SUPREME COURT OF FLORIDA

ANTHONY A. HALL

Appe1lant

-vs-

THE STATE OF FLORIDA

Appellee

_____/

CASE NO. 74,061

APPEAL FROM THE CIRCUIT COURT,
VOLUSIA COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

GERARD F. KEATING, P.A.

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STATEMENT OF THE CASE AND FACTS

On August 26, 1987 the State of Florida filed a first degree murder indictment against Anthony Allan Hall, Defendant and three Co-Defendants. (R 1286)

On September 10, 1987 Defendant filed his Motion to Suppress Confessions and Admissions. (R 1298)

On August 22, 1988 Defendant filed his Amended Motion to Suppress Confessions and Admissions. (R 2343 - 1344)

On May 6, 1988 the Honorable Trial Court entered its Order Denying Motion to Appoint Expert Witness. (R 1330) Defendant had sought to have an expert appointed by the court to assist in the preparation of the defense of insanity at the time of the offense. (R 1323) Defendant was Indigent (R 1282)

On August 22, 1988 Defendant filed his Motion for Clarification or Rehearing for the trial court to rehear the request for appointment of Randall H. Balmer, Assistant Professor of Religion, Columbia University (R 1348-1346) Professor Balmer's proposed testimony would be offered to prove the defense of temporary insanity, and lack of premeditation or specific intent, specifically regarding the influence of Satan through Bunny Dixon.

On August 22, 1988 Defendant filed his Notice of Insanity Defense at Time of Offense. (R 1341-1342) and listed 6 witnesses and requested a jury instruction at trial for a verdict of not guilty by reason of insanity.

On August 22, 1988 Defendant filed his Motion to Appoint

Expert Psychologists for the defense of temporary insanity. (R 1339-1340) Included among these experts was Dr. Andrew Farinacci, Phd. Clinical Psychologist.

On August 22, 1988 Defendant filed his Motion for Severance and Separate Trials. (R 1347 - 1348)

On March 13, 1989, the day the trial began, the Court granted in writing the Motion for Severance but denied Hall's Motion to Appoint Expert and denied his Motion for Clarification or Rehearing. (R 1417-1418)

The jury trial commenced on March 13, 1989. (R 3)

Just prior to jury selection the court denied twelve (12) various motions regarding jury selection and the death penalty. (R 1351-1416)

The crux of Hall's defense was that he was temporarily insane at the time of the offense and that he lacked the requisite mental condition or intent for premeditated murder or the underlying felony. A Co-defendant, Bunny Dixon was a Satan worshiper who studied the Satanic Bible, performed Satanic rituals, talked to a dead 10 year old boy "David" a/k/a Satan and received instructions from Satan how to abduct the victim and to sacrifice the victim to Satan. Just prior to the fatal shooting Bunny Dixon carved an inverted cross in the victim's chest to sacrifice him to Satan. (R 693 - 725)

In Voir Dire the Defendant attempted to inquire of the jurors about their reaction to evidence of satanism and regarding each jurors religious views. (R 157-158-159)

The Court sustained the State's objections. The Defendant made a proffer of the type of Voir Dire questions he intended to ask. (R 160 - 163) The court in no uncertain terms denied the proffer and the entire defense. (R-163) Court, "I told you I wasn't going to allow a defense of temporary insanity based on Satanism." the Defendant also proffered the voir dire questions and evidence as a defense to premeditation to show lack of intent. (R 164) The proffer was denied. (R 166) The Court ruled that it would not allow the defense of temporary insanity or a reduced or diminished intent. (R 170) The Court refused to let Defendant's expert witnesses, a psychiatrist and Religion Professor, testify in the guilt or innocence phase but might consider such evidence as mitigating factors in the sentencing phase. (R 174) Hall's attorney in Voir Dire attempted to question the jurors whether the evidence of the Satanic Bible would sway them from being fair and impartial. (R 181) The court precluded this inquiry. The Satanic Bible was later introduced into evidence. (R*10 after R 1446) Another juror raised the connection between the Satanic Bible and premeditation. (R 187) but the Court's earlier ruling precluded Hall's attorney from further inquiry into these areas.

Counsel gave opening statements. Since Hall was precluded from arguing temporary insanity, he proceeded on other theories of defense: lack of intent or premeditation, self defense (duress from Co-Defendant Bowen) defense of

others (his pregnant sister) and that Bowen not Hall killed the victim. (R 411-416)

The State commenced its case in chief. The State introduced over objection, Defendant's confession to the Missouri Police (R 470 - 493) and to Volusia County Sheriff. (R 532)

At the conclusion of the State's case in chief Hall moved for a directed verdict of acquittal which was denied. (R 607)

The Defendant presented his case. Hall testified (R 693-773)

Hall's attorney made a proffer of the expert testimony of Religion professor Randall Balmer and Psychologist Andrew Farinacci, (R 773-777) including Defendant's Exhibits for identification 0 + P (R-774 and R-1478-1494) The proffer was denied. (R 779)

These two witnesses testified during the sentencing phase and their testimony shows what could have been presented to the jury in the guilt or innocence phase regarding temporary insanity, premeditation and specific intent. (R 1083-1183)

After the proffer Hall requested a directed verdict and judgment of not guilty by reason or insanity. (R 777)

In the charge conference Hall requested jury instructions on insanity, self defense, defense of others, justifiable use of deadly force (R 780), sudden impulse. The court denied these. (R 809-816)

The jury returned a verdict of guilty to premeditated murder and felony murder. (R 1454)

The death penalty phase commenced. (R 1059) The State presented its case. The Defendant presented its case by first proffering the testimony of Columbia University Professor of Religion, Randall Balmer. (R 1083-1104) After the proffer the Court accepted the Professor as an expert in the area of Religion, Evangelical Religion and the role of Satan in human affairs. (R 1105) Professor Balmer testified in front of the jury. (R 1105 - R1150) He stated that Hall's ability to know right from wrong was obliterated and impaired through the effects of the Co-Defendant Bunny Dixon and Satanism and that Defendant's free will was over-come by Satanism and that Hall believed he was under the influence of Satan at the time of the offense.(R 1112 -1121 - 1122) On cross examination the State elicited testimony from professor Balmer about the Co-Defendant Bunny Dixon's confession. (R 1131) Hall objected. (R 1134) The Court permitted the testimony. R 1134-1139) Hall moved for a mistrial which was denied. (R 1145)

Defendant then called Dr. Andrew Farinacci, Clinical Psychologist as witness. R 1151 - 1183) Dr. Farinacci described his credentials. (R 1151 - 1153) and was accepted by the Court as an expert in the area of psychology without objection. (R 1153)

Dr. Farinacci stated that he had been available to testify during the guilt or innocence phase of this trial.

(R 1153) Dr. Farinacci testified about his examination of Hall (R 1156) and his previous review of video taped interviews of Hall and his sister Brenda Daum. (R 1154) Dr. Farinacci administered tests to Hall, (R 1159) including the Wochsler Adult Intelligence Seale Revised; Rorschach Test, Sentence Completion Test; Thermatig Apperception Test; and Projective Drawings Test. (R 774 Defendant's Exhibit P for Identification, page 3 and R 1153 Exhibit Y for Identification).

Dr. Farinacci testified that "at the time of the shooting he was definitely unable to distinguish right from wrong. He was not in his own mind" (R 1163). Dr. Faranacci stated Hall "would fit the concept of insanity as characterized by the McNaughton rule ... on the date of the offense". (R 1165) Dr. Farinacci was well versed in the McNaughton test for insanity having testified over 60 times in Florida circuit courts regarding competency. (R 1152) Dr. Farinacci went on to testify about mitigating factors in Hall's mental condition including his extreme emotional stress (R 1166), the substantial domination of Co-Defendants Bowen and Dixon (R 1166), his inability to appreciate the criminality of his act (R 1166 - 1167), his inability to conform his conduct to be requirements of the law. (R 1167)

The jury's advisory recommendation was the death penalty by 7 to 5 vote. (R 1227)

In Chambers the Court noted that the State's case went

to the jury on one theory of felony murder based on kidnapping, (R 1232) with the State apparently abandoning the robbery and burglary felonies set forth in the indictment.

The Court sentenced Hall to death. (R 1283 - 1284) The Court found four (4) aggravating circumstances; (R 1279 - 1280)

1. That Hall committed the murder while engaged in a kidnapping. FLA. STAT. 921.141 (5)(b).

2. That the crime was committed for pecuniary gain. FLA. STAT. 921.141 (5) (f)

3. That the crime was especially heinous, atrocious or cruel. FLA. STAT. 921.141 (5)(h)

4. That the crime was committed in a cold, calculated and premeditated manner. FLA. STAT. 921.141 (5)(i)

The Court found one non-statutory mitigating factor that Hall was an abused child. (R 1281) The Court rejected the mitigating factors of self defense (duress or coercion), defense of others (sister), or that Hall was acting under the influence of Satanism through Co-Defendant Dixon. (R 1281)

This Appeal flows from the conviction and sentence below.

SUMMARY OF ARGUMENT

The trial court denied Appellant a fair trial by excluding expert testimony regarding his state of mind and temporary insanity at the time of the offense. Hall filed a Notice of Intent to Rely on Insanity Defense. The trial court ruled that a clinical psychologist could not testify that Hall was insane under the McNaughton Rule and that a Religion professor could not testify that Hall did not know right from wrong due to the effect of Satanism through a co-defendant.

Appellants made a proffer of the testimony during the guilt phase and the witnesses themselves were permitted to testify during sentencing, although not under the aegis of any insanity defense.

The court improperly limited Appellant's voir dire.

The court allowed into evidence Hall's two recorded confessions and his extemporaneous statements to police during interstate transport. This was error.

The court should have granted Hall's various pretrial motions.

The court should have instructed the jury on insanity, self-defense, defense of others, sudden impulsive act. The court gave a duress or coercion instruction naming the wrong aggressor.

In sentencing the court refused to find the following mitigating factors in spite of uncontroverted expert evidence: FLA. STAT. 921.141 (6) (b) that Hall was under the

influence of extreme mental or emotional disturbance; FLA. STAT. **921.141** 6(c) that Hall was an accomplice or his participation was relatively minor; FLA. STAT. **921.141** (6)(e) that Hall acted under extreme duress or under the substantial domination of another person; FLA. STAT. **921.141** (6)(f) that Hall did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

The death penalty should not be applied here because it is disproportionate to the facts of this case.

Florida's sentencing statute is unconstitutional.

The court erred in finding the aggravating factors of the heinous, atrocious and cruel, cold, calculated, premeditated and pecuniary gain.

This court should reverse and remand for a new trial and allow the insanity defense and defense of the effects of Satanism on defendant's state of mind.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN IMPROPERLY RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE WHERE SUCH EVIDENCE WAS CRUCIAL TO HIS DEFENSE THEREBY RESULTING IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT AND ARTICLE I SECTION 16 FLORIDA CONSTITUTION

A crucial issue at trial was the defense of temporary insanity at the time of the offense. A corollary defense was that Hall acted under the influence of Satanism as personified by Co-Defendant Bunny Dixon, a Satan worshiper. This was a primary point of contention by the defense throughout the State's case in chief as demonstrated by the numerous questions on cross examination of state's witnesses. (R 497, 567, 581)

This was a primary point of contention by the defense in the presentation of its case. (R 632, 639, 649, 668, 669, 677, 680 - 682, 695 - 696, 702, 705, 708 - 712, 714 - 716)

In an attempt to present evidence on this issue, the defense proffered the testimony of Randall Balmer, Professor of Religion, Columbia University, New York and Dr. Andrew Farinacci, Ph.D Clinical Psychology. (R 773 and 774 Defendant's Exhibits O and P for Identification and R 1478-1494) These witnesses were listed as experts by the defense seven (7) months before trial when the Defendant filed his Notice of Intent to Rely on Defense of Insanity. (R 1341 - 1342). The court, both pretrial and in the guilt phase, denied the use of these experts. The court's ruling cut out the heart of Hall's defense. Hall was precluded from

presenting expert religious and psychiatric testimony regarding his lack of premeditation, lack of intent and insanity (R 584) The witnesses were available to testify themselves, (R 1153) and the reports were proffered to show the court the substance of their testimony. Although these two (2) witnesses were allowed to testify in the penalty phase (R 1083 - 1183) that did not render harmless the error in the guilt phase. If these experts were permitted to testify in the guilt phase perhaps the jury would have brought back verdict for a lesser included offense or even not guilty by reason of insanity.

Even in the sentencing phase the Appellant was precluded from arguing that Hall was temporarily insane, for any reason, but specifically from the influence of Satanism.

In Gurganus v. State, 451 So.2d 817 (FL 1984) this court reversed four (4) convictions and remanded to the circuit court for a new trial when the lower court refused to allow testimony of two (2) clinical psychologists.

The defense in Gurganus gave notice that insanity would be relied upon as a defense. Id at 819. Guraanus proffered the testimony of two (2) experts outside of the presence of the jury. After hearing the proffered testimony the trial judge refused to allow it into evidence on the grounds that the testimony was irrelevant. Id at 820. "During the proffer of the psychologists' testimony the defense made it clear that the testimony was intended to be considered as evidence on three issues relating to Gurganus' state of mind

at the time of the shootings: insanity; whether Guruanus' actions more closely resembled a "depraved mind" as opposed to premeditated behavior; and whether Gurganus was able to entertain the specific intent required to convict him of first-degree murder under either the premeditated or felony murder theories taking into consideration the effects of the combined consumption of drugs and alcohol." Id at p.820.

Likewise, Hall made it clear that the testimony of Professor Balmer and Dr. Farinacci was intended to be considered as evidence of insanity (R 163), depraved mind (R 864) and Hall's inability to entertain the specific intent for premeditated or felony murder. (R 584)

"It is well established in Florida that the test for insanity, when used as a defense to a criminal charge is the McNaughton Rule. Under McNaughton the only issues are: 1) the individual's ability at the time of the incident to distinguish right from wrong; and 2) his ability to understand the wrongness of the act committed. Brown v. State, 245 So.2d 68 (Fla.1971), vacated on other grounds, 408 U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 759 (1972); Campbell v. State, 227 So.2d 873 (Fla.1969), Gurganus at p. 820 and 821.

In Guruanus the proffered testimony showed that the expert opinions were that he was "not in effective control of his behavior," that he had "a mental defect", and that his judgment "would have been seriously impaired". Id at 821.

In Hall the proffered testimony showed Hall's "ability to distinguish right from wrong would be obliterated or

impaired," Hall's "ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" would be affected due to Satanism, and Hall's ability "to act freely and voluntarily" would be affected by a co-defendant's use of the Satanic Bible and performance of a Satanic ritual. (R **775)** Professor Balmer's testimony at sentencing was even more emphatic. He stated that Hall was under the influence of Satan at the time of the shooting through Co-defendant Bunny Dixon the Satan worshipper. Balmer testified that when Dixon carved an inverted cross in the victim to sacrifice him to Satan before the shooting that Hall's ability to know right from wrong was obliterated. (R **1121)**

In Gursanus the expert testimony was inconclusive as to the defendant's insanity under the McNaughton rule. Id at **821.** On the other hand, the testimony of Dr. Farinacci in Hall is quite conclusive. His proffered testimony shows Hall "was operating in a state of altered consciousness brought on by extreme distress, namely fear for his own life and for the life of his sister;" Hall was "unable to make decisions for himself; and unable to make distinctions between right and wrong." (R **776)** Dr. Farinacci's testimony during sentencing would have been the same during the guilt phase. He states, "He (Hall) was not in his right mind." He (Hall) would fit the "concept of insanity as characterized by the McNaughton rule... On the day of the offense". (R **1163, 1165)** Hall was acting "under extreme emotional stress. I would see him

as being acutely disturbed". (R 1166)

The expert testimony in Hall had much greater evidentiary value than that proffered in Gurganus because it was directly on point to prove Hall's insanity and inability to form the requisite premeditation and intent.

In Gurganus this court found merit on the third basis for which the testimony was offered. Gurganus intended to use the testimony as evidence of his intoxication and resulting inability to entertain a specific intent at the time of the offense. Gurganus at 822.

"It is clear that Gurganus' ability to entertain a specific intent at the time of the offense, an element required to be proved by the state, was a relevant issue pertaining to both the first-degree murder and the attempted first-degree murder charges regardless of whether the state sought conviction under either a premeditated or a felony murder theory. To convict an individual of premeditated murder the state must prove, among other things, 'a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues.' Sireci v. State, 399 So.2d 964, 967 (Fla.1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). Obviously, this element includes the requirement that the accused have the specific intent to kill at the time of the offense. E. g. Sipes v. State, 154 Fla. 262, 17 So.2d 93 (Fla.1944); Chisolm v. State, 74 Fla. 50, 76 So.

329 (1917). Likewise, specific intent to kill is also an element to be proved by the state in a charge of attempted first-degree premeditated murder. Fleming v. State. 374 So.2d 954 (Fla. 1979); Deal v. State, 359 So.2d 43 (Fla. 2d DCA 1978).

In order to prove first-degree felony murder the state need not prove premeditation or a specific intent to kill but must prove that the accused entertained the mental element required to convict on the underlying felony. Jacobs v. State, 396 So.2d 1113 (Fla.1981), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981); Adams v. State, 341 So.2d 765 (Fla. 1976), cert. denied, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 158 (1977). Gurganus at p.822".

The underlying felony in Gurganus was attempted kidnapping, and was kidnapping in the instant case. (R 1286, 1232). In order to convict on kidnapping, premeditated murder or felony murder, the state must prove beyond a reasonable doubt, Hall's specific intent at the time of the offense. "When specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant. Cirack v. State, 201 So.2d 706 (Fla.1967); Garner v. State. 28 Fla. 113, 9 So. 835 (1891)".

This statement in Gurganus at pages 822 and 823 makes it clear that Professor Balmer's testimony relating to the effects of Satanism on Hall's mental condition is relevant

and admissible to show Hall's inability to form a specific intent.

This court in Gurganus stated at page 823, "Regardless of the weight or truth of this testimony, we find the testimony to be relevant to the issue of Gurganus' mental capacity at the time of the offense, particularly to the element of premeditation. We hold that it was also error for the trial court to exclude this portion of the testimony."

Likewise in Hall's case it was error to exclude the two expert witnesses.

Most of the objections set forth by the state in their argument of this issue at trial went to the weight rather than the admissibility of evidence. Instead of objecting to the expert testimony the prosecutor could have attempted to diminish the credibility of the expert witness through effective cross examination. In fact the first of the four prosecutors who handled this case when the temporary insanity defense was initially raised, admitted as much. The previous assistant state attorney did not oppose the Defendant's Motion to Appoint these experts. (R 1470) It was the state's position on April 26, 1988 that the jury could hear Defendant's expert testimony and be subject to the State's cross-examination. The former state attorney nevertheless felt confident of a conviction even with the admission of said testimony. Once the state attorney handling this case changed, the state's position changed.

In the state's quest to obtain a conviction it violated

Hall's fundamental right to fully present his defense and get a fair trial. Who knows? Maybe the state could have gotten the conviction even if the expert testimony was admitted?

After this court in Gurganus determined that the trial court erred in excluding the testimony this court then conducted its harmless error analysis at p. 823. This analysis is now governed by DiGuilio v. State, 491 So.2d 1129 (Fla. 1986). "The question in harmless error analysis is whether there is a reasonable possibility that the error affected the verdict."

Hall's Sixth and Fourteenth Amendment rights to provide witnesses on his own behalf are implicated by the lower court's improper exclusion of the two experts' testimony.

The court's error was not harmless beyond a reasonable doubt. There was sufficient evidence in the record in which the jury could have believed that Hall did not know right from wrong at the time of the offense or that his mental condition was overwhelmed by fear and Satanism. The defense argued long and vigorously that Hall did not have the specific intent to commit this crime. If temporary insanity at the time of the offense and Hall's state of mind due to the effects of Satanism were recognized as admissible defenses by the trial court, Hall would have pounded that defense to the jury in voir dire, opening statement, cross examination of state witness, examination of defense witnesses and closing argument. Hall would have had the benefit of jury instructions on insanity. Hall would have

sought a verdict of not guilty by reason of insanity and a directed verdict at the end of the state's case because the state presented no psychiatric testimony to rebut insanity.

In light of Hall's two confessions which were introduced at trial, it is fair to say that the insanity defense and effect of Satanism would have been the key defenses at trial.

After reviewing the record as a whole this court will be unable to say that the exclusion of the testimony was harmless beyond a reasonable doubt. This court should find that the issues of temporary insanity at the time of the offense and the effects of Satanism on specific intent were crucial to Hall's case and the he should have been permitted to introduce this expert testimony.

Other Florida cases on insanity support appellant's position.

In Moruan **v.** State, **537** So.2d **973** (Fla. **1989)** this court concluded that the trial court erroneously excluded medical expert opinion testimony regarding insanity. In Moraan a psychologist and psychiatrist testified by proffer that Moruan was insane at the time of the offense under the McNaughton Standard. Just as in Hall, in Moruan the trial judge let the two experts testify in the penalty phase for mitigating circumstances and the jury recommended death by **7-5** vote.

"In the instant case, there is no doubt that Moraan committed the murder. Rather, the sole issue is his sanity at the time he committed the offense. **As** reflected in this

opinion, Morgan was not able to present evidence on this question." Morgan at p. 976.

Hypnosis is not a factor in the instant case. The experts in Hall based their opinions on statements made by Hall in a pretrial video tape, (R 1453 Defendant's Exhibits #12 and #13 lodged in lower court) and by personal examination of him.

The Moraan case is controlling. This court must vacate Hall's conviction and sentence and remand the cause for a new trial.

The Honorable trial judge never let the jury decide the question of Hall's sanity. "It is the law of Florida that all men are presumed sane, but where there is testimony of insanity sufficient to present a reasonable doubt of sanity in the minds of the jurors the presumption vanishes and the sanity of the accused must be proved by the prosecution as any other element of the offense beyond a reasonable doubt." Yohn v. State, 470 So.2d 123 (Fla. 1985).

In Johnson v. State, 408 So.2d 813 (Fla. 3D DCA 1982) the trial court committed reversible constitutional error in excluding a Psychologist's expert testimony in support of his opinion that Defendant was legally insane at the time he committed the crime. The court in Johnson stated that the exclusion of expert testimony could not be harmless since it curtailed Defendant's opportunity to meet his burden of proof. Johnson at p. 815. "To establish insanity defendant was required to prove that he was insane at the time of the

offense. Id.

Hall was prepared to meet his burden of proof and offered to do so.

In Simonds v. State 304 So.2d 525 (Fla. 2D DCA 1974) the court held that the trial court committed reversible error in excluding the testimony of two psychiatrists who defendant attempted to call as defense witnesses to support his insanity defense. "We point out that the appellant did take the witness stand and testify in his own behalf during the trial. He testified, inter alia, to the facts which formed the basis of the physicians' opinions." Id. So did Hall!

In Fouts v. State 374 So.2d 22 (Fla. 2D DCA 1979), the trial court erred in excluding the proffered testimony of an expert regarding the effects of LSD on the defendant's ability to form a specific or particular intent. "When a defense witness is precluded from testifying as to a matter which is the heart of the defendant's case, such error is harmful." Fouts at page 26. "Clearly, Dr. Afield's testimony was crucial to the defense. While the effects of alcohol may be commonly known, the assistance of an expert would ordinarily be necessary for a jury to understand the effects of LSD. We hold that Dr. Afield's testimony was relevant and proper and should not have been excluded. Fouts at page 28.

The assistance of an expert would ordinarily be necessary for a jury to understand the effects of Satanism. LSD is more akin to Satanism than either of these is to

reality.

In Fisher v. State, 506 So.2d 1052 (Fla. 2D DCA 1987) the trial court erred in failing to direct judgment of acquittal on the issue of insanity. "The two psychologists testified that the defendant was insane at the time of the offenses. Their testimony was not impeached. Thus, the defendant presented sufficient evidence to create a reasonable doubt as to his sanity. The state failed to introduce any lay or expert evidence addressing the issue of the defendant's sanity. Thus, it failed in its burden of proving the defendant's sanity beyond a reasonable doubt."

In the instant case the state failed to prove Hall sane beyond a reasonable doubt. Hall made a motion for Judgment of Acquittal on the basis of Insanity (R 777) and discharge which was denied (R 779). The trial court erred in denying this motion.

The right of an accused to present witnesses to establish a defense is a fundamental element of due process of law. Washinaton v. Texas, 388 U.S. 14 (1967). Indeed, this right is a cornerstone of our adversary system of criminal justice. Both the accused and the prosecution present a version of facts to the judge so that it may be the final arbiter of truth. Id. United States v. Nixon, 418 U.S. 683, 709 (1974). While the precise point involving the effects of Satanism on Defendant's state of mind as set forth in Professor Balmer's testimony appears to be a novel one in Florida, the right of a Defendant to present evidence is not.

Subject only to the rules of discovery, an accused has an absolute right to present evidence relevant to his defense. Roberts v. State, 370 So.2d 800 (Fla. 2d DCA 1979); Campos v. State, 366 So.2d 782 (Fla. 3d DCA 1979).

The state cannot now legitimately claim that Dr. Andrew Farinacci should have been excluded based upon a discovery violation. The prosecutor did not dispute the fact that the state had notice of this witness since August 22, 1988. (R 1341 - 1421)

A Richardson (Richardson v. State, 246 So.2d 771 Fla. 1971) inquiry was conducted by the trial judge regarding the allegation of discovery violation. (R 832 - 842) The court found no discovery violation existed. (R 840)

Dr. Farinacci's report was not admitted as evidence at the trial but was only used in the proffer to show what he could have testified to.

Case law in Florida is clear that it is error for the trial court to exclude evidence which tends in any way, even indirectly, to prove a criminal defendant's innocence, and that all doubt of admissibility of this type of evidence should be resolved in favor of admissibility. Moreno v. State, 418 So.2d 1223 (Fla. 3D DCA 1982).

Florida Evidence Code, Section 90.702 specifically authorizes expert testimony to "assist the trier of fact in understanding the evidence...if it can be applied to evidence at trial."

Section 90.804 allows the expert to base his opinion on

facts "made known to him at or before the trial." In the case at bar, the appellant's expert witnesses were apprised of all relevant facts upon which their opinion would be based prior to testifying.

A trial judge may not frustrate a defendant's legitimate right to present his defense by strict adherence to state evidentiary rules. Chambers **v.** Mississippi, **410** U.S. **284, 302 (1973).** No such rule prevails over the fundamental demand of due process of law in the fair administration of criminal justice. United States **v.** Nixon, **418** US **683 (1974).** In the weighing process, the fundamental constitutional right to present evidence is supreme, and any doubts must be resolved in favor of that fundamental right. The exclusion of the proffered testimony deprived Appellant of a fair trial.

POINT II

THE TRIAL COURT ERRED IN LIMITING APPELLANT'S VOIR DIRE EXAMINATION OF THE VENIRE IN A DENIAL OF DUE PROCESS AND THE RIGHT TO A FAIR TRIAL.

Even though the Appellant was precluded from raising the effects of Satanism on his mental condition as a legal defense, much of the testimony at trial had to do with the Satanic Bible, Ouija Board, Co-defendant Dixon's communications with the spirit of a 10 year old dead boy, her desire to have sex with Satan to produce the Anti-Christ, and the sacrifice to Satan of the victim by Dixon by carving an inverted cross in his chest. (R **564, 565, 567 - 570, 574, 579, 581, 584, 668, 669, 670, 678, 680, 681, 682, 693-725).**

In anticipation of this gruesome evidence, Appellant's defense counsel sought to question prospective jurors about how this evidence would affect their ability to be fair and impartial. (R **142, 151, 156-158).**

Appellant's defense counsel also sought to inquire about the specific religious background of each juror to ascertain whether each could "fairly and impartially render a verdict in this case" when confronted by evidence of the bizarre nature of Satanism and its religious implications (R **159).** The State objected (R **159).** The Court sustained the objection (R **159).**

Appellant's defense counsel then made a proffer of the type of voir dire questions he was seeking to ask (R **160-176).** The proffer included questions about each juror's knowledge of the Old and New Testament, their understanding of Satan, the Anti-Christ, the Book of Revelations, religious ritual and sacrifice, their knowledge of Satanic cults. These voir dire questions were crucial to the defense because of the State's burden of proving premeditation and specific intent (R **163-164).** The court denied the proffer (R **167-168, 174-176)** and sustained the objection.

Juror Heist indicated that evidence of Satanism could very well "affect his ability to be fair and impartial (R **181-182).** The State objected to the line of questioning and the Court sustained the objection. Juror Brown then tied in the Satanic Bible and premeditation (R **187)** which was exactly the line of inquiry which Appellant's counsel had sought

earlier. By the previous ruling Appellant's counsel was precluded from discussing the effect of the Satanic Bible evidence on the jurors (R 181).

Perhaps some of the court's apprehension about the sensitivity of the line of voir dire could have been allayed by conducting an individual and sequestered voir dire. However, Hall's Motion for Individual and Sequestered Voir Dire was denied (R 1405-1409, R 15). This was error.

Other errors committed by the Honorable Trial Court during voir dire include denying Appellant's defense counsel the opportunity to inquire about the juror's support, both financial and by vote, of the newly elected State Attorney who was himself prosecuting this case (R 126, 130). The court erred in limiting Appellant's counsel's questioning of jurors regarding their attitude toward the death penalty (R 194-197), and in denying Appellant's Motion In Limine regarding juror's attitudes toward the death penalty (R 1395-1938, R 17).

Voir dire examination of prospective jurors by counsel is assured by Fla.R.Crim.P. 3.300(b). Jones v. State, 378 So.2d 797 (Fla. 1st DCA 1980). The purpose of voir dire, "Is to obtain a fair and impartial jury to try the issues in the cause". King v. State, 390 So.2d 315, 319 (Fla. 1980). "Subject to the trial court's control of unreasonably repetitious and argumentative voir dire questioning, counsel must have an opportunity to ascertain latent or concealed pre-judgments by prospective jurors which will not yield to

the law as charged by the court, or to the evidence." Jones, supra at 798. Even when counsel for a party has already had an opportunity to examine a particular juror, circumstances may dictate that he be granted further and reasonable interrogation to pursue a line of questioning opened up during the other party's examination. Barker **v.** Randolph, 239 So.2d 110 (Fla. 1st DCA 1970). The trial court's failure to permit such, "Further and reasonable interrogation" may amount to an abuse of discretion. **Id.** at 113. See also Ritter **v.** Jiminez, 343 So.2d 659, 661 (Fla. 3d DCA 1977) ("Trial attorney should be accorded ample opportunity to elicit pertinent information from prospective jurors on voir dire examination").

In Moore **v.** State, 525 So.2d 870 (Fla. 1988) this court held that it was reversible error to refuse to excuse a prospective juror who stated that his belief about the insanity defense would probably prevent him from following the court's instructions on that issue where the primary defense was insanity.

Of course, Appellant Hall was denied the right to rely on the defense of insanity at the time of the offense or the defense of the effects of Satanism on his state of mind. Therefore Appellant's defense counsel could not even bring these matters up in voir dire.

The record in Hall clearly reflects that the sole issues in the sentencing phase of Appellant's trial concerned Appellant's mental state and inability to form the requisite

intent although Appellant was denied the dignity of having this recognized as a legal defense.

The juror's comments on premeditation and the relation to Satanism (R **181, 182, 187)** clearly raise a reasonable doubt whether these jurors could render an unbiased verdict. The trial court erred in refusing to permit questioning regarding the juror's religious beliefs vis a vis Satanism.

A juror's statement that he can return a verdict based upon the standards is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so. Singer **v.** State, **109 So.2D 7** (Fla. **1959).** This was precisely what defense counsel was attempting. A defendant's challenge to a juror for cause should be sustained in a criminal case where an examination of all of the evidence leaves a reasonable doubt of that juror's impartiality. Blackwell **v.** State, **101** Fla. **997, 132 So. 468 (1931).**

In examining jurors on void dire, wide latitude is allowable. Cross **v.** State, **103 So.636, 89** Fla. **212 (1925).** Voir dire examination of jurors should be so varied and elaborated as would seem to require in order to obtain fair and impartial jurors whose minds are free of all interests, bias or prejudice. Gibbs. **v.** State, **193** So.2d **460** (Fla. 2d DCA **1967).** Art. I, **§§** 9 and **16,** Fla.Const. and Amend. V, VI, and XIV U.S. Const.

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO SUPPRESS CONFESSIONS.

Appellant was arrested in Missouri several days after the killing. (R **986)** Appellant gave a confession to Missouri police (R **989)** on August **1, 1987.** On August **4, 1988** Appellant gave a confession to Volusia County Florida sheriffs who were in Missouri to transport Hall back to Florida to face this charge. (R **1014)** These two confessions were tape recorded (R **1437 *32** lodged in lower court) and were played to the jury. (R **544)**

Appellant's counsel filed two pretrial Motions to Suppress the Confessions (R **1298** R **2343-44)** which were denied. (R **1023)** Appellant's counsel made timely objections at trial to the introduction of said statements. (R **470, 479, 493, 532)**

The court erred in denying Appellant's Motion to Suppress Confessions because the confessions were not made voluntarily and there was no knowing and voluntary waiver of Appellant's rights. Miranda **v.** Arizona, **384** U.S. **436, 86** S.Ct. **1602, 16** L.Ed **2d 694 (1966).**

After the Volusia County sheriffs took Hall's tape recorded statement in the Missouri jail, they transported Hall to Florida. Over the **24** hours of travel together Hall made several statements to deputy Bernard Buscher. "I know I am going to fry, I want to be fried. I am going to die in the electric chair" (paraphrase R **1026).** Deputy Buscher did

not give Hall any Miranda warnings during their travel time together in spite of their numerous conversations (R 1023, 1024, 1027).

These statements are irrelevant to guilt or innocence. These statements were improperly admitted and their prejudicial value clearly outweighed their probative value. In light of Hall's two previous recorded confessions, the admission of these transport statements was superfluous and excessive.

In Kight v. State, 512 So.2d 922 (Fla. 1987) the defendant made a comment to a law enforcement officer, **I'm not afraid of the chair." The officer said, "what chair?" and the defendant made more incriminating statements. The officer then Mirandized the defendant and additional incriminating statements were made. The court in Kiaht held that the defendant's statement after the officer's question was made pursuant to interrogation and was thus suppressible. Giving the Miranda warnings made the subsequent statements admissible.

In Hall's case deputy Buscher never gave Miranda warnings during their travel together. Under Kight Hall's statements regarding the electric chair should have been suppressed. These statements were so egregious that it cannot be said that their admission was harmless error.

POINT

THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S VARIOUS PRE-TRIAL MOTIONS

The Appellant filed various pretrial motions which were

each denied. These motions were: Motion to Order the Death Penalty Inapplicable to this Case **(R 1355 -1362);** Motion to Declare Section 921.141(5)(i) Florida Statutes Unconstitutional **(R 1363 - 1382);** Motion to Declare Section **921.141** Florida Statutes **(1987)** Unconstitutional **(R 1383 - 1385);** Motion to Use Jury Questionnaire with attached Appendix **1** (R **1386 - 1394);** Motion In Limine Regarding Juror's Attitude Toward the Death Penalty (R **1395 - 1398);** Motion to Dismiss Indictment or to Declare that Death is not a Possible Penalty (R **1399 -1401);** Motion for Statement of Aggravating Circumstances (R **1402 -1404);** Motion for Individual and Sequestered Voir Dire **(R 1405 -1409);** Motion for Additional Peremptory Challenges (R **1410 -1412);** Motion for List of Prospective Jurors in Advance of Trial **(R 1413 - 1414);** Motion to Sequester Jury During Trial (R **1415 -1416);** The arguments and rulings appear at **(R 8 - 35).**

The Honorable Trial Court erred in denying these motions. The denial of these motions resulted in a violation of Hall's Sixth Amendment Rights.

Witherspoon **v.** Illinois, **391** U.S. **510 (1968)** Gregg **v** Georaia, **428** U.S. **153 (1976)** Gardner **v.** Florida, **430** U.S. **349 (1977)**

The trial court also erred in denying the Appellant's Motion for Directed Verdict and acquital (R **607)** because the state never proved venue (R **454 - 456, R 440 - 441)** in Volusia County an essential element of the crime as charged **(R 1286).**

POINT V

THE TRIAL COURT ERRED IN FAILING TO GIVE APPELLANT'S REQUESTED JURY INSTRUCTIONS

Appellant requested jury instructions on insanity, self defense, defense of others, justifiable use of deadly force, sudden impulsive act, duress or coercion and minimum and maximum penalties for all lesser included crimes. (R 780, 784, 792, 794, 795, 809, 812 - 814, 828)

The court denied Appellant's requests and/or gave a modified instruction (e.g. duress) that Appellant objected to. For example, Hall asserted that he only shot the victim after co-defendant Bowen pointed the gun at him and said shoot the victim or I'll shoot you. (R 724) Appellant requested that the jury instructions reflect that Bowen, not the victim Dang, was the aggressor towards Hall to justify Hall's actions of self defense or justifiable use of deadly force. (R 812, R 902) These requested jury instructions were based on evidence presented at trial (R 705 -707, 712 - 716, 718 -719, 723 -725).

The court's refusal to give these jury instructions denied Appellant his constitutional right to a fair trial.

POINT VI

THE TRIAL COURT'S REFUSAL TO GIVE ANY WEIGHT TO UNCONTROVERTED MITIGATING EVIDENCE RESULTED IN AN UNCONSTIUTIONALLY IMPOSED DEATH SENTENCE IN CONTRAVENTION OF LOCKETT V. OHIO, 438 U.S. 586 (1978).

In the written findings of fact in support of the imposition of the death sentence, the trial court found only one mitigating circumstance, i.e. the non statutory circum-

stance that Hall was an abused child, good son and good brother. (R 1281) The trial judge then carefully analyzed and rejected the remaining statutory mitigating factors as well as all of the nonstatutory mitigating factors for which Appellant presented evidence. (R 1281) In dealing with the evidence presented by Hall in support of mitigating factors 921,141 (6)(b)(d)(e)(f) the trial court:

(1) rejected the defense duress theories that Hall participated in this offense because of fear of and/or threats by co-defendants Bowen and Dixon directed toward the defendant and his pregnant sister.

(2) rejected the defense theory that Hall was under a Satanic spell cast by Dixon and/or Satan.

The court refused to even consider the insanity defense in its sentencing order.

The court specifically found that Hall did not commit the murder while under the influence of extreme mental or emotional disturbance; he was a major participant in the murder; he did not act under duress or domination of another; and his capacity to appreciate the criminality of misconduct was not substantially impaired.

The trial court concluded that the four aggravating factors outweighed the only mitigating factor thus making the imposition of the death penalty appropriate. (R 1283)

Beginning with Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court has held that a trial judge cannot refuse to consider, or be precluded from considering,

any relevant mitigating evidence offered by a defendant. The Lockett holding is based on the distinct peculiarity of the death penalty. An individualized decision is essential in every capital case. Lockett, 438 U.S. at 604-605. The Supreme Court has consistently reiterated the Lockett holding. See e.g. Hitchcock v. Dugger, 107 S.Ct. 1821 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986). However, the Court has also stated that the trial court may give mitigating evidence whatever weight it deems fit. Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982).

This latter holding has rendered Florida's death penalty statute unconstitutional in its application. This conclusion is very much evident from the trial court's sentencing decision relating to Anthony Hall's death sentence. The decision of the trial court to afford very little, if any, weight to the mitigating evidence presented by Hall is tantamount to a refusal to consider valid mitigating evidence. This results in a violation of the spirit of Lockett and vilifies the "individualized decision" essential in every capital case. An excellent analysis of this problem can be found in Waters, Uncontroverted Mitigating Evidence in Florida Capital Sentencings, Fla.B.J., January 1989, at 11.

In the instant case Hall presented uncontroverted mitigating expert testimony of Professor Balmer:

(1) That through devil worship and the effect of Satanism on an individual, Hall's ability to distinguish

right from wrong was obliterated. (R 1113, **1115)**

(2) That at the time of the offense Hall believed he was acting under the influence of the Satan woman and/or Satan. (R **1126)**

(3) That the effects of Satanism could cause Hall to act in a cold calculated and premeditated manner which he otherwise would not do. (R **1124 - 1125)**

(4) That the effects of Satanism could have substantially impaired Hall's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. (R **1126)**

(5) That Hall acted under extreme duress under the threats of the female Satan worshiper to get Hall's sister's baby and sacrifice it to Satan if Hall did not go along with them. (R **1127)**

Hall presented the uncontroverted mitigating expert testimony of Clinical Psychologist Farinacci:

(1) That Hall was very naive, very immature, very suggestible, easily led, with a very poor grasp of reality. (R **1160)**

(2) That Hall has some severe psychological disturbance. (R **1160)**

(3) That when Hall gets under stress he is very likely to distort reality. (R **1162)**

(4) That "at the time of the shooting he was definitely unable to distinguish right from wrong. He was not in his right mind." (R **1163)**

(5) That on the day of the shooting Hall was in "an altered state of consciousness." (R **1163)**

(6) That Hall "would fit the concept of insanity as characterized by the McNaughton rule on the date of the offense." (R **1165)**

(7) That Hall was under the influence of extreme mental or emotional disturbance and was acutely disturbed. (R **1166)**

(8) That Hall acted under extreme duress and under the substantial domination of co-defendants Dixon and Bowen. (R **1166)**

(9) That Hall did not have the capacity to appreciate the criminality of his conduct on the day of the killing. **(R 1166 - 1167)**

(10) That Hall was unable to conform his conduct to the requirements of the law. (R **1167)**

(11) That Hall's level of maturity was more like a teenager. (R **1167)**

The trial court rejected all of this uncontroverted mitigating evidence.

The failure of the trial court to recognize valid mitigating evidence is a violation of Lockett. Such action ignores the individualization required by Lockett. The trial judge has a duty to recognize and weigh valid mitigating evidence. A trial court's refusal to apportion proper weight to valid, uncontroverted mitigating evidence violates Lockett as much as a trial court's explicit refusal to weigh such evidence. The constitutional application of Florida's death

penalty scheme is called into question when the trial court, as in the instant case, refuses to give any weight to valid, mitigating evidence established by the accused. This calls into question the constitutionality of the entire process under both the federal and state constitutions. Amend. V, VI, VIII, and XIV, U.S. Const.; Art. I, Sec. 9,16, and 17, Fla. Const.

POINT VII

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this court has specifically or impliedly rejected each of these challenges to the constituionality of the Florida statute and thus detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities. A motion to declare Florida's death penalty unconstitutional was filed by the Appellant and denied by the trial court. (R 1363 - 1382, 1383 - 1385, R 28)

The Florida capital sentencing scheme fails to provide notice to the capital defendant of the aggravating circumstance upon which the State intends to rely, and thus denies due process of law. See Cole v. Arkansas, 333 U.S. 196 (1948). This contention was raised below at trial. (R 1402 - 1404)

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975) supra, and does not define "sufficient aggravating circumstances." The statute, further, does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. Id. and Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980) (England, J. concurring).

Execution by electrocution is a cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968). This contention was specifically raised below. (R 12-13, 18-19)

The Elledae Rule (Elledae v. State, 346 So.2d 998 (Fla. 1977), if interpreted to automatically hold as harmless error

any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the 8th and 14th Amendments to the United States Constitution. See Initial Brief of Appellant 45-59, Elledge v. State, case number 52, 272, served June 2, 1980.

The Amendment of Section 921.141, Florida Statutes (1979) by adding aggravating factor 921.141(5)(i) (cold and calculated) renders the statute in violation of the 8th and 14th Amendments to the United States Constitution because it results in death being automatic unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating. See Initial Brief of Appellant Gilvin v. State, Fla. S.Ct. Case Number 50,743, served April 13, 1981.

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Fla. S.Ct. Case Number 50,743, served April 13, 1981.

The Florida Supreme Court does not independently weigh an re-examine aggravating mitigating circumstances. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

POINT VIII

THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THIS CASE THUS VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS.

On the spectrum of murder cases that this court has reviewed, this case simply does not qualify as one warranting imposition of the death penalty. Hall's co-defendant in this case, Daniel Bowen, was the leader (R 717 - 721) yet he received a sentence of life imprisonment. In a similar Satanic Ritual murder in Tampa, Jonathan Cantero received life imprisonment. (R 1051 -1053)

In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), this court has again recognized its duty to review the circumstances of every Florida capital case. Reiterating the dictates of State v. Dixon, 283 So.2d 1 (Fla. 1973) and Furman v. Georgia, 408 U.S. 238 (1972) this Court stated:

> It is with this background that we must examine the proportionality and appropriateness of each sentence of death issued in this State. A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty

is administered even handedly.

This court has recognized the mitigating quality of crimes committed impulsively while the perpetrator suffered from a mental disorder rendering him temporarily out of control. E.g. Holsworth v. State, 522 So.2d 348 (Fla. 1988); Amazon v. State, 487 So.2d 8 (Fla. 1986); Miller v. State, 373 So.2d 882 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976).

Anthony Hall is likewise deserving of a life sentence. His crime was a product of his mental impairment. There was evidence that he not in his right mind at the time of the offense. He was under the influence of Satanism induced by Bunny Dixon which commanded him during the offense. Brenda Daum's testimony established that Hall acted strangely at her home after Dixon's Satanic Ritual before the four left. (R 677 - 680 - 682)

Certainly, with the added mitigation of mental impairment contributing to the crime, Hall's life must be spared. Tony Hall's death sentence is disproportionate to his crime. This Court must reverse the death sentence with directions to the trial court to impose life.

POINT IX

SECTION 921.141(5)(h), FLORIDA STATUTES (1987) IS UNCONSTITUTIONALLY VAGUE THUS VIOLATING THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

In imposing Tony Hall's sentence, the trial court found that the murder was especially heinous, atrocious and

cruel as provided by Section 921.141(5)(h), Florida Statutes (1987). Appellant contends that this particular aggravating circumstance is unconstitutionally vague because the jury is not given adequate instruction in how to determine which murders qualify.

Section 921.141(5)(h), Florida Statutes (1987) authorizes the jury and the trial court in a capital case to consider as an aggravating circumstance whether the killing was especially heinous, atrocious, or cruel. The difficulty with this circumstance is that "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372, 382 (1988). Because this aggravating circumstance can characterize every first degree murder, section (5)(h) is unconstitutionally vague. It "fails adequately to inform juries what they must find to impose the death penalty and, as a result, leaves them and appellate courts with the kind of open-end discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972)." Maynard v. Cartwriaht, 100 L.Ed.2d at 380. See Spaziano v. Florida, 468 U.S. 447 (1984). See Godfrey v. Georgia, 446 U.S. 420 (1980).

In the instant case, in accordance with Section (5)(h), the court instructed the penalty phase jury:

> The aggravating circumstances that you may consider are limited to any of the following that are established by

the evidence. * * *

A capital felony was especially heinous, atrocious or cruel. (R 1208)

As in Godfrey, the court read to the jury no other limiting instruction on the subject. As in Maynard v. Cartwrisht, the instruction did not limit the jury's or the trial court's discretion in any significant way. In fact, the instruction was virtually the same as the one condemned in Maynard v. Cartwriaht. Accordingly, allowing Tony Hall to be sentenced to die under this unconstitutionally vague law is error. Amend. V, VIII, and XIV, U.S. Const.; Art. I, Sec. 2, 9, 16, and 22, Fla. Const.

This court also struck the circumstance in Teffeteller v. State, 439 So.2d 840 (Fla. 1983), even though the victim lived for several hours in undoubted pain and knew that he was facing imminent death. Horrible as that prospect may have been, this court determined that fact did not seem to set the murder apart from the norm of capital felonies.

The evidence simply does not establish that Hall's crime was especially heinous, atrocious, or cruel. The state certainly failed to prove this aggravating circumstance beyond a reasonable doubt. The trial court's finding of the circumstance is unsupported by the record. Tony Hall's death sentence, based in part on the finding of this circumstance, is unconstitutional. Amend. V, VIII, XIV, U.S. Const.; Art I, Sec. 9,16,17, Fla. Const.

POINT X

IN CONTRAVENTION OF HALL'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In finding that the state proved this aggravating circumstance beyond a reasonable doubt, the trial court recognized that there must be more than simple premeditation. The trial court relied on this court's pronouncement in Rogers v. State, 511 So.2d 526 (Fla. 1987), that the murder must show heightened premeditation in that it must be proven to be "calculated." Calculation consists of a careful plan or prearranged design. Rogers, 511 So.2d at 533. Webster's Third International Dictionary at 315 (1981) defines the word "calculate" as "(t)o plan the nature of beforehand: think out. . . to design, prepare and adapt by forethought or careful plan."

Tony Hall had no careful plan to kill Mr. Dang. Hall went along for the ride only to get his three co-defendants away from his pregnant sister's home. (R 712 - 713, 716) He was afraid they would harm his pregnant sister. (R 713) Hall did not know about Dan Bowen's plan to kill Dang until the car pulled of I-95. (R 717, 721) Then Bowen apparently changed the plan when Bowen told Dang "I won't kill you put your legs down." (R 1249) Then Bowen killed Dang and threatened to shoot Hall if Hall did not also shoot. (R 1249) Hall had no calculated plan then but only an

instinct for self preservation. Hall only shot after Bowen shot. (R 1249) The slaying was planned all along by Bowen the leader with the guns and knives. (R 705, 722, 739) Hall thought Dang would just be dropped off in the woods without any killing. (R 750) There is no evidence that Hall knew of the ultimate result of this encounter.

The state failed to prove beyond a reasonable doubt that this particular aggravating circumstance (§921.141(5)(i), Fla. Stat.) was established.

There is absolutely no evidence that Tony Hall formulated the intent (if at all) to kill Mr. Dang at any time other than immediately prior to pulling the trigger. The state has simply failed to meet their burden of proving the heightened premeditation required by this particular aggravating circumstance.

The trial court overlooked that Hall acted with some pretense of moral or legal justification. Hall only left his sister's house to get these other three violent and armed persons away from his pregnant sister. (R 1250) The Satan worshipper had threatened the sister to Hall in the context of taking her baby to sacrifice to Satan. (R 712, 1199, 1200) Hall only shot at Dang under duress, coercion or self defense as he claimed at trial. (R 1250)

The state has certainly failed to meet its burden of proof in establishing this aggravating circumstance beyond a reasonable doubt. Tony Hall's death sentence, based in part on the trial court's finding of this circumstance, is

therefore unconstitutional. Amendment V, VIII, and XIV, U.S. Constitution; Article I §9, 16 and 17 Florida Constitution.

POINT XI

THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

In finding that the state had proved this factor beyond a reasonable doubt, the trial court stated:

F.S. 921.141 (5)(f). The capital felony was committed for pecuniary gain.

> "The court finds that the murder was committed by the defendant in order to obtain the victim's money, car and other belongings."

The trial court's finding of this fact is simply not supported by the evidence.

Case law indicates that this aggravating factor is limited in its application to situations where the sole or primary motive for the killings is monetary gain. See Simmons v. State, 419 So.2d 316, 317 (Fla. 1982); State v. Dixon, 283 So.2d 1, (Fla. 1973).

In the instant case the state presented it's case to the jury for the felony murder based on kidnapping, not robbery. (R 1246 - 1248) It is impermissible doubling of aggravating factors for the state to waive its robbery presentation to the jury then rely on the robbery to establish pecuniary gain as an aggravating circumstance.

The state failed to meet its burden of proof in establishing that the sole or primary motive for the killing was monetary gain. Tony Hall's death sentence, based

in part on the trial court's finding of this circumstance, is therefore unconstitutional.

CONCLUSION

The first issue regarding the insanity defense in the guilt portion of the trial is dispositive. It was harmful error for the Trial Judge to exclude the proferred testimony of the clinical psychologist and religion professor from evidence. When this court agrees with appellant, you will find it unnecessary to address the issues concerning sentencing. This court must reverse the convictions and remand to the trial court with instructions to grant Hall a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing Appellant's Initial Brief has been furnished by hand delivery to David Morgan, Esquire, Assistant Attorney General 210 North Palmetto Avenue, Suite 447, Daytona Beach, FL 32114 and the original and seven (7) copies filed with the Office of the Clerk, 500 S. Duval Street, Tallahassee, FL 32399 this 11th day of September, 1989.

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