IN THE SUPREME COURT OF FLORIDA

WILLIAM D. CHRISTOPHER, :
Appellant, :
vs. : Case No. 74,451
STATE OF FLORIDA, :
Appellee. :
:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR COLLIER COUNTY
STATE OF FLORIDA

# INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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## I. PRELIMINARY STATEMENT

Appellant, WILLIAM CHRISTOPHER, was the defendant in the trial court, and will be referred to in this brief as appellant or by name. Appellee, the State of Florida, was the prosecution, and will be referred to as the state. The record on appeal, including the trial transcript, will be referred to by use of the symbol "R". The record on appeal from appellant's 1978 trial will be referred to by use of the symbol "OR". All emphasis is supplied unless the contrary is indicated.

## II. STATEMENT OF THE CASE

William Christopher was charged by indictment filed October 26, 1977 in Collier County with first degree murder of Bertha Skillin and George Ahern. (R1111) His first trial, in May 1978, resulted in a hung jury and a mistrial. Following a change of venue to Glades County, appellant was retried in August 1978. He was convicted of both counts of first degree murder and sentenced to death. The convictions and sentences were affirmed on direct appeal, and on appeal from the denial of post-conviction relief. Christopher v. State, 407 So.2d 198 (Fla. 1981); Christopher v. State, 416 So.2d 450 (Fla. 1982). On July 23, 1987, the Eleventh Circuit Court of Appeals reversed the federal District Court's denial of habeas corpus relief. Christopher v. State of Florida, 824 F.2d 836 (11th Cir. 1987). As stated in the opinion:

> [Following appellant's arrest in Memphis, Tennessee], two Florida police officers, Lieutenant Mills and Officer Young, accompanied by several Memphis officers, began interrogating Christopher. Initially Christopher denied killing the couple, claiming that Ahern had killed Skillin and then had committed suicide. Christopher said that he had found the couple dead on the day of the murder and had fled because he had a criminal record and Ahern had used Christopher's gun, a gun Christopher said he had sold to Ahern. Subsequently, after at least two hours of questioning and, according to Christopher, several violations of his right to cut off questioning, Christopher confessed to both murders. The initial confession was not recorded; immediately afterwards the tape recorder was turned back on and Christopher repeated his confession. This confession was later played to the jury over Christopher's objection.

824 F.2d at 837-38.

The Eleventh Circuit agreed with appellant's argument that the confession was illegally obtained as a result of the interrogating officers ignoring appellant's repeated attempts to invoke his right to cut off questioning [824 F.2d at 840-46].

Prior to the retrial, the state moved for a pre-trial determination of the admissibility of an inculpatory statement allegedly made by appellant to police officer Harold Young at the Memphis airport (two days after the illegal interrogation at the Memphis police department). (R.1140, 1283-84) The state asserted that "[t]he admissibility of this statement is not controlled by Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987)." (R.1140, 1283)[1] The defense objected to the introduction of the airport statement on the ground that it was "fruit of the [poisonous] tree" of the prior illegally obtained confession. (R.1285, 1340-42) The trial court rejected this contention, and ruled the airport statement admissible. (R.1345-46)

The retrial was held April 11-20, 1989, in Collier County, before Circuit Judge Charles T. Carlton and a jury. Appellant was found guilty of both counts of first degree murder. (R.1107, 1170-71) The jury recommended the death penalty as to each count by a 9-3 vote. (R.1172-73, 1393) The trial judge ordered an update on the PSI and deferred sentencing. (R.1394)

At the sentencing hearing on June 26, 1989, the trial judge imposed a sentence of death without making any findings of aggravating or mitigating circumstances. (R.1408-09, see R.1226-

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[1] According to Young, appellant stated at the airport "If you guys had not caught me when you did I would have killed another person and that is Pat Stock's boyfriend, Griff Stacks", because he had also been making passes at appellant's daughter Norma. (R.1140) At appellant's 1978 trial in Glades County, Investigator Young testified concerning the interrogation at the Memphis police department, and appellant's tape recorded statements were introduced. Immediately thereafter, the state proffered Young's testimony regarding the airport statement. (OR.859-61) Defense counsel objected on the grounds that the prejudicial effect of the statement outweighed any probative value, and that it improperly suggested irrelevant criminal acts or intentions. (OR.861-62) The trial court sustained the objection and excluded the proffered testimony. (OR.862, see R.982) Since the airport statement was not admitted in that trial, the Eleventh Circuit had no occasion to comment on whether it was or was not covered by its decision.

30) Two weeks later, on July 10, 1989, written findings in support of the death sentence were filed. (R.1235-37) The court found as aggravating factors that appellant had previously been convicted of felonies involving the use or threat of violence, and that the homicides were "especially heinous, atrocious, or cruel." (R.1237) He found no mitigating circumstances. (R.1237)

## III. STATEMENT OF THE FACTS

### A. TRIAL

In his opening statement to the jury, defense counsel outlined the theory of the defense that George Ahern had shot and killed Bertha Skillin (his live-in girlfriend) and then killed himself. (R.473-75) Appellant had been staying in the apartment with Bertha, Ahern, and Bertha's adopted daughter Norma. (Appellant was Norma's biological father). Bertha and Ahern were not getting along very well; they would have arguments over his involvement with other women. (R.470-71) Norma was unhappy living in Naples with Bertha and Ahern, and she and appellant decided to leave. (R.469-72) Ahern (who knew appellant was leaving but did not know that Norma was going too) agreed to lend appellant some money. (R.473) On the morning of August 31, 1977, appellant dropped Norma off at school, and when he returned to the apartment, Bertha and Ahern were arguing. (R.473) Appellant went outside for a while, and when he came back Ahern met him at the door and suggested they go to the bank and get the money. (R.474) They went there and Ahern made a $300 withdrawal. (R.474) Later, back in the apartment, appellant noticed some blood on the floor. (R.474) Ahern, acting nervous, said that Bertha had cut her finger. (R.474) They each drank a beer, and Ahern disappeared into the back bedroom. (R.475) Appellant heard a shot, and went back and found Ahern dead. (R.475) The gun was a .22 pistol which appellant had sold to Ahern for $60. (R.471, 475) Appellant picked up the gun. The bathroom door was closed and the water was running. (R.475) He opened the door and found Bertha's body. (R.475) Because of his prior record, appellant knew he could not afford to be caught in a situation like this; he went to the school, picked up Norma, and gave her the money. (R.475) They left town as planned. Defense counsel told the jury, "And you will

hear that he doesn't know how to tell her about this or what to tell her until they get to Carlisle in Arkansas. When the car blows up and they're stranded." (R.475)

The following is a summary of the evidence presented at trial:[2]

In early September, 1977, mail carier Arnold Ludwig noticed that the mail was piling up in the mailbox at 117 Tarrow Rd., Apt. 1, in the Glades condominium complex; the residence of Bertha Skillin, George Ahern, and Norma Sands. (R.499-503) Ludwig also observed that their cars had not been moved and the apartment windows were down. (R.500-01) He told the lady in the condominium office that something looked fishy to him; she said she would call the realtor and have it checked out. (R.502-03)

Ludwig further testified that some time in August of 1977 a man (whom he identified as appellant) driving a blue and white 1973 Pontiac with Tennessee plates had stopped him in the vicinity of the condo complex and asked for directions to 117 Tarrow Rd., Apt. 1. (R.503-08)

Hazel VanWyk[3] handled sales and rentals for the Glades condominiums. (R.509-10) In July 1976 she rented No. 1, 117 Tarrow Rd., to Bertha Sands and Jim Skillin. (R.510-11) Bertha subsequently married Skillin, but the marriage did not last a year. (R.512-13, 521-22) After he was gone, Bertha brought in George Ahern and introduced him to Ms. VanWyk as a friend. (R.514, 522) She was not aware that Ahern was living in the apartment with Bertha and Norma. (R.522)

The rent was past due on September 6, 1977. (R.511, 513-14) Ms. VanWyk tried telephoning the apartment, but was not getting any

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[2] Additional facts bearing upon particular issues are set forth in the appropriate argument section of this brief.

[3] Known at the time of trial as Hazel Berio.

answer. (R.513-15) On September 13, she got a call from the office at the Glades asking for the key to the Skillin apartment. (R.515) They told her about the mailman's concerns, and also there was a sign on the door that the power company had shut off the power on September 1. (R.515-16) Ms. VanWyk called the sheriff's department, and then went out to the complex, where she was met by several officers and trainees. (R.516-17, 526) Deputy Jack Kline entered the apartment, came out a few minutes later, and said there was a woman's body inside. (R.519-20) Ms. VanWyk told him he'd better go back in because there was a daughter who lived there. (R.520) Kline re-entered and found the body of an adult male, but no child. (R.521)

Jack Kline of the Collier County Sheriff's Department, a sergeant in 1977, heard the radio dispatch and went to 117 Tarrow Rd. (R.524-25) He was told by Ms. VanWyk that three people lived in the apartment. (R.529) Inside, he discovered the body of a male on the floor in the master bedroom, and the body of a female in the bathroom off the master bedroom. (R.530-33)

Sgt. Jack Gant, who was in charge of the crime scene, observed and photographed apparent blood stains at various locations in the apartment, including the kitchen floor, the side of a stereo unit, the dining room carpet, the carpet leading into the hall, and a corner of the bed in the master bedroom. (R554-55, 575, 591-92) [FBI serologist Robert Beams, who testified out of order, determined that the stains were human blood but was unable to determine a blood type. (R.480-89)].

Sgt. Gant testified that a savings account book was in George Ahern's back pocket. (R.540-42)

Gant attended the autopsy conducted by Dr. Schmid. (R.560) A bullet was removed from the head of George Ahern. (R.562) No bullet was recovered from Ahern's arm or from Bertha Skillin's head. (R.609, 612) No bullets or fragments were found in the

search of the apartment. (R.606-08, 611-12) When the bodies were removed from the apartment, Sgt. Gant got down on his hands and knees and searched underneath where the bodies had been "because many times evidence can be found there." (R.608) However, "[a]gain nothing was recovered." (R.608)

Phone company security manager Henry Booth testified that the last phone call made from the apartment was on August 31, 1977 at 9:42 a.m. (R.619-20)

Florida Power and Light employee Thomas Bennett was called to 117 Tarrow Rd., Apt. 1 on August 30, 1977 to investigate a high power bill complaint. (R.623-24, 626) Bertha Skillin told him that even when she turned off all the appliances, the meter was still running. (R.624) The problem turned out to be a freezer on the back porch which was still connected. (R.626) On September 1, the power was turned off for non-payment. (R.628)

Dr. Heinrich Schmid, then the Collier County medical examiner, conducted autopsies on George Ahern and Bertha Skillin on September 13, 1977. (R.640, 662-63) Ahern died from a gunshot wound to the head. (R.640, 646) After receiving this wound, he would have become immediately unconscious. (R.655) A projectile was recovered from inside the cranium. (R.646, 649-50) There was also what Dr. Schmid believed to be a gunshot entrance wound to Ahern's right arm. (R.651-52, 682) Schmid found no exit wound and no bullet or bullet fragment. (R.652, 677) It was his opinion that the bullet either ricocheted back out through the entrance wound, or fell out at a later time. (R.652, 678-79) However, Dr. Schmid searched the body bag for a bullet and did not find one. (R.668-69, 679)

Ahern also had a bruise on his chest, which Dr. Schmid said was consistent with being struck with a fist. (R.661)

Dr. Schmid expressed the opinion that Ahern's injuries were inconsistent with suicide or accident. (R.658-59, 662)

Bertha Skillin also died from a gunshot wound to the head. (R.663, 666) After receiving this injury, she would have become immediately unconscious and dropped to the floor. (R.665) No bullet was recovered. (R.665-66)

Beth McIntosh[4] was fifteen years old in 1977; she and Norma Sands were friends and schoolmates at Lely High School. (R.684) In the summer of that year, Norma went to Memphis, Tennessee; she returned near the end of summer school vacation. (R.685) Shortly after her return, Norma came over to Beth's house with a man she introduced as "my dad Bill" [Christopher]. (R.686) The three of them went to the beach in appellant's car. (R.686-87) Beth saw a gun underneath the driver's seat; appellant said he had it for protection. (R.687) At the beach, Norma made a statement concerning George Ahern (who was also known by the nickname Charlie). (R.688-89) In response to what Norma said, appellant said "If he was a little younger, I'd kill him." (R.689)

Later that month, Beth learned that appellant was staying with Bertha and Ahern in the Glades. (R.690) Norma told Beth that appellant was going to check her out of school and they were going to Venice, Florida. (R.690-91) Beth did not see Norma or appellant after that. (R.691-92)

Jeremiah Primus, then the assistant principle of Lely High School, testified that school records indicated that on August 31, 1977, between 11:35 a.m. and 12:09 p.m., Norma Sands was checked out of school by William Christopher. (R.696-98)

Patricia Jones was selling cemetery plots and canvassing door-to-door. (R.700-01) On the morning of August 31, 1977, she went to the Glades condominium complex. (R.701) At around 10:15 a.m., she rang the doorbell at 117 Tarrow Rd., Apt. 1, and a man of about 35-40 answered. (R.703-05) When she asked if he was the man of

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[4] Known at the time of the trial as Beth Hooven.

the house, he replied that he was a visitor. (R.704) They talked for about five minutes; the man said he was a sky diving instructor and that he was going to go to Memphis. (R.705)

Norma Sands,[5] appellant's daughter, initially declined to testify. (R.713-19) After being found in contempt of court and spending the three day weekend in jail (R.719), when court resumed the following Tuesday she changed her mind and testified. In August 1977, Norma was fourteen years old, about to turn 15. (R.735, see R.916-17) She was starting the 10th grade at Lely High School. (R.735, 738) Her natural mother was Patricia Stock[6] of Memphis, but she was adopted at birth by Earl and Bertha Sands. (R.735-36) Until 1975 she did not know who her biological father was. (R.737) That summer she went to visit Pat Stock in Memphis and met appellant for the first time. (R.736-37) She did not spend a great deal of time with him that summer. (R.737)

Shortly afterward, Earl and Bertha separated and divorced, and Norma went to live with Bertha in Miami. (R.737, 804-07) Around 1976, Bertha (accompanied by Norma) moved to Naples with Jim Skillin, whom she subsequently married. (R.737-39) They got an apartment in the Glades condominiums. (R.738) Norma did not like Skillin because of the way he treated Bertha, and the marriage soon ended in divorce. (R.739, 804-05) Toward the beginning of 1977, George Ahern moved in with Bertha, although he kept his own residence as well. (R.739, 805, 808) Ahern made sexual advances toward Norma on a number of occasions, grabbing her and fondling her. (R.741-42, 813) Norma also disliked Ahern because he was drunk all the time, he was moody and temperamental, he "seemed to lie a lot", and he and Bertha would get into confrontations about his other girlfriends. (R.805, 813-15, 817-18) Norma acknowledged

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[5] Known at the time of trial as Norma VanLoton.

[6] Later known as Patricia Stacks and Patricia Mills. (R.736)

that, around this time, she had become somewhat incorrigible and was a disciplinary problem to Bertha. (R.805-06)

In the summer of 1977, Norma went back to Memphis to visit her natural mother Pat. (R.739-40) This time she saw more of appellant than she had two years before and they developed a friendship. (R.740-41) While in Memphis, Norma told Pat about George Ahern's sexual advances. (R.742) Norma had mixed feelings about returning to Naples at the end of the summer; she really did not want to come back, but she also didn't want to hurt Bertha. (R.806)

Shortly after Norma came back to Naples, in late July or early August, appellant arrived at the apartment. (R.743, 808) Norma was surprised; she did not know he was coming. (R.743, 808) That day they went to the beach. (R.743-44) A few days after his arrival, after Norma learned that he had been sleeping on the beach, she made arrangements for appellant to stay with them in the apartment. (R.745-46) Appellant and Norma would alternate who would sleep in the bedroom and who would sleep on the couch. (R.746) Appellant seemed to get along surprisingly well with Bertha and with Ahern. (R.812) However, on one occasion when they were at the beach with Beth McIntosh, appellant made a statement to the effect that he would kill Ahern if he ever saw him put a hand on Norma. (R.746-47)

Appellant had a .22 pistol which he sometimes kept in the nightstand drawer in her bedroom. (R.748-49, 815-16)

During the three weeks he was in Naples, a sexual relationship developed between appellant and Norma. (R.749) Norma acknowledged that it was she who instigated the physical relationship; "I shocked him." (R.810) Norma had had sex with others before. (R.811)

Asked whether they acted "as a father and daughter" in the presence of Bertha and Ahern, Norma answered:

> Um -- it depends on how you're saying father and daughter, if you're saying did I jump on him in front of their presence, no. We caressed, we hugged, we talked and we did -- as any relationship, a close relationship. It was --

(R.750)

The prosecutor then said:

> Let me show you your testimony back in 1978, whenever you were asked that particular question.
> "How did you and he act when she and George would be in the room?"
> What was your response?

(R.751)

Defense counsel objected to the state's impeaching its own witness. (R.751) The prosecutor asserted that he was not attempting to impeach the witness, and noted that he had not asked the court to declare her a hostile witness. (R.751) The prosecutor continued "As far as her testimony today, I see no indication that she is adverse, in the sense as the rule speaks of adversity." (R.751-52) Nevertheless, he argued that he was entitled to introduce Norma's prior testimony as substantive evidence under Fla. Stat. § 90.801(2)(a). (R.752-55) The trial court ruled that the prosecutor was attempting to impeach his own witness, but allowed him to do so upon a ruling that "you have met the two-prong test, which is good faith and you would be hurting your case." (R.756) Throughout the remainder of Norma's testimony, the prosecutor continually called her attention to statements she made in her 1978 trial testimony (both trials) and in a 1978 deposition, in order to impeach or supplement her current testimony or to "refresh her recollection." (R.756-61, 763, 767-68, 774, 784, 792, 825-26)

When appellant told her he was going to be leaving Naples, Norma said she was going to follow him. (R.758, 760) Appellant said she wouldn't have to do that; he would let her come with him. (R.760) Norma felt that she was in love with appellant. (R.758-

59) She saw him more as a boyfriend than a father, because at that point in her life that was what she wanted. (R.759-60)

On August 30, Norma called Arlene Cabana, for whom she baby-sat, and told her she was leaving for Miami. (R.761-62) She also told Beth McIntosh she was leaving. (R.762-63) That night she packed her suitcases and put them under the bed. (R.761) Appellant was going to pick her up at school the next day, after Bertha and Ahern went to deliver Meals on Wheels. (R.761, 764-65) He was going to bring her suitcases and possibly her stereo and tv. (R.765-66)

After lunch the next day, Norma was checked out of school. (R.766-68) When she got into appellant's car he gave her some money and asked her to count it. (R.768-69) There was nearly $300. (R.769) When she asked him where he'd got it, he said he'd ripped off some guy in a marijuana deal. (R.769) Norma put the money in her purse. (R.769-70) She asked appellant if he was able to get the stereo and television; he said there wasn't enough time. (R.770) He said he would drive by the apartment, and if the cars weren't there, they could run in and get them. (R.770-71) The cars were there, however, so they didn't stop. (R.770-71) They traveled north, stopping in Fort Myers to buy a lug wrench. (R.772-73) At one point they were stopped by a Florida highway patrolman. (R.773) The gun was on the seat; either Norma or appellant put it underneath on the floorboard. (R.773-75) After the traffic citations had been issued and the officer was gone, appellant tore up the tickets and threw them out the window, saying "We won't be here in Florida again." (R.775-76)

While they were driving, a conversation took place in which appellant told Norma that he and George Ahern had gotten into a fight, and that he had punched Ahern in the nose and he started bleeding all over the place. (R.776-77) Norma said "Great", "All right"; she was pretty happy about that, but she didn't really

believe him. (R.777) Appellant told her to look in the back seat. (R.777) Norma pulled out appellant's tennis shoes and there was blood on them. (R.777) She said "Well, great." (R.777)

They stayed overnight in Atlanta and then spent a couple of days in Memphis. (R.777-78) Then they headed west, intending to go to Phoenix, Arizona where appellant planned to seek work as a skydiving instructor. (R.778) They got only as far as Carlyle, Arkansas, where the car engine blew up. (R.778) They registered into a motel in Carlyle under the name James Tigner, and stayed about a week. (R.778-79) Then, unable to pay the bill, they skipped out and hitchhiked back to Memphis. (R.779)

Norma called her natural mother Pat from West Memphis; she told her they were all right but did not tell her where they were. (R.779-81) Pat expressed concern because she had been unable to reach Bertha by phone. (R.781) Norma (who knew by that time that Bertha and Ahern were dead) told her they had probably gone down to the Keys. (R.781, see R.824)

Appellant and Norma stayed at the home of his mother, Mary Still, for a couple of days. (R.782-83) After a phone call to Mary from Pat Stock (who still did not know where they were), they were thrown out of the house. (R.783, see R.789) They stayed for another couple of days in a vacant house in the Midtown section. (R.783-85) Mary Still, accompanied by appellant's half brother Pete and his half sister Pam, would bring them food. (R.785-89) On September 22, appellant, Norma, Pete, and Pam were arrested at the drive-through at Tony's Pizza. (R.789-90) Norma was taken to a juvenile detention center. (R.790)

Just before the defense began its cross-examination of Norma, the prosecutor moved in limine to exclude as hearsay any testimony pertaining to what he termed "the murder/suicide theory"; i.e. statements appellant made to Norma in Carlyle, Arkansas that George Ahern shot Bertha and then killed himself. (R.795-99) Defense

counsel, arguing that the testimony should be admitted, pointed out that in the prior two trials in this case it was the state which elicited in its direct examination of Norma the very statements which it was now trying to prevent the jury from hearing. (R.799-800, see OR.705-08) The trial court ruled for the state and excluded the testimony. (R.800)

Arlene Cabana testified that on the evening of August 30, 1977, she received a phone call from Norma Sands, who told her she would not be able to baby-sit any more. (R.832-34)

Through the testimony of bank employees Rachel Townsend and Nancy Corbin and customer Karen Hunt, the state presented evidence that shortly after 11:00 a.m. on August 31, 1977, George Ahern made a $300 withdrawal from his savings account at Citizen's National Bank. (R.724-29, 838-46, 848-52, 857-58) Ahern was accompanied by another man. (R.849, 857)[7]

Highway patrolman Robert Fleming stopped appellant for speeding at 2:50 p.m. on August 31, 1977 about ten miles north of Punta Gorda. (R.862-66) Appellant was driving a blue 1973 Pontiac with Tennessee plates. (R.865-66) Fleming issued him citations for speeding and failure to carry a driver's license. (R.861-65)

Memphis police officers Robert Graham, Charles Huff, and J.N. Sanders testified regarding appellant's arrest in that city on September 22, 1977. The police had spotted a vehicle they were looking for, followed it into the drive-through at Tony's Pizza, and arrested the four occupants. (R.870-73, 875-76, 882-83) [In addition to appellant, Norma was taken into custody as a runaway, and appellant's half siblings Pete and Pam were arrested as accessories to murder after the fact. (R.873-73, 875-76, 882-83)]. An inventory search of the vehicle, a Mustang, led to the discovery

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[7] The defense did not contest that it was appellant who was at the bank with Ahern. (R.1061) Interestingly, the prosecutor argued that there was no evidence of that. (R.1075)

of a loaded .22 revolver under the front passenger seat and ten live cartridges lying loose on the rear seat. (R.878-81, 886-88)

The prior testimony of FDLE firearms examiner James Walsh, now deceased, was read to the jury. (see R.891-93) Walsh had determined that the .22 revolver found in the vehicle at the time of appellant's arrest was capable of firing the bullet which was removed from the head of George Ahern. (R.895-901, 909-10) Three different brands of gun, made by three different manufacturers, were capable of firing that projectile. (R.897, 901, 908-09) The bullet was too badly damaged for Walsh to be able to match it to a particular firearm. (R.897, 910)

Norma's natural mother Pat Stock[8] testified that she always called Norma on her birthday (September 6) and she also wanted to speak to Bertha to discuss the problems Norma was having with George Ahern. (R.916-18, 927-28) She tried calling periodically beginning in August 1977 but got no answer. (R.918) When she still couldn't reach anyone on Norma's birthday, she kept calling all hours of the day and night but still no one answered. (R.918) Finally on September 13, Deputy Sheriff Harold Young answered the phone, and Pat learned that Bertha and Ahern were dead. (R.919-22) Pat told Young that she had spoken to Norma and appellant the day before, but she did not know where they were. (R.922-23) Pat related that appellant had told her that Bertha and Ahern had gone to the Keys for a few days, but that she did not believe him and she accused him of killing Bertha. (R.923-24)

Pat testified that Norma had first met her natural father, appellant, in the summer of 1975. (R.924-26) Pat had set up the meeting with Bertha's approval. (R.926) When they saw each other again two summers later, Pat became concerned about the relationship not being a normal "father-daughter" relationship. (R.926-27)

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[8] Known at the time of the trial as Pat Mills.

Norma had never known appellant as a father, and instead "[s]he was infatuated with him, very much so." (R.927) While she was in Memphis that summer, Norma discussed with Pat the problems she was having with George Ahern. (R.927-28) Norma was unhappy in Naples, and begged and pleaded not to have to go back. (R.928, 943-46) On one occasion, at appellant's mother's house, Norma had related that Ahern was making sexual advances to her, and appellant said "I'll kill that S.O.B." (R.938-39, 949-50) This statement, according to Pat, was made in Norma's presence. (R.950)

During the summer of 1977, Pat was engaged to a man named Griff Stacks. (R.939, 947-48)[9] They were not living together, but he was at the apartment a lot. (R.947-48) One night Griff showed up drunk when they were all asleep, and he went into Norma's room and got into her bed instead of Pat's. (R.955, 957) Pat discovered them the next morning asleep. (R.955, 957)

Harold Young was an investigator with the Collier County Sheriff's Department in 1977. (R.958-59) On the afternoon of September 13, he was in the Tarrow Rd. apartment after the discovery of the bodies of Bertha Skillin and George Ahern. (R.959-60) Around 3:00 p.m. the phone rang; it was Pat Stock in Memphis. (R.961) Young learned from her that there were two other people who lived in the apartment, Norma and appellant, and that they had reportedly been seen in Memphis. (R.962)

Young and Lt. Curtis Mills went to Memphis to pursue the investigation on September 14 and stayed until September 21. (R.964-66) On September 22, after they had returned to Naples, Young and Mills flew back to Memphis, having received a call from the local police that appellant had been apprehended. (R.966) On September 24, they picked appellant up at the jail and drove him to the Memphis airport. (R.966-67)

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[9] They were subsequently married and divorced. (R.939, 956)

At this point, defense counsel renewed his objection to the admissibility of the statement allegedly made by appellant to Young at the airport. (R.967-68) The trial court overruled the objection. (R.968) Young then testified that Mills had gone to return the rental car, and he [Young] and appellant were seated in front of the ticket counter. (R.969)

> MR. BROCK [prosecutor]: Okay. Now, at that particular point, had the Defendant been accused of the murder of both Bertha Skillin and George Ahern?
>
> HAROLD YOUNG: Yes, sir, I accused him of both murders.
>
> Q. After having been accused of those murders, did the Defendant, there at the Memphis Airport, make any statement to you?
>
> A. Yes, he did.
>
> Q. What was the statement that the Defendant made?
>
> A. The Defendant asked me what was to become of Norma, and I replied that I thought that the Tennessee Court would return her back to her mother, Patricia Stock.
>
> And the Defendant stated to me, "If you hadn't of caught me when you did, I would have killed one other person." And that was Pat Stock's boyfriend Griff Stock. (sic) Because he'd made passes at Norma too.
>
> Q. So he told you that if you hadn't caught him when you did, he would have killed one other person?
>
> A. Yes, that's what he said, sir.

(R.969-70)

On cross-examination, defense counsel sought to bring out the circumstances surrounding Young's involuntary resignation from the

Sheriff's Department. (R.975-83)[10] The trial court sustained the prosecutor's relevancy objection. (R.983)

After the state rested its case, Norma Sands (Van Loton) was called as a defense witness. She testified that appellant never made any statement in her presence, at his mother's house or anywhere else, in the summer of 1977, to the effect that he would "kill that S.O.B.", referring to George Ahern. (R.996-98) Norma further testified that she never said anything to appellant about Griff Stacks having made sexual advances toward her; she only told her mother and her aunt. (R.998)

In their closing arguments to the jury (first and last), both prosecutors emphasized that the jury had heard no evidence to support the theory outlined by defense counsel in his opening statement; i.e., that George Ahern had shot and killed Bertha Skillin and then killed himself. (R.1036, 1040, 1068) [see Issue II, infra].

## B. PENALTY PHASE

During the charge conference, defense counsel stated to the court:

> Let me say at this point that I have talked to Mr. Christopher about testifying [or] have someone testify on his behalf here, to any of these things.
>
> And that he had instructed me and agreed that he really did not wish to receive a life sentence. And not for me to present any testimony, or have his mother come down, or anyone.
>
> And that, you know, he didn't wish to take the stand to say anything on his own behalf.

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[10] The proffered cross-examination, not heard by the jury, established that Young was forced to resign from the department in 1988 because he had surreptitiously tape recorded conversations with the State Attorney's office (specifically, with Mr. Brock, the prosecutor in this case). (R.979-80)

> And the State had offered him a life sentence earlier and he refused to take that. So he's had a chance at life, and is -- has decided that he doesn't want to go that route under any circumstances.
>
> If that is still your position?
>
> MR. CHRISTOPHER: Right.
>
> MR. OSTEEN [defense counsel]: I don't like to take this position, but this is his third trial and it is his case as well as mine, and I have to, you know, go along with his wishes on that. So we would not be presenting any evidence as to Number 2. [extreme mental or emotional disturbance].

(R.1357)

No further inquiry into the matter was held.

The only penalty phase witness for either side was retired Memphis police officer Thomas Smith, through whom the state established that appellant had been convicted, upon plea of guilty, of assault with intent to commit first degree murder and attempt to commit a felony (rape). (R.1364-67) The charges arose out of a single episode on May 17, 1972. (R.1365-70) Appellant was sentenced to concurrent terms of 3 to 5 years and 1 to 5 years. (R.1365, 1367) Defense counsel, by stipulation, read to the jury written statements from appellant's mother, stepmother, father, and aunt. (R.1370-72)

During its deliberations, the jury submitted the following questions: "(1) Does the 25 year sentence begin at the time of sentencing? (2) Are the two sentences run concurrent? (3) Will the defendant get credit for the jail time served since 1977?" (R.1219, see R.1391-92) With the agreement of both counsel, the court had the bailiff advise the jurors that "these questions are not important as far as their deliberations are concerned", and that as soon as they reached a penalty verdict the court would be glad to answer those questions for them. (R.1391-92, see R.1397-98) The jury subsequently returned 9-3 death recommendations on each count. (R.1172-73, 1393)

## SUMMARY OF THE ARGUMENT

[Issue I] Oregon v. Elstad, 470 U.S. 298 (1985), by its very terms, applies only to "technical" Miranda violations, and not when the initial confession has been obtained by improper and coercive police tactics, and by ignoring the accused's repeated attempts to invoke his right to cut off questioning. See State v. Madruga-Jiminez, 485 So.2d 462 (Fla. 3d DCA 1986); State v. Johnson, 485 So.2d 466 (Fla. 3d DCA 1986). In the latter situation, where the initial confession was actually obtained in violation of the accused's Fifth Amendment rights, the well established constitutional doctrine of "fruit of the poisonous tree" retains its vitality, and "any subsequent statements must [also] be suppressed unless the taint of the improper activity is sufficiently attenuated." Madruga-Jiminez, 485 So.2d at 465.

In this case, appellant was interrogated by Officers Young and Mills at the Memphis police department on September 22, 1977. He told them that George Ahern had killed Bertha Skillin and then shot and killed himself. When the officers made it clear they did not believe him, and chastised him for involving his daughter and his whole family, appellant attempted - no fewer than three times - to invoke his Fifth Amendment right to remain silent by terminating the interrogation. See Miranda v. Arizona, 384 U.S. 436, 473-74 (1966); Michigan v. Mosley, 423 U.S. 96, 100 (1975); Breedlove v. State, 364 So.2d 495, 497 (Fla. 4th DCA 1978). Each time he was flatly ignored. Finally these coercive and improper tactics overcame appellant's will to resist, and he gave a detailed tape-recorded confession to the murders of Skillin and Ahern.

As a result of the illegal tactics used to obtain the confession, the Eleventh Circuit Court of Appeals ultimately granted habeas corpus relief in the form of a new trial. Christopher v. State of Florida, 824 F.2d 836 (11th Cir. 1987). At the retrial, the court, overruling the defense's objection that it was "fruit of the poisonous tree" of the primary constitutional violation, allowed the state to introduce Officer Young's testimony concerning a statement allegedly made by appellant to him at the Memphis airport, two days after the illegal

interrogation and the confession. Young testified that he and appellant were seated in front of the ticket counter:

> MR. BROCK [prosecutor]: Now, at that particular point, had the Defendant been accused of the murder of both Bertha Skillin and George Ahern?
>
> A. Yes, sir, I accused him of both murders.
>
> Q. After having been accused of those murders, did the Defendant, there at the Memphis Airport, make any statement to you?
>
> A. Yes, he did.
>
> Q. What was the statement that the Defendant made?
>
> A. The Defendant asked me what was to become of Norma, and I replied that I thought that the Tennessee Court would return her back to her mother, Patricia Stock.
>
> And the Defendant stated to me, "If you hadn't of caught me when you did, I would have killed one other person." And that was Pat Stock's boyfriend Griff Stock. [sic] Because he'd made passes at Norma too.
>
> Q. So he told you that if you hadn't caught him when you did, he would have killed one other person?
>
> A. Yes, that's what he said, sir.

The airport statement and the primary confession were inextricably related. Contrary to the misleading impression given by the above testimony, Young did not accuse appellant of the murders at the airport; the accusation was made (repeatedly) in the interrogation two days before. Appellant's statement to Young at the airport that "If you hadn't of caught me when you did, I would have killed one other person" referred back to the primary confession, and was just as much a product of the illegal interrogation as the rest of that confession. The passage of two days time, without more, was entirely insufficient to remove the taint of the coercive and unconstitutional tactics used by Young and Mills to overcome appellant's resistance. For the same reasons discussed in Christopher v. State of Florida, 824 F.2d at 846-47, the introduction of the airport statement at trial was harmful error requiring reversal.

[Issue II] In the prior trials in this case, Norma Sands Van Loton had testified on direct examination by the state concerning two statements appellant made to her before their arrest; first, that he had gotten in a fight with George

Ahern and punched him in the nose, and, second, that Ahern had killed Bertha Skillin and himself. In the present trial, in his opening statement to the jury, defense counsel outlined in some detail the "murder/suicide" theory of defense. Throughout Norma's direct examination, the prosecutor (over defense objection) repeatedly referred to her prior trial testimony, in order to impeach or supplement her current testimony or to "refresh her recollection." [See Issue III]. He also brought out appellant's statement to Norma that he had punched Ahern, but this time he chose not to elicit the second statement. Then, just before the defense began its cross-examination, he successfully moved in limine to exclude as hearsay any testimony pertaining to what he termed "the murder/suicide theory." Finally, in his closing argument, the prosecutor emphasized that there was no evidence to support what defense counsel had told the jury in his opening statement. "No wonder Mr. Osteen is having the problems that he's having. Because he's considering I guess, maybe stuff that came to him in a vision, some night."

The exclusion - based on a mechanistic application of the hearsay rule - of this critical evidence in a capital trial violated appellant's right to present his version of the facts and his right to fully and fairly cross-examine a key prosecution witness. See Chambers v. Mississippi, 410 U.S. 284 (1973); Coxwell v. State, 361 So.2d 148, 151-52 (Fla. 1978); Coco v. State, 62 So.2d 892, 894-95 (Fla. 1953). Notwithstanding the hearsay rule, when the state introduces only a portion of a conversation, or only one in a series of related conversations, fairness requires that the defense be allowed to bring in the balance of the conversation as well as the related conversations to enable the jury "to accurately perceive the whole context of what has transpired between the two." Eberhardt v. State, 550 So.2d 102, 105 (Fla. 1st DCA 1989); see also Stumpf v. State, 749 P.2d 880, 889 (Alaska App. 1988). In addition, when one party introduces or uses for impeachment a portion of a witness' former testimony, the other party should in fairness be permitted to introduce the remainder. See Walker v. State, 416 So.2d 1083, 1095 (Ala. Cr. App. 1982); United States v. Walker, 652 F.2d 708 (7th Cir. 1981).

The entire sequence of events here was fundamentally unfair. If the state was permitted to introduce some of what appellant told Norma before they were arrested about what had happened in the apartment, the defense should have been allowed to introduce the rest of it. Eberhardt; Stumpf. If the "murder/suicide" statement was relevant enough for the state to elicit on direct in the prior trials, then - when the state decided to omit it in this trial - the defense should have been allowed to bring it out on cross. Coxwell; Coco. And if the state was permitted to continually refer to Norma's former testimony as impeachment (of its own witness) and substantive evidence, then the defense should have been allowed to bring out on cross the portion of her former testimony - the "murder/suicide" statement - which the state did not want the jury to hear. Walker; Walker. Finally, after successfully moving in limine to prevent appellant from introducing the statement, the prosecutor compounded the error by emphatically (and falsely) suggesting to the jury that the "murder/suicide" theory of defense was nothing but a figment of defense counsel's imagination. See Garcia v. State, ___ So.2d ___ (Fla. 1990) (15 FLW S344, 346). Because of this error of constitutional dimension, appellant is entitled to a new trial.

[Issue III] Appellant's daughter, Norma Sands Van Loton, was a key state witness at trial. Throughout her testimony , over defense objection, the prosecutor continually read or referred to statements she made in her 1978 trial testimony (both trials) and in a 1978 deposition, in order to impeach or supplement her current testimony or to "refresh her recollection." This was patently improper and prejudicial. Jackson v. State, 451 So.2d 458, 462-63 (Fla. 1984). A party cannot impeach its own witness unless she meets the well established criteria for adverseness, and Norma clearly (and by the prosecutor's own admission) did not meet those criteria. Jackson; Austin v. State, 461 So.2d 1380, 1383 (Fla. 1st DCA 1984). Nor was her former testimony admissible as substantive evidence under the "rigidly circumscribed" conditions set forth in Fla. Stat. § 90.801(2)(a). State v. Delgado-Santos, 497 So.2d 1199 (Fla. 1986); Parnell v. State, 500 So.2d 558, 561 (Fla. 4th DCA 1986).

[Issue IV] Because the trial court sentenced appellant to death without prior or contemporaneous written findings as required by the statute, by VanRoyal v. State, 497 So.2d 625 (Fla. 1986), and by Grossman v. State, 525 So.2d 833 (Fla. 1988), and because the sentencing proceeding took place a full year after Grossman became final, this Court must remand for imposition of a life sentence. Stewart v. State, 549 So.2d 171, 176-77 (Fla. 1989).

[Issue V] Because the victims died from gunshot wounds to the head which would have rendered them immediately unconscious, and because neither killing involved physical or emotional torture, the trial court erroneously instructed the jury on, and found, the "especially heinous, atrocious, or cruel" aggravating circumstance. See e.g. Amoros v. State, 531 So.2d 1256, 1257, 1260-61 (Fla. 1988); Lewis v. State, 377 So.2d 640, 641-42, 646 (Fla. 1979). Application of the HAC factor to this case would be inconsistent with the limiting construction established by this Court, and would render the aggravating circumstance unconstitutionally overbroad. See Maynard v. Cartwright, 486 U.S. 356 (1988).

[Issue VI] The trial court erred in allowing appellant to waive the presentation of mitigating evidence without even a perfunctory inquiry into the voluntariness of the waiver. See e.g. Johnson v. Zerbst, 304 U.S. 458 (1938); Boykin v. Alabama, 395 U.S. 238 (1969); contrast Hamblen v. State, 527 So.2d 800 (Fla. 1988) (waiver permissible where defendant's competence was established and trial court conducted thorough inquiry).

## ARGUMENT

### ISSUE I

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE A STATEMENT ALLEGEDLY MADE BY APPELLANT TO INVESTIGATOR YOUNG AT THE MEMPHIS AIRPORT; AS THAT STATEMENT WAS A DIRECT CONSEQUENCE OF APPELLANT'S EARLIER CONFESSION WHICH WAS OBTAINED BY IMPROPER AND COERCIVE POLICE TACTICS, AND IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT.

### A. INTRODUCTION

Oregon v. Elstad, 470 U.S. 298 (1985), by its very terms, applies only to "technical" Miranda violations, and not when the initial confession has been obtained by improper and coercive police tactics, and by ignoring the accused's repeated attempts to invoke his right to cut off questioning. See State v. Madruga-Jiminez, 485 So.2d 462 (Fla. 3d DCA 1986); State v. Johnson, 485 So.2d 466 (Fla. 3d DCA 1986). In the latter situation, where the initial confession was actually obtained in violation of the accused's Fifth Amendment rights, the well established constitutional doctrine of "fruit of the poisonous tree "[11] retains its vitality, and "any subsequent statements must [also] be suppressed unless the taint of the improper activity is sufficiently attenuated." Madruga-Jiminez, 485 So.2d at 465.

In the instant case, the statement allegedly made by appellant to Investigator Young at the Memphis airport was nothing more than a postscript to his earlier confession obtained by Young and Lt. Mills at the Memphis police department. In fact, Young testified at the pre-trial hearing that he felt there was no need for him to further interrogate appellant on September 24 because he already had all the information he needed in the tape recorded confession

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[11] This metaphor for derivative evidence obtained as a direct or indirect consequence of a constitutional violation is drawn from Wong Sun v. United States, 371 U.S. 471 (1963).

of September 22. (R.1318-19) The converse, however, is equally true; there is no reason to believe that appellant would have made an inculpatory statement at the airport on the 24th, but for the fact that the police already had his detailed tape-recorded confession. Prior to the coercive tactics used by the police to unlawfully continue the interrogation on the 22nd and to overbear his free will, appellant had steadfastly maintained that he did not kill George Ahern and Bertha Skillin. If Officers Young and Mills had honored his repeated efforts to invoke his right to terminate the interrogation, he would not have made the tape recorded confession and, just as surely, he would not have added the postscript at the airport. The latter statement was tainted fruit of the primary constitutional violation.

## B. THE INTERROGATION AT THE MEMPHIS POLICE DEPARTMENT ON SEPTEMBER 22, 1977

At the April 10, 1989 hearing on the admissibility of the airport statement, the state introduced into evidence the transcripts of appellant's tape recorded statements made at the Memphis police department. (R.1286-88, 1298-1300, 1311-12)[12]

Investigator Young received a call on September 22, 1977 informing him that appellant had been arrested in Memphis. (R.1291) He and Lt. Mills caught a flight back to Memphis, and that evening they interviewed appellant at the police department and jail facility, in the office of Captain Tom Smith. (R.1291-93, 1321-22) Three Memphis officers were present, but the interrogation was conducted by Young and Mills. (R.1297, T.2) After receiving Miranda warnings, appellant told the officers that George Ahern had shot himself and Bertha. (T.2, 6-19, 24-25)

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[12] Record references to State's Exhibit 2 will be designated by use of the symbol "T". References to State's Exhibit 3 will be designated by the symbol "TT".

Ahern and appellant had returned from the bank, where Ahern had withdrawn $300 to loan appellant so he could leave town. (T.6-8, 16, 19) Soon afterward, back in the apartment, appellant heard a gunshot, and found Ahern's body in the bedroom. (T.12-13, 24-25) He then discovered the body of Bertha (who had evidently been killed earlier) in the bathroom. (T.13) Appellant had sold the gun to Ahern for sixty dollars three days before. (T.13-14) Because he knew the gun could be traced to him, and because he'd been in trouble with the law before, appellant picked it up. (T.13-14) He then went to get Norma at school and they left as planned. (T.14-15) Norma did not know anything about what had happened until he told her in Carlyle, Arkansas. (T.15, 17, 37-38)

When appellant finished, Mills and Young made it clear that they didn't believe him, and admonished him that he had his daughter and his whole family "drawn into this thing." (T.39-47) They repeatedly used Norma as an emotional weapon [see Christopher v. State of Florida, 824 F.2d at 842]:

> MILLS: It don't present any problem to me at all, but ah, it might present some problems to you. So, ah, there is a different way that this thing happened, you know it and I know it, Norma knows it. I don't know how much you care about her.
>
> CHRISTOPHER: What in the hell has she got to do with it. What -- what are you -- are you trying to use her against me or something like that?
>
> YOUNG: No. You used Norma, we haven't.

(T.44-45)

Appellant consistently maintained that he did not kill Ahern and Skillin. (T.40, 46) The interrogation continued as follows:

> YOUNG: Well, that is why we're trying to find out why he was shot.
>
> CHRISTOPHER: My god. No. I didn't shoot him, nor I never shot Bertha.
>
> YOUNG: That's the real corker, I can't understand why you killed this elderly lady, I mean I can understand you might be --

CHRISTOPHER: Well, save --

YOUNG: Now wait a minute. Yea, I accused you, for we signed a warrant against you.

CHRISTOPHER: Okay.

YOUNG: Ah --

CHRISTOPHER: Then I got nothing else to say. If you're accusing me of murder, then take me down there.

MILLS: You were accused when you came in here. You knew you were accused --

CHRISTOPHER: That's right. That's right.

MILLS: -- you knew what you were accused of, and I told you what the girl was accused of, so don't make out like you don't know what you're accused of.

CHRISTOPHER: Oh, ah, -- I know what I'm accused of, I know that I'm accused of both murders.

MILLS: I told you awhile ago you were being charged with both murders.

CHRISTOPHER: Okay then. I got nothing else to say.

(T.46-47)

See Christopher v. State of Florida, 824 F.2d at 840-43.

Ignoring appellant's attempts to invoke his right to remain silent, Young and Mills unlawfully continued the interrogation. (T.47-51) In the face of their accusations, he still maintained that Ahern had shot himself and Bertha. (T.49) When Mills said "I asked you earlier if you had any other blood on you other than your hands, and you told me no", appellant replied:

> Well, look, I'm just constantly telling lies, look I ain't got nothing to say at all, pete, why I have, you know, and that's it. I ain't saying nothing else.

(T.51)

Still the interrogation did not cease. See Christopher v. State of Florida, 825 F.2d at 843, n.20, and 845-46. Eventually, with the tape recorder turned off, appellant confessed to both murders. (R.1308-09, 1323) Immediately afterwards the tape

recorder was turned back on so that appellant could repeat the confession. (R.1310-12, 1324, TT.2-16)

### C. THE STATEMENT AT THE MEMPHIS AIRPORT ON SEPTEMBER 24, 1977

The airport statement was inextricably related to the earlier full confession. This is amply illustrated by the manner in which the state presented it to the jury. At trial, after defense counsel's renewed objection was overruled (R.968), Young testified that he and appellant were seated in front of the Eastern ticket counter, and:

> MR. BROCK [prosecutor]: Now, at that particular point, had the Defendant been accused of the murder of both Bertha Skillen and George Ahern?
>
> A. Yes, sir, I accused him of both murders.
>
> Q. After having been accused of those murders, did the Defendant, there at the Memphis Airport, make any statement to you?
>
> A. Yes, he did.
>
> Q. What was the statement that the Defendant made?
>
> A. The Defendant asked me what was to become of Norma, and I replied that I thought that the Tennessee Court would return her back to her mother, Patricia Stock.
>
> And the Defendant stated to me, "If you hadn't of caught me when you did, I would have killed one other person." And that was Pat Stock's boyfriend Griff Stock. [sic] Because he'd made passes at Norma too.
>
> Q. So he told you that if you hadn't caught him when you did, he would have killed one other person?
>
> A. Yes, that's what he said, sir.

(R.969-70)

When Young testified that he had accused appellant of both murders, it misleadingly appeared that appellant made the statement in response to the accusation. In actuality, as Young testified in

the pre-trial hearing, he did not interrogate or accuse appellant at all on the 24th (R.1314-16, 1318-19); the accusation was made during the interrogation at the Memphis police department on the 22nd, prior to the illegally obtained full confession. Appellant's statement at the airport was, in effect, an addendum to that confession. Just as surely as the confession itself, it was damaging evidence which the state would not have had but for the illegal interrogation conducted by Officers Young and Mills in cavalier disregard of appellant's Fifth Amendment rights.

### D. OREGON V. ELSTAD IS INAPPLICABLE WHERE THE PRIMARY CONFESSION WAS OBTAINED BY IMPROPER AND COERCIVE POLICE TACTICS.

Defense counsel objected to the introduction of the airport statement on the ground that it was "fruit of the poisonous tree" (R.1340-42, 968):

> We have nothing to break the chain of events from the 22nd to the 24th, and his will to resist had been overcome by the police officer in violation of his right to remain silent. That statement at the airport would never have been made if they had honored his right to remain silent, which the federal court says was illegal.

(R.1342)

The prosecutor countered by asserting that Oregon v. Elstad, 470 U.S. 298 (1985) had rejected the "fruit of the poisonous tree" and "cat out of the bag" arguments (R.1332-33, 1342-45), and that the police conduct in this case was a "mere Miranda violation" which did not rise to constitutional magnitude or involve the Fifth Amendment itself. (R.1345) The trial court said:

> I've heard enough. Thank you. I take a very simplistic approach, gentlemen. Clearly there was not an interrogation [at the airport]. It was gratuitous. It was a gratuitous statement, not in response to a question, and therefore does not apply.
>
> I do not buy that "fruit of the poisoned tree", and I make that statement for various and sundry reasons, not just because he had

> given a previous confession. So I will allow the testimony.

(R.1345-46)

Both the prosecutor's argument based on Elstad and the trial court's ruling were constitutionally unsound. The holding in Elstad - as the opinion itself repeatedly emphasizes - is a narrow one. It begins:

> This case requires us to decide whether an initial failure of law enforcement officers to administer the warnings required by Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 Ohio Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974 (1966), without more, "taints" subsequent admissions made after a suspect has been fully advised of and has waived his Miranda rights.

470 U.S. at 300.

It concludes:

> We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings.

470 U.S. at 318.

In between, and crucial to the decision, is the Court's statement that the prophylactic Miranda warnings are not in and of themselves constitutional rights, but instead are measures to insure that the accused's right to remain silent is protected. Elstad, 470 U.S. at 305. See also New York v. Quarles, 467 U.S. 649, 654 (1984); Michigan v. Tucker, 417 U.S. 433, 444 (1974); Duckworth v. Eagan, 492 U.S. ___, 109 S.Ct. ___, 106 L.Ed.2d 166, 177 (1989); Caso v. State, 524 So.2d 422, 425 (Fla. 1988). "Requiring Miranda warnings before custodial interrogation provides 'practical reinforcement' for the Fifth Amendment right." Elstad, 470 U.S. at 305; Quarles, at 654; see Tucker, at 444. In contrast to the warnings, which are merely prophylactic, "the right to silence underlying the Miranda warnings is one of constitutional

dimension, and thus cannot be unduly burdened". South Dakota v. Neville, 459 U.S. 553, 565 (1983). The Elstad Court observed:

> Respondent's contention that his confession was tainted by the earlier failure of the police to provide Miranda warnings and must be excluded as "fruit of the poisonous tree" assumes the existence of a constitutional violation.

470 U.S. at 305.

Accordingly, the Elstad Court rejected the respondent's contention "that a failure to administer Miranda warnings necessarily breeds the same consequences as police infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as 'fruit of the poisonous tree'":

> We believe this view misconstrues the nature of the protections afforded by Miranda warnings and therefore misreads the consequences of police failure to supply them.

470 U.S. at 304.

The Elstad majority noted that neither the environment nor the manner of interrogation in that case was coercive. 470 U.S. at 315. "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." 470 U.S. at 314. This significant distinction was recognized in State v. Madruga-Jiminez, 485 So.2d at 465:

> It is important to note, however, that Elstad involved only a technical violation of Miranda and the court was careful to so limit the decision by stating that "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that the suspect has made an unwarned admission does not warrant a presumption of compulsion." Elstad, 105 S.Ct. at 1296. We can only conclude from a reading of Elstad that when the police use deliberately coercive and improper tactics a presumption of compulsion is warranted. In that case, any subsequent statements must be suppressed unless the taint of the improper activity is sufficiently attenuated. [emphasis in opinion].

Because the Elstad decision was expressly and narrowly drawn to reject the "fruit of the poisonous tree" doctrine only in the context of "unwarned yet uncoercive questioning" [470 U.S. at 318], the majority found inapposite the cases cited in Justice Brennan's dissent "concerning suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation." 470 U.S. at 312, n.3.

The instant case does not involve the failure to give Miranda warnings. Rather, it involves appellant's repeated attempts, during custodial interrogation, to invoke his Fifth Amendment right to remain silent, which were flatly ignored while Officers Mills and Young subjected him to continued interrogation. This was no mere "technical" violation of the prophylactic Miranda rules; it was a flagrant violation of appellant's constitutional right against self-incrimination. As the U.S. Supreme Court stated in Miranda v. Arizona, 384 U.S. 436, 473-74 (1966) and in Michigan v. Mosely, 423 U.S. 96, 100 (1975):

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

In Breedlove v. State, 364 So.2d 495, 497 (Fla. 4th DCA 1978), the court observed:

> In Jones v. State, 346 So.2d 639 (Fla. 2d DCA 1977), statements obtained from a defendant after indicating a wish to remain silent were deemed inadmissible even though not a product of direct interrogation. The record indicates that after the appellant refused to make a statement for the third time, an officer

> continued to interrogate her. Our appellate courts have repeatedly condemned such practice. In [Rivera Nunez v. State, 227 So.2d 324 (Fla. 4th DCA 1969)], quoting State v. Bishop, 272 N.C. 283, 158 S.E.2d 511 (1968), "the vice sought to be removed is the evil of continued, incessant harassment by interrogation which results in breaking the will of he suspect, thereby making his statement involuntary."

Other Florida decisions recognizing the coercive effect of continued police interrogation after the accused has attempted to invoke his right to remain silent include Cason v. State, 373 So.2d 372 (Fla. 2d DCA 1979); Bowen v. State, 404 So.2d 145 (Fla. 2d DCA 1981); Langton v. State, 448 So.2d 534 (Fla. 2d DCA 1984); State v. Belcher, 520 So.2d 303 (Fla. 3d DCA 1988). See also Castro v. State, 547 So.2d 111, 113 (Fla. 1989) (Voluntariness, in the context of Oregon v. Elstad, depends on the absence of "coercive police activity" or "overreaching", citing Colorado v. Connelly, 479 U.S. 157 (1986)).

Justice Stevens, dissenting in Elstad, wrote:

> The Court concludes its opinion with a carefully phrased statement of its holding:
>
> > "We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." Ante, at 318, 84 L.Ed.2d, at 238.
>
> I find nothing objectionable in such a holding. Moreover, because the Court expressly endorses the "bright-line rule of Miranda," which conclusively presumes that incriminating statements obtained from a suspect in custody without administering the required warnings are the product of compulsion, and because the Court places so much emphasis on the special facts of this case, I am persuaded that the Court intends its holding to apply only to a narrow category of cases in which the initial questioning of the suspect was made in a totally uncoercive setting and in which the first confession obviously had no influence on the second. I nevertheless dissent because even such a narrowly confined exception is inconsistent with the Court's prior cases, because the attempt to identify its boundaries

> in future cases will breed confusion and uncertainty in the administration of criminal justice, and because it denigrates the importance of one of the core constitutional rights that protects every American citizen from the kind of tyranny that has flourished in other societies.

470 U.S. at 364-65.

Justice Stevens was obviously correct in his characterization of the Elstad holding as a narrow one. The majority opinion states:

> If errors are made by law enforcement officers in administering the prophylactic Miranda procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.

470 U.S. at 309.

In the instant case, the continued interrogation by Officers Mills and Young after appellant had at least three times unequivocally invoked his right to remain silent[13] was flagrantly improper and coercive, was calculated to overcome his will to resist, and violated the Fifth Amendment itself. Miranda, 384 U.S. at 473-74; Mosley, 423 U.S. at 100; Madruga-Jiminez, 485 So.2d at 465; Johnson, 485 So.2d at 466; Breedlove, 364 So.2d at 497; Bowen, 404 So.2d 146; Langton, 448 So.2d at 535. "Application of the Elstad rationale is inappropriate when this type of police conduct has occurred." Madruga-Jiminez, 485 So.2d at 465.

> We can only conclude from a reading of Elstad that when the police use deliberately coercive and improper tactics a presumption of compulsion is warranted. In that case, any subsequent statements must [also] be suppressed

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[13] See Christopher v. State of Florida, 824 F.2d at 840-41 and 842-43.

> unless the taint of the improper activity is sufficiently attenuated.

Madruga-Jiminez, 485 So.2d at 465.

**E. THERE WERE NO INTERVENING CIRCUMSTANCES PRIOR TO APPELLANT'S STATEMENT AT THE AIRPORT ON SEPTEMBER 24, 1977 SUFFICIENT TO REMOVE THE TAINT OF THE ILLEGAL INTERROGATION TWO DAYS EARLIER.**

For the reasons discussed in Part D, Oregon v. Elstad does not render inapplicable the "fruit of the poisonous tree" and "cat out of the bag" concepts under circumstances where, as here, the police have procured a detailed, tape recorded confession by coercive tactics and in actual violation of the accused's right to remain silent. Under such circumstances, any subsequent statements are also inadmissible unless the state can show that they were "sufficiently attenuated to remove the taint of the initial misconduct." Madruga-Jiminez, 485 So.2d at 466. In the instant case, after Officers Mills and Young had succeeded in obtaining the confession at 10:44 p.m. on September 22, 1977, appellant was returned to his cell in the Memphis jail. Two days later, around 6:30 p.m., the same police officers picked him up at the jail and drove him to the airport. At the time the airport statement was made, appellant was in custody, handcuffed, seated with Young in front of the ticket counter. (R.1315) There had been no intervening court appearance or consultation with an attorney, nor even any repetition of the Miranda warnings.[14] Appellant's statement to Young - one of the same officers who had conducted the illegal

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[14] Even if there had been intervening Miranda warnings, that would not have been sufficient to remove the taint of the improper tactics used to procure the initial confession, especially since appellant was not made aware that the tape recorded confession could not be used against him. Madruga-Jiminez, 485 So.2d at 466.

interrogation - was essentially an addendum to the confession he had already given him.

It is important to recognize that prior to the officers' improper conduct, appellant had been steadfastly maintaining his innocence. After Young and Mills made it clear they did not believe him, and chastised him for involving Norma and his whole family, appellant decided to invoke his right to terminate the interrogation. "Then I got nothing else to say. If you're accusing me of murder, then take me down there." (T.46) At least twice thereafter, appellant again tried to cut off the questioning, and was ignored by Young and Mills. Only by these coercive and unconstitutional tactics did the officers eventually succeed in breaking appellant's will and obtaining his admission of guilt. Clearly, but for the violation of his constitutional rights two days earlier, the statement at the airport would never have been made - and thus it is a textbook example of "fruit of the poisonous tree."

The fact that the airport statement was inextricably related to, and a product of, the prior interrogation and confession is further illustrated by the manner in which the state chose to present it:

> MR. BROCK [prosecutor]: Now, at that particular point, had the Defendant been accused of the murder of both Bertha Skillen and George Ahern?
>
> A. Yes, sir, I accused him of both murders.
>
> Q. After having been accused of those murders, did the Defendant, there at the Memphis Airport, make any statement to you?
>
> A. Yes, he did.
>
> Q. What was the statement that the Defendant made?
>
> A. The Defendant asked me what was to become of Norma, and I replied that I thought that the Tennessee Court would return her back to her mother, Patricia Stock.

> And the Defendant stated to me, "If you hadn't of caught me when you did, I would have killed one other person." And that was Pat Stock's boyfriend Griff Stock. (sic) Because he'd made passes to Norma too.
>
> Q. So he told you that if you hadn't caught him when you did, he would have killed one other person?
>
> A. Yes, that's what he said, sir.

(R.969-70)

Contrary to the misleading impression given by this testimony, Young did not accuse appellant of the murders at the airport; the accusation was made (repeatedly) in the interrogation two days before. Appellant's statement to Young at the airport that "If you hadn't of caught me when you did, I would have killed one other person" referred back to the primary confession, and was just as much a product of the illegal interrogation as the rest of that confession. The passage of two days time, without more, was entirely insufficient to remove the taint of the coercive and unconstitutional tactics used by Young and Mills to overcome appellant's resistance. Cf. Madruga-Jiminez, 465 So.2d at 466.

### F. THE ERROR WAS HARMFUL AND REQUIRES REVERSAL.

For the same reasons discussed in Christopher v. State of Florida, 824 F.2d at 846-47, the introduction of the airport statement at trial was harmful error requiring reversal.[15] The

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[15] In addition to the fact that the jury would take it as an admission of guilt of the charged murders of Skillin and Ahern, the airport statement was doubly prejudicial in that it also told the jury that appellant intended to commit a third murder, that of Griff Stacks. In fact, in the prior trial in 1978, the trial court sustained the defense objection to the airport statement on the grounds that its prejudicial impact outweighed its probative value, and that it improperly suggested irrelevant criminal activity. (OR.859-62) Undersigned counsel is not arguing this as an independent basis for reversal only because of the lack of an objection on these grounds in the 1989 trial. Whether the failure (continued...)

statement provided the prosecution with "a key link in the evidentiary chain of proof" [see United States v. Blair, 470 F.2d 331, 338 (5th Cir. 1972)] in an otherwise entirely circumstantial case; and it was the last item of evidence the jury heard before the state closed its case. (R.969-70) Both prosecutors argued it in their first and last closing statements. (R.1039-40, 1078-79) The state cannot prove beyond a reasonable doubt that the introduction of this damaging evidence did not contribute to the jury's verdict. See Christopher v. State of Florida, 824 F.2d at 846; State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

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[15](...continued)
to renew an objection which was found meritorious by the same trial judge in the prior trial constitutes ineffective assistance of counsel is more appropriately decided under Rule 3.850. Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987).

## ISSUE II

THE TRIAL COURT ERRONEOUSLY RESTRICTED THE DEFENSE'S CROSS-EXAMINATION OF NORMA SANDS VAN LOTON, IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHTS TO PRESENT HIS VERSION OF THE FACTS AND TO FULLY AND FAIRLY CROSS-EXAMINE A KEY PROSECUTION WITNESS.

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.

Washington v. Texas, 388 U.S. 14, 19 (1967); Taylor v. Illinois, 484 U.s. 400, 409 (1988).

In a capital case, where the testimony is critical to the defense and "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers v. Mississippi, 410 U.S. 284, 302 (1973); see Rock v. Arkansas, 483 U.S. 44, 55 (1987).

> Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony.

Rock v. Arkansas, 483 U.S. at 55.

The Sixth Amendment guarantees the accused both the right to present his defense to the trier of fact, and the right to fully and fairly cross-examine the witnesses against him. Chambers; Rock; Taylor; Delaware v. Van Arsdall, 475 U.S. 673 (1986); Coxwell v. State, 361 So.2d 148, 152 (Fla. 1978). These rights are crucial to the accuracy of the fact-finding process. Chambers, 410 U.S. at 295 and 302. In Coxwell v. State, 361 So.2d at 152, this Court held

> ... that where a criminal defendant in a capital case, while exercising his sixth amendment right to confront and cross-examine the witnesses against him, inquires of a key

> prosecution witness regarding matters which are both germane to that witness' testimony on direct examination and plausibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error. In the present case, it clearly did.

In the instant case, in his opening statement to the jury, defense counsel outlined in some detail the theory of the defense that George Ahern had shot and killed Bertha Skillin and then killed himself. (R.473-75) Counsel told the jury, "And you will hear that [appellant] doesn't know how to tell [Norma] about this or what to tell her until they get to Carlisle in Arkansas. When the car blows up and they're stranded." (R.475) Defense counsel had reason to believe that there would be evidence to support this defense, because in the prior trials Norma Sands had testified on direct examination by the state that appellant had told her during their travels that he had punched George Ahern in the nose (OR.702-03), and later told her in the motel in Carlyle, Arkansas that Ahern had killed Skillin and himself. (R.799-80, OR.705-08) In the present trial, Norma initially refused to testify. (R.713-19) As a result, she was found in contempt of court and spent the three day weekend in jail. (R.719) Had she not reconsidered, her prior testimony would have been read to the jury. (see R.715) However, when the trial resumed, she decided to testify. Throughout her direct examination, the prosecutor (over defense objection) repeatedly referred to her prior trial testimony, in order to impeach or supplement her current testimony or to "refresh her recollection." (R.751-61, 763, 767-68, 774, 784, 792, 825-26) [see Issue III, infra]. The prosecutor also brought out appellant's statement to Norma that he had gotten into a fight with Ahern and punched him in the nose. (R.776-77) Norma testified that when they got to Carlyle, Arkansas their car engine blew up and they stayed in a motel for about a week. (R.778-79) This time the

prosecutor did not ask Norma about appellant telling her that Ahern had killed Bertha Skillin and then shot himself.

Just before the defense began its cross-examination of Norma, the prosecutor moved in limine to exclude as hearsay any testimony pertaining to what he termed "the murder/suicide theory"; i.e., the statements appellant made to Norma in Carlyle. Defense counsel, arguing that the testimony should be admitted, pointed out that in the prior two trials in this case it was the state which elicited in its direct examination of Norma the very testimony which it was now trying to prevent the jury from hearing. (R.799-800, see OR.705-08) The trial court ruled for the state and excluded the testimony. (R.800)

The devastating effect of this ruling on the defense is amply illustrated by the following excerpt from the prosecutor's closing argument:

> You'll remember at the very beginning of the trial the Judge said that the evidence that you will receive in this particular case, comes from the witness that testified and from the exhibits.
>
> Now, I could understand Mr. Osteen's position with respect to what he's saying, based on what he said the evidence was going to show in his opening statement.
>
> Now do you remember what he said that the evidence was going to show? And he gave you a scenario of some murder/suicide, where the Defendant had borrow money from Mr. Ahern and because of his record he said that he was afraid, so he grabbed the gun and ran.
>
> Have you heard any evidence of that? No wonder Mr. Osteen is having the problems that he's having. Because he's considering I guess, maybe stuff that came to him in a vision, some night.
>
> Now, I'm not telling you this, you listen carefully to the Judge's instructions when he's talking about a reasonable doubt, when he says, a reasonable doubt, it's not an imaginary doubt.
>
> But yet Mr. Osteen's opening statement was based upon either his imagination or his speculation.

(R.1067-68, see also R.1036, 1040)

For several reasons, fairness required that the defense be allowed to cross-examine Norma concerning appellant's statements. Although as a general rule a defendant's out-of-court exculpatory statements are inadmissible hearsay, the state can "open the door" for the introduction of such testimony. Morey v. State, 72 Fla. 45, 72 So. 490, 493 (1916); Guerrero v. State, 532 So.2d 75, 76 (Fla. 3d DCA 1988). In Eberhardt v. State, 550 So.2d 102, 105 (Fla. 1st DCA 1989), the court stated "[t]he rule of completeness generally allows admission of the balance of the conversation as well as other related conversations that in fairness are necessary for the jury to accurately perceive the whole context of what has transpired between the two. Ehrhardt, Florida Evidence, § 108.1 (2d Ed. 1984)." See also Stumpf v. State, 749 P.2d 880, 889 (Alaska App. 1988) ("When the state ... presents one part of a conversation or statement, or one conversation in a series, the defendant may be entitled to offer or require the state to offer the rest of the statement or conversations in order to set the context for statements already in evidence) In addition, when one party introduces or uses for impeachment a portion of a witness' former testimony, it is not error to allow the other party to introduce the remainder of the former testimony. Walker v. State, 416 So.2d 1083, 1095 (Ala. Cr. App. 1982). See also United States v. Walker, 652 F.2d 708 (7th Cir. 1981). As this Court recognized in Coxwell v. State, 361 So.2d at 151 and Coco v. State, 62 So.2d 892, 894-95 (Fla. 1953):

> a fair and full cross-examination of a witness upon the subjects opened by the direct examination is an absolute right, as distinguished from a privilege, which must always be accorded to the person against whom the witness is called and this is particularly true in a criminal case such as this wherein the defendant is charged with the crime of murder in the first degree. . . . Cross-examination of a witness upon the subjects covered in his direct examination is an invaluable right

> and when it is denied to him it cannot be said that such ruling does not constitute harmful and fatal error.
>
> . . . . . .
>
> ... when the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts ... or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief ...

See also Zerquera v. State, 549 So.2d 189, 192 (Fla. 1989).

In the previous trials, Norma testified that during the period of time after they left Naples but before they were arrested in Memphis, appellant made two statements to her about what had happened. At some point while they were driving north, appellant said he had gotten in a fight with George Ahern and punched him in the nose. Later, in Carlyle, appellant told her that Ahern and Skillin were dead, as a result of a murder/suicide by Ahern. In the present trial, the state presented only the former statement and omitted the latter one. Moreover, the prosecutor repeatedly referred to selected portions of Norma's prior testimony, either to impeach her or as substantive evidence. See Issue III. Then, before the defense's cross-examination began, he successfully moved in limine to prevent appellant from introducing the "murder/suicide" statement which the state itself had elicited from Norma on direct in that same prior testimony. And finally, in closing argument, he emphatically made the point to the jury that it had heard no evidence to support the "murder/suicide" theory of defense that defense counsel had relied on in his opening statement. "Have you heard any evidence of that? No wonder Mr. Osteen is having the problems that he's having. Because he's considering

I guess, maybe stuff that came to him in a vision some night." (R.1068) [See Garcia v. State, ___ So.2d ___ (Fla. 1990) (case no. 73,075, opinion filed June 14, 1990) (15 FLW S344, 346), in which the trial court erroneously excluded exculpatory payroll records offered by the defense, and the prosecutor compounded the error by arguing falsely to the jury that the records weren't presented because they didn't exist].

The entire sequence of events was fundamentally unfair. As in Chambers v. Mississippi, appellant's right to present his defense was essentially obliterated by mechanistic application of the hearsay rule. If the state was permitted to introduce some of what appellant told Norma before they were arrested about what had happened in the apartment, the defense should have been allowed to introduce the rest of it. Eberhardt; Guerrero; Morey; Stumpf. If the "murder/suicide" statement was relevant enough for the state to elicit on direct in the prior trials, then - when the state decided to omit it in this trial - the defense should have been allowed to bring it out on cross. Coxwell; Coco. And if the state was permitted to continually refer to Norma's former testimony as impeachment (of its own witness) and substantive evidence, then the defense should have been allowed to bring out on cross the portion of her former testimony - the "murder/suicide" statement - which the state did not want the jury to hear. Walker v. State; U.S. v. Walker. Because of this error of constitutional dimension, appellant is entitled to a new trial.[16]

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[16] The state may argue that the defense could have "cured" the error by calling appellant to the stand. A similar contention was rejected in United States v. Walker, 652 F.2d at 713:

> In criminal cases where the defendant elects not to testify, as in the present case, more is at stake than the order of proof. If the Government is not required to submit all

(continued...)

[16](...continued)
relevant portions of prior testimony which further explain selected parts which the Government has offered, the excluded portions may never be admitted. Thus there may be no "repair work" which could remedy the unfairness of a selective presentation later in the trial of such a case.

. . . . . .

[T]he Government's incomplete presentation may have painted a distorted picture of Walker's prior testimony which he was powerless to remedy without taking the stand.

In addition to the general principle that a defendant should not be penalized for exercising his right not to testify [see Walker, 652 F.2d at 714], it should also be remembered that if appellant had testified in this trial, he would have been impeached with the illegally obtained confession which the state was barred from using in its case in chief. See Issue I.

## ISSUE III

**THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO IMPEACH HIS OWN WITNESS, NORMA SANDS VAN LOTON, WITH HER FORMER TESTIMONY, AS SHE CLEARLY (AND BY THE PROSECUTOR'S OWN ADMISSION) DID NOT MEET THE CRITERIA FOR ADVERSENESS.**

Appellant's daughter, Norma Sands Van Loton, was a key witness at trial. Throughout her testimony, the prosecutor continually read or referred to statements she made in her 1978 trial testimony (both trials) and in a 1978 deposition, in order to impeach or supplement her current testimony or to "refresh her recollection." (R.751-61, 763, 767-68, 774, 784, 792, 825-26) This was patently improper and prejudicial. Jackson v. State, 451 So.2d 458, 462-63 (Fla. 1984).

Defense counsel objected to the state's impeaching its own witness. (R.751) The prosecutor asserted that he was not attempting to impeach the witness, and noted that he had not asked the court to declare her a hostile witness. (R.751) The prosecutor continued "As far as her testimony today, I see no indication that she is adverse, in the sense as the rule speaks of adversity." (R.751-52) Nevertheless, he argued that he was entitled to introduce Norma's prior testimony as substantive evidence under Fla. Stat. § 90.801(2)(a). (R.752-55) The trial court ruled that the prosecutor was attempting to impeach his own witness, but allowed him to do so upon a ruling that "you have met the two-prong test, which is good faith and you would be hurting your case." (R.755-56)

Clearly, as the prosecutor himself recognized, Norma did not meet the "well-recognized criteria for adverseness." Austin v. State, 461 So.2d 1380, 1383 (Fla. 1st DCA 1984). While it is true that she initially refused to testify, "[t]he fact that a witness may be hostile or unwilling does not mean that he is adverse. See Ehrhardt, Florida Evidence § 608.2, p. 299 (2d Ed. 1984)." Austin

v. State, 461 So.2d at 1383. Under Florida law, impeachment of one's own witness is permissible "only in very limited circumstances", i.e. when the witness meets the criteria for adverseness. Kingery v. State, 523 So.2d 1199, 1203 (Fla. 1st DCA 1988). Those criteria have been long-standing. Kingery, at 1203. In Jackson v. State, 451 So.2d 458, 462 (Fla. 1984), this Court reaffirmed what it had said nearly a century before in "a seminal decision addressing the problem of forgetful witnesses", Adams v. State, 34 Fla. 185, 195-96, 15 So. 905, 908 (1894):

> It is very erroneous to suppose that, under this statute [§ 1101 Rev.Stat.Fla. (1892), precursor to § 90.608(2), Fla.Stat. (1979)], a party producing a witness is at liberty to impeach him whenever such witness simply fails to testify as he was expected to do, without giving any evidence that is at all prejudicial to the party producing him. The impeachment permitted by the statute is only in cases where the witness proves adverse to the party producing him. He must not only fail to give the beneficial evidence expected of him, but he must become adverse by giving evidence that is prejudicial to the cause of the party producing him.

In other words, the state (like any other party in a trial) is barred from impeaching its own witness unless the witness' testimony at trial is affirmatively harmful to the state. Everett v. State, 530 So.2d 413, 415 (Fla. 4th DCA 1988). The mere fact that the witness' testimony is "disappointing" to the prosecutor [see Everett, at 415], or not as favorable as he would like, or not as rich in detail because of lapse of memory, does not establish adverseness within the meaning of § 90.608(2). Since Norma did not give any testimony which was affirmatively harmful to the state, the trial court's ruling which allowed the prosecutor to impeach her with her former testimony every time he was not satisfied with one of her answers or wanted to "refresh her recollection" was prejudicial error. Jackson; Austin; Kingery; Everett; Gibbs v. State, 193 So.2d 460, 463-64 (Fla. 2d DCA 1967); Pitts v. State, 333 So.2d 109 (Fla. 1st DCA 1976); Davis v. State, 539 So.2d 555

(Fla. 4th DCA 1989); London v. State, 541 So.2d 119 (Fla. 4th DCA 1989); Smith v. State, 547 So.2d 281 (Fla. 5th DCA 1989).

As previously mentioned, the trial judge did not accept the prosecutor's contention that Norma's former testimony was admissible as substantive evidence under Fla. Stat. § 90.801(2)(a); he found to the contrary that the state was attempting to impeach its own witness, but ruled (erroneously) that the impeachment was proper. (R.755-56) In fact, the prosecutor's use of Norma's former testimony was equally improper under either theory. Parnell v. State, 500 So.2d 558, 561 (Fla. 2d DCA 1986), rev. den. 509 So.2d 1119 (1987). The statute relied on by the state provides in part that:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> (a) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

Fla. Stat. § 90.801.

In Delgado-Santos v. State, 471 So.2d 74, 76 (Fla. 3d DCA 1985), approved and adopted in State v. Delgado-Santos, 497 So.2d 1199 (Fla. 1986), the Court noted that "[f]or the first time in Florida [section 90.801(2)(a)] permits, under rigidly circumscribed conditions, the use of prior inconsistent statements ... as substantive evidence, rather than, as before, solely for impeachment purposes."

Appellant of course does not dispute that Norma's 1978 trial testimony was given under oath subject to the penalty of perjury. However, in order to be admissible as substantive evidence under this section, the prior testimony must be inconsistent with the witness' present testimony. § 90.801(2)(a); see Delgado-Santos, 471 So.2d at 76 ("Since Ortiz testified at trial and his previous statement, which was violently inconsistent with his trial

testimony, was under oath ... the determinative issue is whether it was given at an "other proceeding" and thus justified its substantive admissibility below"). Black's Law Dictionary defines the term "inconsistent" as "Mutually repugnant or contradictory; contrary, the one to the other, so that both cannot stand ...."

Section 90.801(2)(a) applies only under "rigidly circumscribed conditions" [Delgado-Santos]; it clearly does not give a party carte blanche to use as substantive evidence a witness' former trial testimony simply because the former testimony is perceived as more favorable or more detailed than what the witness remembers now. Nor is it intended to provide a means to circumvent the rule against impeaching one's own witnesses. In Parnell v. State, 500 So.2d at 561, the appellate court said:

> It was also reversible error for the court to admit Theresa Rumsey's deposition testimony as substantive evidence against the appellant. It is true that under Section 90.801(2)(a), Florida Statutes (1983), prior inconsistent statements of a witness taken under oath are admissible as substantive evidence. Moore v. State, 452 So.2d 559 (Fla. 1984). However, Section 90.608(2), Florida Statutes (1983) provides that a party may not impeach its own witness unless that witness' testimony proves adverse to the calling party. The witness must give testimony prejudicial to the cause of the calling party; the fact that a witness cannot recall making prior inculpatory statements is insufficient. Austin v. State, 461 So.2d 1380, 1383 (Fla. 1st DCA 1984). Rumsey's testimony in this case, that she could not recall whether the appellant had confessed the crime to her, did not meet the "well-recognized criteria for adverseness." Id. Therefore, Rumsey's prior inconsistent deposition testimony could not be used for impeachment purposes or as substantive evidence.

Finally, referring back to Issue II, appellant reasserts that it was grossly unfair to allow the prosecutor to use selected portions of Norma's former testimony to improperly impeach her (or as substantive evidence), and then prevent the defense from bringing out on cross-examination other matters which she had testified to in the prior trial, i.e., the "murder-suicide"

statement, which were crucial to the theory of defense. Chambers v. Mississippi, Coxwell; Coco; Walker v. State, U.S. v. Walker.

## ISSUE IV

**BECAUSE THE TRIAL COURT SENTENCED APPELLANT TO DEATH WITHOUT PRIOR OR CONTEMPORANEOUS WRITTEN FINDINGS, AND BECAUSE THE SENTENCING PROCEEDING TOOK PLACE A FULL YEAR AFTER THIS COURT'S DECISION IN GROSSMAN v. STATE, 525 So.2d 833 (Fla. 1988) BECAME FINAL, THIS COURT MUST REMAND FOR IMPOSITION OF A LIFE SENTENCE.**

Florida's death penalty statute requires the trial court to provide written findings in support of its imposition of the death penalty. Fla. Stat. § 921.141(3). In Grossman v. State, 525 So.2d 833, 841 (Fla. 1988), this Court stated that since VanRoyal v. State, 497 So.2d 625 (Fla. 1986) issued "we have been presented with a number of cases in which the timeliness of the trial judge's sentencing order filed after oral pronouncement of sentence has been at issue." Prior to Grossman, the Court had "stated a strong desire that written sentencing orders and oral pronouncements be concurrent" 525 So.2d at 841. The Court announced in Grossman:

> We recognize that the trial court here, and the trial court in other cases which have reached us or will reach us in the near future, have not had the benefit of VanRoyal and its progeny. Nevertheless, we consider it desirable to establish a procedural rule that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement. Accordingly, pursuant to our authority under article V, section 2(a), of the Florida Constitution, effective thirty days after this decision becomes final, we so order.

525 So.2d at 841.

Grossman was decided on February 18, 1988, rehearing was denied on May 25, 1988, and the rule announced therein became effective on June 24, 1988.

In Stewart v. State, 549 So.2d 171, 176-77 (Fla. 1989) - a case where the sentencing proceeding took place prior to Grossman - the trial court failed to provide written findings, but did make detailed oral findings which he dictated into the record at the time he pronounced the death sentence. This Court said

> Prior to, or contemporaneously with, orally pronouncing a death sentence, courts now are required to prepare a written order which must be filed concurrent with the pronouncement. Grossman, 525 So.2d at 841. Should a trial court fail to provide timely written findings in a sentencing proceeding taking place after our decision in Grossman, we are compelled to remand for imposition of a life sentence. Because Stewart's sentencing occurred prior to Grossman and because the trial court followed the jury recommendation of death and dictated its findings into the record, we remand for written findings. Cave v. State, 445 So.2d 341 (Fla. 1984).

The sentencing proceeding in the instant case took place on June 26, 1989, a full year after Grossman became final, and nearly three years after VanRoyal was decided. Therefore, it cannot be argued that the trial court did not have the benefit of both decisions. Moreover, in contrast to Stewart, the trial court here did not even make any oral findings concurrently with his pronouncement of sentence. (R.1408-09) See Patterson v. State, 513 So.2d 1257, 1261 (Fla. 1987); Bouie v. State, 559 So.2d 1113, 1115-16 (Fla. 1990). As Justice Ehrlich recognized in his concurring opinion in VanRoyal, 497 So.2d at 630 (quoted in Patterson, 513 So.2d at 1261):

> [T]he trial court's written findings with respect to aggravating and mitigating circumstances must at least be coincident with the imposition of the death penalty. It is inconceivable ... that any meaningful weighing process can take place otherwise.

The trial court's written sentencing order was not filed until July 10, 1989, two weeks after he sentenced appellant to death. (R.1235-37) These untimely findings failed to comply with the requirements of the statute, of VanRoyal, and of Grossman. This Court must remand for imposition of a sentence of life imprison-

ment. Stewart.[17] See also VanRoyal, 497 So.2d at 630. (Justice Ehrlich concurring).

[17] In the event that this Court reverses appellant's convictions for a new trial for the reasons argued in Issues I, II, and III, it should be with directions that the maximum sentence in case of a guilty verdict of first degree murder shall be life imprisonment. Otherwise, appellant would be penalized for successfully appealing his convictions, in violation of North Carolina v. Pearce, 395 U.S. 711 (1969).

## ISSUE V

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON, AND FINDING, THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE.

According to the testimony of the medical examiner, Dr. Heinrich Schmid, Bertha Skillin died from a gunshot wound to the head. (R.663, 666) After receiving this injury, she would have become immediately unconscious. (R.665) George Ahern also died from a gunshot wound to the head which would have caused immediate unconsciousness. (R.640, 646, 655) There was also what Dr. Schmid believed to be a gunshot entrance wound to Ahern's right arm[18] (R.651-52, 682), and a bruise on his chest which was consistent with being struck with a fist. (R.661)

In the early case of State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), this Court defined the "especially heinous, atrocious, or cruel" aggravating circumstance.

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart

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[18] Defense counsel argued that Dr. Schmid was mistaken in concluding that there was a gunshot wound to the arm. (R.1055-59, 1062) This contention was based on the absence of an exit wound, and the failure to find a bullet or bullet fragment in the arm. (see R.652, 677) Dr. Schmid's opinion was that the bullet either ricocheted back out through the entrance wound or fell out at a later time. (R.652, 678-79) However, no projectile was found in the body bag, or underneath the body at the apartment, or during the search of the apartment. (R.606-08, 611-12, 668-69, 679) For purposes of this argument, undersigned counsel will assume that there was a gunshot wound to the arm, since the trier of fact was entitled to believe Dr. Schmid. However, that wound clearly does not make Ahern's killing "especially heinous, atrocious, or cruel" within the well established meaning of the aggravating factor. See Amoros v. State, 531 So.2d 1256, 1257, 1260-61 (Fla. 1988); Brown v. State, 526 So.2d 903, 906-07 (Fla. 1988); Lewis v. State, 377 So.2d 640, 641-42, 646 (Fla. 1979).

from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily torturous to the victim.[19]

Applying the above standard, this Court has, over the past seventeen years, developed a consistent line of precedent that a homicide committed by gunshot is not "especially heinous, atrocious, or cruel," within the meaning of Florida's death penalty law, unless the actual killing was preceded by the infliction of physical or mental torture.[20] See e.g. Cook v. State, 542 So.2d

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[19] See also, e.g., Cooper v. State, 336 So.2d 1133, 1140-41 (Fla. 1976); Fleming v. State, 374 So.2d 954, 958-59 (Fla. 1979); Armstrong v. State, 399 So.2d 953, 962-63 (Fla. 1981); Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983); Clark v. State, 443 So.2d 973, 977 (Fla. 1983); Blanco v. State, 452 So.2d 520, 525-26 (Fla. 1984); Brown v. State, 526 So.2d 903, 906-07 (Fla. 1988); Amoros v. State, 531 So.2d 1256, 1260-61 (Fla. 1988).

[20] A partial list of gunshot homicide cases in which the "especially heinous, atrocious, or cruel" aggravating circumstance was held to be invalid for this reason includes: Cooper v. State, 336 So.2d 1133, 1140-41 (Fla. 1976); Riley v. State, 366 So.2d 19, 21 (Fla. 1979); Menendez v. State, 368 So.2d 1278, 1281-82 (Fla. 1979); Kampff v. State, 371 So.2d 1007, 1010 (Fla. 1979); Fleming v. State, 374 So.2d 954, 958-59 (Fla. 1979); Lewis v. State, 377 So.2d 640, 645 (Fla. 1979); Williams v. State, 386 So.2d 538, 543 (Fla. 1980); Lewis v. State, 398 So.2d 432, 438 (Fla. 1981); Armstrong v. State, 399 So.2d 953, 962-63 (Fla. 1981); Odom v. State, 403 So.2d 936, 942 (Fla. 1981); McCray v. State, 416 So.2d 804, 807 (Fla. 1982); Raulerson v. State, 420 So.2d 567, 571-72 (Fla. 1982); Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983); Clark v. State, 443 So.2d 973, 977 (Fla. 1983); Oats v. State, 446 So.2d 90, 95 (Fla. 1984); Blanco v. State, 452 So.2d 520, 525-26 (Fla. 1984); Parker v. State, 458 So.2d 750, 754 (Fla. 1984); Jackson v. State, 498 So.2d 906, 910 (Fla. 1986); Jackson v. State, 502 So.2d 409, 411-12 (Fla. 1986); Lloyd v. State, 524 So.2d 396, 402-03 (Fla. 1988); Brown v. State, 526 So.2d 903, 906-07 (Fla. 1988); Amoros v. State, 531 So.2d 1256, 1260-61 (Fla. 1988); Cook v. State, 542 So.2d 964, 970 (Fla. 1989); Hallman v. State, 560 So.2d 223, 225 (Fla. 1990).

In order for the "HAC" factor to be appropriate in a gunshot homicide, there must be acts of physical or emotional torture to set the killing apart from the norm. See e.g. Copeland v. State, 457 So.2d 1012, 1019 (Fla. 1984) ("[p]roof of such additional acts are provided by the evidence of the victim's hours long ordeal" in which she was abducted at knifepoint, brought to a motel room where (continued...)

964, 970 (Fla. 1989) ("HAC" aggravating factor "generally is appropriate when the victim is tortured, either physically or emotionally, by the killer"). This limiting construction is what prevents the aggravating factor from being unconstitutionally overbroad. To apply it in a case like this one, where both victims were killed by gunshot wounds to the head which would have caused immediate unconsciousness, and where neither victim was subjected to physical or emotional torture, would be overbroad application of the HAC circumstance, and would violate the Eighth Amendment of the U.S. Constitution. Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980); see Proffitt v. Wainwright, 685 F.2d 1227, 1263-64 (11th Cir. 1982).

In comparable cases, this Court has found the HAC factor inapplicable. For example, in Amoros v. State, 531 So.2d 1256, 1257, 1260-61 (Fla. 1988), the defendant shot the victim three times at close range; twice in the arm and once (fatally) in the chest. There was evidence that the victim "made a futile attempt to save his life by running to the rear of the apartment, only to find himself trapped at the back door." This Court disapproved the trial court's finding of "HAC":

> We reject the state's contention that our decision in Phillips v. State, 476 So.2d 194

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[20](...continued)
she was repeatedly raped, and then taken to the woods and executed); Mills v. State, 462 So.2d 1075, 1080-81 (Fla. 1985) (victim was abducted and begged for his life to no avail; he was then bound and struck on the head with a tire iron before being killed by an execution-style shotgun blast to the face); Francis v. State, 473 So.2d 672, 676 (Fla. 1985) (victim was forced to crawl on his hands and knees and beg for his life; he was placed on toilet stool, with his hands taped behind his back, for a period in excess of two hours; he was threatened with the injection of Drano and other foreign substances into his body; and he was gagged and taunted before being shot to death); Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987) (victim was lured from home, beaten so badly that part of his ear was torn off, placed in back seat and then trunk of car, and then marched into a swamp at gunpoint to die).

> (Fla. 1985), applies. We note that in Phillips, the victim was stalked by the defendant and the defendant stopped and reloaded his weapon before firing the final shots. In the instant case, the evidence reflects the shots were fired very soon after Amoros discovered the victim. On this record, we find the state has failed to establish beyond a reasonable doubt that this conduct comes within the scope of "especially heinous, atrocious, and cruel." The facts do no set this murder "apart from the norm of capital felonies." See Dixon, 283 So.2d at 9; see also Lloyd v. State, 524 So.2d 396 (Fla. 1988).

531 So.2d at 1260-61.

The Court in Amoros observed that it could not distinguish the facts of the case from those of Lewis v. State, 377 So.2d 640, 641-42, 646 (Fla. 1979), in which the victim was shot in the chest, and then shot several more times as he attempted to flee. The Lewis court said:

> It is apparent that all killings are heinous - the members of our society have deemed the intentional and unjustifiable taking of human life to be nothing less. However, the legislature intended to authorize the death penalty for the crime which is "especially heinous" - "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." ... The killing in the case at bar simply does not fall within that category when viewed in the context of the published decisions of this Court.

377 So.2d at 646.

In Brown v. State, 526 So.2d 903, 904, 906-07 (Fla. 1988), the defendant jumped a police officer who was trying to arrest him for armed robbery. The defendant shot the officer once during the struggle. The officer said "Please don't shoot," whereupon the defendant shot him two more times. This Court held that HAC was improperly found. In Garron v. State, 528 So.2d 353, 354, 360 (Fla. 1988), the defendant fired two shots at his wife, who collapsed with a chest wound. When his step-daughter ran to the phone, called the operator and asked for the police, the defendant leveled the gun at her and fired, killing her. This Court

determined that the trial court's HAC finding "has no merit" and could not be upheld. 528 So.2d at 360.

In addition to the fact that the evidence in the instant case does not establish the aggravating circumstance, the trial court's finding of HAC is replete with references to irrelevant and/or constitutionally prohibited considerations. The finding reads as follows:

> The two capital felonies that were committed by the defendant, William D. Christopher, are especially heinous, atrocious, and cruel. The defendant has a daughter, Norma Sands, who was born out of wedlock to defendant and Patricia Sands Stock. At the time of the birth of the illegitimate child, the defendant was in prison so the mother gave the infant up for adoption to one of the murder victims, Bertha Skillin, and her husband. Bertha Skillin and Norma moved to Florida and the child was reared in this state. The defendant first met his fourteen year old daughter in December, 1975 in Memphis, Tennessee while Norma was in the city for a visit. On approximately the first of August, 1976 (sic), the defendant arrived in Naples, Florida and made contact with his daughter, Norma. The defendant was without funds. One of the murder victims, Bertha Skillin, and the other murder victim, (her boyfriend) George Ahern, invited the defendant to stay in their apartment. Soon the defendant and his daughter, Norma, were engaged in a sexual affair.
>
> During the period the defendant was a guest in the home of Bertha Skillin, he was given money by both victims. In order to conceal his departure with his daughter and to continue his incestuous relationship, the defendant killed Mrs. Skillin with a pistol and dragged her body into the bathroom and closed the door to await the return of George Ahern. Mr. Ahern, who had gone to the bank, withdrew three hundred dollars. Upon his return to the apartment, the defendant knocked Mr. Ahern down. Mr. Ahern ran to his bedroom where the defendant confronted him with a gun shooting Mr. Ahern once in the arm and once in the head. The defendant closed the apartment, checked his daughter out of school, and gave her approximately three hundred dollars. The defendant and his daughter left Naples and were subsequently apprehended in Tennessee.
>
> The bodies were not discovered until September 13, 1977, some two weeks after the murders. Both bodies were markedly decomposed. The right upper forehead of George

> Ahern showed an irregular rounded crater-shaped gunshot entrance wound located above the right eye, as well as a bullet wound in the arm. There was maggot infestation in the wounds, eye sockets, mouth, nose, and ears.
>
> The body of Bertha Skillin was found in the bathroom of her apartment at the same time that the body of George Ahern was discovered. On the right temporal area of the skull was located a gunshot entrance wound above the right ear. The wound, the eyes, and nose were maggot infested.

(R.1236-37)

Appellant's incestuous relationship with Norma is completely irrelevant to whether the killings were "especially heinous, atrocious, or cruel." Likewise, the fact that the bodies were not discovered for two weeks, by which time they were "markedly decomposed" and maggot infested is an improper consideration in finding HAC. See Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975); Simmons v. State, 419 So.2d 316, 319 (Fla. 1982); Herzog v. State, 439 So.2d 1372, 1380 (Fla. 1983); Jackson v. State, 451 So.2d 458, 463 (Fla. 1984). Moreover, several of the details set forth in the second paragraph of the finding were not established by the circumstantial evidence at this trial, and could only have been derived from the unconstitutionally obtained confession which was introduced at appellant's prior trial. See Fla. Stat. § 921.141(1) (evidence secured in violation of United States Constitution or Florida Constitution is inadmissible in capital sentencing proceeding); see also Harich v. State, 437 So.2d 1082, 1085-86 (Fla. 1983); Huff v. State, 495 So.2d 145, 152 (Fla. 1986).

Not only did the trial judge err in finding HAC, he erred in instructing the jury (over defense objection) that they could consider this aggravating factor (see R.1354-55, 1387) "[A]ggravating circumstances must be proven beyond a reasonable doubt before they may properly be considered by judge or jury." Atkins v. State, 452 So.2d 529, 532 (Fla. 1984). See also Stewart v. State, 549 So.2d 171, 174 (Fla. 1989) (under Florida Standard

Jury Instructions, jury should be instructed only on those factors for which evidence has been presented). Absent the improper instruction, there was only one valid aggravating circumstance in this case, so it cannot be shown beyond a reasonable doubt that consideration of HAC did not affect the jury's 9-3 death recommendations. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Appellant's death sentence must therefore be reversed for a new penalty hearing before a newly impaneled jury. In the alternative, and at the least, the death sentence must be reversed for resentencing by the trial judge. See Nibert v. State, 508 So.2d 1, 5 (Fla. 1987) (Remand for resentencing where "[w]e are left with one valid aggravating circumstance ... and no mitigating circumstances. Although death may be the proper sentence in this situation, it is not necessarily so").[21]

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[21] Appellant recognizes that this Court upheld the finding of HAC in the appeal following his prior trial. Christopher v. State, 407 So.2d 198, 202-03 (Fla.1981). That fact, however, is clearly not dispositive. First of all, the "law of the case" doctrine does not apply when, as here, there has been an intervening retrial. See Steele v. Pendarvis Chevrolet, 220 So.2d 372, 376 (Fla. 1969); see also Huff v. State, 495 So.2d at 152 (quoting Fla. R. Cr. P. 3.640(a) that "[w]hen a new trial is granted, the new trial shall proceed in all respects as if no former trial had been had ...", and noting that the evidence adduced at the new trial is all that may properly form the basis for a new death sentence). Secondly, even if the "law of the case" doctrine were otherwise applicable, this Court has the power and responsibility - especially in a case involving the death penalty - to reconsider its prior ruling "in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." Preston v. State, 444 So.2d 939, 942 (Fla. 1984); Strazzula v. Hendrick, 177 So.2d 1 (Fla. 1965); Harris v. Lewis State Bank, 482 So.2d 1378, 1383 (Fla. 1st DCA 1986). The instant case falls into that category. The 1981 opinion, insofar as it upholds the HAC finding, is clearly an aberration within the Florida caselaw on the subject [see footnote 20 p. 57], and it is also inconsistent with the limiting construction of the aggravating circumstance which ensures its constitutionality. Use of a "law of the case" concept to uphold the present finding of HAC would perpetuate the earlier error, and would result in overbroad application of the aggravating factor in violation of the Eighth Amendment. Maynard v. Cartwright; Godfrey v. Georgia; Proffitt v. Wainwright, 685 F.2d at 1263-65.

## ISSUE VI

THE TRIAL COURT ERRED IN ALLOWING APPELLANT TO WAIVE THE PRESENTATION OF MITIGATING EVIDENCE WITHOUT EVEN A PERFUNCTORY INQUIRY INTO THE VOLUNTARINESS OF THE WAIVER.

During the charge conference prior to the penalty phase, defense counsel stated to the court:

> Let me say at this point that I have talked to Mr. Christopher about testifying [or] have someone testify on his behalf here, to any of these things.
>
> And that he had instructed me and agreed that he really did not wish to receive a life sentence. And not for me to present any testimony, or have his mother come down, or anyone.
>
> And that, you know, he didn't wish to take the stand to say anything on his own behalf.
>
> And the State had offered him a life sentence earlier and he refused to take that. So he's had a chance at life, and is -- has decided that he doesn't want to go that route under any circumstances.
>
> If that is still your position?
>
> MR. CHRISTOPHER: Right.
>
> MR. OSTEEN [defense counsel]: I don't like to take this position, but this is his third trial and it is his case as well as mine, and I have to, you know, go along with his wishes on that. So we would not be presenting any evidence as to Number 2. [extreme mental or emotional disturbance].

(R.1357)

No further inquiry into the matter was held. The defense presented no live testimony, although defense counsel, by stipulation, read to the jury written statements from appellant's mother, stepmother, father, and aunt. (R.1370-72) The only mitigating circumstance upon which the jury was instructed was the "catch-all" (R.1388), and the trial court found no mitigating circumstances in his belated sentencing order. (R.1237) [see Issue IV].

The procedure followed here was woefully inadequate to ensure the voluntariness of appellant's purported waiver, and equally inadequate to protect society's interest in seeing to it that the death penalty is applied properly. In Hamblen v. State, 527 So.2d 800 (Fla. 1988), undersigned counsel (proceeding after his motion to withdraw was denied by this Court) argued on behalf of an unwilling client that when a capital defendant refuses to allow the presentation of mitigating evidence because of his personal preference to receive a death sentence, the reliability of the sentencing decision is irreparably compromised. Moreover, this Court is unable to properly perform its appellate function, because the record is warped in favor of death; the aggravating evidence is there, but the mitigating evidence is missing. In order to protect both the defendant's rights and society's interests, the undersigned proposed that, in such circumstances, public counsel be appointed to investigate and present the case for a life sentence, while the defendant is free to request or demand death if that's what he wishes. While Justices Ehrlich and Barkett, dissenting in Hamblen, agreed with that position, the majority held to the contrary, saying "Hamblen had a constitutional right to represent himself and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes would violate the dictates of Faretta."[22] At the same time, the Hamblen majority also recognized that "[t]he rights, responsibilities, and procedures set forth in our constitution have not been suspended simply because the accused invites the possibility of a death sentence." 527 So.2d at 804.

Crucial to the Court's decision in Hamblen were the facts that the defendant had been found competent to stand trial and that the trial court conducted a thorough inquiry into the voluntariness of

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[22] Faretta v. California, 422 U.S. 806 (1975).

his waiver of constitutional rights and his fitness for self-representation. In the instant case, while appellant did not formally act as his own attorney, there is no question that he gave up important constitutional rights, against his attorney's judgment. A capital defendant has the right to have the judge and jury consider all relevant mitigating evidence, under the Eighth and Fourteenth Amendments. Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982). In addition, a capital defendant has the constitutional right to effective assistance of counsel in discovering and presenting relevant mitigating evidence. See Bassett v. State, 541 So.2d 596 (Fla. 1989). These rights may be waived by a mentally competent defendant who voluntarily, knowingly, and intelligently chooses to do so. Hamblen; see also Faretta; Gilmore v. Utah, 429 U.S. 1012 (1976); Goode v. State, 365 So.2d 381 (Fla. 1979). However, in the present case there was no inquiry into appellant's mental competence to waive his rights [see Westbrook v. Arizona, 384 U.S. 150 (1966)], nor was there even a perfunctory inquiry into whether appellant understood the rights he was giving up, and whether he voluntarily, intelligently, and knowingly relinquished those rights. See e.g. Johnson v. Zerbst, 304 U.S. 458 (1938); Boykin v. Alabama, 395 U.S. 238 (1969); Faretta. The sum total of the "inquiry" here was defense counsel asking appellant "If that is still your position?", and appellant replying "Right." (R.1357)

Defense counsel also mentioned that appellant had earlier declined to plead guilty in exchange for a life sentence. (R.1357) Ironically, if he had accepted the offer, there would have had to take place a colloquy establishing that his waiver of constitutional trial rights was knowing and voluntary. See Boykin v. Alabama; Mikenas v. State, 460 So.2d 359, 361 (Fla. 1984); Lopez v. State, 536 So.2d 228 (Fla. 1988). The Boykin Court observed that "[t]he

requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation", 395 U.S. at 242, and further stated:

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences. When the judge discharges that function, he leaves a record adequate for any review that may later be sought [citations omitted], and forestalls the spin-off of collateral proceedings that seek to probe murky memories.

395 U.S. at 243-44.

A capital defendant's refusal to allow his attorney to present mitigating evidence is in some ways comparable to pleading guilty to a death sentence, and even to the extent that that analogy is imperfect, the fact remains that the defendant is giving up important constitutional rights with life-or-death consequences. At rock bottom minimum, the trial court should have determined whether appellant voluntarily, intelligently, and knowingly relinquished those rights under the Johnson v. Zerbst standard. In the absence of even such a minimal inquiry, appellant's death sentence is constitutionally defective.

## CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court grant the following relief:

> Reverse the convictions and death sentences and remand for a new trial [Issues I, II, and III].
>
> Reverse the death sentences and remand for imposition of sentences of life imprisonment [Issue IV].
>
> Reverse the death sentences, and remand for a new penalty proceeding before a newly impaneled jury [Issues V and VI].
>
> Reverse the death sentences and remand for resentencing by the trial judge [Issue V, alternative relief].

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 30th day of August, 1990.

Respectfully submitted,

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