IN THE SUPREME COURT
STATE OF FLORIDA

CIRCUIT CASE #88-028-CF
APPELLATE #74,352

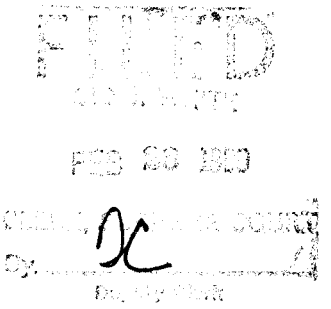
RICHARD EARL SHERE, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/



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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND OF THE FACTS

On February 2, 1988 a grand jury impaneled in Hernando County, Florida, indicted Richard E. Shere, Jr. for the first degree murder of Drew Paul Snyder (R. 1006). Snyder was killed during the early morning hours of December 25, 1987 in Hernando County. Shere was formally charged with the murder on January 14, 1988 after having been initially contacted by law enforcement authorities on January 13, 1988. The Office of Public Defender was appointed to represent him on January 15, 1988.

Numerous pretrial motions were filed, including motions directed at the unconstitutionality of Section 921.141, Florida Statutes, (R. 1122-1144) and an Amended Motion to Suppress statements made by the Defendant (R. 1153-1155). The guilt phase of the trial covered from April 18, 1989 through April 21, 1989 (R. 1-852). The Defendant was found guilty of first degree murder (R. 1210). The penalty phase of the trial was conducted on April 26, 1989 (R. 853-991), with the result being an advisory sentence of death by a 7 to 5 vote (R. 1342). The trial court adjudicated Shere guilty of first degree murder and sentenced him to death (R. 1536-1548). Findings of fact were made by the trial judge to support imposition of the death sentence, wherein three aggravating circumstances were found and 3 or 4 statutory mitigating circumstances in addition to non-statutory mitigating (R. 1454-1458). The Office of the Public Defender was appointed to represent Shere for the purpose of appeal (R. 1490-1491) and a timely Notice of Appeal was filed on June 12, 1989 (R. 1492).

The evidence presented at trial established that during the early morning hours of December 25, 1987, Richard Shere, a subsequent Co-Defendant, Bruce Demo, and the victim, Snyder, went rabbit hunting after Demo and Shere picked Snyder up at his residence in Shere's vehicle, and this was after the Co-Defendant, Demo, had called Shere indicating that he was considering killing Snyder (R. 402-404). The Defendant's version of the incident, as related in his taped statement that was played to the jury over the objection of the defense (R. 400-448), was that after picking Snyder up and doing some rabbit hunting, they stopped to use the bathroom and the Co-Defendant, Demo, began shooting Snyder, and Shere fired no shots at all and, in fact, wanted to take Snyder to the hospital prior to Demo killing Snyder.

The witness, Heidi Greulich Shere, who was living with the Defendant at the time of this incident, testified after being called as a court witness that Shere told her that he, Shere, participated in the shooting of Snyder (R. 704-735). The witness, Raymond Pruden, also testified that Shere told him that he had shot Snyder some 10 to 15 times (R. 739).

During the penalty phase of the trial, the defense produced numerous witnesses who testified as to the general good character of Shere and how the actions attributed to Shere would be totally out of character (R. 873-952). The Defendant testified during the penalty phase (R. 942-952), and that testimony revealed him to be 21 years of age at the time of this incident and that prior to this incident he had engaged in drinking beer and smoking marijuana (R.

942). He further testified as to his religious beliefs and that prior to this case he had never been convicted of a felony (R. 952).

SUMMARY OF THE ARGUMENT

Argument I: The repeated questioning by the prosecutor of the state's witness as to where the Defendant was located, namely at the courthouse, created an inference for the jury that the Defendant had other, unrelated criminal charges and the Motion for Mistrial should have been granted.

Argument II: There was no relevance in this particular case for the photograph of the victim's body to be admitted and the prejudicial effect of allowing that photograph far outweighed any probative value.

Argument III: The Defendant's Motion for Appointment of Private Counsel should have been granted based on the case load and time constraints of the Office of the Public Defender.

Argument IV: The provisions for aggravating and mitigating circumstances, as contained in the Florida Statutes, do not cure the arbitrary and capricious application of the death penalty, and those statutes continue to be unconstitutional.

Argument V: The Defendant's Motion to Suppress statements made by the Defendant should have been granted given the circumstances under which those statements were made. The statements should not be considered "voluntary" under the coercive circumstances present at the time the statements were made to law enforcement officers.

Argument VI: There was no predicate established for calling Heidi Greulich as a court witness since it had not been clearly established that she was hositle to the state or that she had made

inconsistent statements of the nature that would allow that procedure.

Argument VII: The short-form "execusable homicide" instruction has been condemned and has the overall effect of precluding the jury from rendering a possible manslaughter verdict and it is therefore fundamental mental and reversible error to give the instruction.

Argument VIII: The evidence did not merit giving the principal instruction since the state's theory of the case apparently was that Shere was solely responsible for the shooting death of the victim.

Argument IX: The Defendant's Motion for New Trial should have been granted given the juror misconduct and the other matters set forth in that Motion.

Argument X: The misconduct of the jurors by not revealing that one of the jurors had a brother who had been murdered, merited at least an inquiry, if not a new trial.

Argument XI: The sentencing findings of the trial court were improper and unclear and the aggravating circumstances that were found should not have been found. Additionally, the instructions for the penalty phase, as to the particular aggravating circumstances, should not have been given.

ARGUMENT-I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL AS TO INFERENCES BY THE STATE OF OTHER, UNRELATED CRIMINAL CHARGES AGAINST THE DEFENDANT.

The Defendant was initially contacted by law enforcement in regard to this case while the Defendant was at the Hernando County Courthouse on January 13, 1988 for a court appearance on other criminal charges.

The defense moved pretrial to prevent any mention before the jury of the fact that the Defendant was contacted at the courthouse, so that the jury would not be inferentially aware of any additional criminal charges that should not properly be before the jury. This prior ruling was noted at the time of the Motion for Mistrial (R. 399).

In the face of the trial court's ruling, the prosecutor seemed to be persistent in getting that improper information in front of the jury.

In questioning of Sgt. Alan Arick with the Hernando County Sheriff's Department, by the prosecutor, this exchange occurred:

BY MR. TATTI:

Q. Would you describe for the ladies and gentlemen of the jury how it was you came into contact with him on that date?

A. Well, early on in the investigation through talking with a couple of other witnesses, he had been developed

as a suspect. And we had also received information that he might be at the county courthouse.

MR. FANTER: Objection, Your Honor.

THE COURT: Objection sustained.

BY MR. TATTI:

Q. All right. Were you able to locate him on the 13th?

A. Yes.

Q. And where was it that he was located?

A. At the courthouse.

MR. FANTER: Objection, Your Honor.

THE COURT: Objection sustained.

MR. FANTER: I have a motion to make.

THE COURT: I'll let you reserve any motion that you would normally make at this time.

MR. FANTER: Thank you, Your Honor. (R. 339-340)

It is obvious that the prosecutor was determined to get this information in front of the jury. There had been a pretrial ruling that it should not come in as evidenced by the reference of defense counsel that was uncontroverted (R. 399); there had been an objection sustained to the mention of it and then the prosecutor asked again where it was that Shere was located.

Therefore, the State succeeded in getting before the jury a clear inference that the Defendant had additional criminal charges against him.

In anticipation of the argument that the Defendant could have been at the courthouse on business other than criminal matters, it must be pointed out that here we have the testimony of a law enforcement officer that that law enforcement officer had received information that the Defendant would be at the courthouse. It is submitted that that re-enforces the inference for the jury, since a law enforcement officer probably would not be aware of any noncriminal business that the Defendant might have had at the courthouse.

The trial court anticipated the Motion for Mistrial as to this point and allowed the defense to reserve that argument for a later point in the trial (R. 340), and the Motion was later made and denied (R. 399).

It is clearly accepted law that it is improper to present evidence tending to show that a defendant has committed other crimes unless such is to be admitted under a Williams Rule theory. The state had previously filed a Williams Rule Notice in the case (R. 1060-1061) but the trial court granted the defense Motion in Limine to prevent the Williams Rule evidence (R. 1180,244). Craig v. State, 510 So.2d 857, cert. den. 108 S.Ct. 732, 98 L.Ed. 2d 680; Section 90.404, Florida Statutes; State v. Lee, 531 So.2d 133 (Fla. 1988).

In view of the complete disregard of the court's ruling on this point, the Motion for Mistrial should have been granted.

ARGUMENT-II

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE PHOTOGRAPHS OF THE VICTIM'S BODY.

The trial court allowed into evidence as a State's Exhibit 1 (R. 289), a photograph of the victim's body. The defense pointed out that the prejudicial value exceeded any probative value but, significantly, the State offered no reason whatsoever for offering the photograph in response to the defense objection. The trial court, without any such offering by the prosecutor, allowed the photograph into evidence.

In order for such photographs to be allowed, they must have some relevance to the issues. Kingery v. State, 523 So.2d 1199 (Fla. 1st DCA 1988). As pointed out in Kingery, there can be certain matters of relevance such as identification, manner of dress of the victim or other matters. Here, no suggestion was made by the prosecutor as to any relevance of the photograph. However, the prosecutor apparently sensed that none was needed, since the trial court allowed the photograph into evidence without any such offering by the State.

It is submitted that to do so was prejudicial to the Defendant and that the sole purpose of submitting the photograph was to inflame the jury, and the conviction should be reversed because of the improper submission into evidence of the photograph.

ARGUMENT - III

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR APPOINTMENT OF PRIVATE COUNSEL.

This Motion was marked as filed with the Clerk of the Circuit Court of Hernando County, Florida, on December 16, 1988 (R. 1100-1101). The Defendant, apparently as an inmate had no access to statistics to be of assistance to him in this Motion, but it is submitted that given the facts as outlined in the Motion, the trial court should have appointed counsel from the private bar to represent the Defendant.

ARGUMENT-IV

THE FLORIDA DEATH PENALTY STATUTES VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, IN THAT THE STATUTORY AGGRAVATING AND MITIGATING CIRCUMSTANCES, AS APPLIED, DO NOT ADEQUATELY LIMIT THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND THUS RENDER THE DEATH PENALTY SUSCEPTIBLE TO UNDUE ARBITRARY AND CAPRICIOUS APPLICATION.

Furman v. Georgia, 408 U.S. 238 (1972), declared the death penalty unconstitutional because of arbitrary and capricious imposition, and in response to that the state legislature enacted death penalty legislation defining aggravating and mitigating circumstances that must be present before there can be a valid death sentence.

The constitutionality of the death penalty statutes was raised with the trial court by motions timely filed. The case law cited in those motions is herein adopted as part of this brief. (R. 1125-1144, 1149-1150)

The arbitrariness and capriciousness of the death penalty as applied is not cured by the statutory aggravating circumstances as listed in Section 921.141(5)(a), Florida Statutes, in that these are not objective factors that can eliminate the problem. The courts have rejected the argument of vagueness in the aggravating factors and have upheld the death penalty statutes in numerous cases, including Trawick v. State, 473 So.2d 1235 (Fla. 1985), cert. den. 106 S.Ct. 2254, 476 U.S. 1143, 90 L.Ed.2d 699, rehearing den. 106 S.Ct. 3323, 478 U.S. 1014, 92 L.Ed.2d 730, and in Proffitt v. Florida, 428 U.S. 242, 253 (1976).

Nonetheless, it is contended that the application of the death penalty statutes is arbitrary and capricious, violating the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 22 of the Florida Constitution.

ARGUMENT-V

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.

An Amended Motion to Suppress any statements made by the Defendant in this case was filed (R. 1153-1155). The facts surrounding the statements given by the Defendant to law enforcement were testified to by Sgt. Alan Arick of the Hernando County Sheriff's Office (R. 1576) and those facts were basically that the Defendant was at the Hernando County Courthouse on January 13, 1988 for a court appearance in a separate case having Case Number 87-455-CF (R. 1153). Prior to this meeting, Sgt. Arick had already obtained a search warrant for the Defendant's vehicle and had also obtained a warrant for the Defendant's arrest based on an off-bond Order signed on the same afternoon of January 13, 1988 (R. 1582-1583). Sgt. Arick and two others spoke with the Defendant outside the courtroom, asked if he would mind coming to talk with them, which the Defendant agreed to do, and a conversation was held with the Defendant at the Hernando County Sheriff's Department. During that conversation, the Defendant denied any knowledge of the disappearance of the victim in this case and finally indicated that he wished not to be asked any more questions. (R. 1583-1586). When the Defendant invoked his right to remain silent, he was placed under arrest on the off-bond Warrant pertaining to the unrelated Case Number 87-455-CF and was housed in the Hernando County Jail.

The Defendant remained in the jail without any bond on the unrelated charges, and without counsel.

As was pointed out in the hearing on the Motion to Suppress, the Defendant had been told at the time of the initial interrogation that it would be better for the Defendant if he cooperated (R. 1605).

On the following day, January 14, 1988, at about 12:25 P.M., Sgt. Arick and Detective Blade went to the Hernando County Jail to talk again with the Defendant, whereupon the Defendant showed the detectives where the shooting had taken place and later on the same date gave a taped statement as to what occurred (R. 1590-1595). This statement was later admitted into evidence and played for the jury. (R.400-448)

As set forth above, at the time the Defendant gave a statement concerning what occurred, he had previously invoked his right to silence; he had been advised by law enforcement officers that it would be better for him if he cooperated with them; and that it would be bad for him and irreversible if he did not (R. 1605), he was without counsel and had not been taken in front of a judge subsequent to his arrest on the off-bond Warrant; the second interview took place while the Defendant was in jail; and after he had been told by a law enforcement officer that a co-defendant (Demo) had said that the Defendant was responsible for the murder of the victim (R. 1603).

It was pointed out by defense counsel that first appearances were held at 8:00 A.M. on January 14, 1988 for other defendants (R.

1607). Reference is made to the argument at the hearing on the Motion to Suppress (R. 1605-1622) to the effect that given the totality of the circumstances, any statements made by the Defendant were not voluntary and should have been suppressed. In addition to the cases cited during argument at the time of the hearing, it is pointed out that State v. Charon, 482 So.2d 392 (Fla. 3rd DCA 1985) stands for the proposition that the State has the burden of proving "by a preponderance of the evidence that the challenged statements were voluntarily made." (482 So.2d at 392). Charon, cites Brewer v. State, 386 So.2d 232 (Fla. 1980), Williams v. State, 441 So.2d 653 (Fla. 3rd DCA 1983), review denied, 450 So.2d 489 (Fla. 1984) and Puccio v. State, 440 So.2d 419 (Fla. 1st DCA 1983), in support of that proposition.

Charon also talked about the "totality of the circumstances" test and stated as follows:

> A confession must be suppressed if the surrounding circumstances or the declarations of those present at the making of the statement are calculated to delude the accused as to his true position or to exert improper and undue influence over him. Thomas v. State, 456 So.2d 454 (Fla. 1984); Brewer; Williams. Although the detective's actions and misleading comments, if considered individually, might not justify a finding that Charon's statements were involuntary, see Williams, 441 So.2d at 656 and cases cited therein, the totality of the circumstances supports the trial court's conclusion.

In Brewer, supra, it was stated:

> Under that standard, when a question arises as to the voluntariness of a confession, the inquiry is whether the confession was "free and voluntary; that is [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . . " Bram v. United States, 168 U.S. 532, 542-43, 18

S.Ct. 183, 187, 42 L.Ed. 568 (1897). For a confession to be admissible as voluntary, it is required

> that at the time of the making the confession the mind of the defendant be free to act uninfluenced by either hope or fear. The confession should be excluded if the attending circumstances, or the declarations of those present at the making of the confession, are calculated to delude the prisoner as to his true position, or to exert improper and undue influence over his mind.

Frazier v. State, 107 So.2d 16,21, (Fla. 1958); Harrison v. State, 152 Fla. 85, 12 So.2d 307 (Fla. 1943) (386 So.2d at 235-236)

Surely the state has not met its burden under the facts of this case given the setting under which the Defendant, Shere, gave his statements to law enforcement officers. The statements of the Defendant should have been suppressed.

ARGUMENT-VI

THE TRIAL COURT ERRED IN CALLING HEIDI GREULICH AS A COURT WITNESS.

The state sought to call Heidi Greulich as a court witness based on what the state represented were inconsistent statements that she had given in the past, and based on her hostility, possibly, to the state (R. 606-612). The defense objected to this procedure until such time as she was either evasive or tried to testify falsely (R. 609), but the court overruled the objection and allowed her to be called as a court witness (R. 619). It is submitted that there had been no showing to the trial court that this witness should be called as a court witness under Section 90.615, Florida Statutes. As pointed out by defense counsel in his argument against this proceeding, there was no basis to declare her a court witness until there was some showing of a need to do that (R. 609).

Subsequent to the court calling her as a witness, the state, by leading questions and by showing prior statements of this witness, was able to solicit information concerning the Defendant that would otherwise not be admissible. This was condemned in Dudley v. State, 545 So.2d 857 (Fla. 1989) and in Wasko v. State, 505 So.2d 1314 (Fla. 1987). It is submitted that allowing this procedure as to this particular witness was especially harmful to the Defendant and prejudicial to him, and the court was in error, absent the necessary predicate, in declaring her to be a court witness.

ARGUMENT-VII

THE TRIAL COURT ERRED IN GIVING THE SHORT-FORM "EXCUSABLE HOMICIDE" INSTRUCTION.

The jury instruction given in this case as to excusable homicide was the short-form of that definition and was given as follows:

> The killing of a human being is excusable and, therefore, lawful when committed by accident and misfortune in doing any lawful act by lawful means with usual, ordinary caution and without any unlawful intent, or by accident or misfortune in the heat of passion upon any sudden and sufficient provocation or upon sudden combat without any dangerous weapon being used and not done in a cruel or unusual manner." (R. 828)

There was no objection by the defense to this short-form instruction, nor was there a request by the defense that the long-form instruction also be included.

In Schuck v. State, 15 F.L.W. D 242 (Fla. 4th DCA, January 24, 1990), that appellate court dealt with this instruction also in a situation where there was no objection by the defense, and concluded that the giving of the instruction constituted fundamental and reversible error. As pointed out by the Schuck court, the damaging phrase is "without any weapon being used" in that it ". . . is inherently misleading, because it suggests that a killing committed with a deadly weapon is never excusable" (15 F.L.W. D 242)

The long-form excusable homicide instruction was neither requested nor given in this case.

Smith v. State, 539 So.2d 514 (Fla. 2nd DCA 1989), also condemned the giving of the short-form excusable homicide instruction without the long-form being given and engaged in a discussion as to two different contexts in which the long-form instruction should have been given.

> As this court indicated in Tobey v. State, 533 So.2d 1198 (Fla. 2d DCA 1988) this issue in a criminal case of whether or not there was fundamental error from the failure to give a proper jury instruction-in this case and in Tobey, an instruction on excusable homicide-can arise in different contexts, i.e., under different approaches as to why the instruction should have been given. For present purposes two contexts of that kind can be described as follows: (a) when a defense-in this case, excusable homicide-is presented on behalf of defendant by the offering of evidence in support thereof, and (b) when there is an alleged failure by the trial court to instruct accurately on the definition of an offense-in this case, on excusable homicide as a part of the definition of the lesser included offense of manslaughter. (539 So.2d at 516)

The court went on to conclude that in the context (b) situation to not give the long-form excusable homicide instruction is fundamental error in that the instruction on manslaughter, a lesser included offense involved in this case is "incomplete if the jury is not also instructed on both excusable homicide and justiciable homicide." (539 So.2d at 518). The Smith court goes on to reason that the giving of the long-form instruction "promotes the opportunity of the jury to exercise its inherent pardon power." (539 So.2d at 518).

In the case at hand, the Defendant, SHERE, in his statement to the law enforcement officers that was played to the jury (R. 400-448) denied shooting the victim in this case. Therefore, if the

trial jury would have even considered the lesser included offense of manslaughter, this misleading short-form instruction would have precluded them from feeling that they could return a verdict of manslaughter at all. See also Alejo v. State, 483 So.2d 117 (Fla. 2nd DCA 1986) and Garcia v. State, 535 So.2d 290 (Fla 3rd DCA 1988).

It was proper for the trial court to instruct as to manslaughter, a lesser included offense, but by giving the misleading short-form excusable homicide instruction, the trial court effectively precluded the jury from considering manslaughter. The Defendant herein was prejudiced thereby and the case should be remanded for a new trial because of this defective instruction.

ARGUMENT-VIII

THE TRIAL COURT ERRED IN GIVING THE PRINCIPAL INSTRUCTION UNDER THE FACTS OF THIS CASE.

The trial court noted that it was going to give the principal instruction over the objection of the defense (R. 744), and subsequently did give that instruction (R. 834-835).

The defense objected to this proposed instruction based on the state's theory of the case that Shere acted alone in shooting the victim, therefore making the principal instruction inconsistent with the theory presented by the state.

ARGUMENT-IX

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL.

The defense would incorporate the argument made heretofore as to the denial of the Motion to Interview the Jury as to that aspect of the Motion for New Trial dealing with juror misconduct, pertaining to the juror who did not respond to voir dire and advise counsel for either side that she had a brother who had been murdered.

The trial court further erred in denying a Motion for New Trial on the basis of the newly discovered evidence, that being as contained in the affidavit of one Frank DeMotte, that was attached to the Motion for New Trial (R. 1485).

Pursuant to Rule 3.600, Florida Rules of Criminal Procedure, testimony as indicated in the affidavit would qualify as new and material evidence that could very easily change a verdict and there was no way that it could have been discovered prior to the trial, since the statement was not made until after the trial of the Defendant, Shere, and before the trial of the Co-Defendant, Demo.

Reference is made to Baker v. State, 336 So.2d 364 (Fla. 1976), wherein the court had held that if new evidence was discovered, (that evidence was very similar to the evidence in this case) unless it could be determined to be admissible at trial, then it could not effect the trial and a Motion for New Trial on that basis should be denied.

However, this court held that an admission against interest need not be excluded as hearsay, and therefore should be considered in a Motion for New Trial. (336 So.2d at 370) The facts in the Baker case involved the defendant, Baker, having been convicted of robbery and after the trial a wife and mother-in-law of a man named Johnson came forward and stated that Johnson had told them that Baker was innocent and that he, Johnson, had committed the crime (336 So.2d at 366).

This is remarkably similar to our situation, wherein we have a Co-Defendant, Demo, after Shere has been convicted, telling another party that he, Demo, did all the shooting and that the Defendant, Shere, had refused to shoot (R. 1485).

A new trial should have been granted on this basis.

ARGUMENT-X

THE TRIAL COURT ERRED IN DENYING THE MOTION TO INTERVIEW JURORS.

The Motion to Interview Jurors (R. 1488) refers to the Motion for New Trial (R. 1483-1487) as to the juror misconduct.

The Motion is based on two areas of juror misconduct with one being that a juror was seated and served on the jury in this case when that juror had a brother who had been the victim of a murder, and this after the jury panel had been asked specifically whether or not they had been victims of crime or they had relatives who had been victims of crime. (R.55) The second area of misconduct has to do with an indication by at least two jurors that they did not know the Defendant, when in fact they apparently had known him well.

An anonymous letter dated May 5, 1989 (R. 1486-1487) was written, purportedly by someone who was on the jury in this case, and that letter sets forth the alleged misconduct.

Argument on this Motion and the related Motion for New Trial dealt with whether or not the jurors had been asked the question of whether or not they had members of their family who had been victims of a crime (R. 1517-1530). When the jurors were first seated in the jury box prior to voir dire beginning, there were six jurors who ultimately were selected to serve as jurors to try this case (R. 7-20; 238). Those were Colin Clarke, Marie Little, Belinda Van Horn, Augustine Solino, Theresa Cox, and Marion Hyland. Jurors Little, Van Horn, Cox and Hyland are all female jurors.

The significance of that is that the question was asked by the prosecutor: ". . any of you ever been the victim of a crime, you or your family?" (R. 55). There was no response from anyone seated in the jury box, other than Mr. Tjarks (R. 55).

Ultimately three more females, namely Ms. Ostranga, Ms. Kennedy and Ms. Galloway were selected to sit in trial of the case. (R. 238). It is also pointed out that Ms. Galloway ultimately became the foreperson of the jury. (R. 1210)

Given the fact that four females were in the jury box when the question was asked by the prosecutor as noted above and those four were ultimately selected to serve on the jury, the odds are very high that one of them was the juror referred to in the letter dated May 5, 1989. It is noted that this unsigned letter refers to a female as the "chair person", which also tends to corroborate the fact that whoever wrote this letter was indeed on that jury.

At the hearing on the Motion for New Trial and the Motion to Interview the Jury, the trial judge indicated that it was clear to him that the person who wrote the letter had not served on the jury (R. 1526-1527). However, the trial judge did not explain how he arrived at that conclusion. It appears that the trial judge places a great deal of weight on the fact that the letter had reference to "Judge O'Neal" as opposed to Judge McNeal, and he indicated that since he gave them jury certificates with his signature there was no way that they could have misunderstood, and therefore it was not really a juror (R. 1526). We would submit that its very likely that someone may not hold on to a jury certificate so they could

refer to it later, assuming that they did not mislead the signature.

The defense would submit that the statements in that letter indicate that the person was, in fact, on the jury.

The issue becomes whether or not this is enough to allow a post-verdict interview of the jury in the case. In Sconyers v. State, 513 So.2d 1113 (Fla. 2nd DCA 1987), that court reversed a trial court's denial of the defense motion to interview jurors and said:

> It is clear from the record that appellant's motion to interview the jury was a predicate for a motion for new trial. The alleged misconduct was that one of the jurors had not answered truthfully on voir dire the questions regarding the right to arm one's self and the right to use self-defense. It has been held that juror misconduct sufficient to support a motion for new trial occurs when a juror responds untruthfully, even if unintentionally, to questions propounded on voir dire. See White v. State, 176 So. 842 (Fla. 1937) (motion for new trial should have been granted where juror on voir dire responded to defense counsel's question that he had never been represented by either of the state's attorneys, but in fact, had been represented by one of the state's attorney and during a trial recess, had discussed that representation with the state attorney); Mitchell v. State, 458 So.2d 819 (Fla. 1st DCA 1984) (new trial should have been granted where juror on voir dire responded negatively to material questions as to whether she had any family, relatives or friends who worked at correctional institution, even though untruthful response was not intentional, and where defendant has peremptory challenges remaining which counsel would have exercised had the questions been answered truthfully). (513 So.2d at 1115-1116)

The concern of the trial judge, if he allowed this motion, was that it would infringe on the jury deliberation process (R. 1527), but the Sconyers' court dealt with that concern and said as follows:

> Let there be no mistake, misinterpretation or misconstruction-this opinion is not to be read as opening "Pandora's box" to permit interviews of jurors on matters which inhere in the verdict. The juror misconduct alleged here is not a matter which inheres in a verdict. When a motion to interview a juror or jurors set forth allegations that the movant has reasonable grounds to believe that the verdict may be subject to legal challenge, such as a reasonable belief that a juror has been guilty of misconduct, then the trial court should conduct such an interview, limiting it as narrowly as possible, to determine if such grounds do exist. Cf. Fla. Bar Rules of Prof. Conduct, Rule 4-3.5(d)(4) (setting forth basis and procedure for interviewing jurors). (513 So.2d at 1117)

The juror misconduct involved in the Sconyers' case dealt with a juror who had misrepresented during voir dire his attitude toward self-defense in a murder case.

Surely, in the case at hand, as in Sconyers, there was at least enough to require an interview with the jurors to determine whether or not there was juror misconduct, especially in light of the fact that the advisory verdict in this case was 7 to 5 in favor of death, meaning that a swing of one vote would have resulted in a life recommendation by the jury.

ARGUMENT - XI

THE TRIAL COURT'S SENTENCING FINDINGS ARE IMPROPER AND MAKE IMPROPER USE OF STATUTORY AGGRAVATING CIRCUMSTANCES AND THE TRIAL COURT ERRED IN INSTRUCTING THE JURY DURING THE PENALTY PHASE AS TO THOSE PARTICULAR AGGRAVATING CIRCUMSTANCES.

The trial court found that the murder of Snyder was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws, pursuant to Section 921.141(5)(g), Florida Statutes (R. 1454). Reference is made to the argument cited by the defense in the trial of this cause in arguing against the jury being given an instruction in regard to that particular aggravating circumstance (R. 858-859). The evidence produced at trial did not support the trial court finding, in that there was no clear evidence that Shere saw Snyder as a threat to him, or that Snyder was considered to be a possible witness against him.

The trial court found that the murder was "especially evil, wicked, atrocious or cruel" (R. 1455). The aggravating factor that the court apparently was referring to under Section 921.141(5)(h), Florida Statutes 1987, is properly cited as "heinous, atrocious or cruel". The court apparently, based on discussions of the jury instructions, felt that there had been a change in that particular aggravating circumstance (R. 859). Reference is again made to the argument discussed by the defense in arguing against the jury instruction pertaining to this aggravator (R. 860-861). Additionally, the trial court refers in its findings of facts to the fact that "all of the initial shots would have caused pain and

would have allowed the victim to experience the anguish of knowing that he was being killed by his hunting buddies." (R. 1455) It is submitted that that is not supported by the evidence, and it is further submitted that the court's referring to "evil, wicked, atrocious or cruel, "creates confusion by indicating an improper standard and a standard not recognized in the law.

Reference is made to Blanco v. State, 452 So.2d 520, cert. den., 105 S.Ct. 940, 469 U.S. 1181, 83 L.Ed.2d 953 (Fla. 1984), which indicated that this aggravating factor should apply only to those capital crimes where there are certain acts that set it apart from other capital felonies. See also Teffeteller v. State, 439 So.2d 840, cert. den.,104 S.Ct. 1430, 465 U.S. 1074, 79 L.Ed.2d 754, appeal after remand 495 So.2d 744 (Fla. 1986).

Additionally, the trial court relied on the "cold, calculated and premeditated" aggravator under Section 921.141(5)(i), Florida Statutes (1987). Again, this aggravator was not supported by the evidence in the case.

We submit that the trial court has gone beyond the proper use of the statutory aggravating circumstances just as was condemned in Trawick v. State, 473 So.2d 1235 (Fla. 1985), when that court said that ". . . the lack of clarity makes it difficult for us to sort out the relevant and sufficient findings from the irrelevant or insufficient ones." (473 So.2d at 1240).

This lack of clarity is even more evident in the mitigating circumstances that are addressed by the trial court (R. 1456-1457).

The trial court stated that the Defendant had no significant history of prior criminal activity, but then seemed to find that was not a mitigating circumstance, because of statements made in the presentence investigation which is not a part of the record in the case.

The defense submits that the fact of the domination of the Co-Defendant, Bruce Demo, was established by the evidence, as was the impairment of the Defendant at the time this incident occurred.

For the reasons stated above and for the reasons cited by the defense at the time of trial, the penalty-phase jury should not have been instructed as to the aggravating circumstances as discussed above. Reference is also made to the memorandum to Judge McNeal dated May 15, 1989, citing the case law as to mitigating factors that should be considered in this case (R. 1443-1444).

CONCLUSION

This court is respectfully requested to reverse the conviction and remand for a new trial or, alternatively, to vacate the death penalty and to remand for a new penalty proceeding based on the points outlined in this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to HONORABLE ROBERT A. BUTTERWORTH, Attorney General, The Capitol, Tallahassee, Florida 32399-1050, this 26th day of February, 1990.

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