56pgs

IN THE SUPREME COURT OF FLORIDA

HENRY ALEXANDER DAVIS, :

Appellant, :

vs. : Case No. 75,467

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

ROBERT F. MOELLER
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE

On April 9, 1987 a Polk County grand jury returned a three-count indictment against Appellant, Henry Alexander Davis. (R1-3) The first count charged Appellant with the premeditated murder of Joyce Ezell by cutting or stabbing her with a knife or similar type sharp object on March 18, 1987. (R1) Count II charged Appellant with robbing Ezell with a deadly weapon on the same date. (R1-2) The final count charged burglary of Ezell's dwelling on the same date, in the course of which Appellant committed a battery upon her. (R2)

Through counsel, Appellant filed various pretrial motions. In one such motion Appellant asked the trial court to appoint statistical analystS to assist the defense in developing evidence of racial bias in capital sentencing in general, and as related to Appellant's specific case. (R5-6) This motion was heard by the Honorable Carolyn K. Fulmer on October 27, 1987, and denied. (R10-16,19)

In another motion, Appellant sought suppression of a confession or admissions that were obtained from him illegally. (R37-39) This motion was heard by the Honorable J. Tim Strickland on November 6, 1989, and denied. (R40-147,159)

This cause proceeded to a jury trial beginning on January 2, 1990, with Judge Strickland presiding. (R161) On January 9, 1990 the jury found Appellant guilty as charged in all three counts of the indictment. (R1281-1282, 1607-1609)

A penalty phase was conducted on January 10-11, 1990. (R1291-1605) After receiving additional evidence presented by the State and by the defense, the jury recommended that Appellant be sentenced to death. (R1600,1627)

A sentencing hearing was held before Judge Strickland on January 12, 1990. (R1664-1673) At the beginning of the hearing, Appellant's counsel orally moved for a new trial, or for a new penalty trial. (R1667) The court denied the motion. (R1667) On the robbery and burglary counts for which Appellant had been convicted, the court departed from the recommended guidelines range of five and one-half to seven years "due to associated capital offense," and imposed consecutive life sentences. (R1632-1633,1640, 1669-1671) The court then sentenced Appellant to die in the electric chair for the murder. (R1631,1635-1639,1673) In his written "Findings of Fact," the court found these aggravating circumstances applicable: (1) The first degree murder was committed while Appellant was engaged in commission of a burglary. (R1635-1636) (2) The murder was committed for the purpose of avoiding or preventing a lawful arrest. (R1636) (3) The murder was committed for financial gain. (R1636) (4) The murder was especially wicked, evil, atrocious and cruel. (R1636) The court specifically rejected the following mitigating circumstances: (1) The murder was committed while Appellant was under the influence of extreme mental or emotional disturbance. (R1637) (2) Another person committed the murder, and Appellant's participation was relatively minor. (R1637-1638) (3) Appellant was under extreme duress or "emotional domi-

nation to another person." (R1638) (4) Appellant's capacity to conform his consent to the requirements of law was substantially impaired. (R1638) The court stated in his "Findings of Fact" that he had considered "all other relevant circumstances in mitigation, i.e., the Defendant's age, schooling, family background, employment, education and health." (R1639) The court concluded that the aggravating circumstances substantially outweighed the mitigating circumstances, and that the death penalty therefore should be imposed. (R1639)

Appellant timely filed his notice of appeal to this Court on January 23, 1990. (R1641)

The court below declared Appellant indigent, and appointed the public defender's office to represent him on appeal. (R1646)

STATEMENT OF THE FACTS

I. Guilt Phase

Seventy-three year old Joyce Ezell lived alone at 1187 South Lakeshore Boulevard in Lake Wales. (R703,811,825)

Appellant, Henry Alexander Davis, knew Ezell, as he had done yard work at her house with his stepfather, James Stoudemire, whose nickname was "Chaney." (R713,795-796,798-799)

Harold Brown, who lived across the street from Ezell, was walking his dog at about 7:15 a.m. on March 18, 1987 when he saw Appellant walking down the road. (R706-707,712) Appellant made a greeting-type gesture and said something that Brown could not quite hear. (R707) Brown did not notice anything unusual about Appellant's appearance or manner of walking or the way he acted. (R714) Appellant was relatively neat in appearance and was not carrying anything. (R714) Brown said good morning to Appellant and watched him go on down the road and turn into Ezell's driveway. (R707) Appellant walked up to the door, and Brown watched him for 10 to 15 seconds before going into his own house. (R707) When Brown came out of his house a few minutes later with his daughter to take her to school, he looked over at Ezell's house and did not see anybody. (R706,714-715)[1]

---

[1] Appellant objected during Brown's testimony and moved for a mistrial when Brown said he later went to the police station and went through several books and selected several pictures that were similar to the man he saw. The pictures were mug shots and implied that Appellant had a record and was known to the police because they had his picture. (R710-712) The court denied the motion (R712), and denied it again when defense counsel renewed it shortly thereafter. (R715-716)

Laura Christian had worked for Joyce Ezell off and on for five or six years, doing housework. (R727) She would go to Ezell's house when she called, which was approximately every other week, and work for four or five hours. (R727-728) Christian was supposed to work at Ezell's house on March 18, but she was ill, and asked her daughter, Sue Parker, to go in her place. (R726-727,731,734)

Parker arrived at Ezell's house between 8:15 and 8:30 a.m. (R735) She had worked there about three other times, and usually the garage door was open, and she entered through the garage. (R735-736) On that morning, however, the garage door was closed. (R736) Parker knocked on the door for about 10 minutes, but received no answer. (R735) She returned home and called her mother, who told Parker to go back and double check. (R731-732,736) When Parker went back at 9:00, the garage door was still closed, and she got no answer. (R736)

Joyce Ezell was supposed to attend a bridge luncheon at a country club at noon on March 18, 1987, but she did not show up. (R721,825) This prompted Rose Holman to telephone Ezell's neighbors, the Lakes, to ask them to go to Ezell's house and see if her car was in the garage. (R721) Robert Lake did so, and found that Ezell's Cadillac was not in the garage. (R722-724)

Holman also called Ezell's daughter, Marion Ezell Landau, who lived in Winter Haven. (R825,827) Landau called her brother in Winter Park and her mother's sister in Clearwater, but they had not talked to Joyce Ezell. (R827-828) After making those phone calls, Landau drove to Lake Wales, arriving at her mother's house at

approximately 6:00. (R828) The front door was closed. (R828) Landau unlocked it with her key and found her mother's body in the foyer, just inside the door. (R829) She "went screaming across the street," and eventually found a neighbor to call the police. (R829-830)

The police found no sign that Ezell's residence had been entered forcibly. (R700,703-704,852)

The overall appearance of the inside of the residence was very neat and clean, but each room of the house had been gone into and drawers pulled out. (R857-858) Items missing from the house included some of Ezell's silver serving pieces, a "lemon squeezer" pistol that was fired by squeezing its pearl handles, a collection of rare Canadian and American coins, a radio/cassette player, Ezell's purse and wallet, and some jewelry, including a ring that belonged to Ezell's late husband. (R815-817,822-823,832,870-871)

Law enforcement personnel obtained a number of fingerprints inside Ezell's residence. (R1029-1030,1045) Prints found on a silver and glass sugar dispenser and on a key tag attached to keys that were in a cedar chest in the guest bedroom matched the prints of Appellant. (R811-812,1031-1042,1091-1093,1097)

On March 19, 1987, Associate Medical Examiner D. Richard Jones performed an autopsy on Joyce Ezell at Lakeland Regional Medical Center. (R862,891-892,894) Ezell incurred a total of 21 stab wounds, mostly to the neck and back, none of which pierced any major organ or artery. (R859-896) The cause of death was bleeding from these wounds. (R895) Dr. Jones also noted a contusion, or

bruise, of the scalp, and some hemorrhage of the surface of the brain, indicating that there had perhaps been a blow to the head. (R903) There were also multiple additional recent abrasions and contusions. (R903-904) Ezell had been dead less than 24 hours at the time of the autopsy. (R904)

The same day the autopsy was performed on Joyce Ezell, her Cadillac was found in a sink hole at the rear of an orange grove in Lake Wales, less than five miles from Ezell's residence, and about one-half or three-quarters of a mile from where Appellant lived. (R791-792,815,863-865,868,878) The driver's seat of the car was pushed all the way back, as for someone tall. (R871) Joyce Ezell was five feet, one inch tall, and could not have driven the car at all with the seat in that position. (R871,895) The battery was dead, and the keys were still in the ignition. (R868,1099) It appeared that the car had been put in gear and allowed to roll. (R794-795,868) There was evidence the car had been occupied recently by three persons; there was dirt as if off shoes on the driver's side floorboard, passenger's side, and right rear floorboard. (R941-942) A bent Coke can was found and sent to the lab. (R942) There were coins in a paper bag on the floor of the car in front. (R869,1109) In the trunk were various silver serving pieces that belonged to Joyce Ezell. (R818-821,869,1100-1109)

Law enforcement personnel lifted 20 latent fingerprints from Ezell's Cadillac. (R1047-1048) A print found inside the car on the power window button on the driver's side matched Appellant's fingerprints. (R1047-1048) Appellant's prints were also found on

several items recovered from the Cadillac: a wood and silver serving tray, a silver and glass serving tray, a silver box, and a silver serving tray. (R1049-1053)

John Willis Johnson, whose nickname was "Bibby," had known Appellant for four to six years. (R743) On the morning of March 19, Appellant arrived at Johnson's house and asked him to take him to a pawn shop so that he could pawn a couple of items. (R745,777-778,929)[2] Appellant showed him a ring and an old pistol with pearl handles that was fired by squeezing it. (R746,777,783) Johnson agreed to take Appellant to the pawn shop in exchange for $5.00 in cash and $5.00 in gas. (R748) Johnson did not see Appellant with any money before they went to the pawn shop; after Appellant came out, he had about $40.00. (R749) Johnson later saw in the newspaper that Ezell had been killed. (R753) On April 2 Johnson assisted the Lake Wales police in recovering the man's gold ring with a ruby in it from the pawn shop, which was called Midas Collectibles. (R773-774,928-933) Joyce Ezell's son and two daughters identified the ring as having belonged to their father. (R933-934) The firearm was never recovered; the president of Midas Collectibles, Ronald Sullivan, testified that he did not buy a gun the day he bought the ring. (R800,802-803,936)

David Roberts had known Appellant for eight or nine years. (R975) He ran into Appellant in Lake Wales on Thursday night, March 19, when Appellant asked him for a ride home. (R976-977)

---

[2] Johnson admitted during his testimony at Appellant's trial that he was using cocaine in March of 1987, and that this could have affected his memory. (R771)

Both men lived in Highland Park Manor. (R977) Roberts noticed that Appellant had scratches around his eye that were "starting to scab up with blood, hard blood on them." (R977,985) Roberts asked him "who got hold to him." (R977) Appellant replied, "An old lady scratched me," which Roberts took to mean that Appellant had had a dispute with his girlfriend. (R978,985) During the ride home, Appellant "was saying some things containing a murder," but "he didn't come right out and say a murder." (R978-979) Appellant was saying things such as "they didn't intend to do it, they don't know why it happened." (R979)[3] Roberts "didn't pay [Appellant] no mind because he seemed like he was high or something." (R979) Appellant also pointed out an "aisle" in a grove right down the road from Highlands Park Manor and said that a car had gone down that aisle on Wednesday night. (R978-980) Appellant did not say he was in the car. (R979) Roberts had noticed a car that turned and went up and down that "aisle" on Wednesday night between 9:00 and 9:30. (R979) From the taillights, the car was a Cadillac. (R979) It seemed unusual to Roberts for a Cadillac to be driving pretty fast in that sort of sand. (R980) He did not see who was in the car or driving it. (R981)

Appellant was arrested at his mother's home on March 20 at approximately 2:00 a.m. (R875,907-908,952) The police asked Appellant's mother to give them the clothes Appellant had been wearing the day before, when Joyce Ezell was killed, and she gave them a

---

[3] On deposition Roberts had testified that Appellant did not mention anything at all about anyone being killed or anything like that. (R987)

locked suitcase. (R943,958-959) The clothing therein was sent to the Florida Department of Law Enforcement's Tampa Regional Crime Laboratory. (R943,997-998) A pair of Levi jeans labeled as belonging to Appellant failed to give any chemical indication for the presence of blood. (R1022)

Appellant was questioned during the early morning hours of March 20, 1987 at the Lake Wales Police Department by Charles Riley, a Polk County Sheriff's Deputy, and Ernest Stoudemire, a detective for the City of Lake Wales, both of whom were Appellant's uncles. (R912,944,951-953,961-963) Appellant's attitude was cooperative. (R963-964) He denied killing Joyce Ezell. (R954,964) Appellant explained that on March 18 he had caught a labor bus and gone east of Lake Wales on highway 60 where he planted watermelons all day. (R954-955,964) He did not remember the name of the person he worked for, but tried to describe him, and mentioned how much he was paid. (R957,964) As Riley and Stoudemire continued to question Appellant, he changed his story somewhat. (R965) He said he had gone to Mountain Lake early that morning [March 18] looking for a job, but was unable to find anything, and returned to babysit all day. (R965) Appellant denied that he was ever in Joyce Ezell's house or car. (R915,955-956) When he was being questioned about Ezell's death, Appellant was scared and crying. (R960) He said over and over that he did not kill her. (R960)

On March 23, 1987 Appellant sent a message from the Polk County Jail through a sheriff's deputy there that he wanted to speak with someone from the Lake Wales Police Department. (R915-

916,966,971-973) Detective Stoudemire responded along with Detective Farrel Hendrix. (R915-916,966) Appellant told them that the day before the Ezell homicide, he had come into contact with a black male who looked exactly like him. (R918,967-968) This subject showed Appellant an ice pick type of weapon and said he was going to rob Ezell. (R918,967-968) Appellant saw the same man the day after the homicide, and the subject made some comment to Appellant such as "well, did you hear what happened?" (R918) Appellant had known this person for three years, but was unable to give the police a name or address. (R918-919) The detectives were not aware of anyone in Lake Wales who looked exactly like Appellant. (R919,-968)

Appellant also told the police during the March 23 interview that he had seen Ezell at the Lake Wales Post Office the day before the homicide and had offered to go to her house and put up groceries. (R919) He went to her house, where she allowed him to put up groceries, and Appellant then went back to her car, locked it, and left. (R919) Appellant did not explain why he had not told the detectives this when he was arrested. (R919)

On March 26 Detective Hendrix recovered a knife from under a bed in the guestroom at Joyce Ezell's residence. (R832-837,922-926) It was a single-edged, lockblade pocketknife, which was consistent with the wounds incurred by Ezell. (R899-900,997-999) There was Type A human blood on the knife, the same type Joyce Ezell had. (R925-926,1001,1003-1004) The knife was checked for fingerprints, but none was found. (R1054-1055)

Finally, on April 10, 1987 a grove worker found a checkbook cover under a tree in the same grove into which Joyce Ezell's Cadillac had been driven and turned it over to Detective Hendrix. (R787-788,936-940) Inside the checkbook cover were credit cards in the name of Mrs. Lee C. Ezell. (R938) These items were found a few minutes' walking distance from Appellant's residence. (R940)

II. Penalty Phase

A. State's Case

At penalty phase, the State recalled Dr. Jones, the associate medical examiner who testified during the guilt phase regarding the results of the autopsy on Joyce Ezell. (R1295) Dr. Jones testified that the 21 stab wounds to Ezell ranged in depth to a maximum of approximately two inches, and in width to a maximum of approximately two to two and one-half centimeters, and would have caused pain. (R1295-1296) There was no single wound which, by itself, would have caused immediate death. (R1296) It was extremely difficult to know how long it took for Ezell to lose consciousness due to blood loss, but she may have remained conscious for 30 minutes to perhaps an hour or longer. (R1296)

In addition to the stab wounds, there was blunt trauma to the head. (R1297) It was unlikely this injury would have caused unconsciousness in this case, but it was possible. (R1298) Ezell could have gone into an immediate coma and stayed that way until she died. (R1298-1299)

B. Appellant's Case

Appellant's mother, Barbara Stoudemire, testified that Appellant was 25 years old. (R1300) He was given the nickname "Sweetman" when he was a little boy. (R1300) Appellant grew up mostly in Lake Wales, but the family lived in Connecticut for not quite a year. (R1300-1301) Appellant had four sisters, ranging in age from 17 to 28. (R1302)

Appellant's parents divorced in 1975 when Appellant was a little boy. (R1301-1302) His mother then married "Chaney" Stoudemire. (R1302) Appellant's natural father was deceased. (R1301)

In 1986 Appellant sustained a head injury when he was picking fruit and fell out of a tree. (R1303) He was taken to Haines City Hospital, where he was treated. (R1303) It was his mother's understanding that Appellant suffered "[k]ind of brain damage in his head," although she had not talked to his doctors. (R1303,1306-1307)

Appellant's older sister, Alma Sheppard, testified that Appellant received a head injury when he was picking fruit in an orange grove and fell off a ladder. (R1309-1310) Doctors at the emergency room in Haines City did tests and x-rays and released him. (R1310) Appellant did not remain in the hospital overnight. (R1314) Sheppard told her mother she thought that Appellant received some injuries when he fell and hit his head, because he "didn't act normal." (R1311) Appellant had always been quiet, but

he began acting as though he had to convince his family that he loved them. (R1311-1312)

On cross-examination the prosecutor asked Sheppard if Appellant had become involved in anything else that might have added to his change in behavior. (R1314) She responded, "I don't know. When you say involved in?" (R1314) The prosecutor then asked, "Well, isn't it true, Alma, that Henry became involved in cocaine back about the same time?" (R1314) Sheppard answered, "I cannot answer that because I don't know." (R1314) Appellant objected and moved for a mistrial, arguing that the State had raised an inflammatory matter with no evidentiary foundation. (R1314-1317,1319-1327) The court ruled that the State had a good-faith basis for asking the question, and refused to grant a mistrial. (R1327)

Appellant's third penalty phase witness was Dr. Henry L. Dee, a clinical psychologist with a subspecialty in clinical neuro-psychology. (R1327-1328) From 1968-1973 Dr. Dee was the senior consultant for head injury to the Veteran's Administration for the midwestern region of the United States. (R1329) He had examined and treated thousands of patients in the field of neuropsychology and with head injuries. (R1329)

Dr. Dee examined Appellant on two occasions. (R1332) The first was on January 4, 1988, when the issues were competency to stand trial and mental state at the time of the offense. (R1332-1333,1363)

Dr. Dee took a history from Appellant, reviewed various records, and administered a battery of tests. (R1333,1337) In addition to the fall from the tree in November, 1986, Appellant's history included being attacked, kicked in the forehead, and struck on the head with brass knuckles. (R1333)

When Appellant was released from Heart of Florida Hospital after the fall, he was put on medication, apparently Dilantin, an antiseizure medication. (R1334) When Appellant ran out of the medicine, he started having seizures until he began taking it again. (R1334-1335) However, when Dr. Dee saw Appellant, he was in jail and not taking medication, but the jail record did not show any seizure activity. (R1335)

Appellant went to a neurologist, Dr. Rubin, a month after Appellant fell out of the tree, because he was continuing to have problems with his vision. (R1333-1334) Dr. Rubin did a normal neurological examination, CAT scan, and plain films, and found no observable neurological deficit in Appellant. (R1365)

Appellant reported to Dr. Dee that he was continuing to have headaches and blurred vision after the fall; the jail medical records reflected complaints about blurred vision. (R1345-1346)

On the Wechsler Adult Intelligence Scale Dr. Dee gave Appellant in January, Appellant had a full scale score of 80, which placed Appellant at about the ninth percentile of the general adult population. (R1337-1339) This did not show any sort of mental retardation, and was not out of line with other people who were incarcerated. (R1339,1371)

Appellant's performance on the Denman Neuropsychology Memory Scale yielded a full scale memory quotient of zero, indicating that Appellant's memory was terribly impaired. (R1339-1340) Appellant also had grave difficulties with other tests on which patients with brain lesions, particularly in the left hemisphere, very frequently have problems. (R1340-1342) Appellant had difficulty understanding what was said to him, and with thinking of what he wanted to say. (R1345) He was grossly defective on some other tests administered by Dr. Dee. (R1346)

Appellant told Dr. Dee he could recall nothing about the day in question. (R1343-1344) At one point he told Dr. Dee he thought he was picking melons that day. (R1343) At another point he said he was babysitting. (R1343-1344) These stories turned out not to be true, and Appellant said he just did not know what he was doing. (R1344) Appellant's sisters volunteered to Dr. Dee that after falling out of the tree, Appellant had consistently told different versions of stories within a few minutes of each other, a symptom normally called confabulation. (R1344)

Appellant told Dr. Dee that after the accident he had become lost a number of times while walking in familiar places, and was very forgetful. (R1345) Sometimes the things he forgot would come back to him and sometimes they would not. (R1345)

Due to Appellant's difficulties with mental functioning and memory, Dr. Dee concluded in January, 1988 that he was not competent to stand trial. (R1346-1347) Appellant was seen by other doctors, who agreed that he was not competent, and he was sent to

Florida State Hospital, where the doctors prescribed Thorazine, an antipsychotic medication, and Tegretol, an antiseizure medication. (R1336-1337)

Dr. Dee saw Appellant for the second time in April, 1989 when he returned from the State Hospital. (R1347) The examiners there felt that Appellant was then competent. (R1347)

Dr. Dee used the same test instruments as before. (R1347) Appellant's performance on the Wechsler battery of tests was basically unchanged. (R1348) His full scale IQ was exactly the same, 80. (R1348) Appellant showed remarkable improvement on the Denman Neuropsychology Memory Scale. (R1348,1353-1354) However, Appellant continued to have verbal difficulties, and his performance on some of the other tests continued to be grossly defective. (R1352-1354)

The medication Appellant was on should have improved his performance on the tests Dr. Dee administered. (R1353)

When Appellant returned from the hospital, he was very clear about his charges and the criteria used in determining competence to stand trial. (R1348-1349) Appellant told Dr. Dee that his memory was significantly better, and he could recall some things during the time he was supposed to have committed the murder. (R1349) He told Dr. Dee that on the day in question, he was going to load watermelons, but his ride never materialized. (R1349) Appellant encountered Henry "Bibby" Johnson and Reginald "Red" Sheppard, who were smoking crack cocaine. (R1349) They gave Appellant a ride to Joyce Ezell's house so that Appellant could ask

if she had any yard work for him to do. (R1349-1350) Ezell showed Appellant some things she wanted done, and he went around to the back of her house. (R1350) He came back around front to get some fertilizer and tools and noticed that the garage was closed, which was most unusual when he was working there. (R1350) He knocked on the door four or five times. (R1350) Receiving no response, Appellant pushed the door open and found Ezell on the floor. (R1350) Bibby was on one side of her, and Red was on the other with a pocketknife in his hand. (R1350) Appellant bent down and touched Ezell's face because she was bleeding, whereupon Bibby grabbed him. (R1351) Appellant panicked; he did not know what to do. (R1351) All of them started plundering the house. (R1351) Bibby began handing silverware to Appellant to put in the trunk of the car. (R1351) Appellant was crying and did not know what to do; he was scared of the others. (R1351) They told him to get in the car, said if he told anyone they would kill his mother, made various violent threats. (R1351) Appellant was forced to drive Ezell's car a few blocks, and then he jumped out at the first opportunity and went to his girlfriend's house and slept the rest of the day. (R1351,1375) Later he saw Red and Bibby still smoking rock, but avoided them in order to go home. (R1351) Bibby's sister, Viola Johnson, called Appellant's mother that night and told her that Red had come to her home with blood all over him and on his shoes. (R1351) The clothes she described were the same clothes Appellant had seen Red in earlier. (R1351)

Dr. Dee felt that there was probably some malingering when he first saw Appellant, but the second time Appellant was trying as hard as he could on the tests. (R1354-1355,1376) He was eager to proceed to trial and did not want to be found incompetent. (R1354-1355) When Dr. Dee first saw Appellant on January 4, 1988, he was supposed to go to trial that week, which added to his distress. (R1363)

Because of Appellant's performance on the tests, Dr. Dee opined that he had brain damage. (R1355) His diagnosis was organic brain syndrome with mixed features or organic personality syndrome. (R1359) He did not believe Appellant had ever been psychotic. (R1370)

Besides general mental dysfunction, the two most common effects of cerebral damage are memory problems and increased impulsivity, which would make it more difficult for Appellant to mold his conduct according to codes of law. (R1356) Dr. Dee concluded that Appellant was under the influence of extreme mental or emotional disturbance in March, 1987, and his capacity to conform his conduct to the requirements of law was substantially impaired. (R1356-1357) However, Dr. Dee did not believe Appellant's capacity to appreciate the criminality of his conduct was substantially impaired, and had no opinion as to whether or not Appellant acted under emotional duress or the substantial domination of another person. (R1356-1357)

The fourth and final witness for the defense at penalty phase was Thomas McClain, a physician specializing in psychiatry. (R1384)

He first examined Appellant on April 22, 1988 for one and two-thirds hours, following which he concluded that he was not competent to proceed to trial. (R1388) He next saw Appellant on April 6, 1989 for one hour, and found him competent to proceed. (R1388) Finally, on November 20, 1989, Dr. McClain examined Appellant for one and three-quarters hours to reassess his mental state at the time of the offense and to assess any mitigating circumstances that might be present. (R1388-1389)

Dr. McClain also interviewed two of Appellant's sisters by telephone. (R1392) Alma Sheppard told him she had never seen or heard of Appellant having a seizure of any kind (R1409-1410), but both sisters referred to Appellant's personality change after he fell out of the orange tree. (R1392) One sister said it was like two different persons. (R1392) Appellant was still quiet much of the time, but sometimes he would appear to be in a daze, and sometimes he would be irritable. (R1392)

The history Appellant gave to Dr. McClain in April, 1988 included two head injuries which Appellant had apparently not mentioned to the other mental health professionals, a football injury which resulted in Appellant having to be carried from the field, and an incident in August, 1984 when Appellant was kicked in the head. (R1405-1406)

During the first and second interviews, Appellant said he did not have any recollection of the crime. (R1389,1406-1407) During the last interview, Appellant gave Dr. McClain the same version Dr. Dee recounted in his testimony. (R1389)

Dr. McClain did not believe Appellant suffered from a psychosis, although it was possible. (R1408) The last time the doctor saw him, Appellant said he saw little men three feet tall from time to time, but this kind of thing occurred much more often in malingered hallucinations than actual ones. (R1409)

Dr. McClain agreed with Dr. Dee's testimony. (R1397-1398)

Appellant's brain damage led to a cluster of behavioral characteristics, including acting on impulse, not thinking things through. (R1401) Dr. McClain concluded that at the time of the offense, Appellant was under the influence of extreme mental or emotional disturbance, and his ability to conform his conduct to the requirements of law was substantially diminished. (R1397,1401) Appellant's capacity to appreciate the criminality of his conduct might be slightly diminished, but not grossly so. (R1401) Dr. McClain did not really have an opinion as to whether Appellant acted under duress or the substantial domination of another person at the time of the offense, but there was evidence to indicate that Appellant would be more likely to come under the influence of another than the average person, and it was consistent with the medical data of Dr. McClain's examination that if Appellant's version of events was true or roughly true, he could have acted under the substantial domination of another person. (R1398-1399)

C. State's Rebuttal

Dr. Lynn Westby was the State's first rebuttal witness. (R1425) She was a senior supervising psychologist at Florida State

Hospital in Chattahoochee from 1985 through 1989. (R1427-1428) She was on the admission ward when Appellant arrived at the hospital as incompetent to stand trial in July, 1988, and saw him almost daily during his eight or nine month stay there. (R1429-1430)

It was hard to say how Appellant was doing when he arrived at the hospital. (R1430-1431) He said he could not remember much of anything. (R1430-1431) He did not remember having any charges, and so he did not know why he would be at a hospital. (R1430-1431) He could not provide a very good history. (R1431)

Appellant was complaining about little people chasing him around making threats, and he was afraid other people were talking about him all the time and were going to hurt him, and he constantly had to be guard against that. (R1432) Hospital personnel were not sure about brain damage when Appellant arrived there because of the things he was reporting. (R1433) The initial diagnosis of Dr. Phillips, a psychiatrist, was schizophrenia, paranoid type, mental retardation unspecified, chronic substance abuse, marijuana, and borderline personality disorder with antisocial and dependent traits. (R1448-1449)

Fred Vroom, a medical doctor, at the hospital, examined Appellant on August 25, 1988 and administered an EEG, which was abnormal due to mild to moderate dysrhythmia. (R1450-1451) The results of the EEG "collaborated with" a seizure disorder. (R1452)

On September 13, 1988 another medical doctor W.C. Colar, saw Appellant, and concluded that his history and EEG were consistent with an underlying convulsive disorder. (R1454-1455)

Appellant was put on Tegretol and 800 milligrams per day of Thorazine, which was later reduced to 400 milligrams. (R1455-1457)

On December 8, 1988 Dr. Westby wrote a report in which she concluded that Appellant remained incompetent for trial. (R1460-1461) He still denied any memory of his actions, was still saying he did not know what he was charged with or what the penalties were, he was not going to confer with an attorney, and was going to attack the judge if he was convicted. (R1461)

Dr. Westby ultimately concluded that Appellant was malingering, fabricating symptoms and memory deficits to keep from having to go to trial. (R1439) Dr. Westby testified that she never formed any diagnosis of Appellant having suffered from any kind of psychosis, nor did the hospital personnel ever develop any kind of evidence that Appellant suffered from organic brain damage. (R1432,1438) His history of head injuries was not significant. (R1440) School records did not bear out his family's statements that Appellant had been having memory problems since age five. (R1440) A doctor-level intern from Florida State University administered psychological tests to Appellant of the same type discussed by Dr. Dee (but not the Denman). (R1434-1435,1458-1459) None of the tests indicated to Dr. Westby that Appellant had any sort of brain damage; he did fine on tests about which Dr. Dee had testified on which Appellant was below one per cent. (R1435) Hospital personnel compared the results of their neuropsychological tests with the ones done by the community evaluators before Appellant was admitted to Florida State Hospital and could not find any

consistency in the deficits Appellant presented, no coherent clinical pattern to indicate any kind of known brain syndrome. (R1438-1439)

Appellant also gravitated toward the higher functioning patients and stayed with them the whole time he was at the hospital. (R1435-1436) This was significant because patients of like levels of functioning associated with one another. (R1436) There were quite a few incidents in which Appellant displayed aggressive behavior against lower-functioning patients. (R1438) Dr. Westby never observed in Appellant behaviors typical of lower-functioning patients. (R1436-1437)

Toward the end of his stay at the hospital, Appellant's memory improved to the point that he could say what he was accused of and what his charges were. (R1437)

Hospital personnel intended to take Appellant off Tegretol and Thorazine after they "decided there was really nothing wrong with" Appellant, but did not get around to it before he was discharged. (R1455-1456)

Dr. Mark Zwingelberg was a clinical psychologist who had met with Appellant on four occasions. (R1464,1470-1471) On April 8, 1988 he saw Appellant for approximately two hours. (R1471-1472) This interview suggested either strong evidence of psychosis or organic brain dysfunction or possible malingering. (R1472-1473) On April 25, 1988 Dr. Zwingelberg administered a second clinical interview, lasting approximately one hour, and two and one-half hours of individual psychological testing. (R1472) Appellant was

very dysfunctional and psychologically decompensated, which could have been the result of organic brain dysfunction of some sort, or possibly psychosis such as a paranoid schizophrenia. (R1473-1475) Appellant talked to the doctor about little men shooting arrows at him and people talking about him or being out to hurt him. (R1484) He displayed some evidence of depression. (R1475) Appellant denied any memory of the events for which he was charged, and denied any memory of having stolen or pawned anything. (R1476) Appellant believed he was not near the victim's house on the day she was killed, but was unable to give any other explanation of that. (R1476) Dr. Zwingelberg recommended to the court that Appellant go to the state hospital. (R1475-1476) In a report he wrote in May, 1988, before Appellant went to the hospital, Dr. Zwingelberg stated that the results of his testing and interviews strongly suggested that Appellant displayed significant mental illness, displayed characteristics of an organic personality disorder and/or schizophrenia of a paranoid type. (R1500-1503)

When Dr. Zwingelberg next saw Appellant, on April 7, 1989, he was managed on Thorazine and Tegretol, and many functions he had had difficulty with a year earlier had returned. (R1476,1480) This fact was more suggestive of a psychotic episode or malingering than organic brain dysfunction or brain loss. (R1480) Appellant initially stated that he still had amnesia for the events of the day in question, but when Dr. Zwingelberg told him that lack of recall was not necessarily going to help him in court, Appellant said he did recall some things happening to him, and related

essentially the same story he told Dr. Dee and Dr. McClain about going to Joyce Ezell's house with two other people. (R1477-1478)

Dr. Zwingelberg last saw Appellant on November 20, 1989 to evaluate him with regard to sanity at the time of the offense, mental status at the time of the offense, and possible mitigating factors. (R1479)

Some later testing done on Appellant was sort of inconsistent with earlier tests that had shown the possibility of brain damage. (R1482-1483)

Dr. Zwingelberg ultimately concluded that there was a malingering aspect to Appellant's performance, but that he did suffer from an antisocial personality disorder. (R1487-1488) During periods of stress Appellant had the potential and ability to decompensate and display some behavioral deficits as a result of either brain damage, psychosis, or transient psychosis, most likely the latter, resulting from very strong levels of stress. (R1488-1489) Dr. Zwingelberg did not believe Appellant was significantly brain damaged, but there were likely to be some minor deficits, some brain damage, as a result of a seizure disorder or some other cause. (R1490-1491,1500-1501)

III. Sentencing Hearing

When Appellant appeared before the court for sentencing on January 12, 1990, Judge Strickland asked him if he had anything to say before the court proceeded with sentencing. (R1672) Appellant

said that he was an innocent man, and he wanted the Ezell family to know that he was an innocent man. (R1672)

The court had prepared his order sentencing Appellant to death in advance of the hearing, and distributed copies to counsel for Appellant and counsel for the State. (R1668) The court did not read his sentencing order into the record, or announce specifically what he had found in aggravation and mitigation, but stated his conclusion that sufficient aggravating circumstances existed, and that there were insufficient mitigating circumstances to outweigh them, and sentenced Appellant to death. (R1673)

SUMMARY OF THE ARGUMENT

I. At the guilt phase of Appellant's trial, State witness Harold Brown told the jury that he had viewed a number of photographs at the police station, and then was shown a photopack by the prosecutor which contained Appellant's picture. The suggestion was raised that Appellant had a record and was known to the police, because they had his picture, thus prejudicing Appellant in the eyes of the jury. There was no need for any testimony concerning Brown's out-of-court identification of Appellant, as he was able to identify him in court.

When the prosecutor was cross-examining Appellant's sister during the penalty phase, he suggested that Appellant had been using cocaine at about the same period of time when Appellant fell from an orange tree and sustained a head injury. The prosecutor lacked a good-faith basis for raising this issue with Alma Sheppard, and hearing about this irrelevant and inflammatory collateral matter could only have caused the jurors to look unfavorably upon Appellant's bid for a sentence less than death.

II. During his penalty phase argument to the jury, the prosecutor suggested that the jurors take back with them to the jury room the knife that was found in Joyce Ezell's house and "look at it and think about what it would feel like if it went two inches into your neck." This was a highly inflammatory "Golden Rule" argument, which has been universally condemned by Florida courts. The trial court should have granted Appellant's motion for mistrial following the improper argument, or at the very least have given a

curative instruction in an attempt to dissipate the sinister influence the prosecutor's remarks necessarily had on Appellant's jury.

III. Contrary to what the trial court seemed to think, the mere fact that Appellant and Joyce Ezell were acquainted with one another was not enough to support the aggravating circumstance that the homicide was committed for the purpose of avoiding or preventing a lawful arrest. Furthermore, there was evidence to suggest that Ezell's killing may have resulted from a robbery that went bad, which would negate a finding of this aggravating circumstance.

IV. The evidence presented below is susceptible to the interpretation that Joyce Ezell may have been unconscious when the fatal stab wounds were administered, which would negate the trial court's finding that her killing was especially wicked, evil, atrocious and cruel.

V. Resentencing is required because the findings of the court below as to mitigating circumstances are not sufficiently clear to enable this Court to review Appellant's sentence of death. One cannot ascertain specifically what the court actually found to constitute mitigating circumstances, nor did the court assign any particular weight to the mitigating factors that exist.

ARGUMENT

ISSUE I

APPELLANT WAS DEPRIVED OF A FAIR TRIAL BY THE STATE'S INJECTION INTO THE PROCEEDINGS BELOW OF SUGGESTIONS THAT APPELLANT HAD BEEN INVOLVED IN OTHER CRIMINAL ACTIVITIES APART FROM THE OFFENSES FOR WHICH HE WAS BEING TRIED.

At least twice during Appellant's trial, once in guilt phase and once in penalty phase, the prosecutor below put before the jury that convicted Appellant and recommended that he die in the electric chair the prospect that Appellant had been involved in criminal activities apart from those for which he was on trial.

A. Guilt Phase

The State's third witness at guilt phase, Harold Brown, testified that he had seen a black man, whom he subsequently identified as Appellant, go up to Joyce Ezell's door on the morning of March 18, 1987. (R705-712) Before he identified Appellant in court as the man he had seen, Brown testified that he went to the police station and went through several books and selected several pictures that were similar to the man he saw. (R710) The prosecutor then showed Brown State's Exhibit Number 62 and asked him if he had ever seen that folder before. (R710) Appellant immediately objected and moved for a mistrial because the pictures therein were "mug shots" and implied that Appellant had a record and was known to the police because they had his photograph. (R710-712) Defense counsel

also pointed out that the photos were unnecessary if Brown could identify Appellant in court (which he did). (R710-712) The court denied the motion for mistrial. (R712) Brown then referred to going through "two thick books" of photographs at the police station and being asked to pick out "features and resemblance." (R712) He then identified Appellant as the man he saw at Joyce Ezell's house. (R712) Appellant subsequently renewed his motion for mistrial because Brown had said again that he looked at photographs, and the prosecutor "paraded" the photopack in front of the jury. (R715-716) Again, the court denied the motion (R716), but he later indicated that the photopack lacked probative value in light of Brown's in-court identification of Appellant. (R737-741) Later during the State's case, Detective Farrel Hendrix testified that Brown had picked out photograph number six, that of defendant, from the six-picture photopack, and State's Exhibit Number 62 was admitted into evidence over defense objection. (R920-922)

As defense counsel noted, Brown's testimony regarding his viewing of pictures at the police station suggested to the jury that Appellant had been arrested before; otherwise, why would the police have his picture?

> Evidence of collateral crimes, wrongs, or acts committed by the defendant is admissible if it is relevant to a material fact in issue; such evidence is not admissible where its sole relevance is to prove the character or propensity of the accused. §90.404(2)(a), Fla. Stat. (1987);[4] Castro v. State, 547 So.2d

[4] Pursuant to section 90.404(2)(b)1., when the State intends to introduce evidence of collateral wrongdoing allegedly committed (continued...)

111, 114-15 (Fla. 1989); Williams v. State, 110 So.2d 654 (Fla.), cert.denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

Czubak v. State, 570 So.2d 925, 928 (Fla. 1990). Clearly, that Appellant may have been arrested before was not relevant to any material fact in issue at his trial.

Although Brown's testimony did not directly state that Appellant had a prior record, innuendo or insinuation of additional criminal activity is sufficiently prejudicial to require reversal. In Messer v. State, 120 Fla. 95, 162 So. 146 (1935), this Court reversed the conviction where the prosecutor interjected during cross-examination

> veiled innuendoes and suggestions of general criminality calculated to . . . inspire the belief on the jury's part that, regardless of the merits of the particular case being tried, the accused should be found guilty because of his being generally suspected of other offenses.

162 So. at 147. Other decisions by Florida courts to the same effect include Von Carter v. State, 468 So.2d 276 (Fla. 1st DCA 1985)(reference to scar on defendant's neck to insinuate that he had been involved in a knife fight) and Thorpe v. State, 350 So.2d 552 (Fla. 1st DCA 1977)(reference to prior accusation of crime where no conviction was obtained).

Furthermore, introduction of police photographs of suspects has itself been held to constitute error. In D'Anna v. State, 453

---

[4](...continued)
by the defendant, it must provide him with written notice of same at least 10 days before trial. The record does not reflect that Appellant was provided with the required notice.

So.2d 151, 152 (Fla. 1st DCA 1984) the court observed:

> The law is, of course, clear that the admission into evidence, or even the mere mention, of "mug shots" constitutes error. Whitehead v. State, 279 So.2d 99 (Fla. 2d DCA 1973); Mancebo v. State, 350 So.2d 1098 (Fla. 3d DCA 1977); Houston v. State, 360 So.2d 468 (Fla. 3d DCA 1978). This is so because "an accused's right to a fair and impartial jury is violated when the jury is improperly made aware of [a] defendant's arrest for unrelated crimes . . . " Duncan v. State, 450 So.2d 242, 245 (Fla. 1st DCA 1984).

The admission of the highly prejudicial insinuation that Appellant was known to the police must lead to reversal of his convictions. In Dixon v. State, 426 So.2d 1258, 1259 (Fla. 2d DCA 1983), the court wrote:

> The admission of evidence of an accused's prior arrests is ordinarily deemed so prejudicial that it automatically requires reversal of his conviction.

Similarly, in Nickels v. State, 90 Fla. 659, 106 So. 479,488 (Fla. 1925) this Court stated that it is generally "harmful error to admit evidence of other or collateral crimes independent of and unconnected with the crime for which the defendant is on trial." And more recently the Court has stated that erroneous admission of irrelevant collateral crimes evidence "is presumed harmful because of the danger that the jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So.2d 903, 908 (Fla. 1981). Accord: Keen v. State, 504 So.2d 397, 401 (Fla. 1987); Peek v. State, 488 So.2d 52, 56 (Fla. 1986). It is not enough to show that the evidence against a defendant was overwhelming. Error is

harmless only "if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error" Ciccarelli v. State, 531 So.2d 129, 132 (Fla. 1988)(emphasis supplied), a standard which the State cannot meet in the instant case.

The improper references during Brown's testimony undermine confidence in the reliability of Appellant's convictions, in violation of constitutional principles of due process of law. Amend. XIV, U.S. Const.; Art. I, §9, Fla. Const. Appellant's death sentence, predicated upon an unreliable conviction, subjects him to cruel and unusual punishment. Amend VIII, U. S. Const.; Art. I, §17, Fla. Const. Furthermore, the jury may have been influenced in returning their death recommendation by the improper references during the guilt phase, thus tainting the recommendation itself. See Castro v. State, 547 So.2d 111 (Fla. 1989).

B. Penalty Phase

Appellant's second witness at penalty phase was his older sister, Alma Sheppard, who testified concerning Appellant's head injury and the changes in his behavior resulting therefrom. (R1307-1312) On cross-examination the prosecutor asked Sheppard if there was anything else Appellant had become involved in that she thought might have added to his behavior change. (R1314) Sheppard answered, "I don't know. When you say involved in?" (R1314) The prosecutor then asked if it wasn't true that Appellant became involved in cocaine back about the same time. (R1314) Sheppard replied that she could not answer that because she didn't know. (R1314) Appel-

lant immediately objected and moved for a mistrial, citing the inflammatory matters raised by the State which had no foundation in the evidence. (R1314-1317) The prosecutor argued that he had a good-faith basis for asking the question because Appellant was known to the law enforcement community as a person who used cocaine, and cocaine was found in Joyce Ezell's car. (R1319-1327) The court accepted the State's assertions that the question was asked in good faith, and denied Appellant's mistrial motion. (R1327)

The record fails to support either of the prosecutor's representations. There is no evidence that anyone in law enforcement viewed Appellant as a cocaine user, and no evidence that cocaine was found in Ezell's Cadillac.[5] Furthermore, even if everything the prosecutor said was true, he did not even argue that he had a good-faith basis for believing that the witness had knowledge of her brother's cocaine use. Without a basis in fact, the questions should not have been asked; it only served to mislead the jury. Rhodes v. State, 547 So.2d 1201, 1205 (Fla. 1989).

Whether Appellant had used cocaine was irrelevant in the absence of any expert or other testimony concerning how cocaine might have affected him. Even assuming, arguendo, that the matter had some relevance, it was far outweighed by the danger of unduly prejudicing Appellant in the eyes of the jury and confusing the issue they were called upon to decide. §90.403, Fla. Stat. (1989).

---

[5] A bent Coke can was found in the car and sent to the lab (R942), but there was no testimony that the can contained cocaine.

This Court has recognized that interjecting into the penalty phase of a capital trial the suggestion that the accused has committed other irrelevant crimes (in this case, possession of cocaine) may be just as prejudicial as raising such a suggestion during the guilt phase. (Please see cases cited in Part A. above) In Robinson v. State, 487 So.2d 1040 (Fla. 1986) the Court granted a new sentencing proceeding, in part because of the State's improper cross-examination of two defense penalty phase witnesses who testified that Robinson was a good-hearted person and a good worker. The prosecutor asked these witnesses about two crimes that Robinson had not even been charged with that occurred after the murder for which he was on trial. This Court observed that "[h]earing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too far in this instance." 487 So.2d at 1042. Here too the State went too far in its zeal to obtain a death recommendation, violating Appellant's right to a fair sentencing proceeding. Amends. VIII, XIV, U.S. Const.; Art. I, §§9, 16, 17, and 22, Fla. Const. The jury's death recommendation was tainted, and Appellant's death sentence, predicated in part on a tainted jury recommendation, must be vacated.

ISSUE II

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AND FAILING EVEN TO GIVE A CURATIVE INSTRUCTION AFTER THE PROSECUTOR MADE A HIGHLY INFLAMMATORY GOLDEN RULE ARGUMENT WHICH TAINTED THE PENALTY RECOMMENDATION OF THE JURY.

Near the end of his argument to the jury at the penalty phase of Appellant's trial, the prosecutor below remarked as follows (R1558):

> Now I'm only going to ask that certain items be sent back with you, but you should feel free to request any of the evidence if you think that it is necessary. I don't even think you need the knife, you know what it looks like. But it might not be a bad idea to look at it and think about what it would feel like if it went two inches into your neck. But I am going to ask----

Defense counsel thereupon interposed an objection that the State's argument was "inflammatory and improper," which the court sustained. (R1558) As soon as the prosecutor completed his argument, counsel for Appellant moved the court for a mistrial, or, in the alternative, for a curative instruction, citing the prosecutor's Golden Rule argument, which was "inflammatory," and had tainted the proceeding. (R1559-1565) Counsel urged a mistrial as the more appropriate remedy, because a curative instruction for the jury to disregard the improper comment would be insufficient to cure the taint. (R1536-1564) The court initially indicated that he was going to instruct the jury that they were "to disregard the prosecutor's observation about how it would feel to them in terms of putting themselves in relationship to the victim." but thought

better of it after the prosecutor mentioned that an instruction would only serve to "highlight" his remark, and elected not to give any type of curative instruction. (R1563-1565) Appellant raised the Golden Rule violation again in his motion for new trial, which the court denied. (R1667)

The argument of the prosecutor at Appellant's penalty trial presents a classic example of the Golden Rule argument, in which the jurors are invited to place themselves in the position of the victim, which has been universally condemned by the courts of this State as violative of the defendant's right to a fair trial by impartial jurors. E.g., Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Bertolotti v. State, 476 So.2d 130 (Fla. 1985); State v. Wheeler, 468 So.2d 978 (Fla. 1985); Adams v. State, 192 So.2d 762 (Fla. 1966); Barnes v. State, 58 So.2d 157 (Fla. 1952); Bullard v. State, 436 So.2d 962 (Fla. 3d DCA 1983); Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979); Lucas v. State, 335 So.2d 566 (Fla. 1st DCA 1976). The prosecutor's remarks suggested that the jurors should themselves take the murder weapon in hand and relive vicariously the pain that Joyce Ezell must have felt when she was stabbed. Such inflammatory comments may well have persuaded a number of the jurors to vote for death. After all, this was not the most aggravated of murders, such as where torture or a prolonged ordeal is involved, but was a rather common homicide committed during the course of a robbery, and so the offending remarks could have had an effect on the outcome of the penalty proceedings. In Teffeteller v. State, 439 So.2d 840 (Fla. 1983) this Court noted that in death

penalty cases, the only safe rule is that the sentence must be reversed unless this Court can determine from the record that the improper remarks of the prosecutor did not prejudice the accused.[6] Here, as in Teffeteller, this Court "cannot determine that the needless and inflammatory comments by the prosecutor did not substantially contribute to the jury's advisory recommendation of death during the sentencing phase." 439 So.2d at 845. The failure of the trial court to take any remedial action to offset the harm done by the State's improper argument hopelessly tainted the jury's death recommendation. Appellant's death sentence, predicated as it is in part on the tainted penalty recommendation, is unreliable, and cannot stand without violating constitutional principles of due process of law and subjecting Appellant to cruel and unusual punishment. Art. I, §§ 9, 17, and 22, Fla. Const. Amends. VIII and XIV, U.S. Const. Appellant's sentence of death must be vacated, and this cause remanded to the lower court for a new penalty proceeding before a new jury.

---

[6] But see Bertolotti.

ISSUE III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON, AND FINDING THE EXISTENCE OF, THE AGGRAVATING CIRCUMSTANCE THAT THE INSTANT HOMICIDE WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

During the penalty phase jury charge conference, counsel for Appellant objected to the court instructing the jury that they could consider in aggravation that the crime was committed for the purpose of avoiding or preventing a lawful arrest, due to the lack of evidentiary support for this circumstance. (R1510-1514) However, the court overruled the objection "because there [was] evidence to support the proposition that the victim was acquainted with the defendant," and did instruct the jury on this aggravator. (R1514,1591)

The court similarly found that the section 921.141(5)(e) aggravating factor had been established in his written "Findings of Fact," as follows (R1636):

> 2. As an aggravating circumstance, the First Degree Murder for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest. it was shown the victim and the Defendant were acquainted with each other, and that she therefore, unless prevented from doing so, could specifically identify the Defendant as the person who burglarized her home and robbed her of her possessions. The Court therefore finds that one of the Defendant's motives for killing the victim was to prevent his identification.

The mere fact that Appellant and Joyce Ezell were acquainted with each other was not enough to support application of this

aggravator. As this Court stated in Bruno v. State, 574 So.2d 76, 81-82 (Fla. 1991): "Standing alone, the fact that the victim could identify the murderer does not prove beyond a reasonable doubt that the elimination of a witness was a dominant motive for the killing. [Citation omitted.]" See also Perry v. State, 522 So.2d 817 (Fla. 1988); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Caruthers v. State, 465 So.2d 496 (Fla. 1985). The record does not reveal any additional evidence that could justify a finding of this aggravator. On the contrary, several pieces of evidence suggest that the instant homicide perhaps resulted from a robbery that got out of hand. David Roberts testified that on the night after Joyce Ezell's body was found, Appellant had scratches around his eye. (R977,985) When asked about these, Appellant said that an old lady had scratched him. (R978) Ezell may well have been dispatched with 21 stab wounds after she resisted being robbed and scratched the perpetrator, causing an enraged reaction. If so, the aggravating factor found in section 921.141(5)(e) is inapplicable, as in Hansbrough, in which this Court stated:

> Instead of an intended witness elimination murder, it is more likely that this robbery simply got out of hand, as indicated by Hansbrough's stabbing the victim more than thirty times in an apparent frenzy.

509 So.2d at 1086.

In order to establish the aggravating circumstance in question where, as here, the victim was not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very

strong. Caruthers; Bates v. State, 465 So.2d 490 (Fla. 1985); Riley v. State, 366 So.2d 19 (Fla. 1978); Menendez v. State, 368 So.2d 1278 (Fla. 1979). In fact, there must be proof beyond a reasonable doubt that the dominant or only motive for the killing was the elimination of a witness. Perry; Floyd; Rogers v. State, 511 So.2d 526 (Fla. 1987); Doyle v. State, 460 So.2d 353 (Fla. 1984); Oats v. State, 446 So.2d 90 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla. 1983). That proof was not forthcoming in the proceedings below. Indeed, even the trial court did not find that the dominant or only motive for Joyce Ezell's killing was to avoid or prevent arrest; he found this to be only "one" of the motives for the homicide. (R1636)

The aggravating circumstance at issue did not deserve any part in the jury's deliberations, and should not have been factored into the sentencing weighing process by the court below.

ISSUE IV

THE COURT BELOW ERRED IN INSTRUCTING THE JURY ON, AND FINDING THE EXISTENCE OF, THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER HEREIN WAS ESPECIALLY WICKED, EVIL, ATROCIOUS AND CRUEL.

Over objection, the court below instructed Appellant's jury at penalty phase that they could consider in aggravation that Joyce Ezell's killing was especially wicked, evil, atrocious or cruel. (R1514-1515,1592)

The court likewise found this circumstance to exist in his written "Findings of Fact," in which he wrote (R1636):

> 4. As an aggravating circumstance, the First Degree Murder committed was especially wicked, evil, atrocious and cruel. The proof demonstrates the victim was a 73 year old, 120 pound, 5 foot tall female who was stabbed 21 times. Further, it established that no one or combination of stab wounds killed the victim, but that she bled to death. While dying, she would have experienced conscious pain, and that her death could have taken up to an hour. The Court concludes from these facts that the Defendant's actions were extremely wicked and vile, and were designed to inflict a high degree of pain, utterly indifferent to the suffering of the victim and pitiless.

The main problem with this finding is that it ignores evidence that Joyce Ezell may well have been unconscious when she was stabbed, and hence unable to experience any pain that may have been inflicted by the knife. Dr. Jones testified at penalty phase that it was possible that the blunt trauma to Ezell's head could have caused her to become unconscious, although it was unlikely. (R1298) He also stated that it was possible for someone who received the

injuries Ezell received to go into immediate unconsciousness, and that she could have gone into a coma immediately and stayed that way until she died. (R1298-1299) Other pieces of evidence support just such a scenario. Ezell was killed where her body was found, in the foyer (R851), thus negating any suggestion of a prolonged ordeal. A number of the wounds she received were to the back (R895), thus suggesting that she may have already fallen to the floor unconscious when they were inflicted. And, finally, Dr. Jones did not indicate in his testimony that any of the wounds he observed were defensive-type wounds (R891-906,1295-1299), and so there was most likely no significant struggle between Ezell and the perpetrator, perhaps because she was rendered unconscious immediately.

In Herzog v. State, 439 So.2d 1372 (Fla. 1983) this Court found a strangulation killing, which would ordinarily qualify for the section 921.141(5)(h) aggravating factor, Adams v. State, 412 So.2d 850 (Fla. 1982), not to be especially heinous, atrocious, or cruel where the victim was semiconscious during the attack upon her. Perhaps even more to the point is Rhodes v. State, 547 So.2d 1201 (Fla. 1989), in which the Court invalidated application of the aggravator in question in a strangulation killing where the evidence only suggested that "the victim may have been semiconscious at the time of her death." 547 So.2d at 1208 (emphasis supplied). Rhodes indicates that where there is an evidentiary question as to the victim's ability to experience pain when she is killed, the question must be resolved in favor of the defendant.

See also Bundy v. State, 471 So.2d 9 (Fla. 1985)(HAC could not be found where circumstances surrounding victim's death were uncertain).

In sum, then, the circumstances under which Joyce Ezell was killed are somewhat ambiguous, but there is at least some evidence to support the notion that she was not conscious when the stab wounds were inflicted, and any ambiguity must be resolved in favor of Appellant in order to satisfy principles of due process of law and to vindicate Appellant's right not to be subjected to cruel and unusual punishment. Amends., VIII and XIV, U.S. Const.; Art. I, §§ 9 and 17, Fla. Const.

ISSUE V

THE RECORD HEREIN DOES NOT CLEARLY REFLECT THAT THE SENTENCING COURT GAVE PROPER CONSIDERATION TO ALL MITIGATING EVIDENCE THAT WAS PRESENTED AT APPELLANT'S TRIAL.

In his "Findings of Fact" the court below discussed statutory mitigating circumstances (R1637-1639), then summed up his consideration of nonstatutory mitigating circumstances in a single sentence: "Further, the Court has considered all other relevant circumstances in mitigation, i.e., the Defendant's age, schooling, family background, employment, education and health." (R1639) The court did not expand upon his treatment of mitigating circumstances at the sentencing hearing held on January 12, 1990. (R1666-1673)

In Magill v. State, 386 So.2d 1188 (Fla. 1980) this Court noted that the sentencing judge in a capital case is charged with the responsibility of articulating the mitigating circumstances he considered "so as to provide this Court with the opportunity of giving a meaningful review of the sentence of death." 386 So.2d at 1191. In Campbell v. State, 571 So.2d 415, 419-420 (Fla. 1990) this Court further described the duties of the trial judge when considering evidence in mitigation:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant [footnote omitted] to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See Rogers v. State, 511 So.2d 526 (Fla. 1987), cert.denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The court must find as a mitigating circumstance

> each proposed factor that is mitigating in nature [footnote omitted] and has been reasonably established by the greater weight of the evidence [footnote omitted]: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla.Std.Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). Hopefully, use of these guidelines will promote the uniform application of mitigating circumstances in reaching the individualized decision required by law.

See also Rogers v. State, 511 So.2d 526 (Fla. 1987). The judge may not refuse to consider any relevant mitigating evidence presented. Stevens v. State, 552 So.2d 1082 (Fla. 1989); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). And his findings in regard to the death sentence must be of "unmistakable clarity." Mann v. State, 420 So.2d 578, 581 (Fla. 1982); Lucas v. State, 568 So.2d 18, 24 (Fla. 1990).

The trial court's consideration of the mitigation presented at Appellant's trial failed to pass muster under the guiding principles stated above. The court's use of broad categories to describe what he considered leaves one in the dark as to specifically what he had in mind. For example, when he considered Appellant's "health," did this include mental health as well as physical

health? Although the court rejected the statutory mental mitigators found in sections 921.141(6)(b) and (f) of the Florida Statutes (R1637-1638), he could and should have considered the problems with Appellant's mental functioning in the context of nonstatutory mitigation.

Additionally, one cannot tell from the court's discussion which, if any, of the mitigating circumstances he "considered" he actually found to be supported by the record and to be truly of a mitigating nature. He apparently found at least something to constitute legitimate mitigation, because he concluded that the aggravating circumstances outweighed the mitigating, thus indicating that there was some mitigation to weigh in the balance.

Finally, it is not apparent how much weight the court below gave to whatever mitigating circumstance(s) he found to exist. As this Court noted in Campbell, once a mitigating factor is found, it must be given at least some consideration by the sentencing court.

It is impossible for this Court to evaluate the trial court's "Findings of Fact" without receiving clarification as to exactly how the court viewed the mitigating evidence that was adduced at Appellant's trial. Appellant's sentence of death must be vacated, and this cause remanded for resentencing.

CONCLUSION

The rights of Henry Alexander Davis under the Florida and United States Constitutions were violated by the manner in which the proceedings below were conducted. He prays this Honorable Court to reverse his convictions and sentences and remand this cause with directions that Appellant be afforded a new trial. In the alternative, Appellant asks the Court to reverse his death sentence and remand for imposition of a life sentence, or a new penalty phase proceeding before a jury, or resentencing by the court, as appropriate.

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 3rd day of ~~May,~~ June, 1991.

Respectfully submitted,

Robert F. Moeller

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NUMBER 0143265

ROBERT F. MOELLER
Assistant Public Defender
P. O. Box 9000 - Drawer PD
Bartow, FL 33830
(813) 534-4200

RFM/ddv