking for nothing unreasonable but simply trying to narrow the State to the time period and obtain information in order

to adequately prepare for trial. In this matter appellant was prejudiced by lack of this information for the time of the Sisco homicide was crucial to appellant's alibi. Evidence educed at trial from witnesses Nathanial Brice and Laura Mayo was that appellant had arrived at the Pembroke Pines apartment some time earlier that evening, March 31, perhaps as late as 11:00 p.m. According to witnesses appellant remained at this place until shortly after the telephone call to Delores Andrews which was shown on the telephone records to have been at 1:15 a.m. The State did know the time of the offense in this matter and in fact stated it to be " probably...12:01 a.m." (R-1779). The State in charging appellant with the offense on March 31 and then proving the offense to have occurred on April 1 prejudiced appellant in his presentation of defense through witnesses Laura Mayo and Nathaniel Brice. Had the State been held to a date and at least an approximate time appellant's alibi defense could have included an instruction to the jury requiring the State to prove beyond a reasonable doubt the date and approximate time of the offense. Brown v. State, 462 So. 2d 840 (1 DCA 1985) where on charge of second degree murder and second degree arson the State held to times specified in statement of particulars and entitled to instruction.

In a framework which offers a presumption of innocence the accused should be afforded the full use of the rules of procedure as enacted. The use of statement of particulars is

a particularly useful tool which also is time saving and has the effect of narrowing the issues and times for all concerned. This statement of particulars, when furnished, can often expose the case to the parties so that intelligent negotiation can follow and the accused can be fully informed as to the offense. With the rules requirement that reasonable doubts concerning the construction of the rule to be resolved in favor of the defendant this motion of appellant should have been granted. The State offered no reason for noncompliance and the court abused its discretion in denying appellant's motion finding that the rule was an anachronism. Williams v. State, 344 So. 2d 927 (3 DCA 1977).

In conclusion, appellant was prejudiced by the State's failure to furnish a statement of particulars specifying a date when they proved at trial a different date than charged in the indictment. In addition, the trial court abused its discretion in denying appellant's motion by disregarding the rule. Therefore, appellant's conviction should be vacated and remanded for a new trial.

POINT VII

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ALLOWING PHOTOGRAPHS WHICH WERE NOT DISCLOSED TO APPELLANT

At trial the State produced witness Gerald P. Styers who testified as an expert in firearm identification and tool mark identification.

Subsequently on August 39, 1988. seven davs into trial. the State surprised appellant with testimony from Gerald Styers that photographs of the State's exhibit had been taken and were available to show similar points of identification to buttress Styer's testimony. During trial appellant was surprised by the existence of these photographs and it was revealed that the witness had not made these photographs until on or about August 12, 199%(R-1283). The photographs, State's Exhibits 173 and 174, were never disclosed to appellant through any report but State's witness Gerald Styers testified that the photographs had been shown to appellant's appointed expert on or about August 23, 1988 (R-1530). Appellant denied knowledge of the photographs. (R-1531. L-16 & 17, omits "no" and should read: "Judge, 1 have no knowledge of the photographs.") Voir dire of witness Styers confirmed that when last asked about the photographs he said there were none (R-1531). An examination of the record reflects the State filed a supplemental discovery August 22, 1988, listing "P.B.S.O. lab report no. 87-16439 from Gerald Styers". However, appellant has no record of receiving this supplemental response nor the lab report. No

lab report was filed in the trial record.

Without the photographs of 173 and 174 the State had no evidence to corroborate Styer's observations and conclusions.

The State has a continuing duty to disclose. FRCrP 3.220(f). FRCrP 3.220(a)(1)(x) provides reports or statements of experts made in connection with a particular case including results of physical or mental examination and of scientific tests and comparisons are to be disclosed to the defense. In Robinson v. State, 522 So. 2d 869 (2 DCA 1987) it was held that the State's failure to disclose Lab results was reversible error. In addition, upon the failure of State's compliance with discovery the trial court is to inquire into the circumstances of the discovery violation and its possible prejudice to defendant. Richardson v. State, 246 SO. 2d 771 (Fla. 1971). Smith v. State, 500 SO. 2d 125 (Fla. 1986).

In this case the court did hold a "Richardson" hearing as to the photographs. but it was insufficient for failure to make findings regarding the circumstances of the violation and prejudice to the appellant. Even if sufficient the court abused its discretion in allowing the admission of the photographs. State's Exhibits 173 and 174. since tests and results were made and complete before trial but not disclosed to appellant in adequate time to prepare for the photographs and their impact on the jury. Also in support Rivers v. State, 526 So. 983 (4 DCA 1988) where on charge of first degree murder defendant was entitled to a new trial for

State's failure to disclose until midway through ti-iaf results of tests on defendant's clothing that possibly linked defendant to homicide.

Further compounding this discover:; violation was the court's allowing the State to call tho appellant's appointed expert as their witness in the case. Previouslv the court had granted appellant's request for assistance of a trial expert for firearm's identification. During motion hearings the Thursday before the Monday beginning trial the trial court warned appellant that any potential witnesses would have to be disclosed to the State or they might not be allowed to testify and in fact directed appellant to furnish the name of his expert (R-127 & 205). At that time the appellant had appointed expert Richard Dale Carter who had not yet examined the exhibits but was expected to do so before the commencement of evidence in this case. Accordingly appellant did disclose the name of the appointed trial expert and did list his name as a potential witness (R-2538). After it became clear that the appointed expert had no testimonv to he offcrcd in appellant's case his name was withdrawn from the witness list (R-716). The the trial court considered that as the expert had knowledge of the evidence he was therefore a witness who had information regarding this matter and was available to thr State to testifv. It was incumbent for the trial court to hold a "Richardson" hearing on this witness. Robinson v. State, 522 So. 2d 869 (2 DCA

1987).

An indigent defendant should not he at a disadvantage in tria for want of fund:; to hire experts on material and re1evant issues. Had appellant been wealthy he would have been ah e to afford his own firearm's identification expert and would not have had to disclose his investigation to the State nor the identity of his expert. In comparison an indigent defendant must get permission from the court thereby becoming public as to his need and potential use of trial experts. To seize upon that distinction and allow the State to call the appellant's appointed expert as their own witness merely because now that the appointed witness has examined the exhibits and therefore has information material lo the case is unfair and denies appellant equal protection under the 1aw. Further, the court should have held a "Richardson" hearing as to this witness.

In conclusion. the admission of the photographs, State's Exhibits 173 and 174, was prejudicial to appellant in his preparation of the case since their late disclosure did not afford appellant ample opportunitv to respond or prepare. The evidence was particularlv prejudicial on the question of the firearm's identification since it was appellant's belief and the understanding that the State would have no physical evidence to corroborate the observations and conclusions of their firearm's identification expert. Further compounding this late disclosure and equally prejudicial was the use of the appellant's appointed trial expert as the State's witness

which gave further credibility to the State's hired expert and the photographs State's Exhibits 173 and 174. Therefore. the trial court's ruling allowing the admission of the photographs State's Exhibits 173 and 174 and the use of appellant's trial expert should he reversed with the case remanded for a new trial.

POINT VIII

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN NOT INSTRUCTING THE JURY REGARDING EVIDENCE OF OTHER CRIMES.

After introduction of the homicide of Mr. Ellis through State's witness Eugene O'Neill appellant moved for a mistrial and requested instructions to the jury (R-1346, L-7 to 12)

MR. SULLIVAN: The jury has not been advised -- this homicide is irrelevant to the main charge.

THE COURT: Okay. Overruled.

MR. SULLIVAN: The jury is not being instructed?

The foregoing coupled with pre-trial motions and previously trial objections did adequately alert the trial judge to instruct the jury pursuant to Sect. 90.404(2)(2). Because the Section grants the appellant an absolute right to an instruction it should be the duty of the trial judge to offer the instruction to appellant at appropriate time. Failure to give instruction regarding other crimes is reversible error when said instruction is specifically and unambiguously requested. See Rivers v. State, *425* So. 2d 101 (1 DCA 1982), Hodges v. State, 403 *So.* 2d 1375 (5 DCA 1981), Milton v. State, 483 *So.* 2d *935* (3 DCA 1983).

It is the duty of the trial court to instruct the jury and failure to give instruction regarding other crimes was prejudicial to appellant. Therefore, appellant's sentence should be vacated and the cause remanded for a new trial.

POINT IX

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ALLOWING HEARSAY EVIDENCE OF TELEPHONE NUMBER

Linking appellant to the witnesses Laura Mayo, Nathaniel Brice and Daniel Wall was State's Exhibit 55, the phone record of Delores Andrews a friend of appellant, reflecting a 1:15 a.m. phone call from a telephone located in West Palm Beach. At trial the State offered witness Detective Sgt. Guillermo E. Perez to testify as to the telephone number on a pay phone located near the apartment where Laura Mayo, Nathaniel Brice, and Cherie Mayo resided (R-1560).

Sect. 90.801(1)(c), F.S., states:

> ""Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of a matter asserted."

90.801(1)(a) states:

> "A statement is: 1. An oral or written assertion."

A telephone number is a written assertion by the telephone company regarding the identity of a particular outlet. The phone company, although regulated, is a private corporation. Therefore, their records are not public documents or records affording exception to the hearsay rule as instrumental in the verdict. See Smith v. Frische's Big Boy, Inc., 208 So. 2d 310 (2 DCA 1968) where on collision case it was reversible to admit testimony by officer as to what other officer relayed to him as to speed test of automobile used in making

experimental accident test run.

A review pursuant to Diguilio v. State, 491 So. 2d 1129 (Fla. 1986), confirms the State cannot establish beyond a reasonable doubt that the error was harmless.

In conclusion, it was error for the trial judge to allow the hearsay statement identifying the phone number and appellant's sentence should be vacated and his case remanded for a new trial.

POINT X

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FINDING AGGRAVATING CIRCUMSTANCE PURSUANT TO SECTION 921.141(5)(d)

Section 921.141(5)(d) states

> "The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnaping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb."

The trial court found, inter alia, that appellant had driven from Okeechobee to West Palm to obtain money to buy cocaine (R-2617). Appellant's intent and purpose is not supported by any testimony or even any reasonable inference other than the fact that there was testimony that appellant did use cocaine in West. Palm Beach. In addition, the findings regarding the removal of the telephone from Mr. Sisco's hand is not supported by the evidence nor does it have any relevance to the aggravating circumstance found. Mr. Sisco's loss of cash and credit cards are supported only through hearsay and this cannot sustain the trial court findings.

The consideration of evidence regarding appellant's movement from Okeechobee to West Palm Beach is giving double consideration to a single act and would overlap with the trial court findings of aggravating circumstance no. 1. Suarez v. State, 481 So. 2d 1201 (Fla. 1985) cert. denied 106 Supreme Ct. 2908, 476 U.S. 1178, 90 L.Ed. 2d 994.

In addition, the findings of the circumstance with

respect to "engaged in" or "flight from" were not satisfied beyond a reasonable doubt through the evidence or the trial court's findings (R-2617). The trial court findings of afterwards establishes a gap between the completion of the capital felony, murder first degree, and the crimes of theft and thus the engaged "is not proven beyond a reasonable doubt".

With respect to the "flight" there is no finding or evidence supporting this aspect of the circumstance since the term "afterwards" does not sufficiently connect theft to establish the strict requirements of the circumstance.

Finally, this circumstance is duplicitous and violative of the finding in Furman v. Georgia. 408 U.S. 238, 92 Supreme Ct. 2726, 33 L. Ed. 346 (1972), State v. Dixon, 283 So. 2d 1 (Fla. 1973). In the latter it was stated:

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

It is submitted that circumstances of Section 921.141(5)(d) is the norm of capital murder and thus imposition of this circumstance does not set appellant's crime apart from the norm of capital felonies. Finding of pecuniary gain is likewise duplicitous and the norm of capital felonies. This is particularly true in view of the overbreadth given to pecuniary gain by judicial interpretation. Brown v. State, 473 So. 2d 1260 (Fla. 1985), cert. denied, 106 Supreme Ct.

607, *474* U.S. 1038. 88 L.Ed. 2d 585, where finding that there was not double consideration to burglary and pecuniary gain when held that the burglary had broader purpose in minds of the perpetrators.

In conclusion. the trial court findings are not supported by substantative evidence and the circumstance overlaps with the trial court's finding of aggravating circumstance no. 1. In addition. the circumstance itself is violative of the Furman v. Georgia, supra, and State v. Dixon. supra. and which contemplates acts to set the crime apart from the norm of capital felonies.

POINT XI

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING ESCAPE FROM CUSTODY

The imposition of this circumstance is based on the sole finding that the appellant and Mr. Sisco knew each other and therefore the murder was necessary to avoid identification (R-2618). Acquaintance alone is insufficient, upon which to base a finding of this circumstance. Dufour v. State, 495 So. 2d 154 (Fla. 1986), cert. denied, 107 Supreme Ct. 1332, 479 U.S. 1101. 94 L.Ed. 183, where State's evidence included statement of defendant that

> "Anybody hears my voice or sees my face has got to die."

Griffin v. State, 474 So. 2d 777 (Fla. 1985), cert. denied, 106 Supreme Ct. 869, 474 U.S. 1094, 88 L.Ed. 2d 908. Caruthers v. State, 465 So. 2d 496 (1985) where fact of acquaintance was insufficient to establish circumstance. Likewise, the trial court's finding of aggravating circumstance no. 6 (R-2618) that the capital felony was committed to disrupt or hinder is not proven beyond a reasonable doubt by fact of acquaintance between the victim and appellant.

In conclusion. mere knowledge of appellant by Thomas Sisco was insufficient to establish the death was for a witness elimination and the application of aggravating circumstance nos. 3 and 6.

POINT XII

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD. CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION

Satisfying this aggravating circumstance requires a heightened form of premeditation. Perry v. State, 522 So. 2d 817 (Fla. 1988). At trial there was no evidence that appellant planned the crimes charged. Remeta v. State, 522 So. 2d 825 (Fla. 1988), cert. denied, 109 Supreme Ct. 182.

The finding of the trial court that appellant left Okeechobee with the intention of killing and robbing Thomas Sisco (R-2617) is not supported by the evidence and is merely speculation. Also, that the gun was test fired between Okeechobee and West Palm is also speculation based merely on the finding of a discharged cartridge in the Ellis vehicle. It was unknown as to how long this cartridge had been there. Even if the cartridge had been discharged from the Raven .25 caliber pistol, State's Exhibit 1, shortly before the incident the mere evidence of appellant's knowledge that the firearm was operable would not sustain proof beyond a reasonable doubt of this circumstance. Smith v. State, 515 So. 2d 182 (Fla. 1987) where evidence that rock used to bludgeon child to death was brought to the scene of the crime by the defendant.

In conclusion, the evidence was insufficient to support the findings of circumstances proved beyond a reasonable doubt.

POINT XIII

THAT THE COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO PROHIBIT DEATH AS POSSIBLE PUNISHMENT DUE TO DEFENDANT'S RETARDATION

Prior to sentence appellant filed motion to prohibit death as a possible punishment on the grounds of appellant's retardation (R-2590 to *2592).* During penalty phase appellant introduced evidence of his I.Q. in the sixties and a mental age of around nine or ten years. The testimony was undisputed (R-2067). Further testimony established that people of appellant's I.Q. and mental age are unable to plan an idea and consider the consequences (R-2070). The trial court's findings of the appellant's demeanor of lack of retardation or competence is based only on the few minutes appellant testified and is therefore without sufficient foundation.

Execution of a retarded person constitutes cruel and unusual punishment in violation of the Eight Amendment to the United States Constitution and cruel or unusual punishment in violation of Article 1, Section 17 of the Florida Constitution. Thompson v. Oklahoma, 108 Supreme Ct. 2687 (1988), prohibits death penalty for person under the age of 16. Appellant's mental and social age is less than 16. In any case, it is an uncontradicted mitigating circumstance which would outweigh any of the trial court's finding any of the aggravating circumstances in this case. Therefore, appellant's sentence of death should be vacated.

In conclusion, appellant's retardation is an Eighth Amendment bar to execution and in any event a sufficient factor in mitigation outweighing the aggravating factors.

CONCLUSION

Appellant was prejudiced and denied fair and impartial trial by the introduction of other crime evidence involving an unrelated homicide and appellant's buying and using crack cocaine. Neither was relevant to the material facts. but were merelv prejudicial to appellant and offered for the sole purpose of bad character.

Appellant was denied equal protection by denial of motion for draw of jury pool from entire West Palm district and by the creation of .jury districts which resulted in systematic exclusion of a significant portion of the black population from the jury pool.

Appellant was arrested on charge of technical violations of probation, but then questioned regarding a homicide. His statements were involuntary and induced with the expectation of benefit and leniency where the detective told appellant they would go easy on him if he cooperated. Further confusing appellant was the detective's alteration of the rights form changing the "can" to "may" in the phrase "Any statement may be used against you in court". Shortly after appellant's initial arrest he filed a declaration declining questioning. This document was delivered to the local law enforcement and was appellant's assertion that he did not wish to be questioned and desired the benefit of counsel. Nevertheless transporting officers who had established a friendly rapport with appellant did encourage and initiate a conversation with appellant by a question

likely to elicit an incriminating statement by asking "Now that it's all over, what really happened to Mr. Ellis'?". Prompted by further questions of the transporting officers appellant made incriminating statements regarding the homicide in Okeechobee and this case. Since appellant had invoked his right to remain silent and have counsel further interrogation was not permitted without fresh warnings pursuant to Miranda. State v. DeVille, 513 So. 2d 807 (2 DCA 1987).

During arrest of appellant a sheriff's deputy seized appellant's shoes for purposes of inspection for possible match with an imprint that had been left at the Okeechobee homicide. Seizure was without reasonable suspicion since officer's observation did not distinguish appellant's shoes from numerous brands of tennis type shoe, nor were appellant's shoes seized as an instrumentality of the arrested charge of technical violation or for reason to suspect that the shoes contained any weapon and for protection of officers.

Appellant filed motion for statement of particulars requesting, inter alia, time, date and place of offense. This motion was denied for no reason other than information was available through normal discovery. In trial the State proved the crime to have been committed on a date different than the indictment. Failure to release statement of particulars was prejudicial to appellant who relied on alibi

defense.

At trial the State introduced the photographs of ballistics examinations but had not disclosed these photographs to appellant until trial. Further aggravating this discovery violation was the State's use of appellant's appointed expert as their own witness. This cumulative testimony plus the photographs strengthened the State's case as to ballistics results. Late disclosure afforded appellant no opportunity to adequately prepare. Robinson v. State, 522 So. 2d 869 (2 DCA 1987).

Appellant was further prejudiced in trial when the court did not submit an instruction to the jury explaining the other crime evidence. After testimony regarding the unrelated homicide appellant asked that the jury be instructed that the homicide in Okeechobee was irrelevant to this case. This request coupled with the pre-trial motions and trial objections was sufficient to alert the trial judge to instruct the jury pursuant to 90.404(2)(2.) Rivers v. State, 425 So. 2d 101 (1 DCA 1982). Milton v. State, 483 So. 2d 935 (3 DCA 1953).

Appellant was denied effective cross examination and assistance of counsel when the State introduced identity of a telephone number through the hearsay testimony of a police detective. The detective's testimony was to the telephone number was hearsay without exception.

The trial court in finding aggravating circumstances relied on speculation and hearsay testimony to sustain

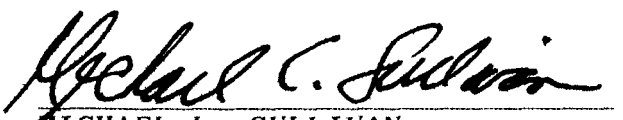
findings. In addition there was overlap and thus improper doubling with the trial court's finding of circumstance 1, 2, 3 and 6.

Finally, imposition of the death penalty was barred by the appellant's mental retardation and evidence of a mental age of nine or ten years. In any case, appellant's inability to plan an idea and consider the consequences of his actions due to his retardation was a mitigating circumstance significant enough to outweigh any of the trial court's findings of aggravating circumstances.

For the foregoing reasons appellant's sentence and .judgment should be vacated and his case remanded for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to Cecilia Terenzio, Esq.. Dept. of Legal Affairs. 111 Georgia Ave., Room 204. West Palm Beach. FL 33401, this 14th day of December, 1989.



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